[Cite as *State v. Hammond*, 2019-Ohio-4253.]

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

STATE OF OHIO,	:	
	:	Case No. 18CA3662
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
LLOYD HAMMOND,	:	
	:	
Defendant-Appellant.	:	**Released: 10/10/19**

APPEARANCES:

Linda L. Kendrick, Chillicothe, Ohio, for Appellant.

Jeffrey C. Marks, Ross County Prosecuting Attorney, and Pamela C. Wells, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for Appellee.

McFarland, J.

{¶1} Lloyd Hammond appeals from his convictions of one count of child endangerment and three counts of rape following a three-day jury trial. On appeal, Appellant contends: 1) the trial court erred in overruling his motion to compel Adena Regional Medical Center to release certain medical records without conducting a hearing or an in-camera review; 2) the trial court erred when it permitted B.H. and K.H., the minor victims of the crimes for which Appellant was convicted, to testify via closed circuit video; 3) he

did not receive effective assistance of counsel; and 4) there was insufficient evidence to support his conviction.

{¶2} Because Appellant was provided a hearing on his motion to compel and an in-camera review was not required in light of the trial court's ruling that the subpoenaed records were not relevant, Appellant's first assignment of error is overruled. Appellant's second assignment of error is overruled because the trial court's voir dire examination revealed competent, credible evidence that there was a substantial likelihood B.H. and K.H. would suffer serious emotional trauma if required to testify in the same room as Appellant. We overrule Appellant's third assignment or error because Appellant failed to show that his counsel provided constitutionally deficient assistance or that any purported error prejudiced Appellant's defense. Finally, in light of our determination that Appellant's convictions were supported by sufficient evidence and were not against the manifest weight of the evidence, we find no merit to Appellant's fourth assignment of error and it is overruled as well. Having found no merit in any of the assignments of error raised by Appellant, the decision of the trial court is affirmed.

FACTS

{¶3} On September 29, 2017, a grand jury indicted Appellant with one count of child endangerment, with serious physical harm, in violation of

R.C. 2919.22, and six counts of rape in violation of R.C. 2907.02. On October 1, 2017, Appellant pleaded not guilty to all counts.

{¶4} The indictment followed an investigation into the welfare of two minor females, B.H. and K.H. A review of the record reveals that B.H. and K.H. are the daughters of N.H., with whom Appellant had a relationship. On June 27, 2017, Appellant and Ms. Hutt dropped off then five-year-old B.H. at Appellant's parents' home and went to the grocery store. Because B.H. was passed out and non-responsive, Appellant's parents took her to the emergency room at Adena Regional Medical Center for treatment. After testing revealed B.H. had opiates and benzodiapine in her system, she was transferred to Nationwide Children's Hospital for urgent care. During interviews with staff at Nationwide Children's Hospital, B.H. indicated that Appellant had given her pills and had raped her and her sister, then twelve-year-old K.H. The Child Protection Center of Ross County and the Chillicothe Police Department conducted further investigation into these allegations, which led to Appellant's indictment in this case.

{¶5} Before trial, Appellant issued a subpoena to Adena Regional Medical Center for the production of medical records relating to B.H. and K.H. When it refused to produce the records, Appellant moved to compel. On December 18, 2017, the trial court held a hearing on the motion to

compel, after which Appellee, the State of Ohio, moved to quash the subpoena on the ground that it sought privileged communications. On January 12, 2018, the trial court overruled the motion to compel, effectively granting the motion to quash.

{¶6} On April 14, 2018, Appellee filed a motion to permit B.H. and K.H. to testify via closed circuit video at trial, which Appellant opposed. On June 18, 2018, the trial court held a hearing and granted the motion. After a separate hearing, the trial court further found that B.H. was competent to testify. Appellant's counsel did not object to that finding.

{¶7} On June 18, 2018, the case proceeded to trial on six counts, with Appellee having dismissed the rape charge in Count 7. On June 21, 2018, after a three-day trial, the jury returned a guilty verdict on the child endangerment charge in Count 1 and the rape charges in Counts 2, 5 and 6. The jury could not reach a verdict on Counts 3 and 4, which the State subsequently dismissed.

{¶8} On August 2, 2018, the trial court sentenced Appellant to thirty months in prison on Count 1, fifteen years to life on Count 2, fifteen years to life on Count 5, and ten years to life on Count 6. The sentences in Counts 2 and 5 are to be served concurrently and the remaining sentences are to be served consecutively, for an aggregate sentence of 27 and ½ years to life.

Appellant now brings his timely appeal, setting forth four assignments of error for our review.

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT-APPELLAT'S [*SIC*] MOTION TO COMPEL THE RELEASE OF MEDICAL RECORDS WITHOUT CONDUCTING A HEARING AND IN-CAMERA INTERVIEW.

II. THE TRIAL [*SIC*] ERRED WHEN IT PERMITTED B.H. AND K.H. TO TESTIFY BY CLOSED CIRCUIT VIDEO.

III. THE DEFENDANT WAS DENIED DUE PROCESS BECAUSE HE DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL.

IV. DEFENDANTS [*SIC*] CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

ASSIGNMENT OF ERROR I

{¶9} In his first assignment of error, Appellant contends the trial court erred in overruling his motion to compel Adena Regional Medical Center to produce medical records without holding a hearing or conducting an in-camera review of the requested records. Appellant thus challenges the procedure by which the trial court overruled his motion, not the analysis supporting the trial court's decision. Appellant did not object to the trial court's procedural approach; as a result, the Court reviews this assignment of error under a plain error standard. *See* Crim.R. 52(B); *State v. Keeley*, 4th Dist. Washington No. 11CA5, 2012–Ohio–3564, ¶ 28.

STANDARD OF REVIEW

{¶10} "We apply the doctrine of plain error cautiously and only under exceptional circumstances to prevent a manifest miscarriage of justice." *State v. Schwendeman*, 2018-Ohio-240, 104 N.E.3d 44, ¶ 15 (4th Dist.). Accordingly, "[t]he test for plain error is stringent." *State v. Ellison*, 2017-Ohio-284, 81 N.E.3d 853, ¶ 27 (4th Dist.). "To prevail under this standard, the defendant must establish that an error occurred, it was obvious, and it affected his or her substantial rights." *State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, ¶ 64. An error affects substantial rights only if it changes the outcome of the trial. *Id.* "The defendant carries the burden to establish the existence of plain error, unlike the situation in a claim of harmless error, where the burden lies with the state." *State v. Cooper*, 170 Ohio App.3d 418, 2007-Ohio-1186, 867 N.E.2d 493, ¶ 31 (4th Dist.).

LEGAL ANALYSIS

{¶11} Appellant's first claimed procedural error, that a hearing was not held, is not well-founded. The trial court held a hearing on Appellant's motion to compel on December 18, 2017. Appellant had an opportunity to present evidence and argument in support of his motion at that time. Accordingly, this portion of his assignment of error is overruled.

{¶12} Appellant also argues he was prejudiced because the trial court did not conduct an in-camera review of the requested medical records. Appellant cites *In re Subpoena Duces Tecum Served Upon Atty. Potts*, 2003-Ohio-5234, 100 Ohio St.3d 97, 796 N.E.2d 915, for the proposition that the trial court was required to conduct an in-camera review.

{¶13} In *Potts*, the State of Ohio subpoenaed an attorney's billing records relating to his client's pending criminal forfeiture case. The trial court denied the attorney's motion to quash and found him in direct contempt after he refused to produce the records. On appeal, the Supreme Court of Ohio considered what test should apply to determine when a motion to quash a criminal subpoena should be granted. Ultimately, it adopted the four-step test set out in *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) to determine whether a subpoena duces tecum is unreasonable or oppressive. Under that test, the party moving to compel the production of documents must show:

> "(1) that the documents are evidentiary and relevant;
>
> (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence;
>
> (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and

> (4) that the application is made in good faith and is not intended as a general 'fishing expedition.' " *Potts* at ¶ 12 (quoting *Nixon* at 699-700).

The Supreme Court of Ohio further held, when deciding a motion to quash a subpoena duces tecum, the court "shall hold an evidentiary hearing" at which the proponent of the subpoena must show that the four-step test is satisfied. *Id.* at ¶ 16.

{¶14} Importantly for our analysis here, the Supreme Court of Ohio also established the sequence in which a trial court should consider the *Nixon* test and a related claim of privilege. Specifically, "[i]f the trial court determines that the subpoenaed documents meet the *Nixon* test and a party claims that the documents are privileged, the trial court shall conduct an in-camera inspection of the documents in question before ruling on any claims of privilege." *Id.* at ¶ 18. As stated in *Potts*, the trial court first determines if the subpoena meets the *Nixon* test. If that test is satisfied, then the trial court is required to conduct an in-camera inspection of the subpoenaed documents to determine if they are privileged. This holding underscores the Supreme Court of Ohio's earlier observation that "[t]he court's determination of whether a subpoena is unreasonable or oppressive is separate from its decision to conduct an in-camera inspection of documents." *Id*. at ¶ 14.

{¶15} In this case, while the trial court acknowledged the claim of privilege in Appellee's motion to quash, it overruled the motion to compel based on its finding that Appellant had not shown the subpoenaed medical records were relevant. Appellant asserted that the medical records contained information regarding earlier, similar accusations made against him by B.H. and K.H. The trial court found, however, Appellant failed to explain "how any additional accusations would be relevant at trial [or] material to impeachment of the children." Although the trial court did not expressly apply the four-step test from *Nixon*, it addressed the first step of the test—whether the documents were "evidentiary and relevant." *Nixon* at 699. Having found Appellant did not meet the first step of the test, the trial court was not required to conduct an in-camera inspection of the medical records. The second portion of Appellant's first assignment of error is therefore also overruled.

{¶16} Having found no merit to either of the arguments raised under Appellant's first assignment of error, it is overruled.

ASSIGNMENT OF ERROR II

{¶17} In his second assignment of error, Appellant contends the trial court erred in permitting B.H. and K.H. to testify via closed circuit video under R.C. 2945.481.

STANDARD OF REVIEW

{¶18} We begin by setting forth the standard of review when considering whether a trial court erred in granting a motion to permit a child sex offense victim to testify outside the presence of a defendant. In *State v. Self*, 56 Ohio St.3d 73, 564 N.E.2d 446 (1990), the Supreme Court of Ohio considered the constitutionality of a former statute enacted "to protect child sexual abuse from traumatization in an 'intimidating courtroom atmosphere' while preserving the right of the accused to confront the witnesses against him." *Self* at 75. As here, the statute permitted child sexual abuse victims to testify outside of court and therefore implicated the Confrontation Clauses contained in the Sixth Amendment of the United States Constitution and Section 10, Article I of the Ohio Constitution.

{¶19} The Sixth Amendment provides, in relevant part, "[i]n all criminal prosecutions the accused shall enjoy the right * * * to be confronted with the witnesses against him." Section 10, Article 1 of the Ohio Constitution similarly provides that "the party accused shall be allowed * * * to meet the witnesses face to face * * *; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance cannot be had at the trial, always securing to the accused means and the opportunity to be present

in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court." The Supreme Court of Ohio has observed that the purpose of the Confrontation Clauses in our Constitutions is "to secure for the opponent the opportunity of cross-examination." *Self* at 76 (emphasis removed); quoting 5 Wigmore, *Evidence*, Section 1395, at 150 (Chadbourn Rev. 1974).

{¶20} While a defendant "is ordinarily entitled to a face-to-face confrontation at trial," such confrontation may be constitutionally denied "where the denial is necessary to further an important public policy and 'the reliability of the testimony is otherwise assured.' " *Self* at 77; quoting *Maryland v. Craig*, 497 U.S. 836, 850, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). To determine whether a statute permitting testimony by child sexual abuse victims outside the defendant's physical presence violates the Confrontation Clauses, the Supreme Court of Ohio applied the following three-part test:

> "The requisite finding of necessity must of course be a case-specific one: the trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. * * * The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. * * * Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than 'mere nervousness or excitement or

> some reluctance to testify.' * * * " *Craig, supra*, 10 S.Ct. at 3169, 111 L.Ed.2d at 685. *Self* at 78.

{¶21} In *Self*, the Supreme Court of Ohio found that the statute at issue (former R.C. 2907.41) was constitutional under the Sixth Amendment and the Ohio Constitution. It specifically held that to permit a child-victim to testify via a videotaped deposition under the statute, "a finding must be made that the child would experience serious emotional trauma if required to testify in open court. Permanent injury need not be proven to establish serious emotional trauma." *Self* at 80. A reviewing court's task "is to determine whether the court's findings are supported by competent, credible evidence." *Id.*; citing *C.E. Morris Co. v. Foley Construction Co.*, 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578 (1978), syllabus.

LEGAL ANALYSIS

{¶22} In this case, the trial court permitted B.H. and K.H. to testify via closed circuit video pursuant to R.C. 2945.481. This statute, similar to the statute before the Supreme Court of Ohio in *Self*, provides that a court may order the testimony of a child sexual abuse victim to be taken outside the room in which a proceeding is being conducted and televised via closed circuit video into the room in which the proceeding is being conducted to be viewed by the jury. R.C. 2945.481(C). Pursuant to R.C. 2945.481(E), in

order to permit such testimony to proceed, the judge must find one or more of the following:

> (1) The persistent refusal of the child victim to testify despite judicial requests to do so;
>
> (2) The inability of the child victim to communicate about the alleged violation or offense because of extreme fear, failure of memory, or another similar reason;
>
> (3) The substantial likelihood that the child victim will suffer serious emotional trauma from so testifying.

{¶23} Here, the trial court held a hearing on the motion to permit B.H. and K.H. to testify via closed circuit video on June 18, 2018. At the conclusion of the hearing, the trial court found there was a substantial likelihood that both of the children would suffer serious emotional trauma if required to testify in Appellant's presence under R.C. 2945.481(E)(3). Appellant argues this factual finding is not supported by the record.

{¶24} Upon review, the trial court's finding is supported by competent, credible evidence. At the hearing, Appellee called three witnesses: Rachel Ewen, foster mother and custodian of B.H. and K.H.; Ashley Muse, Child Protection Center, Child Abuse Specialist; and Brenda Wilhelm, Child Protection Center, Child Therapist. Ms. Ewen testified that when she talked with B.H. and K.H. about the allegations in this case, they acted "embarrassed" and "fearful." K.H. in particular "kind of shuts down," "completely clams up" and "freezes." Ms. Ewen further testified that if B.H.

and K.H. see an individual who looks like Appellant, they are "terrified" and attempt to hide from the individual's view. Ms. Ewen indicated the children continued to have nightmares about Appellant and told her they feared being in the same room with him.

{¶25} Ms. Muse, the Child Abuse Specialist, interviewed K.H. regarding her sexual assault. She testified that K.H. became tearful and "shut down" for a period during the interview. K.H. was uncomfortable speaking about the incident and consequently wrote down her responses to questions.

{¶26} Ms. Wilhelm, the Child Therapist, was the last witness to testify at the hearing. Ms. Wilhelm is a licensed professional counselor with a master's degree in clinical and rehab counseling from Ohio University. At the time of the hearing, she had over ten years of counseling experience. Ms. Wilhelm conducted a trauma assessment of B.H. and K.H., both of which scored high on the trauma scale. She met with B.H. and K.H. over ten times each over approximately a year. She testified B.H. became fearful and anxious when talking about Appellant. When discussing the prospect of testifying in Appellant's presence, B.H. was afraid of having contact with him and having to talk in front of him. Ms. Wilhelm testified that K.H.'s anxiety heightened, and she too was fearful of testifying, even if Appellant

was not in the same room. B.H. and K.H. told Ms. Wilhelm that they feared Appellant because he had threatened them. She expressed her professional opinion that both B.H. and K.H. would suffer serious emotional trauma if they were forced to testify in Appellant's presence. On cross-examination, Ms. Wilhelm further opined that B.H. and K.H. were "a lot more fearful" than other youth she had consulted in preparation for testifying about abuse allegations. According to Ms. Wilhelm, the mere presence of Appellant was "very traumatic" for B.H. and K.H.

{¶27} The testimony of Ms. Ewen, Ms. Muse and Ms. Wilhelm is competent, credible evidence supporting the trial court's finding that B.H. and K.H. would suffer serious emotional trauma if required to testify in Appellant's presence. Appellant argues that this case is similar to *State v. McConnell*, 2nd Dist. Montgomery No. 19993, 2004-Ohio-4263, in which the State of Ohio failed to meet its burden under R.C. 2945.481(E). In *McConnell*, the child victim testified that "she was scared to see her dad because she hadn't seen him in a long time, which made her feel sad." *McConnell* at ¶ 47. A child psychologist testified that it would be "difficult" for the child to testify in her father's presence because it would be an "emotional experience" for her. *Id.* This testimony, however, did not amount to competent, credible evidence that there was a substantial

likelihood that the child would suffer "serious emotional trauma" if she testified in court, as required under R.C. 2945.481(E)(3).

{¶28} The testimony in *McConnell* is not comparable to the testimony supporting the trial court's decision in this case. Three individuals, including two professionals with the Child Protection Center, testified that B.H. and K.H. were fearful of Appellant and traumatized by the possibility of seeing him. Ms. Wilhelm expressly stated that they would suffer "serious emotional trauma" if required to testify in Appellant's presence. In contrast to *McConnell*, the evidence in this case is competent, credible and satisfies R.C. 2945.481(E)(3). Accordingly, Appellant's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

{¶29} In his third assignment of error, Appellant contends he did not receive effective assistance of counsel. He specifically argues that his counsel's performance was deficient because he 1) failed to object to the finding that B.H. was competent to testify; 2) elicited testimony regarding prior accusations of abuse involving Appellant; 3) played the interview of B.H. into the record at trial; and 4) failed to subpoena medical experts to testify regarding medical records introduced into evidence at trial.

STANDARD OF REVIEW

{¶30} The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean a criminal defendant is entitled to "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Hinton v. Alabama*, 571 U.S. 263, 272, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014) (Sixth Amendment right to counsel means "defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence.").

{¶31} To establish constitutionally ineffective assistance of counsel, a defendant must show 1) that his counsel's performance was deficient and 2) that the deficient performance prejudiced the defense and deprived the defendant of a fair trial. *Strickland* at 687; *State v. Obermiller*, 147 Ohio St.3d 175, 2016–Ohio–1594, 63 N.E.3d 93, ¶ 83. "Failure to establish either element is fatal to the claim." *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008–Ohio–968, ¶ 14. Therefore, if one element is dispositive, a court need not analyze both. *State v. Madrigal*, 87 Ohio St.3d 378, 397, 2000-Ohio-448, 721 N.E.2d 52 (2000).

{¶32} The deficient performance part of an ineffectiveness claim "is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' " *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010); *quoting Strickland* at 688; *accord Hinton* at 1088. "Prevailing professional norms dictate that with regard to decisions pertaining to legal proceedings, 'a lawyer must have "full authority to manage the conduct of the trial." ' " *Obermiller* at ¶ 85; *quoting State v. Pasqualone*, 121 Ohio St.3d 186, 2009–Ohio–315, 903 N.E.2d 270, ¶ 24; *quoting Taylor v. Illinois*, 484 U.S. 400, 418, 108 S.Ct. 646 (1988). Furthermore, " '[i]n any case presenting an ineffectiveness claim, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." ' " *Hinton* at 273; *quoting Strickland* at 688. Accordingly, "[i]n order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation." *State v. Conway*, 109 Ohio St.3d 412, 2006–Ohio–2815, 848 N.E.2d 810, ¶ 95 (citations omitted); *accord Hinton* at 273; *citing Padilla* at 366; *State v. Wesson*, 137 Ohio St.3d 309, 2013–Ohio–4575, 999 N.E.2d 557, ¶ 81.

{¶33} Moreover, when considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id*. Additionally, "[a] properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008–Ohio–482, ¶ 10; *citing State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were "so serious" that counsel failed to function "as the 'counsel' guaranteed * * * by the Sixth Amendment." *Strickland* at 687; *e.g.*, *Obermiller* at ¶ 84; *State v. Gondor*, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶ 62.

{¶34} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that " 'but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the outcome.' " *Hinton* at 275; *quoting Strickland* at 694; *e.g.*, *State v. Short*, 129 Ohio St.3d 360, 2011–Ohio–3641,

952 N.E.2d 1121, ¶ 113; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. " '[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.' " *Hinton* at 275; *quoting Strickland* at 695. Furthermore, courts may not simply assume the existence of prejudice, but must require the defendant to affirmatively establish prejudice. *State v. Clark*, 4th Dist. Pike No. 02CA684, 2003–Ohio–1707, ¶ 22; *State v. Tucker*, 4th Dist. Ross No. 01CA2592, 2002-Ohio-1597. As we have repeatedly recognized, speculation is insufficient to demonstrate the prejudice component of an ineffective assistance of counsel claim. *E.g.*, *State v. Jenkins*, 4th Dist. Ross No. 13CA3413, 2014–Ohio–3123, ¶ 22; *State v. Simmons*, 4th Dist. Highland No. 13CA4, 2013–Ohio–2890, ¶ 25; *State v. Halley*, 4th Dist. Gallia No. 10CA13, 2012–Ohio–1625, ¶ 25; *accord State v. Powell*, 132 Ohio St.3d 233, 2012–Ohio–2577, 971 N.E.2d 865, ¶ 86.

ANALYSIS

{¶35} Appellant first argues that his counsel erred by failing to inquire into and object to the trial court's finding that B.H. was competent to testify. Initially, we observe that " '[t]he failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel.' " *State v.*

Fears, 86 Ohio St.3d 329, 347, 715 N.E.2d 136 (1999); *quoting State v. Holloway*, 38 Ohio St.3d 239, 244, 527 N.E.2d 831 (1988). A defendant must also show that he was materially prejudiced by the failure to object. *Holloway* at 244; *accord State v. Hale*, 119 Ohio St.3d 118, 2008–Ohio–3426, 892 N.E.2d 864, ¶ 233. Additionally, tactical decisions, such as whether and when to object, ordinarily do not give rise to a claim for ineffective assistance. *State v. Johnson*, 112 Ohio St.3d 210, 2006–Ohio–6404, 858 N.E.2d 1144, ¶ 139–140.

{¶36} Evidence Rule 601 contains the general rule governing the competency of witnesses. It states, in relevant part, "[e]very person is competent to be a witness except: (A) . . . children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." Evid.R. 601(A). "A trial court must conduct a voir dire examination of a child under ten years of age to determine the child's competence to testify." *State v. Maxwell*, 139 Ohio St.3d 12, 33, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 100. The court must consider the following factors in making this determination:

> (1) the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child's ability to recollect those impressions or observations, (3) the child's ability to communicate what was observed, (4) the

> child's understanding of truth and falsity and (5) the child's appreciation of his or her responsibility to be truthful. *Id.*; *citing State v. Frazier*, 61 Ohio St.3d 247, 251, 574 N.E.2d 483 (1991).

"A determination of competency is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of discretion." *Maxwell* at ¶ 100.

{¶37} In this case, during the trial court's voir dire examination, B.H. was able to recite information regarding her foster siblings and biological siblings. She could remember events that had happened years before, such as attending kindergarten at a different school, and what she received for her last birthday. She recalled residing with Appellant and her mother in the months prior to the hearing and where she had lived with them. B.H. was able to communicate what she observed. The trial court asked B.H. about the difference between a truth and a lie and found that she understood that difference. The trial court also determined that B.H. appreciated her responsibility to be truthful by asking her what a promise means. In sum, the trial court's voir dire addressed the relevant factors under *Maxwell*.

{¶38} Appellant argues *State v. Payton*, 119 Ohio App.3d 694, 696 N.E.2d 240 (11th Dist. 1997) is an analogous case, but the court's examination in *Payton* was not as thorough as the trial court's examination in this case. In *Payton*, the appellant was convicted of forcible rape of a

minor. On appeal, he contended that his counsel was ineffective because he did not object to the finding that the four-year-old victim was competent to testify. The trial court had conducted only a brief voir dire examination of the child at the beginning of her deposition, the transcript for which was only three pages long. During the examination, the child "was unable to testify as to her age without the judge's assistance, although during her direct examination she was able to testify that she had a brother and a sister, and that appellant was her father's friend." *Payton* at 706. She testified she "knew it was good to tell the truth" and promised not to "tell stories." *Id.* However, the child also provided a nonsensical answer when asked if she understood what happens if she did not tell the truth. The judge's other questions concerned whether the child watched cartoons.

{¶39} Based on the limited voir dire in *Payton*, the appellate court found that had defense counsel objected to admission of the victim's testimony on competency grounds, "there was a strong possibility that the objection or motion would have been sustained." *Id.* at 707. Appellant's trial counsel was therefore ineffective and the appellant was entitled to a reversal of his conviction.

{¶40} In contrast to the appellate court in *Payton*, we cannot find that there was a reasonable probability that, had Appellant's counsel objected to

the competency of B.H., the objection would have been sustained. The record establishes that B.H. was competent to testify under *Maxwell*. This portion of Appellant's third assignment of error is overruled.

{¶41} Appellant next contends that his counsel was deficient because he elicited testimony regarding K.H.'s prior accusations against Appellant. During cross-examination of K.H., Appellant's counsel asked whether she had ever told one of her mother's other boyfriends that Appellant raped her. In response, K.H. testified that Appellant had raped her approximately a month before Christmas 2015—a response that Appellant's counsel apparently did not expect. When interviewed by Ashley Muse at the Child Protection Center in 2017, K.H. did not report the earlier rape. On re-direct, Appellee asked additional questions about the rape and K.H. explained that she did not previously report it because her mother had told her not to tell anyone.

{¶42} "The scope of cross-examination falls within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel." *Conway* at ¶ 101; citing *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 45. "[A]n appellate court reviewing an ineffective assistance of counsel claim must not scrutinize trial counsel's strategic decision to engage, or not engage, in a particular line of questioning

on cross-examination." *State v. Allah*, 4th Dist. Gallia No. 14CA12, 2015-Ohio-5060, ¶ 23 (internal quotes omitted); quoting *State v. Dorsey*, 10th Dist. Franklin No. 04AP–737, 2005–Ohio–2334, ¶ 22.

{¶43} Appellant's counsel's decision to question K.H. regarding earlier accusations of abuse might have backfired, but we cannot find that it was objectively unreasonable given the circumstances. The record reveals neither Appellant nor Appellee were aware that K.H. would testify to an earlier act of rape by Appellant. As a result, Appellant's attorney had reason to believe K.H.'s earlier accusation was unfounded and would reflect poorly on her credibility. Appellant's counsel was able to establish that K.H. did not tell Ms. Muse about the earlier rape, which did, to some extent, serve the strategy of undermining K.H.'s credibility.

{¶44} Appellant cites *State v. Goldson*, 138 Ohio App.3d 848, 742 N.E.2d 707 (2000), in support of his argument that his counsel was ineffective for having elicited testimony about prior abuse allegations. In *Goldson*, the appellant challenged his conviction for rape and gross sexual imposition on a seven-year-old child. His trial counsel's strategy was to show that the victim's mother was biased against the appellant and sought to obtain retribution against him. Pursuant to this strategy, trial counsel told the jury of the appellant's prior conviction and suggested that the victim's

mother, "knowing of the conviction, fabricated new allegations, using her children to get back at him." *Id.* at 851. The appellate court found that this strategy was "ill-conceived" because the critical witnesses in the case were the victim and her nine-year-old brother, not the victim's mother. *Id.* If the victim's mother had been a victim, attacking her credibility might have been a valid strategy, but she was not. Consequently, the "gratuitous revelation of Goldson's prior sex offense with a child virtually handed a conviction to the state." *Id.*

{¶45} The key distinction between this case and *Goldson* is that the trial strategy in this case was to undermine the credibility of the victims, not a witness whose testimony was not critical. Thus, the strategy itself was not ill-conceived. When cross-examining any witness, there is always a risk that the witness will testify to new or different facts than those known to counsel. The decision to pursue a certain line of questioning consistent with a reasonable strategy, despite that risk, will not be scrutinized on appeal.

{¶46} Appellant has not shown that his counsel's performance was constitutionally deficient in his decision to cross-examine K.H. about her prior accusations of abuse. He also has not shown that this decision resulted in prejudice that, if removed, would have changed the outcome of his trial.

Accordingly, this portion of Appellant's third assignment of error is overruled.

{¶47} Appellant's next contention is that his counsel was ineffective because he introduced into evidence a video of B.H.'s interview at Nationwide Hospital. He argues that, without introduction of the video, there was insufficient evidence to convict him on Counts 1 through 5—the counts involving B.H. Appellant argues the trial court would have granted his motion for acquittal under Crim.R. 29 at the close of Appellee's evidence, but for the contents of B.H.'s video interview.

{¶48} This contention is based on a misstatement of the record. In overruling the motion for acquittal, the trial court stated B.H.'s testimony did not address all of the elements of Counts 1 through 5. However, the trial court found that evidence was presented as to all of those elements in *both* B.H.'s video interview and the testimony of Alicia Daniels, the social worker and forensic interviewer at Nationwide Hospital. Thus, there is no merit to the contention that introduction of the video interview alone resulted in the denial of Appellant's motion for acquittal. This portion of Appellant's third assignment of error is also overruled.

{¶49} The final contention in Appellant's third assignment of error is that his counsel rendered ineffective assistance because he failed to

subpoena medical experts to testify regarding certain medical records. The trial court admitted into evidence two medical records, marked as Exhibits 4 and 5. The medical records contained certain diagnosis and opinion evidence that Appellant's counsel sought to have redacted on hearsay grounds. The trial court overruled the hearsay objection and noted, if Appellant had objections to the diagnosis and opinion evidence, he could have called his own medical experts to testify regarding the records.

{¶50} "Generally, a counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Treesh*, 90 Ohio St.3d 460, 490, 739 N.E.2d 749, 778-79 (2001). In addition, an appellant claiming ineffective assistance of counsel based on the failure to call a witness must show that the witness's testimony would have impacted the outcome of the case. *State v. Conrad*, 2019-Ohio-263, ¶ 29. Speculation is not sufficient to meet this burden. *Id.*; *accord State v. Tumey*, 2019-Ohio-219, ¶¶ 41-42.

{¶51} Here, Appellant's argument fails because he offers nothing more than speculation that an expert witness would have contradicted the challenged diagnoses and opinions in Exhibits 4 and 5. The final portion of Appellant's third assignment of error is therefore overruled.

{¶52} Having found that none of the issues raised by Appellant's third assignment of error have merit, it is overruled.

ASSIGNMENT OF ERROR IV

{¶53} In his fourth and final assignment of error, Appellant contends his convictions were against the sufficiency of the evidence and the manifest weight of the evidence. Appellant does not argue any particular element of any particular count is lacking evidentiary support. Instead, he broadly contends that there was insufficient evidence to support his convictions on all counts—the child endangerment conviction under Count 1 and the rape convictions under Counts 2, 5 and 6.

STANDARD OF REVIEW

{¶54} "When a court reviews a record for sufficiency, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146; quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). "The court must defer to the trier of fact on questions of credibility and the weight assigned to the evidence." *State v. Dillard*, 4th Dist. Meigs No. 13CA9,

2014-Ohio-4974, ¶ 27; *citing State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 132.

{¶55} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 119.

{¶56} "Although a court of appeals may determine that a judgment is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins* at 387. But the weight and credibility of evidence are to be determined by the trier of fact. *Kirkland* at ¶ 132. The trier of fact is free to believe all, part, or none of the testimony of any witness, and we defer to the trier of fact on evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *Dillard* at ¶ 28; citing *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23.

LEGAL ANALYSIS

{¶57} As mentioned, the jury found Appellant guilty of one count of child endangerment (Count 1) and three counts of rape (Counts 2, 5 and 6). According to Appellee's Amended Bill of Particulars, Count 1 alleged that Appellant was guilty of the child endangerment of B.H. under R.C. 2919.22, including a finding of serious physical harm. Count 2 alleged Appellant engaged in sexual conduct (specifically, fellatio) with B.H., who was less than thirteen, in violation of R.C. 2907.02. Count 5 alleged Appellant engaged in sexual conduct with B.H. by inserting a body part or instrument into the vaginal or anal opening of B.H., in violation of R.C. 2907.02. Count 6 alleged Appellant engaged in sexual conduct (specifically, fellatio) with K.H., who was less than thirteen years old, in violation of R.C. 2907.02. The Court reviews the evidence supporting each of Appellant's convictions in turn below.

{¶58} R.C. 2919.22 defines the crime of child endangerment, in relevant part, as follows:

> "No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support."

{¶59} Viewed in the light most favorable to the prosecution, Appellee presented evidence establishing the following facts at trial. Appellant was living with B.H.'s mother and acting *in loco parentis* of B.H. On or about June 27, 2017, Appellant gave B.H. pills, after which she slept and drifted in and out of consciousness for a number of days. Appellant and B.H.'s mother took B.H. to Appellant's parents' home. The city bus driver who drove them testified that Appellant was carrying B.H. on the bus. During the entire trip, B.H. was passed out. B.H. was later taken to Nationwide Children's Hospital for treatment. B.H. told Alicia Daniels, Social Worker at Nationwide Children's Hospital, that Appellant gave her pills. Diazepam and Seroquel were found in B.H.'s system, and prescriptions for the same drugs were found at the residence shared by Appellant and B.H.'s mother. Hospital records documenting B.H.'s treatment conclude that she overdosed on opiates and benzodiapines. After initially denying it, Appellant later admitted to the police that he was with B.H. on the day of her overdose. B.H. was born on September 20, 2011 and was five years old on June 27, 2017.

{¶60} From these facts, a rational juror could have found the essential elements of the crime of child endangerment proven beyond a reasonable doubt. Specifically, a rational juror could find that Appellant, while acting

in loco parentis of B.H., who was under eighteen years of age, created a substantial risk to her health or safety by giving her narcotics in violation of a duty of care, protection, or support. R.C. 2919.22(A). The jury's finding that Appellant was guilty of child endangerment also was not against the manifest weight of the evidence. Appellant did not identify the evidence purportedly weighing in favor of his acquittal on Count 1. Upon review, the evidence weighs substantially in favor of the jury's guilty verdict.

{¶61} Counts 2 and 5 alleged Appellant committed rape of B.H. in violation of R.C. 2907.02. That statute provides, in relevant part:

> "(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:
> * * *
> (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

{¶62} As to Counts 2 and 5, Appellee presented the testimony of Alicia Daniels. As mentioned, Ms. Daniels was a Social Worker at Nationwide Children's Hospital when B.H. was admitted. She testified that B.H. disclosed that Appellant had engaged in anal/genital, digital/genital, genital/genital, and oral/genital contact with B.H., as well as other physical abuse. B.H. told Ms. Daniels that Appellant had raped her twice. B.H. explained that "rape" is when the "wee wee" goes in the "pee bug." B.H.

indicated to Ms. Daniels that "wee wee" refers to male genitalia and the "pee bug" is the vaginal area. B.H. was able to identify the male body parts on an anatomical drawing of a boy. B.H. reported that Appellant's "wee wee" had touched her mouth, vagina, and butt. She told Ms. Daniels that Appellant put a yellow stick in her butthole, which "hurted badly." B.H. told Ms. Daniels that there was a hole in her "pee bug" and that Appellant stuck his finger in the hole. B.H. said, when Appellant did so, it "hurt" and "burned." When B.H. asked Appellant to stop, he told her to be quiet or he would kill her. B.H. further told Ms. Daniels that Appellant made her touch his penis. As previously noted, B.H.'s birthdate of September 20, 2011 was established in the record.

{¶63} Based on this testimony, a rational trier of fact could have found Appellant guilty of Counts 2 and 5 for engaging in sexual conduct with B.H., specifically fellatio and the insertion of a body part or instrument into the vaginal or anal opening of B.H. Again, Appellant has not identified the evidence purportedly weighing in favor of his acquittal on these counts. Regardless, upon review, the guilty verdict on both counts was not against the manifest weight of the evidence.

{¶64} Under Count 6, Appellant was charged with engaging in sexual conduct with K.H., who was less than thirteen years old, in violation of R.C.

2907.02. The essential elements that Appellee was required to prove are the same elements discussed with respect to Counts 2 and 5. Namely, Appellee had to show Appellant engaged in sexual conduct with K.H., who was not his spouse and was less than thirteen years of age at the time. Appellee did not have to show that Appellant knew K.H.'s age, and any alleged lack of knowledge is not a defense to the crime.

{¶65} The evidence, viewed in the light most favorable to Appellee, established facts from which a rational juror could have found Appellant guilty on Count 6. Ms. Daniels testified that, in addition to the abuse that B.H. personally suffered, B.H. disclosed Appellant had "humped" K.H. and made K.H. "suck [h]is wee wee." B.H. told Ms. Daniels that Appellant and K.H. had taken their clothes off and Appellant put his "wee wee" in the "pee bug." B.H. explained these terms to Ms. Daniels sufficiently to establish that B.H. was describing sexual conduct. K.H. herself testified that, on two occasions, Appellant provided her with alcohol. After drinking the alcohol, K.H. fell asleep. K.H. testified that one day, approximately two years before trial, Appellant appeared in her room while she was cleaning it. Appellant told her to "suck his dick." When K.H. refused, Appellant began to choke her. After choking her, he slapped her across the face. K.H. testified that Appellant then pulled down his pants and underwear and put his penis in her

mouth. After K.H. told her mother about this incident, her mother confronted Appellant and K.H. went to live with her grandmother. K.H.'s mother also testified that, in May 2017, K.H. came to her "bawling" and said Appellant put his private area in her mouth. K.H. testified that she was born on November 24, 2004.

{¶66} Based on these facts, a rational trier of fact could have found Appellant guilty of the rape of K.H. beyond a reasonable doubt. As with the other challenged counts, Appellant does not identify the evidence that purportedly shows the jury's verdict on this count was against the manifest weight of the evidence. To the contrary, upon review, the manifest weight of the evidence supports the jury's guilty verdict on Count 6.

{¶67} In sum, Appellant's convictions on Counts 1, 2, 5 and 6 were neither against the sufficiency of the evidence nor against the manifest weight of the evidence. Accordingly, Appellant's fourth assignment of error is overruled. As such, having found no merit to any of Appellant's four assignments of error, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

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

The Court finds there were reasonable grounds for this appeal.

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

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

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

Smith, P.J. & Hess, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland, 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.