[Cite as *State v. Shannon*, 2019-Ohio-421.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2017-L-092**
- vs -	:	
HOWARD D. SHANNON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 2016 CR 000527.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, *Karen A. Sheppert*, Assistant Prosecutor, and *Jacqueline O'Donnell*, Assistant Prosecuting Attorney, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Edward Heindel, 400 Terminal Tower, 50 Public Square, Cleveland, OH 44113 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Howard D. Shannon, appeals from the July 18, 2017 judgment of the Lake County Court of Common Pleas, sentencing him for rape and gross sexual imposition involving three victims, two biological minor daughters, D.S. and D.S.I. and a minor step-daughter, A.F. On appeal, appellant raises issues regarding his motion to

suppress, motion for severance, speedy trial, ineffective assistance of counsel, manifest weight, and sufficiency. Finding no reversible error, we affirm.

{¶2} On May 23, 2016, appellant was indicted by the Lake County Grand Jury on 16 counts: counts one through 12 involve Victim No. 1 (A.F.) – counts one and two, rape, felonies of the first degree, in violation of R.C. 2907.02(A)(2); counts three through 10, rape, felonies of the first degree, in violation of R.C. 2907.02(A)(1)(b); count 11, gross sexual imposition, a felony of the third degree, in violation of R.C. 2907.05(A)(4); and count 12, corrupting another with drugs, a felony of the fourth degree, in violation of R.C. 2925.02(A)(4)(a); counts 13 through 15 involve Victim No. 2 (D.S.) – count 13, gross sexual imposition, a felony of the fourth degree, in violation of R.C. 2907.05(A)(1); count 14, gross sexual imposition, a felony of the third degree, in violation of R.C. 2907.05(A)(4); and count 15, attempted rape, a felony of the second degree, in violation of R.C. 2923.02 and 2907.02(A)(2); and count 16 involves Victim No. 3 (D.S.I.) - gross sexual imposition, a felony of the third degree, in violation of R.C. 2907.05(A)(4).[1] Appellant pleaded not guilty to all charges at his arraignment.

{¶3} Motion practice ensued, including: appellant's July 15, 2016 motion for severance; appellant's August 2, 2016 motion to suppress; appellant's August 30, 2016 motion to continue the suppression hearing; appellant's December 23, 2016 90-day speedy trial waiver; and appellant's February 28, 2017 motion to continue the trial.

{¶4} A suppression hearing was held on September 23, 2016. Officer Douglas Covert with the Madison Village Police Department ("MVPD") testified for appellee, the state of Ohio. On April 28, 2016, A.F. reported a sexual assault by appellant, her step-father. A.F. was 14 years old at the time of the incident. She claimed that the sexual

1. A.F. is referred to as "L.F." in appellant's brief.

assault occurred two days earlier on April 26, 2016. She alleged vaginal intercourse in appellant's bedroom. A.F. reported that appellant ejaculated inside her and that she was menstruating at the time. The police directed A.F. to get examined by a SANE nurse.

{¶5} Officer Covert contacted the Lake County prosecutor's office to obtain a search warrant for appellant's residence, 34 West Main Street Up, Madison Village, Lake County, Ohio. The warrant was obtained on April 28, 2016, the same day the incident was reported. The warrant called for all bedding, towels, or clothing found in proximity to A.F.'s bedroom, appellant's bedroom, and any drugs or illegal narcotics found in the residence.

{¶6} Officer Covert went to Hillcrest Hospital to interview appellant's wife, Corinna Shannon, and her daughter, A.F., while the search was simultaneously taking place at the residence. At the hospital, A.F. described the clothing that she was wearing to the searching officers during a phone conversation. As a result, the police collected a pair of gray sweat pants, a pair of leggings, two pair of underwear, some sanitary pads, and a smoking pipe. Cuttings for the bed sheet, underwear, and a sanitary pad all tested positive for appellant's semen.

{¶7} Following the hearing, the trial court denied appellant's motion to suppress.

{¶8} The trial court also heard arguments on appellant's motion for severance in which he requested separate trials for the three victims. On March 3, 2017, the court overruled the motion. The court found that the charges in the indictment were properly joined under Crim.R. 8 and that the evidence of each of the acts that would constitute

the commission of the offenses is simple and distinct and, therefore, severance is not required.

{¶9} A jury trial commenced on June 19, 2017.

{¶10} The state presented 56 exhibits and testimony from 18 witnesses: (1) Officer Douglas Covert, with MVPD; (2) Assistant Chief Troy McIntosh, with MVPD; (3) Christi LaPrairie, a registered nurse with Hillcrest Hospital; (4) Karen Zavarella, Ph.D., a DNA analyst with Lake County Crime Laboratory ("LCCL"); (5) Elizabeth Gunsalus, a social worker experienced in child sexual abuse; (6) Dr. Martha Wright, a licensed medical doctor; (7) Lauren McAliley, a retired pediatric nurse practitioner in child advocacy and protection; (8) Kimberly Gilson, a forensic analyst with LCCL; (9) Douglas Rohde, supervisor of chemistry and toxicology with LCCL; (10) Patrolman Ronald Hess, with Madison Township Police Department ("MTPD"); (11) Corinna Shannon, appellant's wife and A.F.'s mother; (12) A.F., Victim No. 1; (13) Stephen LaBonne, Ph.D., a forensic analyst with LCCL; (14) Officer Ian Mussell, with MVPD and with City of Cleveland Division of Police; (15) D.S., Victim No. 2; (16) D.S.I. Victim No. 3; (17) Sergeant Robert Izzo, with Lake County Sheriff's Office; and (18) Detective Timothy John Doyle, with MTPD.

{¶11} Regarding A.F., d.o.b. March 23, 2002, it was revealed that appellant had been sexually abusing her over the years beginning when she was about four or five years old. The abuse progressed from touching and partial penetration with appellant's penis to fellatio and full vaginal and anal intercourse. The abuse occurred in various places over a span of a decade, mainly in the residences where the family lived. A.F.

made several disclosures over the years. A.F. recanted one disclosure at the age of ten after appellant had threatened her.

{¶12} When A.F. was four or five years old, the family lived in a gray house in Geneva. Appellant asked A.F. to play a "game." Appellant instructed A.F. to take off her clothes and get on the bed. He proceeded to touch her all over. A.F. told her mother, who had nothing to say and brushed it off as probably a "dream."

{¶13} When the family lived in a blue house, A.F. shared a bedroom with D.S., appellant's biological daughter by another mother. Appellant inserted his penis a "little bit" while A.F. laid on her back on D.S.'s bed. Appellant instructed A.F. to count to ten, then push him off. This happened often and increased with time.

{¶14} When A.F. was around six years old, appellant gave her a cigarette to smoke in exchange for vaginal intercourse. A.F. recalled experiencing pain afterward and remembered her vaginal area burned when she urinated.

{¶15} When A.F. was around seven and eight years old, appellant demanded A.F. play the "ABC" game with him before she could go outside to play. The ABC game consisted of A.F. lying on her back and engaging in intercourse with appellant, A.F. giving appellant a blow job, or A.F. getting on her stomach or side and engaging in intercourse with appellant. A.F. also recalled appellant taking her to vacant apartments where he would lay her on the floor and engage in vaginal intercourse. A.F. remembered wiping blood from her vagina after sex and the burning sensation when she urinated.

{¶16} When A.F. was ten years old, her mother discovered that she was conversing with an older man online regarding sexually-explicit material. Corinna talked

with her daughter about respecting her virginity. A.F. disclosed that she had not been a virgin since she was around five years old, when appellant began having sex with her. Corinna immediately took her daughter to the hospital. Dr. Wright performed a physical examination on A.F. and found a "notch" on her vaginal opening. A.F.'s vaginal tissues were inflamed, red, and irritated. Although the notch was concerning and suspicious, it was not conclusive of sexual abuse. Corinna brought A.F. to the Care Clinic for a follow-up examination but the appointment was canceled and reset for three months later. At the follow-up, Corinna demanded that she be present during the appointment. A.F.'s physical findings were normal at that time.

{¶17} Lake County Job and Family Services became involved due to A.F.'s allegations regarding sexual abuse by appellant. A.F. and her siblings were removed from their home for a time period and lived at their grandmother's house. Appellant told A.F. that if she did not tell her mother and grandmother that the sexual abuse did not happen, he would make her life "hell." When the case was scheduled for adjudication in juvenile court, A.F. recanted.

{¶18} During the investigation, A.F. made drawings in which she drew bumps on a picture of appellant's penis. She described the bumps as flesh-colored. During an interview with appellant, an officer observed flesh-colored bumps near the base of appellant's penis. The 2013 rape kit at that time was negative for seminal fluids. However, the kit was later resubmitted due to advancements in Y-STR testing. The results proved that the DNA from the vaginal swab and swab from A.F.'s panties was consistent with appellant's Y-STR within a probability of 1 in 6,700 unrelated males. Forensic analyst Dr. LaBonne opined that "the evidence strongly, strongly supports the

hypothesis that [the DNA] came either from the same male or from another male related in the direct male line[.]" (Jury Trial T.p. 1197).

{¶19} When A.F. was around ten, 11, and 12 years old and living in Madison, appellant requested she perform oral sex on him. It happened more times than she could remember and occurred in different rooms throughout the house. Fellatio was requested of A.F. less often than vaginal intercourse and more often than anal intercourse. A specific incident was also revealed when appellant had vaginal intercourse with A.F. in her room and he ejaculated in a towel.

{¶20} When A.F. was around 13 years old, she recalled how appellant would penetrate her fully with his penis. During one incident, appellant was on the floor, she was on top of him, there was blood, and she was hospitalized. A.F. recalled another incident when her sister walked in on A.F. and appellant having sex and they hid behind the living room loveseat. A.F. later told her sister that she and appellant were "catching a jumping spider."

{¶21} A week prior to the April 26, 2016 incident, while A.F.'s mother and sisters were at church, A.F. asked appellant for a cigarette. Appellant had intercourse with A.F. while he bent her over the loveseat in the living room and in the bathroom while A.F. was kneeling on all fours. Anal intercourse was more painful than vaginal intercourse for A.F.

{¶22} On April 26, 2016, A.F. was home from school because she had cramps. A.F. asked appellant for a cigarette and he requested sex. She refused him several times explaining that she was on her period. However, appellant insisted. Appellant had vaginal intercourse with A.F. on his bed. A.F. was wearing zebra print underwear.

Appellant ejaculated inside of her. After intercourse, A.F. went to the bathroom, wrapped up her sanitary pad, and put it in the garbage, which ended up in the receptacle behind the apartment building.

{¶23} Later that evening, A.F. disclosed to her mother, as she had previously, that appellant had been sexually abusing her since the age of four or five. The following day, Corinna notified the police. Corinna left the residence with the three girls, A.F., D.S., and D.S.I. After making a statement to the police, A.F. was taken to Hillcrest Hospital where a rape kit was collected. Corinna indicated she was struck by A.F.'s description of appellant during ejaculation, with him moving around like he was having a seizure.

{¶24} During her medical examination, A.F. identified appellant as the perpetrator. A.F. described the sexual abuse beginning when she was around four or five years old. A.F. explained the abuse began with appellant rubbing his hand against her genitalia, followed by oral contact and penal insertion. She described some penetration with bleeding and pain. Full penetration took place when A.F. was around 12.

{¶25} On April 28, 2016, MVPD obtained a search warrant authorizing them to seize, among other things, A.F.'s clothing, bed sheets, and items from the trash. LCCL members assisted MVPD by collecting evidence from the family residence. DNA analyst Dr. Zavarella obtained a pair of girl's zebra print black and white underwear from the laundry basket in the family's only bathroom. Dr. Zavarella also obtained a sanitary pad which was wrapped around itself and sealed in plastic in a trash receptacle outside of the family's apartment. Both the underwear and sanitary pad tested positive for

sperm and seminal fluid. Further DNA testing revealed appellant's and A.F.'s DNA on the crotch area of the underwear and on the sanitary pad. Cuttings from the bed sheet also tested positive for A.F. and appellant's DNA and appellant's sperm. Other clothing collected, including gray sweatpants and leggings, contained no evidence of seminal fluids. And none of appellant's DNA or seminal fluid was detected from A.F.'s rape kit. However, Dr. Zavarella indicated that finding was not unexpected as A.F.'s vaginal cavity, during menstruation, was in a state of flushing away cells.

{¶26} Shortly after execution of the search warrant, appellant was arrested. Later that evening, MVPD was searching for A.F., who had threatened suicide because her mother had chosen appellant over her. MVPD located and took A.F. to the hospital over Corinna's objections. A.F. disclosed abuse in the past and how her mother was unsupportive.

{¶27} Regarding D.S., she recalled that when she was four years old, appellant climbed on top of her and touched her vaginal area. D.S. recalled another occasion when she was about 12 years old and that appellant touched her vagina while she was lying in bed.

{¶28} Regarding D.S.I. she recalled that when she was around 11 years old, appellant gave her beer. D.S.I. got drunk and vomited. Appellant told D.S.I. that she had to prove herself before she could do whatever she wanted. Appellant required that D.S.I. sit still while he touched her vagina with his hands. After that incident, D.S.I. indicated that appellant had no more rules for her.

{¶29} At the close of the state's case, defense counsel moved for an acquittal pursuant to Crim.R. 29, which was overruled by the trial court.

{¶30} Appellant presented 10 exhibits and testimony from two witnesses: (1) Sandra Chadwick, Corinna Shannon's mother; and (2) Corinna Shannon.

{¶31} Corinna testified that she had purchased a pregnancy test for A.F. but not because A.F. indicated to her that she was having sex with appellant. Corinna's mother, Sandra, testified that A.F. never disclosed to her any allegations of sexual abuse by appellant. Sandra also opined that A.F. does not have a reputation for truthfulness.

{¶32} At the conclusion of all the evidence, appellant renewed his Crim.R. 29 motion, which was overruled by the trial court.

{¶33} The state dismissed two counts, counts four and 15, and the indictment was renumbered. The jury found appellant not guilty of one count, formerly count 12. The jury found appellant guilty of the remaining 13 counts.

{¶34} On July 18, 2017, the trial court sentenced appellant to a minimum prison term of 76 years and a maximum of life imprisonment. Appellant filed a timely appeal and asserts the following six assignments of error:

{¶35} "[1.] The trial court erred when it denied Shannon's motion to suppress gray sweat pants, a pair of leggings, and black and white underwear that were seized at his residence.

{¶36} "[2.] The trial court erred when it did not grant Shannon's motion for severance of the counts involving the three different alleged victims.

{¶37} "[3.] Shannon was denied his constitutional and statutory rights to a speedy trial.

{¶38} "[4.] The convictions were against the manifest weight of the evidence.

{¶39} "[5.] There was insufficient evidence against Shannon.

{¶40} "[6.] Shannon was denied his right to the effective assistance of counsel in violation of the Sixth Amendment and Article I, Section 10 of the Ohio Constitution."

{¶41} In his first assignment of error, appellant argues the trial court erred in denying his motion to suppress gray sweat pants, a pair of leggings, and black and white underwear that were seized at his residence. Appellant maintains the foregoing items were outside of the particular description in the search warrant and based upon the telephone conversation. He claims the police should have obtained a second search warrant before they removed these items.

{¶42} "Appellate review of a trial court's ruling on a motion to suppress presents a mixed question of law and fact. *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. 'An appellate court reviewing a motion to suppress is bound to accept the trial court's findings of fact where they are supported by competent, credible evidence.' *State v. Warner,* 11th Dist. Portage No. 2013-P-0056, 2014-Ohio-1874, ¶20. Accepting the facts as true, the reviewing court independently determines, as a matter of law and without deference to the trial court's determination, whether its conclusion was consistent with the applicable legal standard. *Id.*" *State v. Nasca*, 11th Dist. Ashtabula No. 2016-A-0026, 2016-Ohio-8223, ¶16.

{¶43} The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." "The manifest purpose of this particularity requirement was to prevent general searches. * * * [T]he requirement ensures that the search will be carefully tailored to its justifications, and will not take on

the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison,* 480 U.S. 79 (1987). By requiring a particular description of the items to be seized, the Fourth Amendment "prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States,* 275 U.S. 192, 196 (1927).

{¶44} Crim.R. 41(C) does not require that the items to be seized be described with particularity. That rule provides: "the affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized * * *." Thus, a general description in the affidavit of the items to be seized would satisfy the rule.

{¶45} In this case, the affidavit attached to the request for the search warrant informed the judge that A.F. had made a disclosure in 2012 that her step-father, appellant, had been having sex with her since she was five years old; that subsequent medical examinations and DNA testing on A.F.'s vaginal swabs demonstrated that A.F. had a notch in her vaginal area and the Y-STR profile obtained from A.F.'s vaginal swabs was consistent with appellant's cheek swab standard; appellant had furnished drugs to A.F. which caused her to pass out, and when she awoke, she believed she had been sexually assaulted by appellant; on April 28, 2016, A.F., along with her mother, Corinna, went to MVPD where A.F. made statements regarding sexual activity of a continuous nature with appellant; and A.F. revealed that the most recent incident occurred on April 26, 2016 when appellant ejaculated inside her vaginal cavity.

{¶46} Based on the foregoing, the judge found probable cause to issue a search warrant on April 28, 2016, authorizing the search of, among other things, A.F.'s clothing from the Shannon residence, which includes A.F.'s gray sweat pants and a pair of her leggings (found in her sibling's bedroom), and A.F.'s black and white zebra print underwear (found in the family's shared bathroom). In addition, the record establishes that A.F. and her mother, both residents of the Shannon home, gave consent for the removal of A.F.'s clothing, including the items in which appellant takes issue. *See State v. Hatcher*, 11th Dist. Ashtabula No. 2002-A-0100, 2004-Ohio-2451, ¶15.

{¶47} Thus, because there was probable cause to believe that evidence of appellant's DNA in the form of semen or sperm may appear on A.F.'s clothing, the search warrant authorized the seizure of A.F.'s clothing, and the police had consent to remove the items, we find the trial court committed no error.

{¶48} Appellant's first assignment of error is without merit.

{¶49} In his second assignment of error, appellant contends the trial court erred in denying his motion to sever the counts of his indictment into three separate trials based on the three separate victims.

{¶50} This court generally reviews a trial court's decision to grant or deny separate trials under an abuse of discretion standard. *State v. Brunelle-Apley*, 11th Dist. Lake No. 2008-L-014, 2008-Ohio-6412, ¶108. The term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard,

misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.)

{¶51} However, in this case, appellant failed to renew his motion for relief from prejudicial joinder at the conclusion of the state's case or at the conclusion of the evidence. Therefore, in such circumstances, it is the position of this court, as well **as** other districts, that appellant has waived all but plain error. *State v. Jackson*, 11th Dist. Lake No. 2017-L-140, 2018-Ohio-3241, ¶22; *State v. Appenzeller*, 11th Dist. Lake No. 2006-L-258, 2008-Ohio-7005, ¶75; *State v. Howard,* 3d Dist.Marion No. 9-10-50, 2011-Ohio-3524, ¶82, citing *State v. Miller,* 105 Ohio App.3d 679 (4th Dist.1995); *State v. Lott,* 51 Ohio St.3d 160 (1990); *State v. Clark,* 2d Dist. No. 1078 (May 21, 1980); *State v. Ruffin,* 6th Dist. No. L-93-347 (Oct. 28, 1994), citing *State v. Owens,* 51 Ohio App.2d 132 (9th Dist.1975); *State v. DiCarlo,* 7th Dist. No. 02 CA 228, 2004-Ohio-5118, citing *State v. Boyd,* 8th Dist. Nos. 82921, 82922, 82923, 2004-Ohio-368; ¶18, *State v. Williams,* 10th Dist. Nos. 02AP-730, 02AP-731, 2003-Ohio-5204; *but see State v. Miller,* 5th Dist. No.2003CA00273, 2004-Ohio-3716, fn.1 (addressing the case on the merits rather than applying waiver). "Plain error exists only where the results of the trial would have been different without the error." *Id.* at ¶76.

{¶52} Crim.R. 8(A), Joinder of Offenses, states in part: "Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character * * *."

{¶53} The law favors joinder of multiple offenses and such joinder is liberally permitted if the offenses are of the same or similar character. *Brunelle-Apley, supra,* at

¶104-105. "'When a defendant claims that joinder is improper, he must affirmatively show that his rights have been prejudiced.'" *Id.* at ¶107, quoting Crim.R. 14; *State v. Quinones*, 11th Dist. Lake No. 2003-L-015, 2005-Ohio-6576, ¶38; *State v. Roberts*, 62 Ohio St.2d 170, 175 (1980).

{¶54} In the case sub judice, appellant fails to affirmatively demonstrate that his rights were prejudiced as the result of the trial would not have been different without the alleged error. There were three victims in this case. While they were all related, the sexual conduct involving A.F. was greatly different from that involving her sisters, D.S. and D.S.I. As established, A.F.'s victimization was ongoing over a long period of time and involved fellatio, vaginal intercourse, and anal intercourse. The victimization of D.S. and D.S.I. on the other hand, was much more limited and only involved touching. The evidence presented by the state was simple and distinct and allowed the jury to segregate the proof for each charge. *See State v. Campbell*, 11th Dist. Lake No. 2004-L-126, 2005-Ohio-6147, *5 (holding that because the facts of each alleged crime were separate and easy to understand, the crimes involved different victims, different facts, and occurred at different times, the evidence was simple and distinct and the trial court did not err in denying the appellant's motion to sever).

{¶55} Based on the facts presented, the trial court did not commit plain error in denying appellant's motion to sever.

{¶56} Appellant's second assignment of error is without merit.

{¶57} In his third assignment of error, appellant alleges he was denied his constitutional and statutory rights to a speedy trial.

{¶58} In his sixth assignment of error, appellant contends he was denied his right to the effective assistance of counsel.

{¶59} For ease of discussion, because appellant claims that his speedy trial rights were violated and his counsel was ineffective for failing to file a motion to dismiss based on a statutory and constitutional speedy trial violation, we will address his third and sixth assignments of error in a consolidated fashion.

{¶60} "The Sixth Amendment to the United States Constitution and Article I, Section 10 of Ohio's Constitution guarantee a criminal defendant the right to a speedy trial. That right is implemented in Ohio by statutes imposing specific time limits. *See State v. Pachay,* 64 Ohio St.2d 218, 221 (1980). R.C. 2945.71(C)(2) and (E) require the state to bring a felony defendant to trial within 270 days of arrest or within 90 days if the accused is held in jail in lieu of bail solely on the pending charge. This time may be tolled under certain circumstances, as outlined in R.C. 2945.72." *State v. Jack*, 11th Dist. Geauga No. 2016-G-0057, 2016-Ohio-8424, ¶16.

{¶61} "The accused bears the burden of putting forth prima facie evidence that his statutory speedy trial rights have been violated." *State v. Lynch*, 11th Dist. Ashtabula No. 2013-A-0039, 2014-Ohio-1775, ¶14, citing *State v. Butcher*, 27 Ohio St.3d 28, 30-31 (1986).

{¶62} "The Sixth and Fourteenth Amendments to the United States Constitution guarantee that criminal defendants must be afforded the right to the assistance of counsel before they can be validly convicted and punished by imprisonment. *State v. Victor,* 11th Dist. Geauga Nos. 2014-G-3220 and 2014-G-3241, 2015-Ohio-5520, ¶18, quoting *Village of Highland Hills v. Nicholson,* 8th Dist. Cuyahoga No. 100577, 2014-

Ohio-4671, ¶11, citing *Powell v. Alabama,* 287 U.S. 45 (1932); *Gideon v. Wainwright,* 372 U.S. 335 (1963). Implicit in the right to counsel is the right to competent counsel. 'An attorney has a duty to zealously represent a criminal defendant.' *State v. Henry,* 11th Dist. Lake No. 2007-L-142, 2009-Ohio-1138, at ¶59.

{¶63} "'"In order to prevail on an ineffective assistance of counsel claim, a petitioner must satisfy the two-prong test set forth in *Strickland v. Washington* (1984), 466 U.S. 668 (* * *) (* * *). (* * *) Thus, appellant must show that counsel's performance was deficient and 'must also show prejudice resulting from the deficient performance.'"' (Citations omitted.) *State v. Kirschenmann,* 11th Dist. Portage Nos. 2014-P-0031 and 2014-P-0032, 2015-Ohio-3544, ¶16. *See Henry, supra,* at ¶50-59; *State v. Peoples,* 11th Dist. Lake No. 2005-L-158, 2010-Ohio-2523, ¶17–30." *State v. Smith*, 11th Dist. Trumbull No. 2015-T-0079, 2016-Ohio-7153, ¶17-18.

{¶64} In the instant matter, because appellant never raised a speedy trial issue before the trial court, the record, therefore, is insufficient to show trial counsel was deficient by failing to file a motion to dismiss. *Lynch, supra,* at ¶15. In any event, we note that appellant was arrested on May 11, 2016 and the trial commenced on June 19, 2017 but his speedy trial rights were not violated as there were major tolling events that occurred between those dates: July 15, 2016 motion for severance; August 2, 2016 motion to suppress; August 30, 2016 motion to continue suppression hearing; December 23, 2016 waiver of time (90 days); February 28, 2017 motion to continue trial; March 2, 2017 suppression denied; and March 3, 2017 severance denied.

{¶65} Consequently, although appellant failed to raise a speedy trial issue before the trial court, appellant's case was tried within the 90 days allotted as a result of

the major tolling events. Appellant has not articulated any prejudice. Since appellant's constitutional and statutory speedy trial rights were not violated, his counsel cannot have been ineffective.

{¶66} Appellant's third and sixth assignments of error are without merit.

{¶67} In his fourth assignment of error, appellant maintains his convictions were against the manifest weight of the evidence.

{¶68} In his fifth assignment of error, appellant argues there was insufficient evidence against him.

{¶69} Because appellant's fourth and fifth assignments of error are interrelated, we will address them together.

{¶70} With regard to sufficiency, in *State v. Bridgeman*, 55 Ohio St.2d 261 (1978), the Supreme Court of Ohio established the test for determining whether a Crim.R. 29 motion for acquittal is properly denied. The Court stated that "[p]ursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *Id.* at syllabus. "Thus, when an appellant makes a Crim.R. 29 motion, he or she is challenging the sufficiency of the evidence introduced by the state." *State v. Patrick*, 11th Dist. Trumbull Nos. 2003-T-0166 and 2003-T-0167, 2004-Ohio-6688, ¶18.

{¶71} As this court stated in *State v. Schlee*, 11th Dist. Lake No. 93-L-082, 1994 WL 738452, *4-5 (Dec. 23, 1994):

{¶72} "'Sufficiency' challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while 'manifest weight' contests the believability of the evidence presented.

{¶73} "'"The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference[s] drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence.*"

{¶74} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence 'in a light most favorable to the prosecution,' '(a) reviewing court (should) not reverse a [guilty] verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.'" * * *

{¶75} "On the other hand, 'manifest weight' requires a review of the weight of the evidence presented, not whether the state has offered sufficient evidence on each element of the offense.

{¶76} "'In determining whether the verdict was against the manifest weight of the evidence, "(* * *) the court reviewing 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 jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (* * *)'" (Citations omitted.) * * *" (Emphasis sic.) (Citations omitted.)

{¶77} Regarding sufficiency, "a reviewing court must look to the evidence presented * * * to assess whether the state offered evidence on each statutory element of the offense, so that a rational trier of fact may infer that the offense was committed beyond a reasonable doubt." *State v. March*, 11th Dist. Lake No. 98-L-065, 1999 WL 535675, *3 (July 16, 1999). The evidence is to be viewed in a light most favorable to the prosecution when conducting this inquiry. *State v. Jenks*, 61 Ohio St.3d 259, paragraph two of the syllabus (1991), superseded by state constitutional amendment on other grounds as stated in *State v. Smith*, 80 Ohio St.3d 89 (1997). Further, the verdict will not be disturbed on appeal unless the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis*, 79 Ohio St.3d 421, 430 (1997).

{¶78} Regarding manifest weight, a judgment of a trial court should be reversed "'only in the exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). The trier of fact is in the best position to assess the credibility of witnesses. *State v. DeHass*, 10 Ohio St.2d 230, paragraph one of the syllabus (1967).

{¶79} "[C]ircumstantial evidence and direct evidence inherently possess the same probative value." *State v. Fasline*, 11th Dist. Trumbull No. 2014-T-0004, 2015-Ohio-715, ¶39, citing *State v. Biros*, 78 Ohio St.3d 426, 447 (1997), citing *Jenks, supra*, paragraph one of the syllabus.

{¶80} "A finding that a judgment is not against the manifest weight of the evidence necessarily means the judgment is supported by sufficient evidence." *Patterson v. Godale*, 11th Dist. Lake Nos. 2014-L-034 and 2014-L-042, 2014-Ohio-

5615, ¶23, citing *State v. Arcaro*, 11th Dist. Ashtabula No. 2012-A-0028, 2013-Ohio-1842, ¶32 ("'Since there must be sufficient evidence to take a case to the jury, it follows that "a finding that a conviction is supported by the *weight* of the evidence necessarily must include a finding of sufficiency."'" (Emphasis sic.) (Citations omitted.))

{¶81} For the reasons addressed below, we determine the judgment is not against the manifest weight of the evidence and, thus, further conclude it is supported by sufficient evidence.

{¶82} Appellant was convicted of nine counts of rape involving A.F. and takes issue with the guilty findings for "Rape," in violation of R.C. 2907.02(A)(1)(b) and (2), which provide:

{¶83} "(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:

{¶84} "* * *

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

{¶86} "* * *

{¶87} "(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶88} Regarding R.C. 2907.02(A)(1)(b), the evidence reveals that appellant began sexually abusing A.F. from the time she was about four or five years old. This abuse took place over a span of a decade. A.F.'s ages throughout the abuse were

proved with testimony of her school grades and supported by school photographs and photographs of the residences where she was living during specified dates.

{¶89} Regarding R.C. 2907.02(A)(2), "'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." R.C. 2907.01(A).

{¶90} "A victim need not prove physical resistance[.]" R.C. 2907.02(C).

{¶91} Appellant, A.F.'s step-father and resident of the same household, was her father figure and had parental authority over her, thus, force need not be physical or overt. *See State v. Eskridge*, 38 Ohio St.3d 56, 58-59 (1988) ("Force need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established. * * * Sexual activity between a parent and a minor child is not comparable to sexual activity between two adults with a history of consensual intercourse. The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose.")

{¶92} As addressed, the rapes of A.F. were supported by physical evidence and corroborated by witness testimony.

{¶93} Appellant was also convicted of gross sexual imposition regarding A.F., D.S., and D.S.I. and takes issue with the guilty findings for "Gross sexual imposition," in violation of R.C. 2907.05(A)(1) and (4), which state:

{¶94} "(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:

{¶95} "(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

{¶96} "* * *

{¶97} "(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."

{¶98} "'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).

{¶99} Venue was established in this case by the victims' birthdates, grades in school, and their home addresses, which were verified by the testimony of Detective Doyle with MTPD. The jury heard the testimony of and observed the demeanor of all three victims, A.F., D.S., and D.S.I. referencing the sexual contact by appellant. As stated, the jury heard in detail the sexual abuse that A.F. endured over the span of a decade, involving sexual contact and sexual conduct by appellant. D.S. recalled appellant touching her vaginal area when she was four and 12 years old. D.S.I. also

recalled appellant touching her vagina when she was around 11 years old. *See State v. Breland*, 11th Dist. Ashtabula No. 2003-A-0066, 2004-Ohio-7238, ¶24 ("'It is sufficient to present circumstantial evidence from which the finder of fact can infer the purpose of the act was for sexual gratification; no direct evidence of the accused's mental state is required.'")

{¶100} Pursuant to *Schlee, supra*, there is sufficient evidence upon which the jury could reasonably conclude beyond a reasonable doubt that the elements of rape and gross sexual imposition were proven. Thus, the trial court did not err in overruling appellant's Crim.R. 29 motion.

{¶101} In addition, the jury chose to believe the state's witnesses. *DeHass, supra*, at paragraph one of the syllabus. Based on the evidence presented, we cannot say that the jury clearly lost its way in finding appellant guilty of rape and gross sexual imposition. *Schlee, supra*, at *4-5; *Thompkins, supra*, at 387.

{¶102} Appellant's fourth and fifth assignments of error are without merit.

{¶103} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Lake County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, P.J., concurs in part and concurs in judgment only in part with a Concurring Opinion,

TIMOTHY P. CANNON, J., concurs in part and concurs in judgment only in part with a Concurring Opinion.

THOMAS R. WRIGHT, P.J., concurs in part and concurs in judgment only in part with a Concurring Opinion.

{¶104} I concur in both the judgment and reasoning as to the fourth and fifth assignments, but in judgment only on the second assignment.

{¶105} I concur in the first assignment but for an additional reason. Appellant asserts that seizure of A.F.'s sweatpants, leggings, and underwear was improper because they were not listed as items to be seized in the warrant.

{¶106} However, the wording of the warrant has no effect upon the propriety of the seizure. Given the warrant's general validity, the officers' presence in the home is unchallenged. Once there, mother's consent was sufficient to justify seizure of the clothing. *State v. Wallace*, 2d Dist. Montgomery No. 24383, 2011-Ohio-1741, ¶ 14.

{¶107} I concur in the third and sixth assignments, but with additional analysis to address tolling of speedy trial. There is no dispute that 389 days elapsed between appellant's arrest in May 2016 and trial in June 2017. His motion to sever was filed July 15, 2016, and ruled upon on March 3, 2017, tolling speedy trial for 231 days. *State v. Stephens,* 9th Dist. Summit No. 26156, 2013-Ohio-2223. Moreover, trial was continued at appellant's request, from March 29, 2017 until June 19, 2017, tolling speedy trial for an additional 82 days. *State v. Glass*, 10th Dist. Franklin No. 10 AP-558, 2011-Ohio-6287. Appellant was, therefore, timely tried. *See* R.C. 2945.71(C)(2) & (E).

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TIMOTHY P. CANNON, J., concurring in part and concurring in judgment only in part.

{¶108} I concur with the opinion of the majority. I write to clarify that while the failure to renew a motion to sever filed pursuant to Crim.R. 14 results in a forfeiture of the issue, the same is not true for a motion to sever filed pursuant to Crim.R. 8.

{¶109} Crim.R. 8(A) states:

> Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.

{¶110} Crim.R. 14 provides, in relevant part:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires.

The difference is that Rule 8 addresses the joinder of multiple offenses in the same indictment, while Rule 14 addresses the joinder of multiple offenses for trial, whether in a single or multiple indictments. *State v. Greathouse*, 9th Dist. Summit No. 27782, 2017-Ohio-6870, ¶18; *State v. Hatfield*, 9th Dist. Summit No. 23716, 2008-Ohio-2431, ¶14.

{¶111} A motion filed under Crim.R. 8 disputes the propriety of joining the charges in the indictment and permits joinder only under certain specific circumstances. *See United States v. Terry*, 911 F.2d 272, 277 (9th Cir.1990). A challenge to an indictment in a motion to sever pursuant to Crim.R. 8 need not be renewed. *Greathouse*, *supra*, at ¶19, citing *Hatfield*, *supra*, at ¶14.

{¶112} To be entitled to severance under Crim.R. 14, a defendant must show that he is prejudiced by the joinder of offenses for trial. *Id.* at ¶18. To preserve a claimed error under Crim.R. 14, the defendant must renew a motion to sever either at the close of the State's case or at the conclusion of all the evidence. *Id.* at ¶19. A renewal is necessary because the motion must be considered in light of the evidence introduced at trial. *Id.* Failure to renew a Crim.R. 14 motion results in forfeiture of the issue on appeal. *Id.*