[Cite as *State v. Schroeder*, 2019-Ohio-4136.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 18CA1077
	:	
vs.	:	
	:	DECISION AND JUDGMENT
APRIL SCHROEDER,	:	ENTRY
	:	
Defendant-Appellant.	:	

APPEARANCES:

Brian T. Goldberg, Cincinnati, Ohio, for Appellant.

David Kelley, Adams County Prosecutor, and Kris D. Blanton, Assistant Adams County Prosecutor, West Union, Ohio, for Appellee.

Smith, P.J.

{¶1} April Schroeder appeals the judgment entry of the Adams County Common Pleas Court entered October 24, 2018. Schroeder was convicted by a jury of her peers of one count of rape, R.C. 2907.02(A)(2) and three counts of gross sexual imposition, R.C. 2907.05(A)(1). On appeal, Schroeder raises seven assignments of error challenging her convictions and sentence. Upon review, we find no merit to her arguments. However, we affirm the judgment of the trial court with instructions to correct a clerical error with regard to imposition of Appellant's consecutive sentence.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} On March 9, 2018, an Adams County Grand Jury indicted April Schroeder, “Appellant,” on the above-referenced counts. Appellant’s boyfriend, Michael Lykins, “Lykins” was also indicted on similar and related counts. The victim was Appellant’s minor daughter, M.S., who had just reached the age of thirteen at the time of the alleged sexual misconduct set forth in the indictment.

{¶3} The record reveals that an investigator with the Adams County Prosecutor’s Office, Kenny Dick, was contacted by a representative of Adams County Children’s Services in December 2015. Children’s Services had received a referral from M.S.’s school guidance counselor regarding the allegations. Based on the report from Children’s Services, the investigator scheduled M.S. to be interviewed at the Mayerson Center at Children’s Hospital in Cincinnati, Ohio. Andrea Powers, a social worker at the Mayerson Center, interviewed M.S. on December 10, 2015. The interview was audio and video recorded.

{¶4} M.S. lived with her siblings, Appellant, Lykins, and Lykins’ extended family in Manchester, Ohio. Lykins had lived with Appellant for approximately five years. Lykins babysat Appellant’s children when she was at work. M.S. told Powers she had to obey Appellant and Lykins or she

would "get into trouble." M.S. testified at trial that she feared both Appellant and Lykins.

{¶5} In the forensic interview with Andrea Powers, M.S. detailed two incidents of unlawful sexual activity which occurred in 2014. M.S. explained that approximately ten days after her thirteenth birthday, sometime in July 2014, she was at home with Appellant and Lykins. Appellant and Lykins gave M.S. alcohol and made her watch a pornographic video on YouTube. They told her they were "going to try something new." They told her to go to the bathroom and shave her "private part." She was given lingerie.

{¶6} M.S. was on the living room couch. Appellant put her fingers inside M.S.'s private part. She also "played with" M.S.'s breasts. Lykins also "fingered" M.S. M.S. stated, "Then they started raping me." Her mother sat on the couch beside M.S. while Lykins put his penis inside M.S.'s private part. M.S. also stated that Appellant made M.S. "finger" her. Lykins stopped when M.S. said she was tired and wanted to go to bed. Appellant and Lykins allowed her to go to bed, but they told her not to tell or "they [would] go off to prison."

{¶7} The second allegation of sexual activity instigated by Appellant and Lykins occurred on Halloween night 2014. M.S. told Powers that she

had just come back from trick or treating. Appellant and Lykins were drunk. They told her to come to their bedroom, made her lie on their bed, and started raping her.

{¶8} When Powers questioned M.S. about her mother's actions that night, M.S. stated "I don't remember." However, she explained that Lykins told her to remove her clothes. Lykins and her mother were both naked. Her mother lay on the bed beside her. Lykins put his penis inside M.S. M.S. stated, "The [sic] started having sex with me and I told them I was tired again, they told me to go into my bedroom and lay down and watch T.V. with the other kids." M.S. stated, "I went to my room and cried and I guess I waited until I told my caseworker."

{¶9} Andrea Powers inquired about M.S.'s caseworker. M.S. explained that someone else in the family had made similar allegations against another family member, indicating that was why she had a caseworker. M.S. did not indicate that the other family member had touched her or hurt her in any way.

{¶10} After arraignment and entering pleas of not guilty, Appellant and Lykins eventually opted to go to jury trial. Their cases were consolidated and trial began on September 25, 2018. Kenny Dick was the State's first witness. On cross-examination, Kenny Dick acknowledged the

delay in M.S.'s report made the likelihood of physical evidence being located highly unlikely. Investigator Dick also acknowledged that he did not interview any of the other persons living at the same residence as M.S. Additionally, he admitted he had received a report that other minor female family members of M.S. had made a report of unlawful sexual activity by another male (not Lykins).

{¶11} M.S. also testified. At the time of trial, she was seventeen years old. M.S. identified a photograph of the home she lived in with Appellant, Lykins, and others in 2014. M.S. again described the events of July and October 2014. As to the July "birthday" incident, M.S. added that Appellant fixed M.S.'s hair and makeup and told her they were "going to have some fun." She remembered that she was given beer and vodka. M.S. also testified she "tried not to remember things."

{¶12} As to the October "Halloween" incident, M.S. specifically testified that Appellant told her to remove her clothes. She further recalled that when Lykins put his penis inside her vagina, he was on top of her with his hands on her biceps. Appellant was lying on the bed beside M.S., and she told her to "not say anything and if it hurt [they] would stop." She also testified Appellant touched her vagina on the outside. Appellant also took M.S.'s hand and moved it to her own vagina.

{¶13} Andrea Powers also testified as to her experience and credentials as a social worker and forensic interviewer at the Mayerson Center. She explained the Mayerson Center's multidisciplinary approach to working with children who had made allegations of sexual abuse. She described the forensic interview as a non-leading, non-biased interview when a child has made a disclosure of sexual abuse, physical abuse, and neglect. She testified the purpose of conducting the forensic interview was to assess the child's physical, medical, psychological, and emotional health, as well as any risk to them, in order to recommend medical treatment and psychological treatment. The information acquired through the forensic interview was passed on to the rest of the medical team so that the team could make a determination about how to proceed medically.

{¶14} Powers testified that on the day of the forensic interview, M.S. presented as a "very typical child or adolescent that has come into the center. Very kind of neutral, flat in her affect." Powers identified the audio and video recorded interview as State's Exhibit 5. The interview was then played for the jury. Powers testified that based on the interview, she made the recommendation that M.S. seek counseling, "trauma-based if available." We have reviewed this recorded interview.

{¶15} Powers testified that most of her interviews in these types of cases are delayed disclosures. She also explained the term "grooming." Powers testified that Appellant's and Lykins' acts of providing alcohol and showing pornographic videos to normalize sexual behavior, or see how M.S. would respond, were indicators of grooming. On cross-examination, Powers admitted that there are "false reports." However, she testified that research indicates it is "very rare in child abuse."

{¶16} At the conclusion of the State's case, the trial court admitted the State's exhibits into evidence, including the recorded Mayerson interview. Defense counsel then made a Crim.R. 29 motion for acquittal. Appellant's counsel submitted the motion generally, without argument.[1]

{¶17} Appellant called only one witness, Jacinda Fite, Lykins' adult daughter. She testified that during the relevant time period, she lived in the household with Appellant, her father, M.S. and the additional family members. Ms. Fite testified M.S. always acted "normal" and that she never observed her father act inappropriately with M.S.

{¶18} At the conclusion of the trial this timely appeal followed. Where pertinent, additional facts are set forth below.

ASSIGNMENTS OF ERROR

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[1] Co-defendant Lykins' counsel argued that the element of force had not been shown. The trial court granted judgment of acquittal as to Count II of the indictment, gross sexual imposition, against Lykins.

I. "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY IMPROPERLY APPLYING THE RAPE SHIELD STATUTE AND REFUSING TO ALLOW APPELLANT TO CROSS-EXAMINE THE VICTIM ABOUT HER POSITIVE TEST FOR CHLAMYDIA."

II. "THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW AND/OR AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO SUSTAIN APPELLANT'S CONVICTIONS."

III. "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY ALLOWING THE STATE OF OHIO TO PLAY THE CHILD'S INTERVIEW FROM THE MAYERSON CENTER IN ITS ENTIRETY."

IV. "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY FAILING TO MERGE ALLIED OFFENSES OF SIMILAR IMPORT AT THE TIME OF SENTENCING."

V. "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY IMPROPERLY SENTENCING HER TO CONSECUTIVE PRISON TERMS."

VI. "THE TRIAL COURT ERRED BY INCLUDING IN THE SENTENCING ENTRY THAT APPELLANT SHALL BE RESERVED FOR DENIAL FOR TRANSITIONAL CONTROL, IPP AND SHALL BE DENIED FOR THE PROGRAM FOR COMMUNITY BASED SUBSTANCE USE DISORDER TREATMENT."

VII. "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT'S SIXTH AMENDMENT RIGHTS BY ENTERING JUDGMENT OF CONVICTION AFTER A TRIAL AT WHICH APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR HER DEFENSE."

ASSIGNMENT OF ERROR I- THE RAPE SHIELD STATUTE

STANDARD OF REVIEW

{¶19} "A trial court has broad discretion in the admission or

exclusion of evidence, and so long as such discretion is exercised in line with the rules of procedure and evidence, its judgment will not be reversed absent a clear showing of an abuse of discretion with attendant material prejudice to defendant." *State v. Lamb,* 2018-Ohio-1405, 110 N.E.3d 564, (4th Dist.), at ¶ 27, quoting *State v. Richardson,* 4th Dist. Scioto No. 14CA3671, 2015-Ohio-4708, at ¶ 62; quoting *State v. Green,* 184 Ohio App.3d 406, 2009-Ohio-5199, 921 N.E.2d 276, ¶ 14 (4th Dist.). Absent an abuse of discretion, an appellate court will not disturb a trial court's ruling regarding the admissibility of evidence. *State v. Linkous,* 4th Dist. Scioto No. 12CA3517, 2013-Ohio-5853, at ¶ 22; citing *State v. Martin,* 19 Ohio St.3d 122, 129, 483 N.E.2d 1157 (1985). To constitute an abuse of discretion, the trial court's decision must be unreasonable, arbitrary, or unconscionable. *State v. Adams,* 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). We review the trial court's rape shield rulings under R.C. 2907.02(D) for an abuse of discretion. *State v. Minton*, 2016-Ohio-5427, 69 N.E. 3d 1108, at ¶ 19; *State v. Nguyen,* 4th Dist. Athens No. 12CA14, 2013-Ohio-3170, at ¶ 44.

LEGAL ANALYSIS

{¶20} Appellant was indicted and convicted of one count of rape, R.C. 2907.02. Appellant argues that the trial court erred by not allowing

Appellant's counsel to question M.S. at trial about her having been diagnosed with chlamydia. Appellant sought to introduce evidence that M.S. suffered from chlamydia but that Appellant did not have chlamydia as material evidence that Appellant did not engage in sexual activity with M.S. as alleged in the indictment.

{¶21} The record reveals that Appellant, through counsel, filed a pretrial request for hearing pursuant to R.C. 2907.02(E) regarding the admissibility of evidence pertaining to M.S.'s diagnosis of chlamydia.[2] Appellant's memorandum in support of the request explicitly stated: Information received from the State's initial Compliance with Discovery indicates that M.S. disclosed alleged sexual activity in early December 2015. As a result of her disclosure, she was subsequently tested for sexually transmitted diseases in February 2016. At that time, the alleged victim tested positive for chlamydia. Defendant, April Schroeder, and Co-Defendant, Michael Lykins, were then tested for chlamydia because of the allegations and those tests were negative according to medical records provided by the State of Ohio. The State of Ohio also subpoenaed and

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[2] R.C. 2907.02(E) provides: "Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial." The request was also brought on behalf of co-defendant Michael Lykins.

provided records of both Defendants which did not show that either Defendant had been treated for chlamydia.

{¶22} Appellee, State of Ohio, responded by joining in the request for a hearing. However, Appellee argued that evidence of the diagnosis of chlamydia was not material to a fact issue in the case. Appellee argued that there was a fifteen-month gap between the alleged conduct in the indictment and M.S.'s test results in February 2016. Appellee concluded the results were not relevant and that introducing evidence that the victim had a sexually transmitted disease was extremely prejudicial with no probative value, given the time span.

{¶23} Alternatively, Appellee pointed out that Appellant's records showed that even if she tested negative for chlamydia on March 1, 2016, it did not mean she had never had chlamydia. Appellant's medical records demonstrated that she had been treated with antibiotics on two occasions in late 2015 and early 2016. The antibiotic treatment could have cleared the chlamydia or could have otherwise affected the chlamydia test. Again, Appellee asserted the evidence of M.S.'s chlamydia diagnosis was more prejudicial than probative.

{¶24} The trial court conducted the requested hearing prior to trial to determine the issues raised by the parties. The trial court ruled that use of

the evidence would not be permitted. During the hearing, the court inquired as to whether expert testimony would be presented to attack issues such as whether the antibiotic Appellant used could have masked a chlamydia diagnosis; whether the antibiotic used would have cured chlamydia; whether chlamydia was present in Appellant at an earlier time; or was the presence of chlamydia even tested. The parties acknowledged that there would be no expert testimony on these questions posited by the court. The court found that in light of the lack of conclusive answers to its inquiries, the testimony, though potentially material, was also highly prejudicial, and that the prejudicial nature of the testimony would have outweighed its probative value.

{¶25} On appeal, Appellee reiterates the importance of the fact that there was no expert testimony as to chlamydia testing and the associated issues raised in the hearing. In effect, there would be no way for Appellant to prove or disprove that the victim did or did not contract the disease from Appellant or from a separate sexual partner. Appellee cites the trial court's ruling indicating said evidence of the victim's disease would have only led to speculation on the part of the jury and would therefore have served no legitimate purpose. For the reasons which follow, we agree with Appellee.

{¶26} The rape statute sets forth Ohio's rape shield law in R.C. 2907.02(D), which states:

> Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. * * *

State v. Horsley, 2018-Ohio-1591, 110 N.E.3d 624, at ¶ 53.

{¶27} Many years ago now, in *State v. Sowards,* 4th Dist. Scioto No. 90CA1923, 1996 WL 409111 (July 12, 1996), we discussed application of the rape shield law. On appeal, Sowards argued that evidence his child/victim had sex with other men might have explained the origin of the trichomonas vaginitis infection that a medical doctor had found in the child's vagina. We noted that Sowards (1) made no argument that any of the men who had sex with the child suffered from an infection that they might have transmitted to the child; and (2) made no argument that he did not have an infection at the time. "Rather, appellant merely *guesse[d]* that the child's

infection originated from one of these other men." *Id.* At *5. (Emphasis added.)

{¶28} In summary, in *Sowards,* we found that without evidence that the other men had the disease and/or evidence that Sowards did not have the disease, evidence that the child was raped by other men was not relevant to the question of whether appellant raped the child. *Id.* See *State v. Garrett*, 12th Dist. Clermont No. CA89-08-070, 1990 WL 98222 (July 18, 1990), in which the court determined that because the state was prepared to present evidence that trichomoniasis can be cured within weeks, and because the defendant and another person could have been cured between the time of the rape and the time of the medical examination, the evidence that the child rape victim suffered from trichomoniasis was both prejudicial and irrelevant. *Cf. State v. McMahon,* 2d Dist. Clark Nos. 94CA49 and 94CA50, 1996 WL 173396, (Apr. 12, 1996) (abrogation on other grounds recognized by *State v. Fitch,* 2d Dist. Clark No. 2002–CA-5, 2003-Ohio-203, fn. 5), in which the court allowed evidence that the victim and the defendant both tested positive for gonorrhea, and another man tested negative; *State v. Hamilton,* 2d Dist. Clark No. C.A. 3015, 1993 WL 541608 (Dec. 29, 1993), in which the court entertained the defendant's argument that contrary to the State's doctor's

diagnosis, the victim's sexually transmitted disease was chlamydia, a disease the defendant did not have.

{¶29} Our decision finding that evidence that Sowards' victim was raped by other men was not relevant to the question of whether Sowards raped the child was cited subsequently by the Eighth Appellate District in *State v. Kimmie*, 8th Dist. Cuyahoga No. 1999 WL 236685 (April 22, 1999). In *Kimmie*, the defendant claimed that the court erred by refusing to permit Kimmie to cross-examine the victim about her past sexual activity. Kimmie knew the hospital records showed the victim had contracted trichomonas, a sexually transmitted disease manifesting itself as a vaginal infection. Kimmie apparently did not have the disease and wished to inquire about the victim's past sexual activity to suggest that he was not the individual who had sexual relations with the victim.

{¶30} The Court noted that, generally, evidence of specific instances of the victim's sexual activity is not admissible. *See* R.C. 2907.02(D). An exception exists if the accused can show that the victim's past sexual reputation or activity is necessary to prove the origin of semen, pregnancy, disease or past sexual history with defendant. Even then, the court may exclude such evidence if the court finds that it is irrelevant or is prejudicial.

State v. Guthrie, 86 Ohio App.3d 465, 467, 621 N.E.2d 551, (12th Dist. 1983).

{¶31} In *Kimmie,* the appellate court noted the defendant did not clearly articulate the reasons why he should have been permitted to inquire about the victim's past sexual activity as a means of discovering how she contracted her sexually transmitted disease. Kimmie appeared to argue that he could not have been the assailant since he did not have any sexually transmitted disease. The Eighth District Court summarized:

[Kimmie’s] argument assumes one of two things-either the victim contracted her sexually transmitted disease as a result of the rape or defendant should have contracted the disease if he had sexual intercourse with the victim. These assumptions can be assailed on any number of grounds, but even if true, *the victim's preexisting sexually transmitted disease has nothing to do with the issue whether he forced sex on the victim as charged in the indictments.* (Emphasis added.) Even had the victim been sexually active with other partners, that fact would prove nothing. See *State v. Sowards,* 4th Dist. Scioto No. 90 CA 1923, 1996 WL 409911. The disease exception to R.C. 2907.02(D) does not permit fishing expeditions - an accused cannot, without more, raise irrelevant issues relating to the victim's sexually transmitted disease without making some showing of relevancy. Since no

relevancy had been shown in this case, the court did not abuse its discretion by refusing to permit defendant to question the victim.

{¶32} More recently in *State v. Minton, supra,* this court reiterated that Ohio's rape shield law prohibits any evidence of the victim's sexual history "unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender." R.C. 2907.02(D). *Id.* at ¶ 30. Even if one of the enumerated exceptions applies, introduction of such evidence is permitted only if the court finds that the evidence is material to a fact at issue and that its prejudicial nature does not outweigh its probative value. *Id.* Moreover, where the contested evidence is submitted only to impeach the victim's credibility, such evidence is prohibited by the rape shield law. *State v. Ferguson,* 5 Ohio St.3d 160, 450 N.E.2d 265 (1983), paragraph two of the syllabus.

{¶33} In *Minton,* the defendant sought to introduce evidence of the victim's statements regarding other men allegedly responsible for her pregnancy. We found the trial court did not err in excluding the evidence because we failed to see how this evidence was material to a fact at issue in the case. There, Minton had admitted to having intercourse with the victim as alleged in one of the counts of his indictment. Furthermore, Minton's trial counsel had admitted during an in camera hearing that the true motive

in attempting to introduce the statements was for the purpose of impeaching the victim's credibility. Noting that the rape shield law does not allow evidence to be submitted merely to impeach the victim's credibility, we opined that the origin of the victim's pregnancy had no bearing on whether Minton and the victim engaged in sexual activities on the other alleged dates. We concluded that the prejudicial nature of the contested evidence outweighed its probative value.

{¶34} The same reasoning is equally applicable here. In Appellant's case, without expert evidence to clarify various issues relating to the disease of chlamydia and chlamydia testing, the risk is that the evidence would only tend to suggest that M.S. had multiple partners and be useful only in attempting to damage her credibility with the jury. The evidence of M.S.'s chlamydia diagnosis has no bearing on whether or not Appellant's mother committed the criminal sexual acts specified in the indictment.

{¶35} We find the case law in our district supports the trial court's ruling. In this case, excluding the evidence of M.S.'s chlamydia diagnosis was not an abuse of discretion. Appellant's argument has no merit. As such, we overrule Appellant's first assignment of error.

ASSIGNMENT OF ERROR III-
RIGHT OF CONFRONTATION

{¶36} For ease of analysis, we next consider Appellant's third

assignment of error. Appellant argues that his right of confrontation was violated when the State of Ohio was permitted to play the entire interview of M.S., which was conducted at the Mayerson Center. Appellant points to inconsistencies between M.S.'s statements in the Mayerson interview and in her trial testimony. Appellant also argues the out-of-court statements in the interview were not made for purposes of medical diagnosis and treatment due to a year-long delay in reporting the abuse. Thus, Appellant asserts that the statements M.S. gave in the interview were also inadmissible hearsay, as well as violative of his confrontation clause rights. For the reasons which follow, we find no merit to Appellant's assignment of error.

STANDARD OF REVIEW

{¶37} As set forth fully in Paragraph 19 above, the admission of evidence is within the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), at paragraph two of the syllabus; *State v. Knauff,* 4th Dist. Adams No. 10CA900, 2011-Ohio-2725, at ¶ 22.

LEGAL ANALYSIS

{¶38} The Mayerson interview was audio and video recorded on a DVD and played during Andrea Powers' testimony. Powers was the professional from Cincinnati Children's Hospital who interviewed M.S. and identified Exhibit 5, the DVD of the recorded interview with M.S. Defense

counsel did not lodge an objection prior to the playing of the interview for the jury and did not object when the DVD was offered and admitted into evidence. The failure to object is significant because Evid. R. 103(A) provides:

> Error may not be predicated upon a ruling which admits
> or excludes evidence unless a substantial right of the party is affected, and (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context[.]

{¶39} Evid. R. 103(A) follows the longstanding rule that the failure to make a specific objection to the admission of evidence waives the objection and it cannot thereafter form the basis of a claim in an appellate court. *Kent v. State,* 42 Ohio St. 426, 430–431, 1884 WL 256; *Knauff, supra,* at ¶ 25. Crim.R. 52(B), however, provides a mechanism by which defendants may obtain review of "plain errors" that affected "substantial rights" even where they failed to object. Generally, appellate courts take notice of plain error under Crim.R. 52(B) with the utmost caution, only under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Gardner,* 118 Ohio St.3d 420, 2008–Ohio–2787, 889 N.E.2d 995, ¶ 78; *State*

v. Patterson, 4th Dist. Washington No. 05CA16, 2006–Ohio–1902, ¶ 13; *State v. McCluskey,* 4th Dist. Ross No. 17CA3604, 2018-Ohio-4859, at ¶ 11. Plain error should be noticed if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *State v. Bundy,* 4th Dist. Pike No. 11CA818, 2012–Ohio–3934, 974 N.E.2d 139, ¶ 66. The Supreme Court of Ohio has stated that appellate courts should conservatively apply plain-error review, and notice plain error in situations that involve more than merely theoretical prejudice to substantial rights. *State v. Steele,* 138 Ohio St.3d 1, 2013–Ohio–2470, 3 N.E.3d 135, ¶ 30. Thus, because Appellant failed to object to the playing of the Mayerson interview at trial, she has waived all but plain error.

1. Confrontation Clause

{¶40} The Sixth Amendment to the United States Constitution gives a defendant the right "to be confronted with the witnesses against him." *See* also Ohio Constitution, Article I, Section 10 ("the party accused shall be allowed * * * to meet the witnesses face to face"). *State v. Blanton,* 4th Dist. Adams No. 16CA1031, 2018-Ohio-1275, at ¶ 16. "[T]his bedrock procedural guarantee applies to both federal and state prosecutions." *Knauff, supra,* at ¶ 41, quoting, *Pointer v. Texas,* 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)." *Crawford v. Washington*, 541 U.S. 36, 42, 124

S.Ct. 1354, 158 L.Ed.2d 177 (2004). "Section 10, Article I [of the Ohio Constitution] provides no greater right of confrontation than the Sixth Amendment[.]" *State v. Self,* 56 Ohio St.3d 73, 79, 564 N.E.2d 446(1990). Therefore, we limit our review of Appellant's argument to the federal right of confrontation.

{¶41} Out-of-court statements that are "testimonial" in nature violate the Confrontation Clause of the Sixth Amendment when introduced at trial if the defendant has no opportunity to cross-examine the declarant on those statements. *Knauff, supra,* at ¶ 42; *Crawford* at 68. In *Crawford,* the Court provided a basic definition of testimonial statements known as the "objective-witness test." This test provides that statements are testimonial in nature when they are "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]" *Id.* at 52.

{¶42} In *Knauff, supra,* at ¶ 42, we held that we need not determine whether the statements played before the jury (recorded interview at the Mayerson Center of a young child victim) were "testimonial." We observed that the Court in *Crawford* was explicit: "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.* at fn. 9, citing

California v. Green, 399 U.S. 149, 162, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). In *Knauff,* we pointed out that the child victim testified at trial and was subject to cross-examination. The same is true in Appellant's case. M.S. testified at trial and was subject to cross-examination.

{¶43} Knauff nonetheless contended that he had no meaningful way of confronting the statements made in the video. We noted, however, that the record reflected that defense counsel had the opportunity to question the child victim concerning the statements but chose not to. Defense counsel even spoke with Knauff to determine whether there was any additional line of questioning Knauff wished pursued. Counsel then stated on the record that after consulting Knauff, he had no further questions. Consequently, we held that even if some or all of the video-recorded interview was testimonial in nature, Knauff had the opportunity to cross-examine D.K. on her statements. We found no constitutional error in the court's decision to admit the video-recorded interview.

{¶44} In support of her confrontation clause argument, Appellant directs us to certain inconsistencies in M.S.'s statements to Andrea Powers during the Mayerson interview, as opposed to her trial testimony regarding the two incidents in which sexual activity allegedly occurred. In the Mayerson interview, M.S. stated that during the October 2014 incident the

co-defendant told her to remove her clothes. When asked what Appellant did during the October 2014 incident, M.S. stated "I don't remember."

{¶45} However, at trial, M.S. testified that during the October incident, her mother told her to get undressed and the co-defendant again put his penis inside her vagina. M.S. said that Appellant touched M.S. sexually and ordered M.S. to touch her as well.

{¶46} A thorough review of the trial transcript indicates that when defense counsel cross-examined M.S. at trial, he began by eliciting an affirmative response from her that it was fair to say her memory would have been fresher at the time she was interviewed by Andrea Powers. He also elicited an affirmative response from her that she did recall Ms. Powers' questioning about the October incident, and her response to Ms. Powers that she did not remember what her mother did during the October incident. She further acknowledged her response to Ms. Powers that she did not recall her mother doing anything "except laying next to" her on the bed.

{¶47} The transcript shows defense counsel then switched to the July incident and was able to elicit many "I don't know" responses regarding details such as the type of alcohol she was given, the type of container it was in, whether her mother was drinking alcohol, whether the co-defendant was drinking alcohol, and what time of day it occurred. M.S. later testified she

could not remember the name of the guidance counselor to whom she reported the abuse. Defense counsel was able to successfully attack M.S.'s memory and raise legitimate issues as to credibility.

{¶48} As defense counsel finished cross-examination, he further elicited testimony, to which M.S. agreed, that the "story" she testified to in court regarding her mother and the October incident was different than the one she gave in the Mayerson interview. On re-direct, M.S. testified that later in the Mayerson interview, she made a statement that her mother had touched her breasts and private parts during the October incident. We have observed that in the Mayerson interview, when first asked about the October incident, M.S. generally testified: "[t]hey told me to come to their bedroom and they made me lay on their bed and they started raping me there."

{¶49} Defense counsel had the opportunity to cross-examine M.S. Given defense counsel's vigorous cross-examination of M.S. regarding the inconsistencies in her statements, we do not think Appellant was denied her constitutional right of confrontation. *See Knauff, supra,* at ¶ 43; *see also State v. Woodruff,* 1st Dist. Hamilton Nos. C-140256 and C-140257, 2015-Ohio-2422, at ¶ 19. Under these circumstances, we cannot say that plain error occurred.

2. <u>Inadmissible Hearsay</u>

{¶50} Appellant also argues that the Mayerson interview was inadmissible as hearsay. Statements made outside of the courtroom, offered at trial to prove the truth of what they assert, are generally inadmissible as "hearsay" unless an exception applies. Evid.R. 801(C); Evid.R. 802; *State v. DeMarco,* 31 Ohio St.3d 191, 195, 509 N.E.2d 1256 (1987); *Knauff, supra* at ¶ 27. Out-of-court statements made for purposes of medical diagnosis or treatment are hearsay, but are admissible in court under the hearsay exception provided in Evid.R. 803(4). Such statements are only admissible "insofar as reasonably pertinent to diagnosis or treatment." Evid.R. 803(4).

{¶51} In *Knauff, supra,* the accused contended that the video-recorded interview in his case did not satisfy the reliability threshold of Evid.R. 803(4). We observed that in deciding whether hearsay is reliable enough for admission under Evid .R. 803(4), courts look at several factors. The first is the "selfish-motive" doctrine, i.e., "the belief that the declarant is motivated to speak truthfully to a physician because of the patient's self-interest in obtaining an accurate diagnosis and effective treatment." *Knauff, supra,* at ¶ 28, quoting, *State v. Muttart,* 116 Ohio St.3d 5, 2007–Ohio–5267, 875 N.E.2d 944, at ¶ 34, citing *State v. Eastham*, 39 Ohio St.3d 307, 312, 530 N.E.2d 409 (1988), (Brown, J., concurring). Another factor courts consider is the medical professional's subjective reliance on the statement, because

"physicians, by virtue of their training and experience, are quite competent to determine whether particular information given to them in the course of a professional evaluation is 'reasonably pertinent to diagnosis or treatment [,]' and are not prone to rely upon inaccurate or false data in making a diagnosis or in prescribing a course of treatment." *Id*. at ¶ 41, 530 N.E.2d 409, quoting *King v. People* (Colo.1990), 785 P.2d 596, 602. In *Muttart,* the Supreme Court of Ohio observed that the professional reliance factor is of "great import" in cases of child abuse. *Id*. In *Knauff,* at ¶ 29, we pointed to *Muttart's* non-exhaustive list of additional factors that a court should weigh when considering whether out-of-court statements obtained from a young child are admissible under this exception:

> (1) Whether medical professionals questioned the child in a leading or suggestive manner and whether the medical professional followed proper protocol in eliciting a disclosure of abuse;
>
> (2) Whether the child had a reason to fabricate, e.g., a pending legal proceeding or bitter custody battle;
>
> (3) Whether the child understood the need to tell the medical professional the truth; and
>
> (4) Whether the age of the child could indicate the presence

or absence of an ability to fabricate a story.

Id. at ¶ 49, 875 N.E.2d 944; *State v. Rutherford,* 4th Dist. Pike No. 17CA883, 2018-Ohio-2638, at ¶ 20.

{¶52} In *Knauff, supra*, the defendant contended that the child victim's statements were inadmissible under Evid.R. 803(4) because she did not understand that she was providing them for purposes of medical treatment. In other words, the factor of the patient's incentive to tell the truth to the medical professional for proper treatment was lacking. However, we observed that at the very beginning of the interview, the victim acknowledged her awareness of the purpose of the interview. The victim revealed to the forensic interviewer that she had sexual contact with her father. She then said, "that's why I'm here—to see a doctor." We found her statement satisfied the foundational requirement even though she was five-years-old.

{¶53} Here, Appellant argues that portions of the interview were not for medical purposes and should have been excluded. She points out the abuse allegations were not reported until over a year later. Thus, she contends that with the delay in reporting it was unlikely that any medical information could be obtained.

{¶54} We have reviewed the interview and the transcript. M. S. was fourteen years old when she spoke to Andrea Powers. Powers' testimony described the interview process and explained that it was done in a non-leading manner in order to gather information and assess the child's physical, medical, psychological, and emotional health. Powers also testified the purpose of the forensic interview is to provide medical and psychological treatment. Powers further testified that based on the interview, it was recommended that M.S. seek trauma-based counseling. The recorded interview and interview transcript reflect this manner and purpose.

{¶55} We have also reviewed the four additional reliability factors found in *Muttart.* We find that Powers did not conduct the interview with M.S. in a leading or suggestive manner. Powers explained that they were talking about "things that are real and true," and that it was o.k. for M.S. to answer "I don't know," if she did not know the answer to a question. Powers also explained that if she (Powers) said something wrong, it was o.k. for M.S. to correct her. M.S. indicated she understood these directions. Therefore, we find the record reflects that M.S. was old enough to understand the need for truthfulness in seeking medical or psychological treatment.

{¶56} It is also true that M.S. was old enough to appreciate the negative consequences that fabricating allegations could have on her mother and mother's boyfriend. During M.S.'s cross-examination by co-defendant's counsel, M.S. acknowledged that a sexual assault report was filed against a male relative by her younger sister and another female child in the household. The report was made two months before M.S. disclosed the allegations against Appellant and Michael Lykins.

{¶57} Notwithstanding the delay in reporting, and the existence, arguably, of a possible ulterior motive for reporting abuse, we conclude that the interview was reasonably pertinent to psychological diagnosis and treatment of M.S. As we stated in *Knauff* the victim's mental health was an important purpose of the forensic interview and the questions and answers provided were reasonably pertinent to medical treatment. For these reasons, we find the trial court did not commit plain error by allowing the interview to be played for the jury and admitted into evidence. We find no abuse of discretion or plain error occurred by the court's ruling admitting the redacted version of the video-recorded Mayerson interview under Evid.R. 803(4).

{¶58} For the foregoing reasons, we find no merit to Appellant's third assignment of error. It is hereby overruled.

ASSIGNMENT OF ERROR II- SUFFICIENCY AND/OR MANIFEST WEIGHT OF THE EVIDENCE

STANDARD OF REVIEW

{¶59} A claim of insufficient evidence invokes a due process concern and raises the question of whether the evidence is legally sufficient to support the verdict as a matter of law. *State v. Blanton,* 2018-Ohio-1278, 110 N.E.3d1, (4th Dist.) at ¶ 13; *State v. Wickersham,* 4th Dist. Meigs No. 13CA10, 2015-Ohio-2756, at ¶ 22; *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. *Thompkins,* syllabus. The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781 (1979); *State v. Jenks,* 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991). Furthermore, a reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Thompkins,* 78 Ohio St.3d at 390 (Cook, J., concurring).

{¶60} Thus, when reviewing a sufficiency-of-the-evidence claim, an appellate court must construe the evidence in a light most favorable to the prosecution. *State v. Dunn,* 4th Dist. Jackson No. 15CA1, 2017-Ohio-8469, at ¶ 13; *Wickersham, supra,* at ¶ 23; *State v. Hill,* 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. Grant,* 67 Ohio St.3d 465, 477, 620 N.E.2d 50 (1993). A reviewing court will not overturn a conviction on a sufficiency-of-the-evidence claim unless reasonable minds could not reach the conclusion that the trier of fact did. *State v. Tibbetts,* 92 Ohio St.3d 146, 162, 749 N.E.2d 226 (2001); *State v. Treesh,* 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001).

{¶61} " ' "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." ' " *Dunn, supra,* at ¶ 15, quoting, *Wickersham, supra,* at ¶ 24, quoting *Thompkins*, 78 Ohio St.3d at 387. " 'Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be

established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief." ' " *Wickersham, supra,* at ¶ 24, quoting *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517, ¶ 12, quoting *Thompkins,* 78 Ohio St.3d at 387, quoting Black's Law Dictionary 1594 (6th Ed.1990).

{¶62} When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence, and consider the credibility of witnesses. The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. *Dunn, supra*, at ¶ 16; *Wickersham, supra,* at ¶ 25; *State v. Issa,* 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Murphy,* 4th Dist. Ross No. 07CA2953, 2008–Ohio–1744, ¶ 31. " 'Because the trier of fact sees and hears the witnesses and is particularly competent to decide "whether, and to what extent, to credit the testimony of particular witnesses," we must afford substantial deference to its determinations of credibility.' " *Barberton v. Jenney,* 126 Ohio St.3d 5, 2010–Ohio–2420, 929 N.E.2d 1047, ¶ 20, quoting *State v. Konya,* 2nd Dist. Montgomery No. 21434, 2006–Ohio–6312, ¶ 6, quoting *State v. Lawson,* 2nd Dist. Montgomery No. 16288 (Aug. 22, 1997). As the *Eastley* court explained:

> “ '[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment must be made in favor of the judgment and the finding of facts.
>
> * * *
>
> If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.' ”

Eastley at ¶ 21, quoting *Seasons Coal Co., Inc. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn.3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978). Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact finder, as long as a rational basis exists in the record for its decision. *State v. Picklesimer*, 4th Dist. Pickaway No. 11CA9, 2012–Ohio–1282,¶ 24; accord *State v. Howard,* 4th Dist. Ross No. 07CA2948, 2007–Ohio–6331, ¶ 6 (“We will not intercede as long as the trier of fact has some factual and rational basis for its determination of credibility and weight.”).

{¶63} Once the reviewing court finishes its examination, the court may reverse the judgment of conviction only if it appears that the fact-finder, when resolving the conflicts in evidence, “ ‘ “clearly lost its way and

created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." ' " *Dunn, supra,* at ¶ 17; *Wickersham, supra*, at ¶ 26, quoting *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). A reviewing court should find a conviction against the manifest weight of the evidence only in the " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*, quoting *Martin,* 20 Ohio App.3d at 175; *State v. Lindsey,* 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

{¶64} When an appellate court concludes that the weight of the evidence supports a defendant's conviction, this conclusion necessarily includes a finding that sufficient evidence supports the conviction. *Dunn, supra* at ¶ 18; *Wickersham, supra*, at ¶ 27; *State v. Pollitt,* 4th Dist. Scioto No. 08CA3263, 2010–Ohio–2556, ¶ 15. " 'Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency.' " *State v. Lombardi,* 9th Dist. Summit No. 22435, 2005–Ohio–4942, ¶ 9, quoting *State v. Roberts,* 9th Dist. Lorain No. 96CA006462 (Sept. 17, 1997).

{¶65} Given that appellant has asserted both that her convictions are against the manifest weight of the evidence, as well as unsupported by sufficient evidence, we will begin with the "manifest- weight" analysis.

LEGAL ANALYSIS

{¶66} Appellant argues that all the charges should be dismissed because the prosecution did not prove two of the elements of rape, i.e., "sexual conduct" and "force." Appellant further argues that the conviction was based solely on the evidence provided by M.S.'s uncorroborated testimony. As such, Appellant concludes her convictions are not supported by sufficient evidence and are also against the manifest weight of the evidence. For the reasons which follow, we disagree with Appellant's arguments.

{¶67} R.C. 2907. 02(A)(2), Rape, provides that "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." Appellant argues that sexual conduct with another person was not proven because M.S. testified on direct examination that Appellant put her fingers "around my vagina." Appellant then asserts that the prosecution improperly characterized how M.S. testified. The transcript reflects her testimony regarding the rape count as follows:

Q: And when you initially got to the couch, who was with you?

A: Me and my mom.

Q: Okay. And what did your mother do?

A: My mother told me to lay on the couch and that's what I did. She then proceeded to put her fingers around my vagina.

Q: Okay. Do you remember how that made you feel?

A: I was uncomfortable and very scared.

Q: How do you know it was inside your vagina?

A: I felt it.

{¶68} Appellant argues that the question "how do you know it was inside your vagina" was an improper characterization. Appellant argues that taking M.S.'s testimony at face value, sexual conduct did not occur. Appellant further argues the prosecution improperly played the Mayerson interview, wherein M.S. tells Andrea Powers that Appellant put her fingers inside of M.S.'s vagina, to bolster M.S.'s testimony.

{¶69} We begin with the observation that defense counsel did not object to the alleged improper characterization. Therefore, the alleged error will be reviewed for plain error only. Thus, we must consider whether the prosecution's characterization of the testimony affected the outcome of the trial.

{¶70} Chapter 2907, Sex Offenses, provides that the definition of sexual conduct is as follows in RC. 2907.01(A):

"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.

{¶71} Later in direct testimony regarding the rape incident, M.S. testified as follows:

Q: I'm going to take you back to when you sat on the couch. Initially when you got the couch what were you wearing?

A: The lingerie.

Q: And you'd said that your mom was touching you. What made your mom stop touching you?

A: I told her I didn't want to do it anymore.

{¶72} In this case, the jurors were instructed that they were to decide all disputed questions of fact. We have already determined that the trial court did not err in permitting the Mayerson interview to be played for the jurors. In the interview, M.S. told Andrea Powers that her mother put her fingers inside her "private part." We are mindful that the trier of fact is free

to believe all, part, or none of the testimony of any witness, and we defer to the trier of fact on evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *State v. Chafin,* at 32; *Dillard* at ¶ 28; citing *State v. West,* 4th Dist. Scioto No. 12CA3507, 2014–Ohio–1941, ¶ 23. Here, the jurors apparently found M.S. to be a credible witness in both her recorded interview and at trial.

{¶73} Given that we have found no error in the trial court's admission of the Mayerson interview, we cannot find that the prosecutor's mischaracterization, if any, changed the outcome of the trial. The jury was given enough information via the interview and the testimony from which it could decide whether or not there was penetration. See *State v. Ritchie,* 12th Dist. Warren No. CA-2017-11-155, 2018-Ohio-4256, at ¶ 81.

{¶74} Appellant next argues that the prosecution failed to prove all counts because it failed to prove the necessary element of force. Appellant concedes that because of the parent/child relationship the showing of force may be proven by a lesser standard, such as subtle, slight, or emotional coercion. However, Appellant argues that in this case, there was "zero evidence" of force on any of the four counts. For this reason, Appellant concludes all counts should have been dismissed.

{¶75} In *State v. Shadoan,* 4th Dist. Adams No.03CA764, 2004-Ohio-1756, we considered similar arguments regarding the lack of a showing of force in a rape conviction. We noted that R.C. 2901.01(A) defines force as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." *Shadoan, supra,* at ¶ 19. To prove the element of force in a rape case involving a minor child when the offender stands in loco parentis, the force need not be physical or brutal. *Id*. Instead, the parent's position of authority and power, in relation to the minor's vulnerability, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary. *See State v. Eskridge*, 38 Ohio St.3d 56, 59, 526 N.E.2d 304 (1988); *see, also*, *State v. Riffle,* 110 Ohio App.3d 554, 561, 674 N.E.2d 1214 (9th Dist. 1996); *Shadoan, supra.*

{¶76} In *Shadoan,* at ¶ 20, we noted the *Eskridge* court's explanation of required force as follows:

> The force and violence necessary to commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other. With the filial obligation of obedience to a parent, the same degree of force and violence

may not be required upon a person of tender years, as would be required were the parties more nearly equal in age, size and strength.

{¶77} Thus, when the rape involves a child and that child's parent, or person who stands in loco parentis, subtle and psychological forms of coercion sufficiently show force. *Shadoan, supra,* at ¶ 21; *see*, e.g., *Eskridge,* 38 Ohio St.3d at 58–59, 526 N.E.2d 304. "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." *Id.*

{¶78} In this case, M.S. testified as follows regarding the type of subtle and psychological power Appellant held over her:

Q: If your mom asked you to do something, in that time frame when you were thirteen years, right after sixth grade, would you obey her?

A: Yes.

Q: What, what would have happened if you didn't do what you were told?

A: I would get in trouble.

Q: What kind of trouble?

A: Mainly grounding.

***

Q: How do you feel [sic.] your mom if you didn't obey her?

A: I feared her.

Q: Because of that fear what would you do when you were told what to do?

A: I would do it.

{¶79} Additionally, M.S. testified as to her feelings during both incidents as being "scared and uncomfortable." Apparently, in both incidents, Lykins was on top of her. Specifically as to the Halloween incident, M.S. testified that Lykins' hands were on her biceps and she "really" didn't feel like she could get up.

{¶80} In *Shadoan,* we found sufficient evidence existed that the defendant used force or the threat of force to compel the thirteen year old victim. The victim stated that she felt uncomfortable and scared during each incident. The jury reasonably could have inferred that the victim's will was overcome by fear. Thus, we found that the circumstances sufficiently demonstrated the element of force. *Id.* at ¶ 22.

{¶81} In this case, the trial court instructed the jury on the meaning of force and threat of force. The trial court explained that when the relationship between the victim and defendant is one of child and parent, or

one acting as a parent, "[t]he element of force need not be openly displayed or physically brutal. It can be subtle, slight, psychological, and or emotionally powerful." The court continued:

> "Evidence of an expressed threat of harm or evidence of significant physical restraint is not required. If you find beyond a reasonable doubt that under the circumstances and evidence the victims will was overcome by fear, duress, and or intimidation, the element of force has been proved."

{¶82} Although it is true M.S. testified that her mom stopped touching her when M.S. stated "I told her I didn't want to do it anymore," that does not lessen any fear or emotional force M.S. experienced. M.S. could not have known at the beginning of each incident that simply saying she was tired would cause Appellant or Lykins to cease. We find that some evidence of subtle or emotional force, which the jury apparently found credible, was produced at Appellant's trial.

{¶83} Finally, Appellant argues that the manifest weight of the evidence fails to sustain a conviction on all counts because the evidence was based solely on M.S.'s testimony. Appellant points out various "weaknesses" of the case, including no physical evidence, the delay in reporting, and the lack of eyewitness testimony. Appellant concludes the

testimony of a single witness, with no additional corroborating evidence, is insufficient to sustain the convictions.

{¶84} While it is true that Appellant has been convicted upon circumstantial evidence, with a great deal hinging upon M.S.'s credibility, " '[i]t is well settled that a rape conviction may rest solely on the victim's testimony, if believed, and that "[t]here is no requirement that a rape victim's testimony be corroborated as a condition precedent to conviction." ' " *State v. Horsley,* 2018-Ohio-1591, 110 N.E.3d 624 (4th Dist.) at ¶ 74; *State v. Canterbury,* 4th Dist. Athens No. 13CA34, 2015-Ohio-1926, at ¶ 62; quoting *State v. Patterson,* 8th Dist. Cuyahoga No. 100086, 2014-Ohio-1621, at ¶ 40; quoting *State v. Lewis,* 70 Ohio App.3d 624, 638, 591 N.E.2d 854 (4th Dist. 1990). Here, the jury apparently found M.S.'s testimony compelling.

{¶85} We have reviewed the entire record, weighed the evidence and all reasonable inferences, and have considered the credibility of witnesses. We cannot say that in this case, the jury lost its way and created a manifest miscarriage of justice requiring reversal of Appellant's convictions. We find Appellant's convictions are supported by the manifest weight of the evidence. Furthermore, having concluded that the weight of the evidence

supports Appellant's convictions, we necessarily further find that sufficient evidence supports the convictions.

{¶86} For the foregoing reasons, we find no merit to Appellant's second assignment of error. Accordingly, it is hereby overruled.

ASSIGNMENT OF ERROR IV- ALLIED OFFENSES OF SIMILAR IMPORT FOR PURPOSES OF SENTENCING

STANDARD OF REVIEW

{¶87} The sentencing transcript reveals that Appellant did not make a merger of allied offenses argument at sentencing. The failure to raise merger of allied offenses at a sentencing hearing forfeits all but plain error. *State v. Mack,* 4th Dist. Washington Nos. 17CA34 and 17CA35, 2018-Ohio-5165, at ¶ 17; *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 21, 28. As set forth above, to establish plain error defendant must show that "but for a plain or obvious error, the outcome of the proceeding would have been otherwise, and reversal must be necessary to correct a manifest miscarriage of justice." *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 16. Crim.R. 52. The imposition of multiple sentences for allied offenses of similar import amounts to plain error. *State v. Richardson,* 12th Dist. Clermont Nos. CA2014-03,023, CA2014-06-044, CA2014-06-0454, 2015-Ohio-824, at

¶ 84; *State v. Accorinti,* 12th Dist. Butler No. CA2012–10–205, 2013–Ohio–4429, ¶ 9.

LEGAL ANALYSIS

{¶88} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," and this protection applies to Ohio citizens through the Fourteenth Amendment and is additionally guaranteed by Article I, Section 10 of the Ohio Constitution. *Dunn, supra,* at ¶ 87; *Mullins, supra,* at ¶ 8. This constitutional protection prohibits multiple punishments for the same offense being imposed in a single trial absent a clear legislative intent to the contrary. *Id. See North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, (1969), overruled on other grounds, *Alabama v. Smith,* 490 U.S. 794, 109 S.Ct. 2201, (1989); *Missouri v. Hunter,* 535 U.S. 359, 103 S.Ct. 673, (1983).

{¶89} The General Assembly enacted R.C. 2941.25 to specify when multiple punishments can be imposed in the same trial:

> (A) Where the same conduct by the defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted

of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them. *Dunn, supra*, at ¶ 88; *State v. Mullins,* 4th Dist. Scioto No. 15CA3716, 2016–Ohio–5486, at ¶ 9.

{¶90} Merger is a sentencing question where the defendant bears the burden of establishing his entitlement to the protection of R.C. 2941.25 by a preponderance of the evidence. *Dunn, supra,* at ¶ 89; *Mullins, supra,* at ¶ 10. *State v. Washington,* 137 Ohio St.3d 427, 2013–Ohio–4982, 999 N.E.2d 661, ¶ 18. Appellate courts apply a de novo standard of review in an appeal challenging a trial court's determination of whether offenses constitute allied offenses of similar import that must be merged under R.C. 2941.25. *State v Dunn,* 4th Dist. Jackson No. 15CA1, 2017-Ohio-518, at ¶ 86. *State v. Williams,* 134 Ohio St.3d 482, 2012–Ohio–5699, 983 N.E.2d 1245, ¶ 28; *State v. Cole,* 4th Dist. Athens No. 12CA49, 2014–Ohio–2967, ¶ 7.

{¶91} Under current Ohio law, courts can only impose multiple punishments in a single trial for a defendant's conduct under two situations: 1) where the charged crimes are not allied offenses, i.e., it is not possible to commit multiple crimes with the same action, *State v. Johnson,* 128 Ohio St.3d 153, 2010–Ohio–6314, 942 N.E.2d 1061; and 2) the crimes are allied offenses but the defendant's actions have dissimilar import, i.e., the crimes were committed separately, or with a separate animus, or the resulting harm for each offense is separate and identifiable. *Dunn, supra,* at ¶ 89; *State v. Ruff,* 143 Ohio St.3d 114, 2015–Ohio–995, 34 N.E.3d 892, paragraph one of the syllabus. See *Mullins, supra,* at ¶ 10.

{¶92} Initially, we look to see if the charges Appellant faced represent allied offenses. To accomplish that we must look at Appellant's conduct to determine if it was possible to both commit one offense and commit the other by that conduct. *Johnson, supra,* at ¶ 48; *Mullins, supra,* at ¶ 13. *State v. Peace,* 11th Dist. Portage No. 2018-Ohio-3742, at ¶ 28.[3] Appellant was convicted of Count One, Rape and Count Two, Gross Sexual Imposition. Count One alleged:

[3] Stated differently, upon considering whether two offenses are based on the same conduct, a court focuses on whether the crimes were committed via a single act. *State v. J.M.,* 10th Dist. Franklin No. 14AP-621, 2015-Ohio-5574, ¶ 56 (finding that the digital penetration was accomplished with the same movement and at the same time and animus as the gross sexual imposition); *State v. Brindley*, 10th Dist. Franklin No. 01AP–926, 2002-Ohio-2425, ¶¶ 19-33 (holding that touching the victim's breast and then touching her vaginal area are separate offenses).

> On or about July 8, 2014 and July 18, 2014 in Adams County, Ohio, April Schroeder did engage in sexual conduct with a minor (DOB: 7-03-01) and the said April Schroeder purposely compelled the minor to submit by force or threat of force, said act in violation of Title 29 Ohio Revised Code Sec. 2907.02(A)(2) and against the peace and dignity of the State of Ohio.

Count Two alleged:

> On or about and between July 8, 2014 and July 18, 2014, in Adams County, Ohio, April Schroeder did have sexual contact with a minor (DOB:7-3-01), not the spouse of the said April Schroeder, or cause the minor, not the spouse of the said April Schroeder, to have sexual contact with the said April Schroeder or cause the minor and another to have sexual contact and the said April Schroeder having purposely compelled the minor to submit by force or threat of force. Said act in violation of Title 29 Ohio Revised Code Sex. 2907.05(A)(1) and against the peace and dignity of the State of Ohio.

{¶93) As to Count One, M. S. testified the rape occurred when

she had just turned thirteen and had finished the sixth grade, which was between July 8, 2014 and July 18, 2014. M.S. testified that her mother told her to remove her clothes and her mother put her fingers "around my vagina." The prosecutor questioned, "How did you know it was inside your vagina," and M.S. responded, "I felt it." This evidence supports the penetration required for the sexual conduct of rape. As to Count Two, M.S. also testified that during the same incident, her mother touched her on her breasts.

{¶94} Appellant argues that both the rape and gross sexual imposition occurred during the same incident and thus are allied offenses of similar import. Appellant focuses on the close proximity of the alleged acts. Appellee responds that M.S. suffered specific injuries with each separate act of sexual conduct and contact. M.S. suffered injury when she was forced to allow Appellant to insert her fingers into M.S.'s vagina, the sexual conduct of the rape. M.S. also suffered injury when she was forced to allow Appellant to touch her breasts, the sexual contact of the gross sexual imposition.

{¶95} In *State v. Roush,* 10th Dist. Franklin No. 12AP-201, 2013-Ohio-3162, the appellate court found that even if defendant's conduct of touching K.R.'s breasts occurred in close proximity to any of the acts of

rape, because defendant's touching of K.R.'s breast was conduct separate and distinct from the acts needed to complete the rapes, and because a separate animus existed for the sexual contact with K.R.'s breasts, the rape and gross sexual imposition convictions were not allied offenses of similar import subject to merger. *Id.* at ¶ 71. In S*tate v. Cooper*, 2d Dist. Montgomery No. 23143, 2010–Ohio–5517, the appellate court noted that "[w]hen a defendant gropes his victim's breast and buttocks, as well as rapes her," the acts "of groping are not merely incidental to the rape, and a trial court does not err in separately sentencing the defendant for each of the counts of gross sexual imposition based upon those actions, as well as for the rape." *Id.* at ¶ 24. This court has found that where the defendant "rubbed [the victim's] breasts, * * * ran his hands through her vagina, and * * * performed oral sex upon her, [e]ven assuming that Appellant's rape and gross sexual imposition offenses could be committed with the same conduct, they were committed with a separate animus." *State v. Byrd,* 4th Dist. Scioto No. 10CA3390, 2012–Ohio–1138, ¶ 110–11. We agree with the results reached in these decisions.

{¶96} M.S. was forced to endure separate acts causing separate harm. The jury apparently found credible M.S.'s statement to Andrea Powers that Appellant inserted her fingers into M.S.'s vagina. Similarly, M.S. also

testified that Appellant touched her breasts. We find that Appellant's conduct as described in the July 2014 incident constitute two separate and distinct acts occurred as alleged in Counts One and Two. Therefore, the trial court did not commit plain error by failing to merge the Count One Rape and Count Two Gross Sexual Imposition as allied offenses of similar import.

{¶97} For the foregoing reasons, we find no merit to Appellant's fourth assignment of error. Accordingly, it is hereby overruled.

ASSIGNMENT OF ERROR V- CONSECUTIVE SENTENCE

STANDARD OF REVIEW

{¶98} When reviewing felony sentences appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Rackley,* 4th Dist. Ross No. 17CA3616, 2019-Ohio-1981, at ¶ 21; *State v. Shankland,* 4th Dist. Washington Nos. 18CA11, 18CA12, 2019-Ohio-404, at 18; *State v. Marcum,* 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1, 22-23. Under R.C. 2953.08(G)(2), "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." Instead, R.C. 2953.08(G)(2) provides that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either:

(a) That the record does not support the sentencing

court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant; or,

(b) That the sentence is otherwise contrary to law.

LEGAL ANALYSIS

{¶99} Under R.C. 2929.14(C)(4), a trial court must engage in a three-step analysis and make certain findings before imposing consecutive sentences. *State v. Carter,* 4th Dist. Pickaway No. 18CA1, 2018-Ohio-4503, at ¶ 34; *State v. Bever,* 4th Dist. Washington No. 13CA21, 2014–Ohio–600, ¶ 16; *State v. Clay,* 4th Dist. Lawrence No. 11CA23, 2013–Ohio–4649, ¶ 64; *State v. Howze,* 10th Dist. Franklin Nos. 13AP–386, 13AP–387, 2013–Ohio–4800, ¶ 18. Specifically, the trial court must find that:

(1) the consecutive service is necessary to protect the public from future crime or to punish the offender;

(2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public; and one 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.

See Carter, supra, at ¶ 24.

{¶100} Appellant argues that the trial court did not make the appropriate findings in the sentencing entry as required. Appellant concedes that the necessary findings were made in open court on record. However, the sentencing entry did not incorporate these findings for consecutive sentences. When imposing consecutive sentences, a trial court must state the

required findings as part of the sentencing hearing, and by doing so it affords notice to the offender and to defense counsel. *See* Crim.R. 32(A)(4).

{¶101} Because a court speaks through it journal, *State v. Brooks*, 113 Ohio St.3d 199, 2007–Ohio–1533, 863 N.E.2d 1024, ¶ 47, the court should also incorporate its statutory findings in the sentencing entry. *State v. Bonnell,* 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.3d 659, at ¶ 29; *Carter, supra,* at ¶ 35; *State v. Hart,* 4th Dist. Athens No. 13CA8, 2014 WL 3733, at ¶ 38. The findings required by the statute must be separate and distinct findings; in addition to any findings relating to the purposes and goals of criminal sentencing. *Bever, supra,* at ¶ 17; *State v. Nia*, 8th Dist. Cuyahoga No. 99387, 2013-Ohio-54424, at ¶ 22. Here, Appellant requests that the court modify her sentences to a concurrent 11-year sentence in the Ohio Department of Corrections. Appellant suggests in the alternative that the matter be remanded to the trial court for a new sentencing hearing.

{¶102} Appellee concedes that the trial court stated on the record at the sentencing hearings the required findings for Appellant's consecutive sentence but did not incorporate those findings in the sentencing entry. However, Appellee disagrees with Appellant's assertion that the imposition of the consecutive sentence was invalid and requires automatic modification to a concurrent sentence or remand to the trial court. Given that the trial

court made all of the necessary findings on the record before imposing consecutive sentences, we view the failure to incorporate the statutory findings into the sentencing entry as a simple clerical mistake. In *State v. Moore,* 4th Dist. Adams No. 18CA1070, 2019-Ohio-1467, we observed at ¶ 20, "[S]uch a clerical mistake may be corrected by the court through a nunc pro tunc entry to reflect what actually occurred in open court." *State v. Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 30.

{¶103} Because the consecutive sentence was clearly imposed on the record and in Appellant's presence, it appears that we need not vacate nor remand the trial court's judgment. Therefore, we overrule Appellant's fifth assignment of error and affirm the judgment of the trial court. Rather, pursuant to App.R. 9(E), we instruct the trial court to issue a nunc pro tunc sentencing entry that includes the required findings so as to accurately reflect the sentence imposed on the record during the sentencing hearing. *State v. Scoggins,* 4th Dist. Scioto No. 16CA3767, 2018-Ohio-8989, at ¶ 109.

ASSIGNMENT OF ERROR VI- SENTENCING ENTRY

STANDARD OF REVIEW

{¶104} The standard of review for felony sentences has been set forth fully above.

LEGAL ANALYSIS

{¶105} Appellant argues that the trial court improperly made Appellant automatically ineligible for transitional control, IPP, or community-based substance treatment at the time of sentencing. Appellant directs our attention to the Fifth Appellate District's decision in *State v. Spears,* 5th Dist. Licking No. 10-CA-95, 2011-Ohio-1538, which held that it is error for the trial court to deny placement into prison programming at the time of sentencing. In Appellant's case, the second page of the Judgment Entry on Sentence states:

> (1) the defendant's placement/transfer in to a Transitional Control Program (ORC 2967.26) is specifically " RESERVED FOR DENIAL"; and, (2) defendant's placement/transfer into an Intensive Program Prison (O.R.C.5120.032) is specifically "RESERVED FOR DENIAL."[4]

The entry further orders that the Defendant's placement/transfer/eligibility into the "Program for Community Based Substance Use Disorder Treatment," pursuant to O.RC. 5120.035. is denied.

{¶106} In response to Appellant's argument, Appellee contends that the trial court did not improperly deny transitional control, the intensive

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[4] The entry's "reservations of denial" are contingent upon notification that the Ohio Department of Rehabilitation and Corrections desires consideration of the Appellant for those programs.

prison program, or community-based substance abuse treatment. Appellee asserts that Appellant's convictions for rape and gross sexual imposition caused Appellant to be ineligible for those programs. Our research reveals that Appellee is correct.

1. Transitional Control

{¶107} Ohio Admin. Code Sec. 5120-12-01(A), establishment of a transitional control program and minimum criteria defining eligibility states:

> Section 2967.26 of the Revised Code permits the adult parole authority of the department of rehabilitation and correction to transfer eligible prisoners to transitional control status for the purpose of closely monitoring a prisoner's adjustment to community supervision during the final one hundred eighty days of the prisoner's confinement.

{¶108} In *State v. Riley,* 4th Dist. Athens No. 2012-Ohio-1086, Riley, who was convicted of aggravated vehicular assault and aggravated vehicular homicide, challenged the trial court's denial of his transfer to transitional control. We observed at ¶ 15:

> Riley is already disqualified from being transferred to transitional control. Specifically, to be eligible for transfer to transitional control, a prisoner "shall not have any past or current convictions for* * *

aggravated vehicular assault, section 2903.08, * * * or aggravated vehicular homicide, section 2903.06 of the Revised Code." Ohio Adm. Code 5120–12–01(F)(12). This is exactly to what Riley pled: aggravated vehicular assault, under R.C. 2903.08(A)(2)(b), and aggravated vehicular homicide, under R.C. 2903.06(A)(2)(a). Consequently, Riley is ineligible for transitional control and the trial court's disapproval is moot.

{¶109} The same is true in Appellant's case. In order to be eligible for transitional control transfer pursuant to R.C. 2967.26, Ohio Adm. Code 5120-12-01(F)(10) provides that prisoners shall not have any past or current convictions for a violation of any sex offense included in Chapter 2907 of the Revised Code, except in limited circumstances not applicable here. Consequently, Appellant is not eligible for transitional control and the trial court's reservation of denial is moot.

2. Intensive Program Prison

{¶110} Intensive Program Prison, commonly referred to as "IPP," " 'refers to several ninety-day programs, for which certain inmates are eligible, that are characterized by concentrated and rigorous specialized treatment services. An inmate who successfully completes an IPP will have his/her sentence reduced to the amount of time already served and will be

released on post-release supervision for an appropriate time period.' " *State v. Turner,* 8th Dist. Cuyahoga No. 2016-Ohio-3325, at ¶ 28, quoting, *State v. Peltier*, 2d Dist. Champaign No. 2019-Ohio-569, at 20, quoting, *State v. Howard,* 190 Ohio App.3d 734, 2010-Ohio-5283, 944 N.E.2d 258, ¶ 12 (2d Dist.), quoting the Ohio Department of Correction and Rehabilitation website. IPPs focus on " 'educational achievement, vocational training, alcohol and other drug abuse treatment, community service and conservation work, and other intensive regimens or combinations of intensive regimens.' " *Howard, supra,* at ¶ 10, quoting R.C. 5120.032. Trial courts have discretion to recommend placement of an offender into an IPP pursuant to R.C. 5120.032.

{¶111} R.C. 5120.032(B)(2)(a) provides that a prisoner who is serving a prison term for a felony of the first degree is not eligible to participate in an intensive program prison. *State v. Jones,* 2d Dist. Montgomery No. 24075, 2011-Ohio-4013, at ¶ 43. Appellant was convicted and sentenced for rape, a felony of the first degree. R.C. 5120.032(B)(2)(a) specifically excludes individuals serving prison terms for first and second-degree felonies from participating in an IPP. Hence, Appellant is not eligible for IPP. Therefore, again the trial court's reservation of denial into IPP is moot.

3. Community-based Substance Use Disorder Treatment Program

{¶112} The community-based substance use disorder treatment program, R.C. 5120.035, provides in pertinent part as follows at subpart (A):

(1) "Community treatment provider" means a program that provides substance use disorder assessment and treatment for persons and that satisfies all of the following:

> (a) It is located outside of a state correctional institution.
>
> (b) It shall provide the assessment and treatment for qualified prisoners referred and transferred to it * * *

(4) "Qualified prisoner" means a person who satisfies all of the following:

> (a) The person is confined in a state correctional institution under a prison term imposed for a felony of the fourth or fifth degree that is not an offense of violence. * * *
>
> e) The person is not serving any prison term other than the term described in division (A)(4)(a) of this section.

{¶113} Once again, it is obvious that Appellant may not be considered a "qualified prisoner." While Appellant is serving a portion of her prison sentence for gross sexual imposition convictions, she is also serving a term of imprisonment for rape. Thus, she is serving a prison term other than the term described in division (A)(4)(a). Therefore, the trial

court’s denial of her placement into a community-based substance use disorder treatment program is not in error.

{¶114} For the foregoing reasons, we find no merit to Appellant’s sixth assignment of error. Under the applicable statutes, she is simply not eligible for the transitional control program, the intensive prison program, or the community-based substance use disorder treatment program. As such, Appellant’s sixth assignment of error is hereby overruled.

ASSIGNMENT OF ERROR VII-
INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

{¶115} Criminal defendants have a right to the effective assistance of counsel. *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), fn.14; *State v. Runnion,* 4th Dist. Washington Nos. 18CA7, 18CA8, 2019-Ohio-189. To establish constitutionally ineffective assistance of counsel, a criminal defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Accord *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Goff*, 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). “In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective

level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Conway,* 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95. "Failure to establish either element is fatal to the claim." *State v. Jones,* 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14.

{¶116} When considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland* at 689; *Runnion, supra,* at ¶ 22. "A properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor,* 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10, citing *State v. Smith,* 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. *State v. Gondor,* 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 61.

B. LEGAL ANALYSIS

{¶117} Under the final assignment of error, Appellant argues

that she received ineffective assistance in that (1) her counsel failed to object to the Mayerson interview which should have been excluded at trial as it was violative of her federal and state rights of confrontation and also inadmissible hearsay; and (2) counsel failed to proffer expert testimony to answer the trial court's questions so that the court would have allowed testimony that M.S. had been diagnosed with chlamydia while Appellant had not received the same diagnosis. However, we have previously found that Appellant's right of confrontation was not violated because the victim testified and Appellant's counsel had the opportunity to cross-examine her. Furthermore, the Mayerson interview was not inadmissible hearsay because it was made for the purposes of diagnosis and treatment.

{¶118) As to the issue of the chlamydia diagnosis, Appellee argues that nothing about admission of the proposed evidence would have changed the outcome of the trial, but it would have led to "wild" speculation of the trier of fact. Appellee concludes that neither of Appellant's arguments regarding her ineffective assistance claim have merit. For the reasons which follow, we agree with Appellee.

1. <u>The Mayerson Interview</u>

{¶119} As set forth above in Assignment of Error Three, we

found no error, let alone plain error, occurred by the admission of the Mayerson interview into evidence at trial. In our resolution of the issue, we pointed out that M.S. testified in court and was available for cross-examination. The case law is clear. *See Knauff, supra,* at ¶ 42. Defense counsel vigorously cross-examined M.S. as to the specifics of Appellant's conduct and the co-defendant's conduct.

{¶120} Defense counsel was able to elicit many "I don't remember" responses in an effort to damage the victim's credibility. Defense counsel was able to attempt to discredit M.S. by her lack of recall at times; by the evidence that many other people were nearby at times and no one reported any wrongful sexual conduct; by the victim's own delay in reporting the alleged wrongful sexual conduct; and by suggesting that M.S. may have had ulterior motives for making false allegations.[5] We found no merit to Appellant's argument that her confrontation clause rights were violated.

{¶121} Similarly, we found no merit as to Appellant's hearsay argument. We found that the Mayerson interview was reasonably pertinent for purposes of medical and psychological diagnosis. For this reason as

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[5] Defense counsel elicited testimony that M.S. enjoyed staying with her grandmother, suggesting that the grandmother gave M.S. preferential treatment from the other grandchildren and further suggesting that M.S. had an ulterior motive for her allegations against Appellant and Lykins: removal from the household and placement with the grandmother.

well, we found the trial court did not abuse its discretion or commit plain error.

{¶122} Having found no error occurred, let alone plain error, we cannot say that Appellant's trial counsel rendered ineffective assistance by failing to object to the Mayerson interview. Based on current Ohio law and the precedent in this district, it is highly unlikely that the trial court would have excluded the interview. For these reasons, we do not find trial counsel's performance was deficient for failure to make a fruitless objection or argument. *See State v. Blanton,* 208-Ohio-1278, 110 N.E. 3d 1 (4th Dist.), (Counsel can hardly be deemed ineffective for failing to advance a fruitless argument. *See State v. Lytle,* 4th Dist. Ross No. 96CA2182, 1997 WL 118069, (Mar. 10, 1997). We thus find no merit to Appellant's argument that trial counsel was deficient for failing to object to the Mayerson interview.

2. The Evidence of The Chlamydia Diagnosis

{¶123} In Appellant's brief, she argues that trial counsel was ineffective by failing to proffer expert testimony or evidence that would have persuaded the trial court to allow the evidence that M.S. had been diagnosed with chlamydia while Appellant was not diagnosed with it. As referenced above, Appellant's trial counsel filed a motion requesting a "rape

shield hearing" pursuant to R.C. 2907.02(E), to determine if the chlamydia evidence was admissible. The trial court granted Appellant's motion for the hearing.

{¶124} At the hearing, the trial court mentioned that without expert testimony on various pertinent issues relating to the diagnosis, "we are asking the jury to speculate at a tremendous degree." Consequently, the court denied Appellant's motion. Appellant now argues trial counsel's failure to obtain expert testimony clarifying the issues and supporting the admissibility of the chlamydia diagnosis constitutes ineffective assistance. We disagree.

{¶125} Our review of the record demonstrates that Appellant's trial counsel was court appointed. "As a matter of due process, indigent defendants are entitled to receive the 'raw materials' and the 'basic tools of an adequate defense,' which may include provision of expert * * * assistance." *State v. Mason,* 82 Ohio St.3d 144, 149, 1998–Ohio–370, 694 N.E.2d 932, quoting *Ake v. Oklahoma,* 470 U.S. 68, 77 (1985) (other citations omitted). "Due process * * * requires that an indigent criminal defendant be provided funds to obtain expert assistance at state expense only where the trial court finds, in the exercise of a sound discretion, that the defendant has made a particularized showing (1) of a reasonable probability

that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial." *Mason* at syllabus.

{¶126} Given Appellant's indigency, it is reasonable to conclude that she would have not been able to hire an expert and pay for his or her time in reviewing records and preparing a written opinion and/or testifying at trial. As set forth above, the trial court had discretion whether or not to order that Appellant be provided funds to obtain the expert at state expense. The body of Appellant's brief fails to advance any argument that there was a reasonable probability that a requested expert would have aided in her defense or that denial of a request for expert assistance would have resulted in an unfair trial. Without anything to bolster Appellant's argument on appeal, it is sheer speculation that an expert would have been helpful to Appellant's defense at trial.

{¶127} We have previously found that whether or not M.S. had chlamydia was not relevant to whether or not Appellant committed illegal sexual conduct. We also find that there is no reasonable probability that an expert would have aided in Appellant's defense. Trial counsel's failure to request an expert does not constitute deficient performance.

{¶128} Appellant has failed to establish deficient performance on the part of trial counsel. Failure to establish this element is fatal to her ineffective assistance claim. We find no merit to the final assignment of error. Accordingly, it is hereby overruled.

CONCLUSION

{¶129} We find no merit to Appellant’s seven assignments of error. Accordingly, we affirm the judgment of the trial court. However, having noticed a clerical error called to our attention in consideration of Appellant’s fifth assignment of error, the judgment of the trial court is affirmed with instructions to correct the clerical error regarding the consecutive sentence that was imposed during the sentencing hearing but omitted from the sentencing entry.

JUDGMENT AFFIRMED WITH INSTRUCTIONS.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED WITH INSTRUCTIONS and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court,

BY: ____________________________________
Jason P. Smith, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.