[Cite as *State v. Blanton*, 2018-Ohio-1275.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 16CA1031
v.	:	
DENNY W. BLANTON, JR.,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	RELEASED 03/27/2018

APPEARANCES:

Dennis C. Belli, Columbus, Ohio, for defendant-appellant.

David Kelley, Adams County Prosecuting Attorney, and Kris D. Blanton, Adams County Assistant Prosecuting Attorney, West Union, Ohio, for plaintiff-appellee.

Hoover, P.J.

{¶1} Denny W. Blanton, Jr. ("Blanton") appeals his conviction and sentence entered in the Adams County Court of Common Pleas on September 20, 2016. Following a jury trial, Blanton was found guilty of two counts of rape and two counts of kidnapping. Following a separate hearing, the jury also specified that Blanton was a sexually violent predator as to each of the four felony counts. On appeal, Blanton contends that he is entitled to a new trial for several reasons: (1) the trial court made several rulings that resulted in constitutional violations; (2) the trial court erred in making other evidentiary rulings; and (3) he received ineffective assistance from his trial counsel. Alternatively, Blanton contends that several sentencing errors exist necessitating a re-sentencing hearing. Having reviewed the record, we find no merit in any of Blanton's assignments of error. Furthermore, where the trial court did commit error, such error is harmless and did not affect the outcome of the proceedings. Accordingly, we affirm the judgment of the trial court.

I. Facts and Procedural History

{¶2} Blanton was indicted on four counts: Count 1 – rape in violation of R.C. 2907.02(A)(2), with a sexually violent predator specification, a felony of the first degree; Count 2 – kidnapping in violation of R.C. 2905.01(A)(4), with a sexual motive specification and sexually violent predator specification, a felony of the first degree; Count 3 – kidnapping in violation of R.C. 2905.01(A)(2), with a sexual motive specification and sexually violent predator specification, a felony of the first degree; and Count 4 – rape in violation of R.C. 2907.02(A)(2), with a sexually violent predator specification, a felony of the first degree. Various pre-trial hearings were held, and on August 22, 2016, a five-day jury trial commenced. The State presented several witnesses, including the accuser, J.S.; and the defense presented Blanton in his own defense. The following facts are adduced from the trial.

{¶3} It is undisputed that on February 22, 2016, in Adams County, Ohio, sexual conduct occurred between Blanton, then an eighteen-year old male, and J.S., a fifteen-year old female. The State contends that Blanton used his overwhelming size and strength to overpower, kidnap, and brutally rape J.S. On the other hand, Blanton acknowledges that sexual relations occurred, but contends that the relations were consensual.

{¶4} At the time of the incident, Blanton was a high school senior, played linebacker and offensive line on his high school's football team, and held the school record for bench press. J.S., a high school freshman, was slight in stature; yet, she was an accomplished track and cross country athlete.

{¶5} J.S. testified that on the day of the incident she was running her usual 6-7 mile training route after school along Tater Ridge Road when Blanton pulled up next to her in his pick-up truck and lured her nearby by asking for directions. According to J.S., Blanton then got

out of his truck, shoved her to the ground, hit her in the face with his fist, tied her arms together with his belt, and threatened to kill her if she screamed or resisted. He also told her he had a gun. He then threw J.S. in the back seat floorboard of his truck and drove her to an isolated cemetery where he forced her to perform oral sex on him and then vaginally raped her.

{¶6} J.S. testified that after Blanton raped her she engaged in conversation with Blanton in an effort to calm him down. Blanton asked her "if [she] enjoyed it", to which she replied "yes" because she was afraid if she did not respond "something worse could happen." She also told him that all her friends do things like this. Blanton then dropped her off on the side of Wheat Ridge Road. As he was dropping her off he told her not to tell anyone what had occurred. Before leaving, J.S. exchanged "knuckles," i.e. fist bumps, with Blanton because she wanted it to "seem" like they were friends.

{¶7} Blanton, on the other hand, told the jury that he was traveling on Tater Ridge Road following his purchase of lumber from a nearby sawmill when he observed J.S. standing in the road appearing to be in some sort of distress. When she waved at him, he stopped to check on her condition. Blanton testified that they then had a brief conversation; and J.S. accepted his invitation to give her a ride home. During the trip, Blanton claims that J.S. requested that he pull off the side of the road in the vicinity of the cemetery. After he stopped the truck, J.S. allegedly invited him to join her in the back seat. Blanton claims that J.S. then began rubbing his leg, which led to oral and vaginal sexual relations between the two of them. Blanton recalled, "we were laughing, having a good time."

{¶8} When they were done, Blanton proceeded to take her home. On the way, Blanton claims that J.S. suggested they stop for a donut at Miller's Bakery. Blanton declined; then, he told J.S. he needed to get home to meet his girlfriend. Blanton claims that J.S.'s "whole

demeanor [then] changed" and she directed him to "just drop [her] off here [on the side of Wheat Ridge Road]."

{¶9} There is some disparity as to what happened after J.S. was dropped off on the side of the road. J.S. testified that although she was dropped off near a house, she decided to run almost a third of a mile to Miller's Bakery to seek assistance. However when she got there she thought it might be closed, and instead approached a nearby house and immediately asked the resident if she could use the phone so she could call her mom. The resident, however, testified that she observed J.S. sit on the blocks at the end of her driveway for a period of time before making the call.

{¶10} Upon learning of the incident, J.S.'s mother came and got J.S., contacted 911, and drove J.S. to the emergency room at the Adams County Regional Medical Center. The hospital medical staff performed a sexual assault evidence collection kit and examination of J.S. Blanton's DNA and seminal fluid were found on vaginal and anal swabs taken from J.S. and Blanton's DNA and semen was found on J.S.'s shorts. There was bleeding coming from her genitalia; and further medical evaluation revealed that her hymen was bruised and torn. She also had abrasions on her vaginal tissue. In addition, she had a red swelling on her left cheek and various red markings, a scratch, and dirt on her back, arms, and legs. Following her discharge, J.S. was referred to the Mayerson Center of the Cincinnati Children's Hospital in Cincinnati, where she was interviewed by a social worker and examined by a physician. A video recording of the interview was played for the jury and admitted as an exhibit. The social worker and physician also testified at trial.

{¶11} Blanton was picked up by police and transported to the police station for questioning on February 23, 2016. Blanton was read his Miranda rights and was questioned

about the incident. Blanton admitted that he gave J.S. a ride in his truck, but repeatedly and adamantly denied that he touched her. He claimed they had no physical contact whatsoever. In addition to the evidence obtained from the rape kit examination, the police investigation also revealed the presence of J.S.'s blood on the back seat of Blanton's vehicle. At trial, Blanton explained that he initially told law enforcement he did not have sex with J.S. because he did not want to openly admit that he had cheated on his girlfriend.

{¶12} Ultimately, the jury rejected Blanton's version of events and found him guilty of all charges. At a subsequent hearing, the jury also found that Blanton was a sexually violent predator as to each of the four felony counts. Thereafter, the trial court merged the two kidnapping convictions for the purposes of sentencing, and sentenced Blanton to three mandatory terms of 10 years to life in prison, running consecutively, for a total term of incarceration of 30 years to life. Blanton filed a timely notice of appeal.

II. Assignments of Error

{¶13} On appeal, Blanton assigns the following errors for our review:

Assignment of Error I:

> THE TRIAL COURT'S REFUSAL TO PERMIT DEFENSE COUNSEL TO CROSS-EXAMINE THE ALLEGED VICTIM ABOUT A MOTIVE TO FABRICATE A RAPE ACCUSATION VIOLATED HIS RIGHT OF CONFRONTATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

Assignment of Error II:

> THE TRIAL COURT'S RESTRICTIONS ON THE DIRECT TESTIMONY OF DEFENDANT-APPELLANT AND ITS INTERFERENCE WITH DEFENSE COUNSEL'S PROFESSIONAL JUDGMENT WERE CONTRARY TO THE RULES OF EVIDENCE AND THE RULES OF PROFESSIONAL CONDUCT, AND DEPRIVED HIM OF HIS RIGHT UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO PRESENT A COMPLETE DEFENSE.

Assignment of Error III:

> THE ADMISSION OF THE HOSPITAL SOCIAL WORKER'S OPINION THAT THE ALLEGED VICTIM'S VERSION OF EVENTS WAS CONSISTENT WITH SEXUAL ASSAULT VIOLATED EVID. R. 702, AND, COUPLED WITH THE TRIAL COURT'S IMPLICIT REPRESENTATION TO THE JURY THAT THE WITNESS WAS QUALIFIED TO RENDER SUCH AN OPINION, DEPRIVED DEFENDANT-APPELLANT OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A FUNDAMENTALLY FAIR JURY TRIAL.

Assignment of Error IV:

> DEFENDANT-APPELLANT WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, DUE TO THE COMBINED PREJUDICIAL EFFECT OF MULTIPLE INSTANCES OF DEFICIENT PERFORMANCE.

Assignment of Error V:

> THE SENTENCING OF DEFENDANT-APPELLANT AS A SEXUALLY VIOLENT PREDATOR VIOLATED R.C. 2971.03 AND DEPRIVED HIM OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A FUNDAMENTALLY FAIR JURY DETERMINATION DUE TO INSUFFICIENT EVIDENCE TO SUPPORT THE SPECIFICATION, DEFECTIVE JURY INSTRUCTIONS, AND ERRONEOUS ADMISSION OF EVIDENCE.

Assignment of Error VI:

> THE RECORD CLEARLY AND CONVINCINGLY DOES NOT SUPPORT THE IMPOSITION OF THREE CONSECUTIVE 10-YEARS TO LIFE PRISON TERMS.

III. Law and Analysis

A. Assignment of Error I – Cross-Examination of Victim

{¶14} During cross-examination of J.S., defense counsel asked: "Your mother and father would be very upset with you would they not if you had voluntarily submitted to a sex act?" The prosecutor objected to the inquiry; and the trial court admonished defense counsel stating: "That

is so inappropriate. You're asking her to read the minds of mothers and fathers on an act she alleges never had happened in her life. * * * That was fully inappropriate. Objection sustained. You'll stay away from that." The following day of trial, the trial court forewarned counsel as follows: "There was a * * * what I consider deliberate, considering the experience, an unringing of the bell question that was asked yesterday. Let me assure you the Court will not be tolerant. I know the experience and the knowledge and the preparation of these counsel. Any counsel attempt that again [*sic*] there will be immediate hearings on that."

{¶15} In his first assignment of error, Blanton contends that the trial court's restriction on the cross-examination of J.S. violated his constitutional right of confrontation. Specifically, he submits that he had a constitutional right to question J.S. about the existence of a potential motive to make a false accusation of rape to avoid disclosing consensual sexual relations to her parents.

{¶16} 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"). But this protection "guarantees only 'an *opportunity* for effective cross-examination[.]' " (Emphasis in original.) *State v. Lang,* 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 83, quoting *Delaware v. Fensterer,* 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985). Trial courts have "wide latitude * * * to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall,* 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

{¶17} Similarly, Evid.R. 611(B) requires trial courts to permit "[c]ross-examination * * * on all relevant matters and matters affecting credibility." However, under Evid.R. 611(A), a trial court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence[.]"

{¶18} When a defendant challenges a trial court's limitation on cross-examination on appeal, the standard of review turns on the nature of the limitation. "Limitations * * * that deny a defendant 'the opportunity to *establish* that the witnesses may have had a motive to lie' infringe on core Sixth Amendment rights" and are reviewed de novo. (Emphasis in original.) *State v. Gonzales*, 151 Ohio App.3d 160, 2002-Ohio-4937, 783 N.E.2d 903, ¶ 45 (1st Dist.), quoting *United States v. Nelson*, 39 F.3d 705, 708 (7th Cir.1994). To establish a confrontation violation, then, Blanton must show that he was "prohibited from engaging in otherwise appropriate cross-examination." *Van Arsdall* at 680. *Accord State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶¶ 170-172.

{¶19} We note that the credibility of a witness may be attacked by any party. Evid.R. 607(A). However, "[a] questioner must have a reasonable basis for asking any question pertaining to impeachment that implies the existence of an impeaching fact." Evid.R. 607(B). "This rule prevents counsel from testifying and asserting as fact mere innuendo that is included within a question when there is no reasonable belief that a factual predicate exists for the implied impeaching fact." *State v. Bolling*, 2d Dist. Montgomery No. 20225, 2005-Ohio-2509, ¶ 64, citing Weissenberger, Ohio Evidence Courtroom Manual (2005), p. 218. Furthermore, Evid.R. 616(A) provides: "Bias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence."

{¶20} Here, the contested inquiry implies that J.S. and Blanton engaged in consensual sexual conduct, and that J.S.'s parents would disapprove of such act, even though the evidence presented up until the time of the inquiry provided no reasonable basis for such presumption. In other words, the defense failed to set forth an adequate foundation for the inquiry, as there was nothing in the record indicating that J.S. concocted the allegations out of fear that her parents would discover consensual sexual relations and disapprove of such behavior. In contrast, the record suggests that J.S. and Blanton were complete strangers, and that J.S. on her own volition reported the incident to her mother immediately after the act had occurred. It is mere hypothetical conjecture to conclude that J.S. was lying about the allegations out of fear of her parents discovering she had engaged in sexual relations. Allowing this inquiry would have run the immediate danger of confusing matters at issue in the case.

{¶21} Furthermore, the inquiry invited J.S. to speculate about her parents' thoughts. Questions that invite a witness to speculate – i.e., to guess at an answer rather than rely on known facts – are improper. Evid.R. 602; Evid.R. 701. Ohio law specifically precludes questions that require a witness to speculate or guess about the thoughts of another. *E.g., State v. Ross*, 7th Dist. Columbiana No. 94-C-56, 1995 WL 763301, *6 (Dec. 22, 1995) ("Thus, a lay witness generally may not testify as to what someone else was thinking at a certain point in time."); *see also State v. Forgette*, 6th Dist. Lucas No. L-00-1209, 2001 WL 536832, *2 (May 18, 2001) ("[Witness] would have to speculate in order to testify as to the [thoughts of the jury]. We cannot say that it was a clear and prejudicial abuse of discretion for the trial court to exclude this line of questioning."); *State v. Spivey*, 3d Dist. Marion No. 9-12-27, 2013-Ohio-851, ¶ 82 ("[Witness]'s testimony regarding the thoughts of her husband [w]as speculative * * *."); *State v. New*, 10th Dist. Franklin No. 05AP-930, 2006-Ohio-2965, ¶ 23 ("Witnesses cannot know what is in another

person's mind. Therefore, witnesses cannot venture opinions on the [thoughts] of another person * * * Witnesses may only testify to the facts they observed.").

{¶22} Here, J.S. was asked *if her parents* would be upset with her if she had consented to sexual relations. Any answer from J.S. would have been speculative, because what her parents might have thought about the posed hypothetical is entirely outside the scope of her knowledge and perception.

{¶23} For the reasons stated above, we conclude that the trial court did not improperly deny Blanton the right to cross-examine J.S. about a potential motive to lie; and thus, his confrontation rights were not violated. Accordingly, we overrule Blanton's first assignment of error.

B. Assignment of Error II – Direct Testimony of Defendant

{¶24} In his second assignment of error, Blanton contends that the trial court violated his right to present a complete defense because during his direct examination it: (1) sustained three hearsay objections to questions about statements allegedly made by J.S. to Blanton; and (2) warned Blanton's counsel of possible perjury and ethical violations when counsel attempted to elicit Blanton's version of events that contradicted statements Blanton had previously made to police. Blanton argues that these "unreasonable limitations" "deprived him of the ability to tell the jury his innocent account in a natural format, including the statements made by J.S. that led him to believe she wished to engage in consensual sexual relations." [Appellant's Brief at 15-16.] We conclude that the trial court did err by sustaining the hearsay objections to questions about statements allegedly made by J.S. to Blanton. However, the error was harmless and does not warrant reversal. We further conclude that the trial court's "warning" did not interfere with Blanton's right to present a complete defense.

{¶25} A defendant in a criminal case has the due process right to take the witness stand and to testify in his or her own defense. *Rock v. Arkansas*, 483 U.S. 44, 51, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); *Harris v. New York*, 401 U.S. 222, 225, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). The right to testify and to present a complete defense also may implicate the Compulsory Process or Confrontation Clauses of the Sixth Amendment. *See Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." *Brooks v. Tennessee*, 406 U.S. 605, 612, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972).

{¶26} A defendant's right to testify is not without limitation, however, and " 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' * * * But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock* at 55-56, quoting *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

1. Sustainment of Hearsay Objections

{¶27} In the case sub judice, on three separate occasions the trial court sustained the State's hearsay objections to defense counsel's attempt to elicit the statements allegedly made to Blanton by J.S. during the events in dispute. The first attempt was when Blanton attempted to state where J.S. said she lived. The second was when Blanton attempted to state where J.S. said she was going. The third was when Blanton attempted to state J.S.'s response to his question, which he supposedly asked just prior to engaging in sexual relations, "Are you sure this is all right?"

{¶28} Blanton argues that the trial court's "mechanistic and erroneous application of the hearsay rule during [his] direct examination" "forced [him] to relate his account of the events for

the jury in an artificial, stilted manner" and "rose to the level of a denial of Blanton's constitutional right to testify and present a complete defense." [Appellant's Brief at 17.] We note that Blanton was able to testify that based upon conversations with J.S. he believed she consented to sexual relations. However, he was precluded from answering the specific questions outlined above.

{¶29} The State contends that the testimony was properly excluded as hearsay.

{¶30} Here, the State elicited testimony from J.S. indicating a lack of consent. Blanton sought to introduce testimony about the victim's statements that was directly probative of the material issue of consent and pertinent to his defense. "Verbal acts may be admitted to explain an actor's conduct in reaction to the statements, to show the effect on the hearer, and to show the mental state of the declarant." *State v. Ciacchi*, 8th Dist. Cuyahoga No. 92705, 2010-Ohio-1975, ¶ 20, citing *State v. Williams*, 38 Ohio St.3d 346, 348, 528 N.E.2d 910 (1988), fn. 4. Thus, we conclude that the testimony was not properly excluded under the hearsay rule; rather, the statements at issue were "verbal acts" that were offered to prove the defense theory of consent. *See id*. ("The testimony was not hearsay, rather, the statements in question were 'verbal acts' that were offered to support the defense theory * * * and to prove consent.").

{¶31} Because the proffered testimony was not properly excluded under the hearsay rule, the trial court erred by refusing to admit the testimony. Nonetheless we determine that such error was harmless.

{¶32} Crim.R. 52(A) defines harmless error and provides: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." To determine whether substantial rights were affected, a court must evaluate prejudice to the defendant. *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶¶ 23, 27.

Courts are to focus on the impact the error had on the verdict and the strength of the remaining evidence. *Id.* at ¶ 25.

{¶33} In this case, although the trial court excluded the victim's statements to Blanton, Blanton was nonetheless permitted to present evidence and testimony in support of his claim that the victim had falsely accused him of kidnapping and raping her. Specifically, the trial court allowed Blanton to testify in front of the jury that J.S. made comments to him that made him believe that the sexual conduct was consensual. Thus, Blanton was afforded a meaningful opportunity to present a complete defense and his substantial rights were not affected. We note that a criminal defendant is only entitled to "a fair trial, not a perfect one." *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. 1431, 89 L.Ed.2d 674. The trial court's error in excluding the proffered testimony was harmless.

2. The Trial Court's Warning

{¶34} In separate interviews with the sheriff and the prosecutor's investigator, Blanton denied that he had engaged in sexual activity with J.S.[1] At trial, he retracted his denials, but insisted that the sexual relations between him and J.S. were consensual. On this subject, defense counsel asked Blanton to explain "[h]ow was that discussion different from what you told the ladies here today, the gentlemen today." Blanton answered: "I denied having any contact with [J.S.]." Defense counsel then asked him why his story had changed, but before he could answer, the prosecutor objected.

{¶35} The trial judge then had a sidebar discussion wherein he stated that he "was concerned about soliciting or procuring or promoting potential perjury." He indicated he was

[1] The recorded interviews with the sheriff and the prosecutor's investigator were admitted and played at trial prior to Blanton taking the stand in his defense.

getting "anxious" because defense counsel for not asking "open ended questions." Ultimately, however, the trial judge determined that it was not "[his] call as to how [defense counsel] wished to proceed." He informed defense counsel "[t]his is [the] last warning, not warning, this is the last discussion. It's not a warning, it's the last discussion. It, it's not a ruling that I'm going to make."

{¶36} Following the sidebar discussion, Blanton was asked to give "your version" as to why he had originally denied sexual activity when giving his initial accounts to law enforcement. Blanton responded that he wanted to tell the sheriff and the investigator that he had sex with J.S.; but he has afraid to openly admit to the sexual conduct because he had a girlfriend. No other questions were asked of Blanton on direct examination.

{¶37} Blanton now contends that the trial court's sidebar discussion interfered with defense counsel's direct examination and violated his right to present a defense because defense counsel "capitulated to the [trial court's] threats" by suddenly asking open ended questions and abruptly ending the direct examination. We disagree with Blanton's characterization of events.

{¶38} In Ohio, "[t]rial courts are usually afforded discretion in the manner in which they conduct witness examination and witness recantation of prior statements." *State v. Fletcher*, 4th Dist. Lawrence No. 08CA22, 2009-Ohio-3255, ¶ 11. Courts may "warn a witness of the penalties of perjury" so long as the warning does not rise to a level of intimidation that interferes with the defendant's right to present witnesses. (Internal quotations omitted.) *State v. Urbina*, 2016-Ohio-7009, 72 N.E.3d 105, ¶ 36 (10th Dist.). "Merely warning a defense witness of the consequences of perjury does not, in and of itself, violate a defendant's due-process rights." *State v. Harrison*, 1st Dist. Hamilton Nos. C-150642, C-150643, & C-150645, 2016-Ohio-7579, ¶ 6.

{¶39} First, upon review of the record, we view no "threats" or perceived intimidation by the trial court. While the trial court admitted that it was concerned about possible perjury, it ultimately decided that any ethical or perjury determinations were outside the province of the court. Second, and most importantly, the trial court decided that it was up to defense counsel on how he wished to proceed in the form, manner, and scope of his direct examination; and Blanton, was able to testify at length about the events surrounding the incident. He fully explained that he denied having sex with J.S. in the recorded interviews because he had a girlfriend and did not want to openly admit that he cheated on her. Thus, there clearly was no interference with Blanton's right to present a complete defense and we see no error or prejudice in the sidebar discussion.

3. The Combined Effect

{¶40} Finally, Blanton argues that the combined effect of the trial court's rulings and "interference" with defense counsel prejudiced his efforts to convey his exculpatory account to the jury in a credible and convincing manner. We disagree.

{¶41} While the trial court's hearsay rulings were in error, the error was harmless because Blanton was offered the opportunity to present his defense in a meaningful and coherent manner. Furthermore, we already determined that the trial court's perjury warning was not prejudicial to Blanton's presentation of the case. Accordingly, the so-called combined effect of the trial court's actions did not violate Blanton's right to present a complete defense.

{¶42} For the reasons stated above, we overrule Blanton's second assignment of error.

C. Assignment of Error III – Testimony of Social Worker

{¶43} In his third assignment of error, Blanton contends that the trial court erred by allowing a social worker to testify as an expert witness regarding a forensic interview with J.S.

{¶44} At trial, the State presented the testimony of Tracy Colliers, a social worker at the Mayerson Center at Cincinnati Children's Hospital. Colliers testified that she interviewed J.S. on February 24, 2016, to inquire about allegations J.S. had made regarding her interaction with Blanton. In fact, a recording of the interview was played at trial and admitted as an exhibit. Over Blanton's objection, Colliers testified that J.S.'s statements during the interview "were consistent with a sexual assault."

{¶45} Blanton provides several arguments in support of his assertion that Colliers's opinion testimony should have been excluded at trial.

{¶46} First, Blanton argues that the State failed to properly lay a foundation under Evid.R. 702 for admitting Colliers's testimony that J.S.'s statements made during the forensic interview were consistent with being sexually assaulted.

{¶47} The determination of the admissibility of expert testimony is within the discretion of the trial court; and its discretion will not be disturbed absent an abuse of that discretion. *See Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, 850 N.E.2d 683, ¶ 9. An abuse of discretion connotes that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. *Id*.

{¶48} Evid.R. 702 provides:

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. * * *

{¶49} Blanton argues that this case does not relate to matters beyond the knowledge or experience possessed by lay persons, or to a misconception common among lay persons. We disagree.

{¶50} Whether a victim's statements are "consistent with" a sex crime is beyond the knowledge and experience possessed by lay persons. Ordinary citizens in their everyday affairs do not typically interview, evaluate, and analyze sex victims. *See State v. Stowers*, 81 Ohio St.3d 260, 262, 690 N.E.2d 881 (1998) (Internal quotations omitted.) ("Most jurors would not be aware, in their everyday experiences, of how sexually abused children might respond to abuse. * * * [T]he common experience of a juror may represent a less-than-adequate foundation for assessing whether a child has been sexually abused.") Colliers provided the jury with her professional insight to allow the jury to better assess, examine, and scrutinize J.S.'s statements about the incident, as well as understand the overall evidence of the case and the issue of consent.

{¶51} Next, Blanton contends that Colliers lacked the requisite qualifications under Evid.R. 702(B) to render an opinion.

{¶52} A review of the transcript reveals that Colliers is a licensed social worker at the Mayerson Center, where she regularly conducts forensic interviews of children victimized by sex crimes. She has been employed in this capacity since 2005 – specifically at the Mayerson Center since 2012 – and has a Master's Degree in social work from the University of Cincinnati. She

estimated that, since 2005, she has conducted over 1,000 interviews of sexually-victimized children. Moreover, prior to Blanton's trial, Colliers had testified as an expert witness in Ohio on two other occasions. Given this record of specialized training and professional experience, we conclude that Colliers did not lack the requisite qualifications under Evid.R. 702(B) to render an expert opinion. *See State v. Barnes*, 12th Dist. Brown No. CA2010-06-009, 2011-Ohio-5226, ¶¶ 51-53 (social worker was qualified expert in forensic interviewing where witness had master's degree, interviewed over 800 children in alleged sexual abuse cases, and provided prior expert testimony).

{¶53} Next, Blanton contends that the State failed to lay a foundation that Collier's opinion relied on reliable scientific, technical, or specialized information pursuant to Evid.R. 702(C). We disagree. In addition to J.S.'s statements, Colliers was able to observe J.S.'s demeanor during the interview. She was also able to rely on her vast experience interviewing victims of sexual abuse. Thus, we conclude that Collier's opinion was supported by specialized information in addition to the statements made by J.S. *See State v. Coleman*, 2016-Ohio-7335, 72 N.E.3d 1086, ¶ 29 (6th Dist.) (an expert may not base his or her opinion that a child was sexually abused solely on the child's statements, but instead must analyze the statements in conjunction with the physical evidence, the expert's observations of the child's demeanor, or other indicators tending to show the presence of sexual abuse); *State v. Lawson*, 4th Dist. Highland No. 14CA5, 2015-Ohio-189, ¶ 21 ("During the interview [the expert] had the opportunity to observe the children's behavior and speech patterns. Often the physical reactions to questioning provide important clues to determining whether the conduct alluded to in statements have a basis in fact.").

{¶54} Lastly, Blanton contends that the trial court erroneously permitted Colliers to testify as to her opinion on J.S.'s veracity. He further argues that because Colliers was qualified as an expert, the jury gave her opinion on J.S.'s veracity great weight.

{¶55} While an expert witness may not testify as to the veracity of the child's statements, *State v. Boston*, 46 Ohio St.3d 108, 545 N.E.3d 1220 (1989), syllabus, the expert may offer testimony that provides "additional support for the truth of the *facts testified to* by the [victim], or which assists the fact finder in assessing the [victim's] veracity." (Emphasis sic.) *Stowers*, 81 Ohio St.3d at 262-263, 690 N.E.2d 881. "Therefore, an expert in child sexual abuse can testify as to his or her opinion on whether the child was abused, but the expert may not testify as to the veracity of the child's statements." *Coleman* at ¶ 29.

{¶56} Here, we conclude that Colliers's testimony did not go to the veracity of J.S.'s statements, i.e., she offered no opinion on truthfulness. Rather, Colliers testified only that, based on her education, training, skill, and experience as a social worker and forensic interviewer, J.S.'s statements were "consistent with a sexual assault." Our conclusion follows the precedent established in Ohio. *See Barnes, supra*, at ¶¶ 57, 60 (expert witness's testimony that victim's statements were "consistent with inappropriate sexual * * * contact", while perhaps indirectly bolstering the victim's credibility, was not the same as the direct rendering of an opinion as to the victim's veracity); *Stowers, supra*, (expert testimony that child victims' statements were "consistent with the problems experienced by children who had been sexually abused" was admissible and did not constitute improper vouching). Accordingly, the testimony was permissible under *Boston* and *Stowers* because it does not directly speak to J.S.'s credibility, but rather "is additional support for the truth of the *facts testified to* by the child, or which assists the finder in assessing the child's veracity."

{¶57} In any event, even if we were to assume arguendo that Colliers's expert testimony improperly vouched for J.S.'s credibility, any error in allowing the testimony is harmless. " 'Although having a[n] [expert] witness testify that the victim is telling the truth is an error, it is harmless error if the victim testifies and is subject to cross-examination.' " *Coleman*, 2016-Ohio-7335, 72 N.E.3d 1086, at ¶ 34, quoting *State v. Hupp*, 3d Dist. Allen No. 1-08-21, 2009-Ohio-1912, ¶ 20; *see also Lawson*, *supra*, at ¶ 23 (even if forensic interviewer's testimony was improper credibility vouching, it did not affect the outcome of trial because the victims testified and were subject to cross examination). Therefore, because J.S. testified and was subject to cross-examination, even if it was error to allow Colliers to testify that J.S.'s statements were "consistent with a sexual assault", such error was harmless.

{¶58} Based on the foregoing, Blanton's third assignment of error is overruled.

D. Assignment of Error IV – Assistance of Counsel

{¶59} In his fourth assignment of error, Blanton alleges numerous instances where his counsel performed deficiently, and argues that the prejudicial effect of the errors, individually and/or cumulatively, deprived him of his right to the effective assistance of counsel.

{¶60} To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Short*, 129 Ohio St.3d 360, 2011–Ohio–3641, 952 N.E.2d 1121, ¶ 113; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Failure to satisfy either part of the test is fatal to the claim. *Strickland* at 697; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989).

"Because this issue cannot be presented at trial, we conduct the initial review." *State v. Plymale*, 4th Dist. Gallia No. 15CA1, 2016–Ohio–3340, ¶ 34.

{¶61} The defendant has the burden of proof because in Ohio, a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶ 62. In reviewing the claim of ineffective assistance of counsel, we must indulge in "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Quotations omitted.) *Strickland* at 689. 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. *Gondor* at ¶ 61.

{¶62} Blanton first contends that his trial counsel acted deficiently because they failed to successfully counter and rebut the prosecution's hearsay objections during his direct testimony. Blanton argues that the prosecutor's hearsay objections were "frivolous"; and counsel's "failure to provide the trial judge with relevant arguments and legal authorities to defeat the prosecutor's objections" signified that counsel was unfamiliar with the Ohio Rules of Evidence, and thus deficient. Finally, he contends that this disruption in his testimony was prejudicial because it prevented him from telling the jury his account of consensual sexual relations in a natural, coherent, and unstilted manner.

{¶63} Even if we were to assume that Blanton's trial counsel acted deficiently in this regard, Blanton was not prejudiced. As explained *supra*, Blanton was permitted to testify at length about his version of the events. Blanton provided the jury with his own narrative about how J.S. flagged him down, directed him to the cemetery, and then offered him sex. Because

Blanton was able to adequately provide his version of events, and to argue that the relations were consensual, he was not prejudiced. Put another way, had the hearsay statements been admitted, the trial's outcome would be the same.

{¶64} Blanton also argues that his counsel acted deficiently during his direct examination when he capitulated to the trial court's "threats" and shifted to narrative questioning without advising him beforehand. However, a review of the record reveals that Blanton knew that he was going to be asked to simply tell his story. Immediately before Blanton was sworn as a witness, Blanton's counsel told the trial court during a sidebar discussion that "[counselor] is going to ask the witness * * * what his version of the events * * * are. * * * [H]e's not going to lead him. He's not going to suggest answers. He's just going to allow him to present a narrative." Thus, it is clear that it was part of the defense's strategy to present Blanton's testimony in narrative form. To suggest that counsel abruptly shifted to this form of questioning to the surprise of Blanton is not an accurate representation of what occurred. Therefore, Blanton's argument that his defense counsel was ineffective in the presentation of his case is without merit.

{¶65} Blanton's second claim of ineffective assistance of counsel is based upon his trial counsel permitting the trial court to declare the physician and social worker from the Mayerson Center to be experts in the presence of the jury. However, that both the social worker and physician were declared experts in the presence of the jury did not prejudice Blanton. *See, e.g., State v. Bolton*, 8th Dist. Cuyahoga No. 96385, 2012-Ohio-169, ¶ 62 ("Although we agree with appellant's position that [the witness] should have been qualified as an expert in DNA outside the presence of the jury, * * * we find the error was harmless in this case, given the correctness of permitting [the witness] to testify as an expert."). Here, the witnesses were correctly permitted to testify as experts and no prejudice occurred. Accordingly, Blanton's argument that his defense

counsel was ineffective for failing to object to the declaration of the witnesses as experts in the presence of the jury is without merit.

{¶66} Next, Blanton argues that his trial counsel performed deficiently by unsuccessfully cross-examining Dr. Kathi Makoroff. Dr. Makoroff of the Mayerson Center performed a physical examination of J.S. in the days immediately following the encounter with Blanton and opined at trial that her physical findings were consistent with sexual assault. On cross-examination, Blanton's trial counsel was unsuccessful in his attempt to rebut the opinion testimony. Blanton claims that his counsel should have cross-examined Dr. Makoroff about "forensic research" that according to Blanton, suggests that the kinds of injuries sustained by J.S. can also occur during consensual sex; or alternatively, introduced a defense expert to rebut Dr. Makoroff's opinion.

{¶67} " 'The extent and scope of cross-examination clearly fall within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel.' " *State v. Madden*, 4th Dist. Adams No. 09CA883, 2010-Ohio-176, ¶ 25, quoting *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 146. Moreover, "counsel's decision to rely on cross-examination instead of calling an expert does not constitute ineffective assistance." *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 118.

{¶68} The decision on how to approach the cross-examination of Dr. Makoroff does not constitute ineffective assistance. Trial counsel could have reasonably determined that further questioning Dr. Makoroff about J.S.'s sensitive injuries would be poor strategy, resulting in an inflamed and upset jury. Accordingly, we do not find trial counsel's cross-examination of Dr. Makoroff rises to the level of deficient performance.

{¶69} Furthermore, even if a deficiency actually occurred, we conclude that Blanton was not prejudiced. Given the abundance of evidence in this case, the jury could conclude that Blanton was guilty as charged even without Dr. Makoroff's expert opinion. Therefore, we do not find that trial counsel's alleged failure to effectively cross-examine Dr. Makoroff constitutes ineffective assistance of counsel.

{¶70} Blanton next argues that his counsel's failure to object to the playback and admission of the audio/video recording of the forensic interview conducted by social worker Colliers, and the admission of Collier's written report containing a summary of the statements made by J.S. and a "diagnosis" of sexual abuse constituted ineffective assistance of counsel. Specifically, Blanton argues that the statements made during the interview were inadmissible hearsay.

{¶71} Regardless of whether the statements made during the forensic interview constitute hearsay or not, their admission did not prejudice Blanton. J.S.'s recorded interview with Colliers was merely cumulative of her trial testimony. *See State v. L.E.F.*, 10th Dist. Franklin No. 13AP-1042, 2014-Ohio-4585, ¶ 14 ("[I]nsofar as [victim]'s statements may have been [inadmissible], we conclude such admission constitutes harmless error because the statements were cumulative of [victim]'s live trial testimony, which was subject to cross-examination."). Thus, Blanton cannot demonstrate that but-for the admission of the interview, the jury verdict would be different. This is especially true given the amount of additional evidence that supports a finding of guilt. Thus, trial counsel's failure to object to the playback and admission of the forensic interview and interview report did not amount to ineffective assistance of counsel.

{¶72} Next, Blanton argues that his trial counsel's decision to call, but then abruptly withdraw, Blanton's girlfriend as a witness constituted ineffective assistance of counsel because it caused the jury to think that the girlfriend "would contradict Blanton's testimony * * * further prejudic[ing] his defense."

{¶73} Blanton's ineffective assistance claim is premised on speculation, which is insufficient to establish his claim. *State v.* Short, 129 Ohio St.3d 360, 2011–Ohio–3641, 952 N.E.2d 1121, ¶ 119 (mere speculation cannot support either the deficient-performance or prejudice requirements of an ineffective-assistance claim); *State v. Williams*, 4th Dist. Jackson No. 15CA3, 2016–Ohio–733, ¶ 37 (defendant cannot base claim of ineffective assistance of counsel on speculation that evidence outside the record would establish prejudice). Here, Blanton suggests that we should speculate as to the jury's thoughts and impressions. No evidence exists in the record to suggest that the jury gave any thought to counsel's decision to call, but then subsequently withdraw, Blanton's girlfriend as a witness. Blanton relies solely on mere speculation. Accordingly, Blanton's argument is without merit.

{¶74} Lastly, Blanton contends that the cumulative effect of the aforementioned errors deprived him of his right to the effective assistance of counsel. However, because Blanton failed to show that his counsel committed any error, his cumulative error argument also fails.

{¶75} Based on the foregoing, Blanton's fourth assignment of error is overruled.

E. Assignment of Error V – Sentencing as a Sexually Violent Predator

{¶76} In his fifth assignment of error, Blanton contends that sentencing him as a sexually violent predator was improper because of: (1) insufficient evidence; (2) defective jury instructions; and (3) the re-admission of J.S.'s recorded interview with Colliers at the sexually violent predator determination hearing. For the following reasons, we disagree.

1. Sufficiency of the Evidence

{¶77} "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." *State v. Davis*, 4th Dist. Ross No. 12CA3336, 2013-Ohio-1504, ¶ 12. "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." *Id.*, citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Therefore, when we review a sufficiency of the evidence claim in a criminal case, we review the evidence in a light most favorable to the prosecution. *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 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).

{¶78} The Ohio Revised Code defines a "sexually violent predator" as one who "commits a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses." R.C. 2971.01(H)(1). Blanton argues that the evidence was insufficient for a finding that he is a sexually violent predator because there was no evidence that he was likely to engage in sexually violent behavior in the future.

{¶79} When determining whether the defendant is likely to engage in the future in one or more sexually violent offenses, the Ohio Revised Code provides certain "factors" that may be considered. R.C. 2971.01(H)(2)(a)-(f). This list is "nonexhaustive," and a court may consider any

other evidence that it deems relevant to determining the likelihood of recidivism even if it is not specifically enumerated in the statute. *See State v. Kimble*, 9th Dist. Lorain No. 13CA010412, 2016-Ohio-981, ¶ 21; *see also* R.C. 2971.01(H)(2)(f).

{¶80} Additional relevant factors include: (1) whether the defendant has taken responsibility for his actions; (2) defendant's "continual denial" of sex despite DNA evidence; and (3) the egregiousness of the crime against the victim, including evidence of injuries sustained by the victim. *Kimble* at ¶ 21; *State v. Hardges*, 9th Dist. Summit No. 24175, 2008-Ohio-5567, ¶ 58.

{¶81} An expert witness may also supply the fact-finder with additional information relevant to their determination of whether a defendant is a sexually violent predator. *See State v. Culp*, 9th Dist. Summit No. 26188, 2012-Ohio-5395, ¶¶ 38-41 (psychologist provided the jury with additional factors – e.g., impulsivity, younger age, self-control problems, poor social support system, victim being a stranger, etc… – that make reoffending more likely).

{¶82} In the case sub judice, the State called Dr. Stuart Bassman as an expert to testify about the risk of re-offending. Dr. Bassman identified certain factors that make the risk of re-offending greater. Specifically he noted: (1) the age of the offender and the higher risk of re-offending by young offenders; (2) the relationship of the offender and the victim, with offenders that attack unfamiliar victim's having a greater risk of impulsivity and re-offending; and (3) the remorsefulness of the offender, with the apparent lack of regret, remorse, or responsibility evidencing a higher risk of re-offending.

{¶83} On this record, including Dr. Bassman's testimony and the evidence presented in the underlying matter, sufficient evidence existed to support the jury's finding that Blanton is

likely to engage in the future in one or more sexually violent offenses and thus that he is a sexually violent offender. Accordingly, Blanton's sufficiency argument is without merit.

2. Jury Instructions

{¶84} Blanton further argues that the trial court failed to fully instruct the jury on the statutory definition of a sexually violent predator.

{¶85} Blanton's trial counsel failed to object to the instructions that were given to the jury. Thus, we can recognize the error only if it constitutes plain error. "To constitute plain error, a reviewing court must find (1) an error in the proceedings, (2) the error must be a plain, obvious or clear defect in the trial proceedings, and (3) the error must have affected 'substantial rights' (i.e., the trial court's error must have affected the trial's outcome)." *State v. Dickess,* 174 Ohio App.3d 658, 2008–Ohio–39, 884 N.E.2d 92, ¶ 31 (4th Dist.), citing *State v. Hill,* 92 Ohio St.3d 191, 749 N.E.2d 274 (2001), and *State v. Barnes,* 94 Ohio St.3d 21, 27, 2002–Ohio–68, 759 N.E.2d 1240. "Furthermore, notice of plain error must be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *Id.,* citing *State v. Landrum,* 53 Ohio St.3d 107, 111, 559 N.E.2d 710 (1990), and *State v. Long,* 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. "A reviewing court should notice plain error only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

{¶86} "When we review a trial court's jury instructions, we may not judge 'a single instruction to a jury * * * in artificial isolation,' but we must view it 'in the context of the overall charge.' " *State v. Stephenson,* 4th Dist. Adams No. 12CA936, 2013–Ohio–771, ¶ 20, quoting *State v. Madrigal,* 87 Ohio St.3d 378, 396, 721 N.E.2d 52 (2000). "Thus, we must consider the jury instructions 'as a whole' and then determine whether the jury charge probably

misled the jury in a manner materially affecting the complaining party's substantial rights." *Id.* As explained further by the Ohio Supreme Court:

> In determining the question of prejudicial error in instructions to the jury, the charge must be taken as a whole, and the portion that is claimed to be erroneous or incomplete must be considered in its relation to, and as it affects and is affected by the other parts of the charge. If from the entire charge it appears that a correct statement of the law was given in such a manner that the jury could not have been misled, no prejudicial error results.

State v. Hardy, 28 Ohio St.2d 89, 92, 276 N.E.2d 247 (1971).

{¶87} "A defective jury instruction does not rise to the level of plain error unless the defendant shows that the outcome of the trial clearly would have been different but for the alleged erroneous instruction." *Dickess* at ¶ 32, citing *State v. Campbell*, 69 Ohio St.3d 38, 41, 630 N.E.2d 339 (1994), and *Cleveland v. Buckley*, 67 Ohio App.3d 799, 805, 588 N.E.2d 912 (8th Dist.1990).

{¶88} As previously mentioned, the Ohio Revised Code defines a "sexually violent predator" as one who "commits a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses." R.C. 2971.01(H)(1). A "sexually violent offense" is defined as "[a] violent sex offense" or "[a] designated homicide, assault, or kidnapping offense that the offender commits with a sexual motivation." R.C. 2971.01(G). A "violent sex offense" is defined, in relevant part, as a "violation of section 2907.02 [rape], 2907.03 [sexual battery], or 2907.12[repealed] or of division (A)(4) or (B) of section 2907.05 of the Revised Code [certain gross sexual imposition offenses][.]". R.C. 2971.01(L)(1).

{¶89} Our review of the record indicates that the trial court provided the definitions for a sexually violent predator, a sexually violent offense, and a violent sex offense to the jury. Blanton argues that the trial court's failure to recite the essential elements of the offenses of rape, sexual battery, and gross sexual imposition "allowed the jurors to make the violent sexual predator finding based on their belief that Blanton was likely to engage in future activity that does not meet the definition of a violent sex offense." We disagree.

{¶90} Reviewing the jury instructions as a whole, we conclude that a correct statement of the law was given in such a manner that the jury could not have been misled. Accordingly, the trial court did not commit plain error in giving its sexually violent predator jury instructions.

3. Admission of Hearsay Evidence

{¶91} Finally, Blanton argues that the trial court erred by admitting a copy of J.S.'s recorded forensic interview as evidence at the sexually violent predator determination hearing, claiming that the recording contained inadmissible hearsay statements.

{¶92} Blanton's argument fails because the Ohio Rules of Evidence do not strictly apply to sexually violent predator determination hearings. Evid.R. 101(C) excepts application of the Rules of Evidence, including the hearsay rule, from certain proceedings, such as miscellaneous criminal proceedings. Among those specifically excepted from the Rules of Evidence are proceedings for extradition or rendition of fugitives; sentencing; granting or revoking probation; proceedings with respect to community control sanctions; issuance of warrants for arrest; criminal summonses and search warrants; and proceedings with respect to release on bail or otherwise. Evid.R. 101(C). "A sexual predator determination hearing is similar to sentencing or probation hearings where it is well settled that the Rules of Evidence do not strictly apply." *State v. Cook*, 83 Ohio St.3d 404, 425, 700 N.E.2d 570 (1998). "A determination hearing does not

occur until after the offender has been convicted of the underlying offense." *Id*. "Further, the determination hearing is intended to determine the offender's status, not to determine the guilt or innocence of the offender." *Id*. Accordingly, "the Ohio Rules of Evidence do not strictly apply to sexual predator determination hearings", and "reliable hearsay * * * may be relied upon by the [trier of fact]." *Id*. Moreover, the sexually violent predator statute allows the trier of fact "to consider the evidence presented during the trial [of the underlying offenses] to discern whether [the offender] is a sexually violent predator." *State v. Price*, 8th Dist. Cuyahoga No. 99058, 2014-Ohio-2047, ¶ 16. Thus, the trial court properly admitted the recorded forensic interview during the sexually violent predator determination hearing.

{¶93} For the above stated reasons, we overrule Blanton's fifth assignment of error.

F. Assignment of Error VI – Consecutive Sentences

{¶94} In his sixth assignment of error, Blanton contends that the trial court erred by imposing consecutive sentences because the record does not clearly and convincingly support the imposition of consecutive sentences. Specifically, he argues that the facts of the case were not "so great or unusual" as to justify consecutive sentences, and also that consecutive sentences are not necessary to protect the public.

{¶95} The trial court merged the two kidnapping convictions for the purposes of sentencing, and sentenced Blanton to three mandatory terms of 10 years to life in prison on the three remaining charges, running consecutively, for a total term of incarceration of 30 years to life.

{¶96} 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. 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 (3) as applicable here, the harm caused by two or more multiple offenses was so great or unusual that no single prison term for any of the offenses committed adequately reflects the seriousness of the offender's conduct. R.C. 2929.14(C)(4). The trial court "is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and [to] incorporate its findings into the sentencing entry, but it has no obligation to state reasons to support its findings." *State v. Bonnell,* 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.3d 659, syllabus. Furthermore, the trial court is not required to recite "a word-for-word recitation of the language of the statute * * *." *Id.* at ¶ 29. "[A]s long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Id.* A failure to make the findings required by R.C. 2929.14(C)(4) renders a consecutive sentence contrary to law. *Id.* at ¶ 37; *Bever* at ¶ 17; *State v. Nia,* 8th Dist. Cuyahoga No. 99387, 2013–Ohio–5424, ¶ 22. 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* at ¶ 17; *Nia* at ¶ 22.

{¶97} We review felony sentences under the standard set forth in R.C. 2953.08(G)(2). *Bever* at ¶ 13; *State v. Baker*, 4th Dist. Athens No. 13CA18, 2014–Ohio–1967, ¶ 25. That statute directs the appellate court to "review the record, including the findings underlying the sentence," and to modify or vacate the sentence "if it clearly and convincingly finds * * * (a) [t]hat the

record does not support the sentencing court's findings under division * * * (C)(4) of section 2929.14 * * * of the Revised Code * * * [or] (b) [t]hat the sentence is otherwise contrary to law." R.C. 2953.08(G)(2).

{¶98} Our court has described "clear and convincing evidence" as follows:

> "Clear and convincing evidence" is evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. See, *Eppinger,* supra, at 163; *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus. " 'It does not mean clear and unequivocal.' " *Eppinger,* at 164, quoting *Cross,* at 477. The clear and convincing evidence standard is considered a higher degree of proof than a mere "preponderance of the evidence," the standard generally utilized in civil cases. However, it is less stringent than the "beyond a reasonable doubt" standard used in criminal trials. See, *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74; *Cross,* at 477.
>
> When reviewing whether "clear and convincing evidence" supports the trial court's decision, we must examine the record and ascertain whether sufficient evidence exists to meet this burden of proof. See, *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368. This type of review is deferential to the trial court, and we must affirm the court's judgment if the record contains some competent, credible evidence to support it. See, *Schiebel,* at 74, and *State v. Longnecker,* Washington App. No. 02CA76, 2003-Ohio-6208, at ¶ 23. In reviewing the court's decision, we are not permitted to substitute our judgment for that of the trial court. See, *Longnecker,* supra; *State v. Waulk,* Ross App. No. 05CA2847, 2006-Ohio-929, at ¶ 12.

State v. Offenberger, 4th Dist. Washington No. 06CA22, 2007-Ohio-2551, ¶¶ 11-12.

{¶99} " 'It is also important to understand that the clear and convincing standard used by R.C. 2953.08(G)(2) is written in the negative. It does not say that the trial judge must have clear and convincing evidence to support its findings. Instead, it is the court of appeals that must clearly and convincingly find that the record does not support the court's findings. In other words, the restriction is on the appellate court, not the trial judge. This is an extremely deferential standard of review.' " *State v. Bass*, 4th Dist. Washington No. 16CA32, 2017-Ohio-7059, ¶ 7, quoting *State v. Venes*, 2013–Ohio–1891, 992 N.E.2d 453, ¶ 21 (8th Dist.).

{¶100} Here, the record reflects that the trial court made the findings required by R.C. 2929.14(C)(4) when it ordered Blanton's sentences be served consecutively. In addition, the trial court noted the seriousness of the charges: stranger abduction by spontaneous impulse in broad daylight; the disparity in size; the physical restraint of the victim with a belt; the punching and pushing; the threats of use of a gun; the use of force to commit rape; the lack of any sense of remorse; and the calculated and continuous lies by Blanton. The trial court found that Blanton's conduct was "heinous", and noted that a stranger abduction, kidnap, and rape had never been alleged in Adams County prior to this case. Finally, the trial court noted that it was unaware of "any sentence that would adequately reflect the seriousness of this conduct."

{¶101} The trial court later memorialized these findings within its sentencing entry. From the trial court's statements at the sentencing hearing and the language used in the sentencing entry, it is clear that the trial court complied with the dictates of R.C. 2929.14(C)(4). It is also clear that the record supports the trial court's findings that the harm caused by Blanton's offenses was so great or unusual that no single prison term adequately

reflected the seriousness of his conduct and that consecutive sentences were necessary to punish Blanton and protect the public.

{¶102} Blanton argues that because each of his sentences contained a "life tail", concurrent sentences would have been sufficient to protect the public. He further argues that because his conduct was typical of the conduct normally comprising the offenses, the harm created was not so great or unusual as to justify consecutive sentences. We find this argument disingenuous and completely unpersuasive. The evidence shows that Blanton was a violent sexual predator who spontaneously kidnapped and raped a 15 year-old stranger in broad daylight. Blanton's violent actions inflicted physical and emotional damages upon the victim, and forever impacted the victim and the community. Blanton committed the abuse and then repeatedly lied to authorities. The record manifestly rebuts Blanton's claim that his conduct was not so great or unusual as to justify consecutive sentences, or that consecutive sentences are not necessary to protect the public.

{¶103} In sum, we cannot find by clear and convincing evidence that the record does not support the trial court's findings justifying the imposition of consecutive sentences. Consequently, we overrule Blanton's sixth assignment of error.

IV. Conclusion

{¶104} Having overruled all of Blanton's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs.

The Court finds that reasonable grounds existed for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Court of Common Pleas 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.

McFarland, J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs in Judgment Only.

For the Court

By: _____
Marie Hoover, 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.