[Cite as *State v. Palmer*, 2021-Ohio-4639.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JEFFREY PALMER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0108

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2018 CR 660

BEFORE:
Gene Donofrio, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed

Atty. Paul Gains, Prosecutor and *Atty. Ralph Rivera,* Assistant Prosecutor, Mahoning County Prosecutor's Office, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Atty. John Juhasz, 7081 West Boulevard, Suite 4, Youngstown, Ohio 44512, for Defendant-Appellant.

Dated:
September 29, 2021

Donofrio, J.

{¶1} Defendant-appellant, Jeffrey Palmer, appeals from a Mahoning County Common Pleas Court judgment after a jury trial convicting him of 12 counts of rape of A.B., a child under the age of 13, and 1 count of gross sexual imposition (GSI) of A.B., a minor under the age of 13. Appellant was sentenced to a total of 40 years to life in prison.

{¶2} Appellant was indicted by direct presentment to the Mahoning County Grand Jury for 12 counts of rape of a minor under the age of 13, and 1 count of GSI. Each of the rape charges stated identical findings. Appellant was arraigned and his counsel filed a request for a bill of particulars.

{¶3} On July 17, 2019, counsel for appellant filed a motion to withdraw as counsel. It was filed five days before the July 22, 2019 jury trial. The State filed the bill of particulars on July 18, 2019. On July 22, 2019, the trial court overruled the motion and rescheduled the trial to September 3, 2019.

{¶4} On September 3, 2019, the jury trial began. The State's witnesses included: A.B.; her mother; a neighbor; Boardman police officers; Andrea Miller, a social worker employed by Akron Children's Hospital (ACH) who interviewed A.B. and her mother; Janet Gorsuch, a Nurse Practitioner (NP) at ACH in the Child Advocacy Center (CAC); and Courtney Wilson, the social worker who conducted the interview of A.B. at CAC. Appellant was the only person who testified for the defense.

{¶5} After closing arguments, the trial court issued jury instructions and distributed verdict forms, one for each count. The jury began deliberating and after approximately one hour, they returned guilty verdicts on all counts. Counsel for appellant filed a motion for a new trial and the court overruled it. The trial court sentenced appellant to 10 years to life on each of the 12 rape convictions and 5 years on the GSI conviction. The court ran: Counts 1, 2, and 3 for rape concurrently to each other; Counts 4, 5, and 6 for rape concurrently to each other but consecutively with Counts 1, 2, and 3; Counts 7, 8, and 9 for rape concurrently to each other but consecutively with Counts 1,2, and 3, and Counts 4, 5, and 6; Counts 10, 11, and 12 for rape concurrently to each other, but

consecutively with Counts 1, 2, and 3, 4, 5, and 6, and 7, 8, and 9; and Count 13 for GSI concurrently with all sentences. The total sentence was 40 years to life in prison.

{¶6} Appellant filed the instant appeal alleging nine assignments of error. His first assignment of error states:

> Appellant Was Denied Due Process Because the Indictment, Bill of Particulars, Jury Instructions, and Verdict Failed to Differentiate Between the Different Types of Conduct Said to Constitute Rape.

{¶7} Appellant asserts that his due process and double jeopardy protections were violated by having 12 identical counts presented in the indictment. He contends that this denied him a fair opportunity to defend against those charges and to avoid double jeopardy because there was no way to determine the evidence that the jury relied upon to convict him on all rape counts. He asserts that the jurors therefore had no idea which count they were considering or whether each of them were considering the same type of sexual conduct for each particular count.

{¶8} Appellant relies on *Valentine v. Konteh,* 395 F.3d 626 (6th Cir. 2005) for support. There, Valentine was indicted on 20 identical counts of child rape and 20 identical counts of felonious sexual penetration of a child. The indictment alleged that the offenses occurred between March 1, 1995 and January 16, 1996, mimicked the language of the statutes, and identified the victim's birthdate. The bill of particulars stated that the offenses occurred at the family home. The minor was the only witness to testify and she stated that Valentine forced her to perform fellatio on "about" 20 occasions, he digitally penetrated her vagina on "about" 15 occasions, and he anally penetrated her on "about" 10 occasions. The minor altered the numbers during cross-examination. The jury convicted Valentine on all counts and he was sentenced to 40 consecutive life terms.

{¶9} On appeal, the Eighth District Court of Appeals affirmed all of the rape convictions, but only 15 of 20 of the felonious sexual penetration counts. *Valentine*, 395 F.3d 626. The court found no evidence to support five of the latter counts. *Id.*

{¶10} Valentine filed a federal habeas corpus petition asserting that he was denied due process because he was tried and convicted on an indictment that did not specify dates and did not distinguish between conduct on any specific date. The district

court granted the petition and found that the indictment violated due process because its identical language in each count failed to notify Valentine of the crimes with reasonable certainty so that he could protect himself against double jeopardy. *Id.* at 630-631. The district court relied upon *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), where the United States Supreme Court outlined the criteria that an indictment must contain in order to be found sufficient. *Valentine*, 395 F.3d at 630-631. The *Russell* Court determined that an indictment is sufficient if it (1) contains the elements of the charged offenses, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy. *Russell*, 369 U.S. at 763-764. While acknowledging that the federal right to a grand jury indictment has never been found to apply to the states, the Sixth Circuit cited cases applying the due process rights of the indictment elements in *Russell* to state criminal indictments. *Valentine*, 395 F.3d at 631 (citations omitted).

{¶11} Applying *Russell* in *Valentine*, the Sixth Circuit held that Valentine's rights to due process and double jeopardy were violated. *Valentine*, 395 F.3d at 632. The Court explained that the wide date range set forth in the indictment was sufficient, but there were no distinctions between each set of 20 counts for each offense because Valentine was charged for 2 criminal acts that each occurred 20 times, rather than for 40 separate criminal acts. *Id.* The Court found that the prosecution did not present the factual bases for 40 separate acts in either the indictment or in evidence at trial. *Id.* at 633. The Court noted that at trial, the child victim described "typical" abusive behavior by Valentine and testified that the "typical" abuse occurred 15 or 20 times. *Id*. The Court found that the jury would not be able to consider each count on its own and could not have found Valentine guilty of counts 1-5, but not counts 6-20, because there was no differentiation between these sets of counts. *Id*. The Sixth Circuit held that Valentine would therefore not be able to adequately defend against some of the charges without defending against all of the charges and could not distinguish between the charges. *Id*. The Court also held that Valentine would be unable to protect himself against double jeopardy because he could be punished multiple times for the same offense. *Id*. at 634.

{¶12} Here, appellant acknowledges that this Court does not follow *Valentine*. However, he asserts that our reasons for rejecting *Valentine* are "less than persuasive."

He posits that *Valentine* was not based on a direct challenge under the United States or Ohio Constitutions, but was based upon the much higher standard delineated in federal habeas corpus law. Appellant contends that in S*tate v. Billman*, 7th Dist. Monroe Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, we "misperceived" *Valentine's* constitutional analysis because we held that it applied the Fifth Amendment provisions regarding grand jury indictments, which did not apply to the Ohio Grand Jury indictment requirement. He asserts that *Valentine* relied upon the double jeopardy clause of the Fifth and Fourteenth Amendments, and no case has rejected *Valentine's* constitutional reasoning.

{¶13} Appellant adds that his right to present a defense is also hindered by allowing "such vague and duplicative allegations" with no corroborative evidence. He reasons that A.B. testified that she was sexually assaulted multiple times a day when her mother was at work, but no daycare records, mother's employment records, or A.B.'s school records were offered. Appellant asserts that since all 12 counts against him were identical, he was left without the ability to determine when, where, or what allegations were alleged against him and he could not offer evidence showing A.B. was in school or daycare when the alleged assaults occurred, or that her mother worked more or different hours than she testified.

{¶14} A person accused of a felony in Ohio is "entitled to an indictment setting forth the 'nature and cause of the accusation' pursuant to Section 10, Article I of the Ohio Constitution." *State v. Moats,* 7th. Dist. Monroe No. 14 MO 0006, 2016-Ohio-7019, quoting *State v. Sellards*, 17 Ohio St.3d 169, 170, 478 N.E.2d 781 (1985). The Ohio General Assembly has defined a sufficient indictment as one:

> (A) [t]hat is entitled in a court having authority to receive it, though the name of the court is not stated; * * *
>
> (B) * * *that it was found by a grand jury of the county in which the court was held, * * *
>
> (C) [t]hat the defendant is named, * * *
>
> (D) [t]hat an offense was committed at some place within the jurisdiction of the court, * * *

> (E) That the offense was committed at some time prior to the time of finding of the indictment * * *

R.C. 2941.03.

{¶15} R.C. 2941.04 allows two or more offenses to be charged in a single indictment. R.C. 2941.05 indicates that each count of an indictment:

> Is sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the section of the Revised Code describing the offense or declaring the matter charged to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is charged.

{¶16} The indictment need not demonstrate underlying facts that are not elements of the offenses because this is the function of the bill of particulars. *State v. Pepka*, 125 Ohio St.3d 124, 2010-Oho-1045, 926 N.E.2d 611, ¶ 23.

{¶17} The State should supply specific dates in response to a bill of particulars or demand for discovery with regard to an alleged offense where it possesses such information. *State v. Sellards,* 17 Ohio St.3d 169, 171, 478 N.E.2d 781 (1985) (due process not violated when State cannot be more exact with specific dates unless defendant demonstrates prejudice). Moreover, "when the state allows open file discovery, a bill of particulars is not required." *State v. Oliver*, 7th Dist. Mahoning No. 07 MA 169, 2008-Ohio-6371, ¶ 38; s*ee also State v. McQueen*, 7th Dist. Mahoning No. 08 MA 24, 2008-Ohio-6589, ¶ 24.

{¶18} The indictment in this case is sufficient. It identified the proper court, indicated that it was a presentment to the Mahoning County Grand Jury, and it named appellant and A.B. It also informed appellant of the offenses charged against him, stated the jurisdiction where the offenses were committed, and the range of dates of the acts, which showed that they occurred before the indictment. The indictment also tracked the

language of the rape and GSI statutes, included a range of dates during which the offenses occurred, and indicated A.B.'s birthdate.

{¶19} As we have held, indictments that charge sexual offenses against children do not need to specify the exact date of the alleged abuse if the State establishes that the offense was committed within the time frame alleged because specific dates and times are not elements of the offenses charged. *See State v. Billman*, 7th Dist. Monroe Nos. 12 MO 3, 12 MO 5, 2013–Ohio–5774, ¶ 30*; State v.Yacov*, 8th Dist. No. 86674, 2006–Ohio–5321, ¶ 17; *State v. Gus*, 8th Dist. No. 85591, 2005–Ohio–6717. Further, "[t]here is no inherent defect in an indictment that charges a defendant with repetition of the same crime over a defined period of time." *Id.* at ¶ 33. We also explained that many child victims are not able to remember exact dates and times, especially where the crimes involve a repeated course of conduct over an extended period. *Billman* at ¶ 30, citing *State v. Mundy*, 99 Ohio App.3d 275, 296, 650 N.E.2d 502, (2d Dist.) (1994). "The problem is compounded" where, as here, "the accused and the victim are related or reside in the same household, situations which often facilitate an extended period of abuse." *Billman* at ¶ 30, citing *State v. Robinette*, 5th Dist. No. CA–652, 1987 WL 7153, *3 (Feb. 27, 1987). An exception exists when failing to provide specific dates "results in material detriment to the accused's ability to fairly defend himself, as where the accused asserts an alibi or claims that he was indisputably elsewhere during part, but not all, of the interval specified." (Internal citations omitted.). *Billman, supra*, at ¶ 30, citing *Yacov* at ¶ 18. That did not occur in this case since appellant asserted that he was not living in the home or in the area during the time that A.B. stated that the offenses occurred. Thus, we find that the indictment is sufficient.

{¶20} The bill of particulars in this case is also adequate. It identified that the range of dates provided were the dates that appellant moved in and out of A.B.'s residence. It identified the address as where they resided and where the offenses occurred. It also identified A.B. and her birthdate, and specifically stated that appellant digitally penetrated her vagina, forced her to engage in vaginal and anal intercourse, and performed oral sex on her, at least three times as to each act, while he lived in A.B.'s home. It also identified the proper statutes.

{¶21} The testimony of A.B. and her mother provided additional details of the sexual acts. A.B. testified that when she was ten years old, appellant came to live with them, and he watched her and her siblings while her mother worked. (Tr. at 175). She testified that the first time that appellant touched her, she was on the couch in the living room on her tablet when he started asking her about the birds and the bees. (Tr. at 179). She stated he told her to get up and go to her mom's room, he shut the door, laid her down on the bed, and touched her vaginal area. (Tr. at 180).

{¶22} She testified that appellant's conduct then escalated each time, such as taking out his penis and rubbing it against her "private part." (Tr. at 181). She testified that they went into her mother's room because it was the only door that locked. While initially she stated that appellant did not put his penis or his fingers inside her vagina, she testified that it hurt when appellant touched her "private part." (Tr. at 183-185). She later testified that it would hurt when appellant kept forcing his penis inside of her vagina and he did this at least ten times. (Tr. at 190-193). She also testified that sometimes when he rubbed his fingers on her "privates," it would hurt and this happened more than five times. (Tr. at 193). She stated that appellant put his mouth on her "private area" more times than she could count, but then narrowed it to more than 10 times but less than 15 times. (Tr. at 191-192). She also provided detail about times when the acts would occur, such as once when she came inside to get a glass of water while her siblings were outside and appellant called her into her mother's room, pulled her pants down, bent her over the bed, and put his penis "between her legs." (Tr. at 185). She further testified that sexual acts would occur twice a week and sometimes more than once per day. (Tr. at 191). A.B. also related that appellant would rub Vaseline on his penis and told her that if he could continue with her, he would never touch her mom again. (Tr. at 189). Based upon the indictment, bill of particulars, and A.B.'s testimony, sufficient details were provided to separate the acts, the number of acts, and where and when the acts occurred.

{¶23} Moreover, appellant did not object to the indictment or to the bill of particulars, or allege any defects by pretrial motion. He also did not seek more information about the charges. Without an objection, we conduct a plain error review. A three-part test is used to determine whether plain error exists. *State v. Parker*, 7th Dist. Mahoning No. 13 MA 161, 2015-Ohio-4101, ¶ 12, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759

N.E.2d 1240 (2002). "First, there must be an error, i.e., a deviation from a legal rule. Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. Third, the error must have affected 'substantial rights.'" *Parker* at ¶ 12, citing *Billman*, 7th Dist. Monroe Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶ 25. Plain error does not exist here.

{¶24} As appellant acknowledges, we are not bound by *Valentine* and do not follow *Valentine*. *State v. Miller*, 7th Dist. Mahoning No. 17 MA 120, 2018-Ohio-3430; *State v. Adams*, 7th. Dist. Mahoning, No. 13 MA 130, 2014-Ohio-5854, 26 N.E.3d 1283*; State v. Moats*, 7th Dist. Monroe, No. 14 MO 0006, 2016-Ohio-7019; *State v. Billman*, 7th Dist. Monroe, Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774; *State v. Clemons*, 7th Dist. Belmont No. 10 BE 7, 2011-Ohio-1177. 2020-Ohio-633, ¶ 11-16.

{¶25} One of our most recent decisions declining to follow *Valentine* is *State v. Thomas*, 7th Dist. Mahoning No. 18 MA 0025, 2020-Ohio-633, ¶ 14-17. There, Thomas was convicted of 19 counts of rape of a minor child. *Id.* The indictment charged him with 16 counts of rape and 3 counts of rape by force or threat of force. The first 16 counts identically charged that "on or between August 12, 2011 and August 11, 2015," Thomas engaged in sexual conduct with the victim, the victim was less than 13 years old, and he compelled the child victim to submit by force or threat of force*. Id.* at ¶ 9. The other three counts charged that "on or between August 12, 2015 and February 29, 2016," he engaged in sexual conduct with the victim and compelled him to submit by force or threat of force*. Id.* On appeal, Thomas relied upon *Valentine* and argued that the indictment violated his due process and double jeopardy protections. He asserted that the "carbon copy" charges of multiple counts of child rape failed to put him on notice of the charges or protect him from any future prosecution for the same offenses.

{¶26} In deciding not to follow *Valentine*, we looked to our previous explanation in *State v. Triplett*, 7th Dist. Mahoning No. 17 MA 0128, 2018-Ohio-5405:

> As we recently stated in *Miller*, this court does not follow *Valentine. State v. Miller*, 7th Dist., 2018-Ohio-3430, [118] N.E.3d [1094], ¶ 30, *citing, e.g., State v. Adams*, 7th Dist., 2014-Ohio-5854, 26 N.E.3d 1283, ¶ 36; *Billman,* 7th Dist. Monroe Nos. 12 MO 3, 12 MO 5 at ¶ 34-36; *State v. Clemons*, 7th Dist. Belmont No. 10 BE 7, 2011-Ohio-

> 1177, 2011 WL 861847 (finding no due process violations and opining potential double jeopardy concerns can be cured if they arise in the future). This type of argument would improperly protect a defendant who committed multiple instances of the same offense against a child in his care. *Miller,* 7th Dist., 2018-Ohio-3430, [118] N.E.3d [1094], at ¶ 31, citing *Billman*, 7th Dist. Monroe Nos. 12 MO 3, 12 MO 5 at ¶ 36. Contrary to the *Valentine* majority's claim, there is no indication the jury would believe its finding of guilt on one count of child endangering would require a conviction on another count of child endangering merely because it contained the same elements and the same date range. Furthermore, the Sixth Circuit does not rely on *Valentine* as precedent. *Miller,* 7th Dist., 2018-Ohio-3430, [118] N.E.3d 1094]. At ¶ 22, citing *Coles v. Smith*, 577 Fed.Appx. 502, 507-508 (6th Cir. 2014) (rejecting this argument by a defendant in a case of 43 undifferentiated counts of rape regarding his step-daughter as Valentine used an incorrect standard for habeas).

{¶27} In declining to follow *Valentine*, we found that Thomas had not offered any new arguments or new reasons why we should follow *Valentine*. 2020-Ohio-633, ¶ 17. We also cited to the victim's testimony that while he did not recall the exact number of times Thomas raped him because it was too many to count, he recalled that when he was nine, ten, eleven and twelve years old, Thomas raped him at least once per season, and once per season when he was thirteen years old. *Id*. at ¶ 18. We found that this sufficiently established each count of the charges. *Id.*

{¶28} The analysis in *Thomas* applies here as well since A.B.'s testimony is similar, but even more specific. A.B. testified that when appellant lived with her and her family during the dates identified in the indictment, he forced his penis inside of her vagina at least 10 times, put his mouth on her "private area" more times than she could count, but more than 10 times and less than 15, and digitally penetrated her more than five times. (Tr. at 191-193). She testified that these sexual acts would occur twice a week and sometimes more than once per day. (Tr. at 191).

{¶29} Further, even looking to *Valentine,* it is distinguishable from the instant case. In *Valentine*, the Sixth Circuit noted that the bill of particulars did not provide further differentiation among the rape counts alleged in the indictment. 395 F.3d at 629. Here, the bill of particulars provided differentiation as it identified acts of digital penetration, vaginal intercourse, anal intercourse, and oral sex, and stated that each of these acts occurred at least three times. Further, in *Valentine*, the Court found that the prosecution failed to present the factual bases for 40 separate incidents which took place and the victim testified to only "typical" abusive behavior and stated that the "typical" abuse happened 15 or 20 times. 395 F.3d at 632-633. Here, A.B. testified more specifically, indicating that appellant put his mouth on her vagina more times than she could count, but narrowed it down to more than 10 times and less than 15. (Tr. at 191-192). She testified that he put his penis inside of her vagina at least 10 times, and digitally penetrated her vagina more than 5 times. (Tr. at 192-193). She stated that appellant started these acts at the end of spring and over summer break, and once they began, they happened twice a week and sometimes more than once per day when her mother was at work. (Tr. at 191). She testified that all but one of the acts occurred in her mother's bedroom because it was the only room with a lock on the door, and one act took place in the dining room.

{¶30} NP Gorsuch also testified that she watched social worker, Ms. Wilson, conduct the forensic interview of A.B. (Tr. at 282). She testified A.B. disclosed that appellant would take her into her mother's bedroom while her mother was at work and exclude her siblings. (Tr. at 282). She testified that A.B. stated that in the bedroom, appellant would put his finger inside of her vagina, put his penis inside of her vagina and inside her anus, and he would put his mouth on her vagina. (Tr. at 282). NP Gorsuch testified that A.B. told Ms. Wilson that this would happen four to five times per week. (Tr. at 282).

{¶31} While the indictment, bill of particulars, and verdict forms were not as specific as appellant would like, they provided adequate notice and adequately informed him of the charges against him to conform with due process and double jeopardy concerns.

{¶32} Accordingly, appellant's first assignment of error lacks merit and is overruled.

{¶33} Appellant's second assignment of error states:

> The trial court erred and denied Appellant due process of law, equal protection and the right to have justice administered without denial when it failed to instruct the jury on the lesser offenses of gross sexual imposition. U.S. Const., amend. XIV, Ohio Const., art. I, §§ 1, 2, and 16.

{¶34} Appellant contends that A.B.'s testimony was inconsistent and did not assign a specific act to a specific event. He asserts that A.B. denied that appellant put anything inside of her, then said he put his penis into her private area, and said that this happened only once, and then "sometimes." (Tr. at 185-192). He notes that no one testified as to oral penetration. Appellant acknowledges that a court is not required to give lesser-included or inferior offense instructions every time it is requested, but it must give such instructions if the evidence reasonably warrants in order to prevent a failure of justice. He states that failing to instruct on lesser offenses when the evidence warrants leaves the jury only the choices of convicting or acquitting in total, even though they may conclude that something happened, but not exactly what the evidence demonstrated. He contends that this happened here because the jury could only convict him of 12 counts of rape or acquit him, even if they believed something else happened based on A.B.'s testimony.

{¶35} We usually review the trial court's rulings on jury instructions under an abuse of discretion. *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989). However, appellant did not object to the jury instructions or request a lesser-included instruction at trial. Crim.R. 30 provides, in pertinent part: "[o]n appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error should be noticed and corrected, "if the error 'seriously affect[s] the

fairness, integrity or public reputation of judicial proceedings' [.]" *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002), quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936).

{¶36} GSI is a lesser-included offense of rape. *State v. Foust*, 150 Ohio St.3d 137, 161-162, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 54, citing *State v. Johnson,* 36 Ohio St.3d 224, 226, 522 N.E.2d 1082 (1988). However, merely because an offense can be a lesser-included offense of another does not mean that a court must instruct on both offenses whenever the greater offense is charged. *Id*. A lesser-included offense charge is required only when the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense*. State v. Wine*, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207, ¶ 21, quoting *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988). The court must view the evidence in favor of the defendant when determining whether to include a lesser-included offense jury instruction*. Wine*, 2014-Ohio-3948, quoting *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶ 37.

{¶37} The difference between rape and GSI is that rape requires proof of "sexual conduct" and GSI requires proof of "sexual contact." "Sexual conduct" includes "sexual contact," and therefore GSI under R.C. 2907.05(A)(4) is a lesser-included offense of the offense of rape under R.C. 2907.02(A)(1)(b). R.C. 2907.01(A) defines "[s]exual conduct" as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." R.C. 2907.01(B) defines "[s]exual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

{¶38} Viewing the evidence in a light most favorable to appellant, it appears that a GSI charge was not required as a lesser-included offense to the rape charges. In *State v. Johnson*, 36 Ohio St.3d 224, 522 N.E.2d 1082 (1988), the Ohio Supreme Court held that a criminal defendant is not entitled to a lesser-included offense jury instruction on

GSI where he denies any participation in the alleged offense, and the jury, in its consideration of the defense "could not reasonably disbelieve the victim's testimony as to 'sexual conduct' and, at the same time, consistently and reasonably believe her testimony of mere 'sexual contact.' " If the trial court would provide such an instruction, it would allow the jury to make an unreasonable conclusion. *Id*. at 227.

{¶39} We followed the holding of *Johnson* in *State v. Wright*, 7th Dist. Jefferson No. 97 JE 12, 2000 WL 652542, at *3-4 (May 15, 2000), where we found no merit to Wright's assertion that the trial court erred by failing to charge the jury on the lesser-included offense of GSI as to his rape charge. We found that the jury instruction was not required in such situations because " 'it is difficult to perceive how a person could engage in sexual conduct and not at the same time be involved in sexual contact.' " *Wright*, 2000 WL 652542, at *4, quoting *State v. Gregory,* 2d Dist. Montgomery No. 14187 (Aug. 19, 1994).

{¶40} Applying *Wright,* we find that the trial court did not err in the instant case when it failed to charge the jury with the lesser-included offenses of GSI on appellant's rape charges. Appellant denied any participation in the offenses. He testified that A.B. was never in his care alone and when her mother worked, A.B. and her siblings were placed either in daycare or with their grandmother. (Tr. at 357, 372, 384-385). Further, the testimony of A.B., her mother, and NP Gorsuch did not reasonably support acquittal on the rape charges. As mentioned earlier, A.B. testified to appellant putting his mouth on her vagina more than 10 times and less than 15, putting his penis inside of her vagina at least 10 times, and digitally penetrating her vagina more than 5 times. She recalled when this conduct began and stated that these acts happened twice a week and sometimes more than once per day, when her mother was at work and once when her mother was home. A.B.'s mother testified that when she worked, appellant watched her children. (Tr. at 143). She also testified that A.B. disclosed to her that every day while she was at work, and sometimes multiple times per day, appellant sexually molested A.B. anally and vaginally, and touched her or inserted his finger into her vagina. (Tr. at 16). NP Gorsuch testified that A.B. disclosed that appellant would take her into her mother's bedroom when her mother was at work and he would exclude her siblings. (Tr. at 282). She stated that in the bedroom, appellant put his finger inside of her vagina, put his penis

inside of her vagina and inside her anus, and put his mouth on her vagina. (Tr. at 282). NP Gorsuch testified that A.B. stated that this would happen four to five times per week. (Tr. at 282).

{¶41} There are some inconsistencies in A.B.'s testimony as she did initially testify that appellant did not penetrate her vagina with his penis or engage in anal intercourse with her. However, her later testimony, and the testimony of her mother and NP Gorsuch, provided evidence that did not reasonably support an acquittal on 12 counts of rape and guilty verdicts on only GSI. Thus, adequate evidence of sexual conduct was presented to sustain the rape charges.

{¶42} Accordingly, appellant's second assignment of error lacks merit and is overruled.

{¶43} Appellant's third assignment of error states:

> Appellant was denied due process of law and liberties protected by the Ohio Constitution because there was insufficient evidence as to the counts alleging oral rape.

{¶44} Appellant contends that the trial court erred by denying his motion for acquittal because insufficient evidence existed of penetration for oral rape. He asserts that "sexual conduct," as defined in the rape statute, requires evidence of penetration as to oral rape and no such evidence was presented. He cites A.B.'s testimony that "he put his tongue all over it," when asked what appellant would do when he "put his mouth down there," on "her private part." (Tr. at 183). He also cites the testimony of NP Gorsuch that A.B. stated that appellant put his penis inside of her vagina and inside of her anus, and he "put his mouth on her vagina." (Tr. at 282). Appellant also contends that the prosecutor misrepresented the evidence when she stated at closing that appellant "performed oral sex on" the minor "more than 10 times", and the minor described appellant putting his mouth on her vagina "and moving his tongue all around." (Tr. at 418). He contends that the prosecutor also mispresented the evidence when she told the jury that A.B. described to her, without suggestion, "that he had also licked her vagina, and he did that at least ten times." (Tr. at 446).

{¶45} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the verdict. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). Sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements proven beyond a reasonable doubt. *Smith,* 80 Ohio St.3d 113. When evaluating the sufficiency of the evidence to prove the elements, it must be remembered that circumstantial evidence has the same probative value as direct evidence. *State v. Thorn,* 7th Dist. Belmont Nos. 16BE00054, 17BE0013, 2018-Ohio-1028, ¶ 34, citing *State v. Jenks,* 61 Ohio St.3d 259, 272-273, 574 N.E.2d 492 (1991) (superseded by state constitutional amendment on other grounds).

{¶46} Appellant's assignment of error is without merit. R.C. 2907.01(A) defines "sexual conduct" as used in R.C. 2907.02, the rape statute:

> (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.

R.C. 2907.01(A).

{¶47} The statute first identifies the acts that constitute "sexual conduct." It then states that penetration is sufficient to complete vaginal or anal intercourse. It does not state that penetration is required for cunnilingus.

{¶48} The Ohio Supreme Court has specifically held that "[p]enetration is not required to commit cunnilingus. Rather, the act of cunnilingus is completed by the placing of one's mouth on the female's genitals." *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 7887 N.E.2d 1185, ¶ 86, citing *State v. Ramirez,* 98 Ohio App.3d 388, 393, 648

N.E.2d 845 (3d Dist. 1994); *State v. Bailey,* 78 Ohio App.3d 394, 395, 604 N.E.2d 1366 (1st Dist. 1992). The *Lynch* case applies in the instant case.

{¶49} Here, A.B. testified that appellant put his mouth on her "private area" more times than she could count, but at least ten times. (Tr. at 192-193). She identified when the sexual conduct began, where it occurred, and stated that it occurred when her mother was at work. (Tr. at 183-184). NP Gorsuch testified that A.B. disclosed that appellant would take her into her mother's bedroom, exclude her siblings, and put his mouth on her vagina and perform other sexual conduct four or five times per week. (Tr. at 282). While appellant asserts that "no witness testified to Palmer moving his tongue around" A.B.'s vagina at trial "as the State falsely claimed in final argument," A.B. did in fact testify that appellant "would stick his tongue all - - like put his tongue all over it." (Tr. at 183).

{¶50} Accordingly, appellant's third assignment of error lacks merit and is overruled.

{¶51} In his fourth assignment of error, appellant asserts:

> Appellant was denied due process of law and equal protection of the law, and his rights guaranteed by the Ohio Constitution, when the state was permitted to introduce impermissible and inflammatory "other act" evidence.

{¶52} Appellant asserts that the trial court erred by allowing the State to introduce "other acts" evidence and irrelevant evidence that was used only to portray him as a bad person. He contends that the only purpose in using this evidence was to inflame the jury to find him guilty because no physical evidence of rape or GSI existed and A.B. originally testified "that nothing sexual had happened to her."

{¶53} The admissibility of "other acts" evidence under Evid. R. 404(B) is a question of law requiring a de novo review. *State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651. However, when a defendant does not object at trial to the alleged erroneous admission of testimony, the court reviews under the plain error doctrine. Plain error should be noticed and corrected, "if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings' [.]" *State v. Barnes*, 94 Ohio

St.3d 21, 27, 759 N.E.2d 1240 (2002), quoting *U.S. v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936). Evid. R. 404 provides in relevant part:

> (B) Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

{¶54} Evid. R. 404(B) "categorically prohibits evidence of a defendant's other acts when its only value is to show that the defendant has the character or propensity to commit a crime." *State v. Smith*, 162 Ohio St.3d 353, 2020-Ohio-4441, ---N.E.3d ---, ¶ 36. The list of exceptions for admissibility is not exhaustive. *Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, ¶ 26. "The key is that the evidence must prove something other than the defendant's disposition to commit certain acts." *Id.* at ¶ 22.

{¶55} The Ohio Supreme Court has set forth a three-part test to determine whether "other acts" evidence is admissible. *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20. The three parts are: "(1) the evidence must be relevant, Evid.R. 401, (2) the evidence cannot be presented to prove a person's character to show conduct in conformity therewith but must instead be presented for a legitimate other purpose, Evid.R. 404(B), and (3) the probative value of the evidence cannot be substantially outweighed by the danger of unfair prejudice, Evid.R. 403." *Id*. The admissibility of "other-acts evidence" pursuant to Evid.R. 404(B) is a question of law. *Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, ¶ 22. However, "[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343 (1987), paragraph two of the syllabus.

{¶56} Appellant challenges the testimony of A.B.'s mother, particularly her statements about their sex life, how A.B.'s behavior changed before and after he came into her life, and whether the mother regretted allowing him to reside with them. (Tr. at 142-144). He also contends that the State presented propensity evidence in the opening statement when describing the testimony of Ms. Redmond, A.B.'s neighbor. (Tr. at 132). Appellant further challenges Ms. Redmond's testimony regarding how she knew A.B.'s mother, how she met appellant, how A.B.'s behavior changed when appellant began staying home alone with the children, the way appellant treated A.B., and an argument between appellant and A.B.'s mother. (Tr. at 255-262). She also testified that she did not like appellant and recalled his statement that he could have sex with any of the "B's" around the apartment complex. (Tr. at 261). Appellant also asserts that the State impermissibly used his statement to the police to portray him as a liar.

{¶57} At trial, appellant's attorney objected only to the questions of A.B.'s mother regarding her sex life with appellant (Tr. at 144-145), the regret of A.B.'s mother about allowing appellant to move in, (Tr. at 142), and Ms. Redmond's testimony that A.B. did not want to come outside and play after appellant began living there. (Tr. at 259). The court reviews the admissions of these purported "other acts" de novo. *Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.2d 651, ¶ 26. However, no objections were made to any of the other statements. (Tr. at 143-144, 257, 259, 261). Thus, appellant has waived all but plain error as to the majority of his purported "other acts" evidence. Evid. R. 103(A)(1), (D); *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810.

{¶58} Even reviewing appellant's assertions, none of the statements that he challenges constitute "other acts" evidence. Even if they were, it was harmless error to admit them and did not substantially affect appellant's rights because the remaining evidence against appellant established his guilt. That evidence includes in particular, A.B.'s testimony regarding the numerous instances of vaginal intercourse, digital penetration, and cunnilingus that occurred, and the testimony of A.B.'s mother and NP Gorsuch regarding A.B.'s disclosures of appellant forcing her to engage in vaginal intercourse, digital penetration, cunnilingus, and anal intercourse.

{¶59} Accordingly, appellant's fourth assignment of error lacks merit and is overruled.

{¶60} In his fifth assignment of error, appellant asserts:

> Appellant was denied a fair trial because of the ineffectiveness of his trial counsel.

{¶61} Appellant asserts that counsel was ineffective because he admitted that he was unprepared for trial and failed to file a motion to suppress appellant's statement to police, which was used against him. He also argues that his counsel failed to file a motion in limine concerning "other acts" evidence, failed to object to such evidence, and failed to request a limiting instruction at trial. Finally, appellant asserts that the trial court was angry and annoyed at him, which caused the court to unreasonably find that he was trying to "play the system" by requesting new counsel in order to delay his trial. Appellant concludes that counsel violated *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and prejudice resulted because the verdict would have been different, especially when no physical evidence existed. He cites *Hodge v. Hurley*, 426 F.3d 386 (2005), as support for reversal when counsel failed to object to comments by the prosecutor and no physical evidence confirmed illicit sexual activity.

{¶62} The test for determining whether counsel was ineffective is: (1) whether counsel's performance was deficient; and (2) if so, whether the deficiency resulted in prejudice. *State v. Harrison*, 7th Dist. Jefferson No. 19 JE 0009, 2020-Ohio-3624, ¶ 16, citing *State v. White*, 7th Dist. Jefferson No. 13 JE 33, 2014-Ohio-4153, ¶ 18, citing *Strickland*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *State v. Williams,* 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 107. Appellant must prove both prongs of the test and if one prong is not met, this Court need not address the remaining one. *Harrison*, 2020-Ohio-3624, at ¶ 17, citing *Strickland*, 466 U.S. at 697. In order to meet the deficient performance prong, appellant must show that counsel's performance fell below an objective standard of reasonable representation. *Id.* In order to meet the prejudice prong, appellant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id*. In Ohio, a licensed attorney is presumed competent. S*tate v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d

905 (1999). Further, a reviewing court is highly deferential to trial counsel's strategy and must indulge in a strong presumption that counsel's performance fell within a wide range of reasonable professional assistance. *State v. Bradley*, 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373 (1989).

{¶63} On July 17, 2019, appellant's counsel filed a motion to withdraw as counsel, citing irreconcilable differences, and indicating that he would stop preparing the case. The trial court held a hearing on that same date, with appellant, his counsel, and the assistant prosecuting attorney present. Appellant's counsel stated that he had received a letter from appellant about his request for counsel to withdraw. (Tr. at 3). Counsel took a moment at the hearing to speak with appellant and after doing so, he stated that "Mr. Palmer now tells me that he's not necessarily asking that I not be his lawyer." (Tr. at 3). Counsel explained that appellant wanted him to file a motion for a speedy trial under R.C. 2945.72, but he ethically could not do so because appellant had already signed a speedy trial waiver. (Tr. at 3). Counsel told the court that appellant thought that he was signing a waiver of speedy trial to a specific date and had he known he was waiving speedy trial rights as to any date, he would not have signed it. (Tr. at 3).

{¶64} The court asked appellant's counsel if the waiver was initialed by the court, and counsel responded that it had. (Tr. at 3). The court asked appellant whether he wanted the court to put the court's bailiff on the stand to testify that appellant's counsel had reviewed the waiver with appellant. (Tr. at 4). Counsel replied that it was not necessary. (Tr. at 4). The following then took place on the record:

> THE COURT: Well, then how could he not know - - Mr. Palmer, how could you not know you're signing a waiver if somebody asks you the question?
>
> THE DEFENDANT: The way - -
>
> THE COURT: I'm tired of this crap. Everybody in that jail says they want a new attorney to delay their trial. Guess what? It's not going to happen. You're going to trial on Monday, and you could tell all your little friends back at that Justice Center if they want to pull this stunt, too, they're not getting a new attorney either.

(Tr. at 4). Appellant's counsel informed the court that upon receiving appellant's letter, he "maybe wrongfully" contacted other people to tell them he was not going forward with representing appellant and he "put the file down. I will not be prepared to go Monday." (Tr. at 5). Counsel stated that he could be prepared to go to trial in a week, on July 24, 2019, but the trial court continued the trial date only until July 22, 2019. (Tr. at 5).

{¶65} However, on July 22, 2019, the trial court issued a judgment entry overruling the motion to withdraw as counsel and continued the July 22, 2019 trial date to September 3, 2019. (7/22/19 J.E.). Since the trial court ultimately continued the trial date, no prejudice exists as to counsel's failure to fully prepare for trial. Further, appellant's counsel did file the motion to withdraw, but the court denied it. Accordingly, we find that counsel did not deficiently perform.

{¶66} As to the trial court's denying the motion to withdraw, the court appeared to become angry and should have inquired further into the motion. However, the court allowed appellant and his counsel time to speak off the record, and appellant did not object or challenge counsel's subsequent statement to the court that appellant was not requesting that counsel withdraw, but rather, he was requesting that counsel file a motion to withdraw the speedy trial waiver he had signed. Moreover, appellant does not identify to us any reason for requesting the withdrawal of counsel and he fails to explain how the court abused its discretion in denying the motion. He merely states in his appellate brief that he "may, or may not, have had a legitimate reason for seeking the removal of counsel." This Court can only rely upon the evidence in the record on appeal. *State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, ¶ 171. From the record, we find that the trial court committed no prejudicial error by failing to inquire further of appellant about the motion to withdraw or by denying the motion based upon counsel's representations at the hearing.

{¶67} As to appellant's assertion that counsel was ineffective by not filing a motion to suppress appellant's statement to the police, this failure alone does not constitute per se ineffective assistance of counsel. *State v. Patterson*, 8th Dist. No. 105265, 2017-Ohio-8318, 99 N.E.3d 970. When a defendant asserts ineffectiveness of counsel based upon a failure to file a suppression motion, the defendant must prove there was a valid ground to suppress the evidence in dispute. *Spaulding,* 151 Ohio St.3d 378,

2016–Ohio–8126, 89 N.E.3d 554, at ¶ 94, citing *State v. Brown*, 115 Ohio St.3d 55, 2007–Ohio–4837, 873 N.E.2d 858, ¶ 65; *see also State v. Dawson*, 7th Dist. Mahoning No. 15 MA 0081, 2017-Ohio-5709. The defendant must also show there is a reasonable probability the result of the trial would have been different if the evidence had been suppressed. *Id.*

{¶68} It appears that appellant is talking about his statements to Sergeant Hillman during an interview on May 8, 2018, after appellant read the Miranda warnings and signed a waiver. (Tr. at 323-324). Sergeant Hillman testified at trial that appellant initially denied residing at any time in Boardman, Ohio, where A.B. lived, and then he stated that he lived with A.B., her siblings, and her mother for two to three months in Boardman. (Tr. at 324). Appellant denied to Sergeant Hillman that he was ever left alone with any of the children for any period of time when he resided with them. (Tr. at 324-325). Appellant offers no valid grounds for filing a motion to suppress and he makes no showing of a reasonable probability that the verdict would have been different if the statements were suppressed. Thus, this assertion is without merit.

{¶69} Appellant lastly asserts that his counsel was ineffective by failing to object, failing to file a motion in limine, and failing to request a limiting instruction as to "other acts" evidence presented at trial. However, as previously explained, the acts that appellant identifies are not "other acts" evidence under Evid. R. 404 and thus counsel did not deficiently perform by failing to object or file motions concerning this evidence.

{¶70} Accordingly, appellant's fifth assignment of error lacks merit and is overruled.

{¶71} Appellant asserts in his sixth assignment of error that:

> Appellant was denied due process when the State was permitted to impermissibly bolster the testimony of the victim by using "expert" medical testimony to bolster the victim's testimony.

{¶72} Appellant complains that he was convicted based upon an improper "expert" opinion by NP Gorsuch, who testified that there were no physical findings for sexual abuse, yet rendered a "diagnosis" of "concerning for sexual abuse." Appellant faults the State for presenting this testimony, his counsel for failing to object to this

testimony, and the court for not excluding this testimony. He asserts that it was irrelevant and inadmissible because it is not medical testimony and was based only upon A.B.'s statements to NP Gorsuch. He contends that it also improperly bolstered A.B.'s testimony and its veracity.

{¶73} Appellant's assertion is without merit. Evid.R. 702 governs expert testimony and identifies who may testify as an expert witness. Evid.R. 704 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact." In *State v. Boston*, the Ohio Supreme Court held that expert testimony under Evid. R. 702-705 is not limited to only those trained in medicine or other sciences. 46 Ohio St.3d 108, 119, 545 N.E.2d 1220 (1989). The Court held that experts, if properly qualified, can also include a social worker or those who have specialized knowledge, experience and training in recognizing child abuse*. Id.* However, the Court cautioned and held that "[a]n expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." *Id.* The Court further held that an expert's opinion on whether sexual abuse occurred is admissible under Evid. R. 702 and 704 because it aids jurors in making their decision as most jurors in their everyday experiences are not aware how sexually abused children may respond to abuse. *Id*. at 128.

{¶74} NP Gorsuch is an expert in this case due to her specialized knowledge, training, education, and experience in child abuse pediatrics. She testified as to her credentials, education and training in this field. (Tr. at 273). She discussed the general evaluation process of a child for abuse at Akron Children's Hospital and testified that she evaluated A.B. on April 24, 2018 and made a report. She further testified that Courtney Wilson, a social worker at the Akron Children's Hospital CAC, interviewed A.B. and she watched the interview through a one-way mirror. (Tr. at 281). She indicated that A.B. disclosed that when she was ten years old, appellant sexually abused her when he was left alone with her and her siblings while her mother was at work. (Tr. at 282). She testified that A.B. disclosed that four or five times a week, appellant touched her genitals, put his finger inside of her vagina, put his penis inside of her vagina and inside of her anus, and he would put his mouth on her vagina. (Tr. at 282).

{¶75} NP Gorsuch testified that she independently examined A.B., reviewed the reports of A.B. and her disclosures, and the reports of her mother and her siblings. She opined that based upon this evidence, she found that A.B.'s case was "concerning for sexual abuse." Since NP Gorsuch relied upon more than just A.B.'s statements, we find that no error occurred by allowing the admission of her expert opinion as to whether A.B.'s case was "concerning for sexual abuse." *See Thomas*, 7th Dist. Mahoning No. 18 MA 0025, 2020-Ohio-633 at ¶ 32 (NP's diagnosis of "concerning for sexual abuse" was not improper statement of child victim's veracity when diagnosis was based upon other facts in addition to child's statements.).

{¶76} Moreover, we find no error in admitting NP Gorsuch's testimony that A.B. identified appellant as her perpetrator. The Ohio Supreme Court held in *Boston* that "an out-of-court statement of an allegedly abused child of tender years, including identification of a perpetrator, made to a qualified expert in child abuse, is admissible if the expert has independent evidence of physical or emotional abuse of the child, the child has no apparent motive for fabricating the statement and the child has been found unavailable after a good-faith effort to produce the child in court." 46 Ohio St.3d 108, 127, 545 N.E.2d 1220 (1989). NP Gorsuch had independent evidence through the testimony of A.B.'s mother and the review of A.B.'s statements to others and her siblings' statements that appellant and A.B. were alone in the bedroom.

{¶77} Further, unlike *Boston*, A.B. was present for trial, testified, and was subject to cross-examination. While NP Gorsuch's testimony may have implied that she believed A.B.'s testimony and this bolstered A.B.'s credibility, it does not violate *Boston.* Such testimony is "permitted to counterbalance the trier of fact's natural tendency to assess recantation and delayed disclosure as weighing against the believability and truthfulness of the witness." *Stowers*, 81 Ohio St.3d at 263. Further, even if NP Gorsuch's testimony improperly vouched for A.B.'s credibility or she had testified that she thought A.B. was telling the truth, the error in admitting the testimony was harmless. As we noted in *State v. Smith*, numerous courts have held that "'*Boston* does not apply when the child victim actually testifies and is subject to cross-examination.'" 7th Dist. Mahoning No. 14 MA 0159, 2016-Ohio-3418, citing and quoting *State v. Hupp*, 3d Dist. No. 1–08–21, 2009-Ohio-1912, 2009 WL 1110601, ¶ 20, quoting *State v. Thompson*, 5th Dist. No. 06CA28,

2007-Ohio-5419, 2007 WL 2938166, ¶ 50, quoting *State v. Benjamin*, 8th Dist. No. 87364, 2006-Ohio-5330, 2006 WL 2900036, ¶ 19 citing *State v. Fuson*, 5th Dist. No. 97 CA 000023, 1998 WL 518259 (Aug. 11, 1998). A.B. testified before the jury and appellant and she was subjected to cross-examination. The jury was able to hear her responses and could determine her credibility for themselves, independent of NP Gorsuch's testimony.

{¶78} We further find no error by the trial court in admitting NP Gorsuch's testimony that A.B.'s behavior in this case was consistent with behaviors she had observed in other sexually abused children. She was asked about A.B.'s delayed disclosure of abuse and her statements of only some of the sexual abuse incidents with a denial of the others. In *Stowers*, the Ohio Supreme Court held that "[a]n expert witness's testimony that the behavior of an alleged child victim of sexual abuse is consistent with behavior observed in sexually abused children is admissible under the Ohio Rules of Evidence." 81 Ohio St.3d 260, 261, 1998-Ohio-632, 690 N.E.2d 881. NP Gorsuch estimated that she has observed or conducted about 3,500 child sexual assault interviews, and it was her experience that children commonly did not remember exact dates of abuse. (Tr. at 283). She also testified that delayed disclosures by child abuse victims were common and in about 70% of cases, children do not disclose until at least a year after the abuse. (Tr. at 287). She further explained that children sometimes disclose only increments of the abuse because they are embarrassed or worried about how adults around them will respond. (Tr. at 291).

{¶79} NP Gorsuch also testified that her physical examination of A.B. was normal. (Tr. at 285). She explained that normal physical findings most likely resulted because A.B. had her menstrual period, which made her genital tissues more elastic and thicker, and because the incidents occurred more than two years before her examination, so they could have healed. (Tr. at 285-286). She testified that her diagnosis in this case was "[c]oncerning for sexual abuse." (Tr. at 288). NP Gorsuch explained that the hierarchy for diagnosis was "highly concerning, concerning, moderate concern, low concern." (Tr. at 288). She opined that A.B.'s case was "concerning" for sexual abuse because she had a good disclosure, good details, and supportive information from her sister and brother. (Tr. at 289). Accordingly, no error occurred in allowing NP Gorsuch's testimony about the

consistency of A.B.'s behavior and disclosures with that of other children that she had evaluated.

{¶80} Accordingly, appellant's sixth assignment of error lacks merit and is overruled.

{¶81} Petitioner's seventh assignment of error asserts:

> Appellant was denied due process and the effective assistance of counsel because there were repeated references made to the child as the "victim," to which trial counsel failed to object.

{¶82} Petitioner broadly asserts that repeated references at trial to A.B. as the "victim" is similar to *State v. Almedom*, 10th Dist. Franklin No. 15AP-852, 2016-Ohio-1553, where the Tenth District Court of Appeals unanimously reversed the conviction of a defendant in a child sexual abuse case based upon an aggregate of comments and defense counsel's deficiency. However, appellant in this case fails to identify who made the references to A.B. as a victim and he fails to cite to the portions of the transcript where the references were made. Loc.R. 16(E)(5) provides that references to the record and citations to authorities are required and sets forth that (a) "each contention supporting an issue presented for review shall be followed by references to the relevant parts of the record and citations to the relevant authorities." It is not this Court's " 'duty to search the record for evidence to support an appellant's argument as to alleged error.' " *State v. Pyles,* 4th Dist. Scioto No. 2018-Ohio-4034, ¶ 45, quoting *Lias v. Beekman*, 10th Dist. Franklin No. 06AP1134, 2007-Ohio-5737, ¶ 6, quoting *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, 850 N.E.2d 1218, ¶ 94 (10th Dist.).

{¶83} Appellee identifies that the assistant prosecutor referred to A.B. as a victim one time during voir dire. (Tr. at 61). Appellee also notes that Detective Hillman referred to A.B. as a victim 4 times in his testimony. (Tr. at 313, 316, 318, 322). Appellee contends that *Almedom* is distinguishable because it involved defense counsel's failure to object to, among other things, the trial judge's repeated use of the word "victims" to describe the minor girls that the defendant was accused of sexually abusing. Appellee also cites *State v. Aboytes*, 11th Dist. Lake No. 2020-L-001, 2020-Ohio-6806, ¶ 181 where the Eleventh District distinguished *Almedom* because it involved the trial judge's repeated references

to the girls as "victims" and noted that the Tenth District had more recently recognized that other courts had found that the use of the word "victim" is not the same as expressing an opinion that a defendant is guilty of a crime. *Aboytes*, supra, citing *State v. Madden*, 10th Dist. Franklin No. 16AP-259, 2017-Ohio-8894, 100 N.E.3d 1203, ¶ 33.

{¶84} Appellant's assignment of error lacks merit. Again, in order to show the ineffective assistance of trial counsel, appellant must show: (1) that counsel's performance was deficient; and (2) if so, that the deficiency resulted in prejudice. *Harrison,* 7th Dist. Jefferson No. 19 JE 0009, 2020-Ohio-3624, ¶ 16, citing *White*, 7th Dist. Jefferson No. 13 JE 33, 2014-Ohio-4153, ¶ 18, citing *Strickland*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Both prongs must be met and if one is not met, the appellate court does not need to address the remaining one. *Harrison*, 2020-Ohio-3624, at ¶ 17, citing *Strickland*, 466 U.S. at 697.

{¶85} Although appellant asserts that *Almedom* is almost a "carbon copy" of the instant case, *Almedom* is easily distinguishable. *Almedom* involved charges against the defendant for the sexual abuse of three girls under the age of 13 and the defendant denied having any sexual contact with the girls. 2016-Ohio-1553, at ¶ 2. As the court explained, it was the trial judge in that case who referred to the girls as "victims" before the jury on two occasions. *Id.* at ¶ 3, 4. The assistant prosecutor also referred to the girls as "victims" once in jury selection. *Id*. at ¶ 4.

{¶86} In vacating the verdict, the appellate court found that defense counsel deficiently performed and resulting prejudice occurred from "the conduct of defense counsel linked with the prejudicial comments of the trial judge when added to those of the assistant prosecuting attorney during jury selection undermined the proper function of the adversarial process." *Id*. at ¶ 10. The appellate court held that the defendant was portrayed as a "disgusting person" who sexually abused children well before the presentation of evidence. *Id*. at ¶ 11. It reasoned that the trial judge, who was the ultimate authority in the courtroom, told the jury repeatedly that the defendant victimized the girls and defense counsel "stood idly by and made no objection to the trial judge's accusation that his client was a child abuser." *Id*.

{¶87} The appellate court also cited to counsel's numerous other deficiencies, such as failing to move for a mistrial and failing to request that the court tell the jury that

it could not consider part of the testimony of one of the children after her charges against the defendant were dismissed. *Id*. at ¶ 7. The appellate court noted that trial counsel also failed to file any pre-trial motions except a bill of particulars even though appellant was facing life in prison, and even though one of the girls was six years old and counsel should have filed a motion to determine her competency. *Id.* The court noted that defense counsel also repeatedly failed to object to direct examination questions and to "huge" portions of the State's evidence*. Id*. at ¶ 8.

{¶88} In the instant case, appellant does not assert that the trial judge made any reference to A.B. as a victim. Further, while the prosecution referred to A.B. as a victim once in voir dire, and Detective Hillman referred to her in this capacity four times, it does not rise to the level of prejudice as that in *Almedom* since *Almedom* was primarily concerned with the trial judge's references and the numerous other deficiencies of defense counsel in that case.

{¶89} In addition, the Tenth District distinguished *Almedom* in *State v. Nichols,* Franklin Nos. 19AP-113, 19 AP-116, 2020-Ohio-4362, ¶ 39. There, the defendant's counsel argued that the prosecutor's references to the minor as the victim constituted prosecutorial misconduct and was grounds for a mistrial. The *Nichols* Court found *Almedom* "readily distinguishable" from the case before it because "[fi]irst and foremost," the trial judge was the one who made references to the minor as a victim, not the prosecutor. *Id*. The court explained that the judge is neutral and detached on matters before it, but a prosecutor does not have to be. *Id*. The court further found that the improper references in *Almedom* were made throughout the entire trial, while the references by the prosecutor in the case before it were only in rebuttal closing argument. *Id*. The court found no error by the prosecutor in referring to the minor as a victim in closing because the prosecutor is permitted to comment on what the evidence has shown and the inferences that could be made from it. *Id*.

{¶90} Similar to this case, the trial judge did not make references to A.B. as a victim. Further, while the prosecutor made one such reference, it was in voir dire. While Detective Hillman did so four times, it does not appear that these references, even combined, undermined the adversarial process or produced an unjust result. In *State v. Aboytes*, 11th Dist. Lake No. 2020-L-001, 2020-Ohio-6806, the Eleventh District Court of

Appeals held that trial counsel was not ineffective for failing to object to references to the minor as a victim during trial because unlike *Almedom,* trial judge did not make the references, the references were not made throughout the trial, and the references did not undermine proper functioning of the adversarial process so that court could be sure a just result was produced.

{¶91} Accordingly, appellant's seventh assignment of error lacks merit and is overruled.

{¶92} In his eighth assignment of error, appellant asserts:

> The trial court erred by failing to record all sidebars as required by Ohio Crim. R. 22, thus depriving Appellant the liberty secured by U.S. Const. amend. XIV and Ohio Const. art. I, §§ 1, 2, and 6.

{¶93} Appellant contends that Crim. R. 22 was violated because it requires the recording of all sidebars and his sidebars were not recorded, which violates his rights to equal protection. He concedes that his counsel did not object to the failure, but he asserts that it was the trial court's duty to create and ensure a record of all proceedings.

{¶94} Appellant's assignment of error is without merit. Appellant does not cite this Court to the portions of the transcripts where the sidebars occurred. Loc.R. 16(E)(1) provides that the Argument shall include "how the trial court is alleged to have erred * * * followed by references to the parts of the record demonstrating the alleged error." Local Rule (E)(5) indicates that references to the record and citations to authorities are required and sets forth that (a) "each contention supporting an issue presented for review shall be followed by references to the relevant parts of the record and citations to the relevant authorities."

{¶95} Further, the Ohio Supreme Court has held that "reversal will not occur because of unrecorded pretrials or sidebars where the defendant has failed to demonstrate that a request was made at trial or objections were made, that an effort under App.R. 9 was made to reconstruct what occurred, and that material prejudice resulted." *State v. Palmer,* 80 Ohio St.3d 543, 687 N.E.2d 685 (1997), syllabus. The Court upheld this holding in the capital case of *State v. Goodwin*, 84 Ohio St.3d 331, 340, 1999-Ohio-356, 703 N.E.2d 1251 (1999). Goodwin presented a proposition of law that his trial

transcript was inadequate for appellate review because 8 pretrials and 27 bench conferences were not recorded. *Id*. at 340. The Court held that "[i]t is clearly the duty of counsel to request and ensure that all sidebar conferences are recorded by the court stenographer." *Id*., citing *State v. Grant*, 67 Ohio St.3d 465, 481, 620 N.E.2d 50 (1993). The Court held that Goodwin waived any possible error because no pretrial motion was made to record all sidebars and his counsel did not request that the pretrials and sidebars be recorded. *Id*. The Supreme Court indicated that it would not presume prejudice from the " 'mere existence of * * * unrecorded bench and chambers conferences* * *.' " *Id*., quoting *Palmer*, 80 Ohio St.3d 543, 687 N.E.2d 685, syllabus.

{¶96} Appellant in this case has not met the requirements of the Ohio Supreme Court's criteria in *Palmer* as he does not show that he or his counsel requested that the sidebars be recorded, he does not attempt to reconstruct the sidebars, inform this Court of the material parts of those sidebars, or explain how the lack of recordings resulted in prejudice to him. The failure to create a record of these proceedings thus results in the waiver of any alleged error. *Id*.

{¶97} Accordingly, appellant's eighth assignment of error lacks merit and is overruled.

{¶98} In his ninth assignment of error, appellant asserts:

> Appellant was denied a fair trial because of the effect of cumulative errors.

{¶99} Under the doctrine of cumulative error, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995). This means that if the court finds various errors to be harmless error, we may reverse based upon the effect of all of these harmless errors together. *State v. Donkers*, 170 Ohio App.3d 509, 2007-Ohio-1557, 867 N.E.2d 903, ¶ 202 (11th Dist.).

{¶100} A cumulative error analysis is not necessary in this case because the Court finds no merit to appellant's assignments of error and thus no instances of harmless error occurred.

{¶101} Accordingly, appellant's ninth assignment of error lacks merit and is overruled.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.