**[Cite as *State v. Hackett,* 2019-Ohio-1091.]**

# IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DAVID HACKETT,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**
**Case No. 17 MA 0106**

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Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 13-CR-1125

**BEFORE:**
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

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**JUDGMENT:**
Affirmed.

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*Atty. Paul J. Gains,* Mahoning County Prosecutor*, Atty. Ralph M. Rivera,* Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

*Atty. Ronald D. Yarwood*, DeGenova & Yarwood, LTD., 42 N. Phelps Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated: March 19, 2019

**Robb, J.**

**{¶1}** Defendant-Appellant David Hackett appeals his convictions for aggravated murder, rape, kidnapping, and repeat violent offender specifications entered in Mahoning County Common Pleas Court. Appellant raises five assignments of error in his appeal.

**{¶2}** The case was tried to a jury. Before trial was scheduled to start, Appellant moved for a continuance and requested to represent himself. The trial court granted both requests and designated appointed counsel Attorney DeFabio as standby counsel. Appellant's first two assignments of error relate to his decision to represent himself. First, Appellant argues the record does not indicate he knowingly and voluntarily waived his right to counsel. Next, Appellant argues the trial court incorrectly limited the role of standby counsel by indicating Appellant could not ask standby counsel any questions unless he relinquished the right to proceed pro se.

**{¶3}** Appellant's third and fourth assignments of error raise sufficiency and manifest weight of the evidence arguments. The third assignment of error addresses the rape charge and conviction, while the fourth assignment of error addresses the kidnapping charges and convictions.

**{¶4}** The last assignment of error asserts the trial court committed plain error when it instructed the jury that for kidnapping the jury had to find Appellant removed the victim from where she was found or that he restrained her liberty. He asserts the trial court had previously found there was no evidence the victim was removed from where she was found. Therefore, he asserts the trial court should not have included that element in its instruction.

**{¶5}** For the reasons expressed below, all assignments of error lack merit. The convictions are affirmed.

Statement of Facts

**{¶6}** Around 8:00 a.m. on October 14, 2013 the body of a Jane Doe was discovered on the access road to the Water Department off of North West Avenue in Youngstown, Ohio. The victim was found naked except for a brassiere and had been

stabbed multiple times. A knife was located in the vicinity of the body. 5/30/17 Trial Tr. 266.

**{¶7}** Later in the afternoon, Ruth Weaver and Appellant went to the police station to report a person living with them, C.C., as missing. Weaver saw on the news that a body was found and recognized the necklace; the necklace belonged to C.C. Weaver and Appellant were able to identify the Jane Doe as C.C.

**{¶8}** The victim had been living with Weaver, her seven children, and Appellant at 165 New York Avenue in Youngstown for a few months prior to her death. The victim was a drug addict and was often "dope sick" while she was staying with them. Allegedly, the victim worked at a gentlemen's club, made and sold methamphetamine, and stole things to support her habit. Appellant allegedly was her drug dealer.

**{¶9}** Appellant and Weaver were interviewed by the police on October 16, 2013. Appellant claimed that from 7:00 p.m. to 9:00 p.m. on October 13, 2013 he was in Salem, Ohio. 5/30/17 Trial Tr. 417. Weaver was interviewed separately and stated Appellant was at church with her and then went to get her an iced coffee. 5/30/17 Trial Tr. 420-421. The officer who conducted both interviews indicated there was nothing consistent between Appellant and Weaver's stories. 5/30/17 Trial Tr. 422. During the interview, Weaver was shown the knife found near the victim's body; she stated it was Appellant's knife. 5/30/17 Trial Tr. 423. Both Appellant and Weaver's cell phones were taken.

**{¶10}** During the investigation, the police used records from Weaver, Appellant, and the victim's cell phones to determine where each person's phone was on the evening of October 13, 2013. The police also used the phones to see the text messages between the three of them. The victim's phone was not recovered, so records from the phone carrier were used. Likewise, text messages were deleted from Appellant and Weaver's phones. The police were able to recover some text messages from Appellant's phone, but were not able to recover any from Weaver's phone.

**{¶11}** The GPS from the victim's phone indicated that at 8:05 p.m. on October 13, 2013 the phone was in the area where her body was found the next day. Her phone was there for approximately 1 hour before it was removed. 5/30/17 Trial Tr. 472. After that, the GPS from the phone indicated it travelled to the Weathersfield area of Meridian Road. 5/30/17 Trial Tr. 477. At that point the battery ran out or it was turned off. 5/30/17 Trial

Tr. 477. The records from Appellant's cell phone indicate his phone was in the same area of the victim's phone from 8:00 p.m. to 9:00 p.m. on October 13, 2013. 5/30/17 Trial Tr. 473. The phone records indicated the phone was not in Salem, Ohio. 5/30/17 Trial Tr. 483. Weaver's phone was not in the area of where the victim's body was found on October 13, 2013 between 8:00 p.m. and 9:00 p.m. 5/30/17 Trial Tr. 479.

**{¶12}** There were frequent short text messages between Appellant and the victim prior to her death. 5/30/17 Trial Tr. 481. Those text messages indicated the two had planned to meet prior to the victim's death to use drugs. According to the text messages they had planned to take the vehicle with a "curtain." Surveillance video recovered from a business close to where the victim's body was found showed a dark conversion van entered the property around 8:00 p.m. on October 13, 2013 and left around 9:00 p.m. There were text messages between Weaver and Appellant during and after that time. 5/30/17 Trial Tr. 485. Those text messages were deleted and the police were not able to recover them. 5/30/17 Trial Tr. 485.

**{¶13}** A conversion van was found at Appellant's residence on October 16, 2013. 5/30/17 Trial Tr. 412. The police searched the van and took samples of blood found in the van. The victim's DNA was found on the steering wheel. 5/30/17 Trial Tr. 517.

**{¶14}** After the interview with police, Weaver allowed the police to search her residence. A pair of jeans Appellant wore on the night of October 13, 2013 were recovered from the house; testing was performed on the jeans. There was blood found on the jeans and the results indicated it contained the victim's DNA. 5/30/17 Trial Tr. 512. The waistband of the jeans was tested and it contained DNA from both the victim and Appellant. 5/30/17 Trial Tr. 512.

**{¶15}** The knife that was recovered from the area where the victim's body was found was also tested. Weaver identified this knife as Appellant's knife. There was a blood stain on the knife blade that contained the victim's DNA. 5/30/17 Trial Tr. 510. An additional swabbing from the blade contained Weaver's DNA. 5/30/17 Trial Tr. 510. Appellant was excluded as a contributor to the DNA found on the knife blade. 5/30/17 Trial Tr. 510. Samples were taken from the handle of the knife. 5/30/17 Trial Tr. 510. It was determined that the DNA found on the handle was from more than one person, however the victim was a major contributor of the DNA. 5/30/17 Trial Tr. 510.

**{¶16}** An autopsy of the victim's body was performed and samples were taken for a sexual assault kit. The medical examiner indicated the victim had been stabbed 81 times and observed defensive wounds. 5/30/17 Trial Tr. 626, 631. The knife that was found at the scene was determined to be consistent with the knife that inflicted the victim's wounds. 5/30/17 Trial Tr. 640. Only two of the stabs wounds were lethal; one stabbing to the carotid artery and another stabbing to the right collarbone region. 5/30/17 Trial Tr. 632-633. The cause of death was lack of oxygen to her body. 5/30/17 Trial Tr. 634. The stabbing of the carotid artery caused lack of blood flow to her brain and thus, a lack of oxygen to her brain. 5/30/17 Trial Tr. 633. There was also severe damage to her left lung, which additionally meant she was not getting oxygen to her body. 5/30/17 Trial Tr. 634. Some of the stab wounds happened after or near the time of death. 5/30/17 Trial Tr. 638. It could not be determined in which order the wounds occurred; however, it was determined that incapacitation would have happened within 60 seconds to 2 minutes of the first of either fatal wound. 5/30/17 Trial Tr. 639, 646. The manner of death was classified as homicide. 5/30/17 Trial Tr. 643.

**{¶17}** The autopsy included a toxicological analysis and three major drugs were found in the victim's system – amphetamines, cocaine, and morphine. 5/30/17 Trial Tr. 635. The amphetamines included methamphetamine, amphetamine, and pseudoephedrine, which are commonly present in Ecstasy. 5/30/17 Trial Tr. 635-636. The morphine found in her system was specific to heroin. 5/30/17 Trial Tr. 637.

**{¶18}** Testing performed on the vaginal swab determined Appellant and all of his male paternal relatives could not be excluded as a possible contributor to that DNA. 5/30/17 Trial Tr. 590-591.

**{¶19}** Appellant was indicted for aggravated murder, a violation of R.C. 2903.01(B)(F); rape, a violation of R.C. 2907.02(A)(2)(B); and two counts of kidnapping, violations of R.C. 2905.01(A)(2)(C) and R.C. 2905.01(A)(4)(C). 10/24/13 Indictment. The aggravated murder count included four death penalty specifications – R.C. 2929.04(A)(3), R.C. 2929.04(A)(5) and two R.C. 2929.04(A)(7) specifications. The rape and kidnapping counts included repeat violent offender specifications as enumerated in R.C. 2941.149.

**{¶20}** Appellant pled not guilty to the charges and was represented by two appointed counsel – Attorney Maro and Attorney DeFabio. In 2016, the state moved to

dismiss the death specifications, which was granted. 1/22/16 Motion; 1/28/16 J.E. As a result, Attorney Maro was dismissed from the case, and the case proceeded with Attorney DeFabio representing Appellant. 1/28/16 J.E. Jury trial was scheduled for January 18, 2017. On that date, Appellant orally moved to proceed pro se and for a continuance. 1/20/17 J.E.; 1/18/17 Tr. 2. After a colloquy with Appellant, the trial court granted the request and ordered Attorney DeFabio to be standby counsel. Tr. 1/20/17 J.E.; 1/18/17 Tr. 9-16. Trial was set for May 30, 2017. 1/20/17 J.E.

**{¶21}** On March 31, 2017 Appellant filed a pro se request for full assistance of standby counsel. 3/31/17 Motion. A hearing was held on this motion and the trial court explained the role of standby counsel and that it does not include hybrid representation. 3/31/17 Tr. 5. The motion was overruled. 4/14/17 J.E. A written waiver of counsel was executed and filed on April 13, 2017.

**{¶22}** The trial proceeded on May 30, 2017. Appellant was found guilty of all offenses and of the repeat violent offender specifications. 6/9/17 J.E.; 6/12/17 J.E. Appellant was sentenced to life without parole for aggravated murder and eleven years for rape. The two kidnapping counts merged with the aggravated murder count for purposes of sentencing. Appellant was advised that as part of his rape sentence he would be subject to three years of postrelease control and he was advised of the consequences of violating postrelease control. 6/9/17 J.E.

**{¶23}** Appellant timely appealed his convictions.

First Assignment of Error

"The trial court deprived Appellant of his right to counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, by failing to make sure that his waiver of counsel was made knowingly, intelligently, and voluntarily."

**{¶24}** Appellant argues the trial court was more interested in attempting to talk him out of representing himself then determining if the waiver was made knowingly, intelligently, and voluntarily. He contends the court never asked Appellant about his education or discussed the possible defenses or mitigation of charges. He also asserts he was not aware he could not have hybrid representation.

**{¶25}** The state argues the record includes the transcript of the hearing where Appellant moved to proceed pro se and the transcript where he asked for full assistance

of standby counsel and those transcripts along with the written waiver of assistance of counsel demonstrates Appellant knowingly and voluntarily waived the right to counsel. The state does not address the specific arguments that Appellant was not advised about possible defenses or mitigation of charges, or asked about his education.

**{¶26}** The Sixth Amendment to the United States Constitution provides that criminal defendants shall have the right to the assistance of counsel for their defense. The Sixth Amendment's guarantee of counsel also includes the right of self-representation. *State v. Johnson*, 112 Ohio St.3d 210, 2006–Ohio–6404, ¶ 89, citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

**{¶27}** To establish an effective waiver of the right to counsel, the trial court must make sufficient inquiry to determine whether the defendant fully understands and intelligently relinquishes that right. State v. *Gibson,* 45 Ohio St.2d 366, 345 N.E.2d 399 (1976), paragraph two of the syllabus. Crim.R. 44 requires waiver of counsel to be made in open court and for a serious offense, such as the one before us, the waiver must be in writing. Crim.R. 44(C).

**{¶28}** The Ohio Supreme Court has mentioned:

> "To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter."

*Gibson,* 45 Ohio St.2d at 377, quoting *Von Moltke v. Gillies* , 332 U.S. 708, 723, 68 S.Ct. 316, 92 L.Ed.2d 309 (1948).

**{¶29}** The Ohio Supreme Court once again reiterated the factors to consider for a valid waiver in 2004. *State v. Martin,* 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 277, quoting *Gibson* quoting *Von Moltke*.

**{¶30}** Furthermore, in order for the defendant to competently and intelligently choose self-representation, he should be made aware of the dangers and disadvantages of self-representation so that the record will establish that "'he knows what he is doing and his choice is made with eyes open.'" *Faretta* at 835, quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942). However, there is no single test to determine if a defendant has knowingly, intelligently, and voluntarily waived his right to counsel. *State v. Mootispaw*, 4th Dist. No. 09CA33, 2010–Ohio–4772, ¶ 21. Instead, appellate courts should independently examine the record, i.e., conduct a de novo review, to determine whether the totality of circumstances demonstrates a knowing, intelligent, and voluntary waiver of the right to counsel. *Id*.

**{¶31}** The waiver hearing transcript is 23 pages long. The trial court at length discussed the implications of self-representation. The trial court asked Appellant if he had an understanding of the rules of evidence and criminal procedure. 1/18/17 Counsel Waiver Tr. 9-10. Appellant indicated his familiarity with those rules was limited. 1/18/17 Counsel Waiver Tr. 10. The court explained Attorney DeFabio had years of experience and understanding of those rules. 1/18/17 Counsel Waiver Tr. 10-11. The court stated that if Appellant chose to represent himself he would be bound by those rules and due to his limited understanding of the rules he might not be able to "proceed and present a defense that you wanted presented because you don't know how to present it." 1/18/17 Counsel Waiver Tr. 11. The court also explained that it could not tell Appellant how to ask questions if the state lodged an objection. 1/18/17 Counsel Waiver Tr. 11. The court then explained that if he represented himself, was convicted and appealed, he could not raise ineffective assistance of counsel on appeal. 1/18/17 Counsel Waiver Tr. 11-12.

**{¶32}** The trial court also explained the nature of the charges and the ranges of penalties. 1/18/17 Counsel Waiver Tr. 12-15. The trial court indicated that if it granted the request of self-representation, it would appoint Attorney DeFabio as standby counsel. 1/18/17 Counsel Waiver Tr. 16. The trial court discussed the Crim.R. 11 plea agreement that was offered by the state. The state offered to amend count one to murder, which would carry a sentence of 15 years to life; ask for the sentences for counts two through four to run concurrently with count one; and it would dismiss the repeat violent offender specifications attached to counts two, three, and four. 1/18/17 Counsel Waiver Tr. 17-

18. Appellant indicated he had already rejected that offer and was still rejecting that offer. 1/18/17 Counsel Waiver Tr. 18-19.

**{¶33}** After all the advisements, Appellant still expressed a desire to proceed pro se. 1/18/17 Counsel Waiver Tr. 15, 19. The trial court granted Appellant's request, however, it cautioned:

> All right. I cannot advise you strongly enough that I would discourage any individual from representing themselves, especially when that person acknowledges that they have a limited familiarity with the Ohio Rules of Evidence and a limited familiarity with the Ohio Rules of Criminal Procedure. I think you are asking for disaster. And again, I'm not getting to the issue of the timeliness of this motion yet, but I'm trying to go through this discussion with you to attempt to convince you that you are far better off with an attorney who has experience trying cases like this than if you were to proceed on your own. So I'm going to turn it over to you. What are your thoughts?
>
> * * *
>
> Again, I am strongly cautioning you that I think you are making a mistake proceeding pro se, but it's your right. If you start this trial, whether you try to give opening statements, when you try to question witnesses, if during the trial you recognize that you're in over your heard and want Attorney DeFabio to jump in at that point in time, I would allow that, but he may be unable to repair any damage that you may have done acting as your own attorney without knowing the rules of evidence or the rules of criminal procedure. Do you understand?

1/18/17 Counsel Waiver Tr. 15, 16-17.

**{¶34}** In addition to the above colloquy, a written waiver was executed. 4/13/17 Waiver of Counsel. It listed the offenses and punishments. 4/13/17 Waiver of Counsel. Also included were advisements on the perils of representing oneself:

> I understand that the services of a lawyer can be of great value in determining whether the charges against me are sufficient as a matter of law, whether the procedures used in investigating the charges and obtaining

> evidence against me, including any statements I may have made, were lawful, whether an act I may have committed actually amounts to the offense of which I am charged, whether I have any other valid defense to the charges, and if I am found guilty, whether I should be placed on community control, be required to pay a fine, or be sentenced to term of imprisonment. I understand that if I am found guilty of the offense charged the court may sentence me to a term of imprisonment even though I have given up my right to a lawyer. I understand that if I am convicted I will have a right to appeal my case.
>
> I understand that if I choose to represent myself the court will hold me to the same rules of evidence and procedure that a lawyer must follow. I understand that my lack of knowledge of these rules will not prevent the court from enforcing them. I understand that if I am convicted I will have a right to appeal my case, but my lack of knowledge of legal procedure or evidentiary rules may result in waiving review of certain issues on appeal.

4/13/17 Waiver of Counsel.

**{¶35}** The oral and written advisements clearly informed Appellant of the nature of the charges and the punishments if convicted of those offenses. Appellant was also clearly advised of the dangers and disadvantages of self-representation so that he could make a knowing and intelligent determination of whether to waive counsel and proceed pro se. We disagree with Appellant's characterization that the trial court's advisement was an attempt to talk him out of self-representation. The advisement was a statement about the pitfalls of self-representation.

**{¶36}** Admittedly, as Appellant points out, there was not a discussion of the possible defenses to the charges. However, given the totality of the circumstances and the advisement given, this court concludes the lack of this discussion alone is not enough to find that Appellant did not knowingly, intelligently, and voluntarily waive his right to counsel. The Ninth Appellate District has stated, "It is not necessary that the court 'undertake pseudo-legal representation of a defendant by specifically advising him of possible viable defenses or mitigating circumstances * * *.'" *State v. Yeager*, 2018-Ohio-

574, 106 N.E.3d 274, ¶ 6 (9th Dist.), citing *State v. Bloodworth*, 9th Dist. No. 26346, 2013-Ohio-248, ¶ 12, quoting *Ragle*, 2005-Ohio-590 at ¶ 12. "[A] broader discussion of defenses and mitigating circumstances as applicable to the pending charges is sufficient." *State v. Trikilis*, 9th Dist. Nos. 04CA0096–M, 04CA0097–M, 2005-Ohio-4266, ¶ 13. "A court may also consider various other factors, including the defendant's age, education, and legal experience." *Id*.

**{¶37}** In *Yeager*, the fact that Yeager had counsel for five months prior to representing himself, he actively participated in the proceedings, and had previously represented himself pro se contributed to the determination that the waiver was intelligent, voluntary, and knowing even though the trial court did not specifically advise on defenses. *Yeager*, 2018-Ohio-574 at ¶ 8, 12.

**{¶38}** Similarly, the Third Appellate District has held a waiver is knowing, intelligent, and voluntary even though the trial court did not explicitly state that there may be "possible defenses to the charges and circumstances in mitigation thereof." *State v. Logan*, 2017-Ohio-8932, 101 N.E.3d 572, ¶ 40 (3d Dist.). The record in *Logan* reflected Logan did "a lot of work on his own" on the case, developed "a lot of theories," and drafted "expansive notes on questions he wanted to ask." *Id*. Logan also asked intelligent questions of the trial court regarding representing himself during the ex parte hearing and Logan had previously represented himself in a criminal case. *Id*.

**{¶39}** When appellate courts have found an advisement to be invalid and the waiver unknowing, unintelligent or involuntary, they have done so when the offender was not advised about multiple things. For instance, the Eighth Appellate District determined a waiver invalid when the trial court failed to advise the offender of the dangers of self-representation, did not review the elements of the charges or any defenses to the charges, and did not advise the offender that if he elected to proceed pro se, he would be held to the same standards as an attorney. *City of Cleveland v. Daniels*, 8th Dist. No. 106136, 2018-Ohio-4773, ¶ 14. *See also Cleveland v. Anderson*, 8th Dist. No. 97787, 2013-Ohio-165, ¶ 10 (Where this court noted that the trial court did not engage in any colloquy with the defendant "advising him of the nature of the charge, the statutory offense included within it, the range of allowable punishment, possible defenses to the charge

and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the matter").

**{¶40}** Although there is no indication in the record Appellant had previously proceeded pro se in a criminal case, this case is more akin to *Logan* and *Yeager* than it is to *Daniels*. Appellant was on parole for aggravated murder and aggravated robbery when the crimes were committed; Appellant had been convicted by a jury in 1979. Thus, Appellant had some understanding of the criminal justice system and the jury process. Appellant had counsel for over three years before he moved to represent himself; the motion was filed on the day trial was to begin. Furthermore, the pro se motions leading up to the trial were researched and well written. The trial court noted this during the hearings on Appellant's Motion for Full Assistance of Standby Counsel. 3/31/17 Tr. 5; 4/13/17 Tr. 2. During these hearings, the trial court sustained Appellant's Brady motion. 4/13/17 Tr. 5. Therefore, given that the trial court made all the other advisements set forth by the Ohio Supreme Court in *Martin* and *Gibson*, the failure to advise on defenses alone is not sufficient, given the facts in this case, to find the waiver invalid.

**{¶41}** Appellant also asserts the trial court did not ask him about his education. There is no specific rule requiring the trial court to inquire about the offender's education. The competence a defendant must possess in order to waive his right to counsel and represent himself "is the competence to waive the right, not the competence to represent himself." *Godinez v. Moran*, 509 U.S. 389, 399, 113 S.Ct. 2680 (1993). A "defendant's 'technical legal knowledge' is 'not relevant' to the determination whether he is competent to waive his right to counsel," and his "ability to represent himself has no bearing upon his competence to choose self-representation." *Id*. at 400, quoting *Faretta*, 422 U.S. at 836. Organized educational achievement does not always have a bearing on the person's ability to intelligently waive counsel. A trial court can determine the ability to waive counsel through the advisements, which is why the advisements are required. *Gibson,* 45 Ohio St.2d at 377, quoting *Von Moltke*, 332 U.S. at 723. Regardless, as explained above, the trial court did ask about Appellant's understanding of the criminal procedures and evidentiary rules. The trial court was also aware that Appellant had committed a previous murder and was on parole when the crimes were committed. This shows a basic understanding of the criminal justice system.

**{¶42}** Appellant also contends the waiver was not intelligently made because he was not aware that he could not have hybrid representation. This argument is unfounded. In Appellant's pro se Motion for Full Assistance of Standby Counsel, he acknowledged he was not entitled to hybrid counsel or to act as co-counsel. 3/31/17 Motion. This motion is lengthy and cited to multiple cases concerning standby counsel and hybrid representation. At the hearing on this motion, Appellant specifically told the court he was not asking for hybrid representation. 3/31/17 Tr. 5. The trial court took the matter under advisement and a second hearing was held where the trial court explained it was overruling the motion. 4/13/17 Tr. 2-4. At this hearing, the trial court explained Appellant was not entitled to hybrid representation. 4/13/17 Tr. 2-4. The hearings and the motion indicate Appellant was aware that he could not have hybrid representation if he proceeded pro se.

**{¶43}** Consequently, considering the entire advisement and all the circumstances, the failure to advise Appellant of the possible defenses did not render the waiver unintelligent, unknowing, and/or involuntary. No one factor is dispositive in determining whether the waiver is valid. *Trikilis*, 2005-Ohio-4266 at ¶ 13. This court concludes the record indicates Appellant knowingly, intelligently, and voluntarily waived his right to counsel.

Second Assignment of Error

"Appellant was denied his Sixth Amendment right to counsel when the trial court incorrectly limited the role of stand-by counsel."

**{¶44}** Appellant contends the trial court incorrectly limited the role of standby counsel; he argues the trial court stated counsel would not be able to participate in any capacity unless Appellant relinquished his right to proceed pro se. Appellant does not cite this court to the portions of the transcript indicating standby counsel's role was impermissibly limited. Appellant acknowledges he was not entitled to hybrid representation, but he asserts he was entitled to the assistance of counsel to explain basic courtroom protocol and rules.

**{¶45}** The state argues Appellant was not entitled to hybrid representation and counsel was not improperly limited. It asserts counsel was present during every court proceeding and was available to Appellant throughout the trial to allow Appellant to ask

questions when the need arose. It contends counsel's assistance was apparent throughout the record and cites to pages in the transcript.

**{¶46}** "In Ohio, a criminal defendant has the right to representation by counsel or to proceed pro se with the assistance of standby counsel. However, these two rights are independent of each other and may not be asserted simultaneously." *Martin*, 103 Ohio St.3d 385, paragraph one of the syllabus. Consequently, the *Martin* Court reaffirmed its determination hybrid representation is not permitted in Ohio. *Id*. at ¶ 31-33.

**{¶47}** The reason hybrid representation is not permitted is because of the issues it potentially causes. Hybrid representation raises troubling issues of who is the ultimate decision maker – counsel or the offender? *Id*. at ¶ 33. The Federal Seventh Circuit Court of Appeals has indicated that the purpose of banning hybrid representation is two-fold: first, hybrid representation allows a defendant to address a jury in his capacity as counsel without being subject to cross-examination in his capacity as a defendant; second, hybrid representation "complicates and prolongs a trial, to the detriment of jurors and the judicial system because there is a queue waiting for attention." *United States v. Oreye*, 263 F.3d 669, 673 (7th Cir.2001).

**{¶48}** Since hybrid representation is not allowed, the question is what is the role of standby counsel? The role of standby counsel was first introduced by the United States Supreme Court and described as aiding "'the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.'" *Martin*, 103 Ohio St.3d 385 at ¶ 28, quoting *Faretta*, 422 U.S. at 834, fn. 46. The United States Supreme Court has indicated standby counsel serves as an important resource for pro se defendants by assisting them to navigate "the basic rules of courtroom protocol" and to "overcome routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals." *McKaskle v. Wiggins*, 465 U.S. 168, 184, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). Our sister districts have explained standby counsel is there to answer the defendant's questions regarding courtroom procedure. *State v. Hardman*, 2016-Ohio-498, 56 N.E.3d 318, ¶ 21 (8th Dist.) ("[S]tandby counsel serves as an important resource for pro se defendants by assisting them to navigate 'the basic rules of courtroom protocol' and to 'overcome routine obstacles that stand in the way of the defendant's achievement of his

own clearly indicated goals.'"); *State v. Owens*, 3d Dist. No. 1-07-66, 2008-Ohio-4161, ¶ 26 ("The role of standby counsel is not to perform legal research for a criminal defendant who chooses to represent themselves at trial. Rather, standby counsel is appointed to attend the trial and answer the defendant's questions regarding courtroom procedure."). The trial court has the authority to limit a pro se defendant's conferences with standby counsel because excessive involvement with standby counsel may destroy the appearance that a defendant is acting pro se. *State v. Crosky*, 10th Dist. No. 06AP-655, 2008-Ohio-145, ¶ 103.

**{¶49}** The Eighth Appellate District has held when a trial court specifically states standby counsel cannot advise the offender at any point that is an impermissible limitation of standby counsel. *State v. Robinson*, 8th Dist. No. 106721, 2018-Ohio-5036, ¶ 16-18. In that case, the trial court specifically advised:

> He is here should you decide that you wish to re-engage in the attorney-client relationship with [counsel]. He's not going to be here to advise you at any point.
>
> The law in Ohio does not allow dual representation. So you deciding to represent yourself means that this is all on your shoulders. You cannot talk with him about your case, about strategy, or about questions.

*Id*. at ¶ 16.

**{¶50}** In holding this limitation was impermissible, the appellate court explained that counsel is permitted to answer a defendant's questions regarding courtroom procedure. *Id*. at ¶ 17, citing *Hardman*, 2016-Ohio-498 and *Owens*, 2008-Ohio-4161at ¶ 26. "Contrary to the trial court's instructions to [Appellant], standby counsel is not appointed to merely sit in the courtroom and wait to see if the defendant changes his mind about representing himself." *Robinson* at ¶ 18. It is noted that in rendering this decision, the appellate court also found the waiver of counsel was not knowing, intelligent, or voluntary. *Id*. at ¶ 9-15, 19. The convictions could have been reversed and the matter remanded for a trial solely on the invalid waiver.

**{¶51}** The Fifth Appellate District has found a permissible limitation of standby counsel where the trial court relegated standby counsel to the back of the courtroom, but

permitted Appellant to talk to counsel at breaks. *State v. Newman*, 5th Dist. No. 2017CA00219, 2018-Ohio-3253, ¶ 27-30. The appellant in *Newman* argued he was denied the opportunity to speak with standby counsel regarding the formulation of questions for one witness. *Id*. at ¶ 28. The appellate court held the transcript pages relied upon revealed this was purely speculation. *Id*. at ¶ 29. "Appellant asked to speak with standby counsel following his cross examination, and re-cross of [the witness]. He stated no reason for his desire to speak with counsel, and further was advised once again that he could speak to standby counsel during a break." *Id*. In reaching this decision, the appellate court relied on the fact that evidence was overwhelming in the case since the victim identified the defendant as the perpetrator of the crime and the defendant's girlfriend turned him in to the police, told the detective he committed the crime, and testified at trial. *Id*. at ¶ 31.

**{¶52}** In the case sub judice, the trial court defined the role of standby counsel at three hearings and prior to the start of trial. The first hearing concerned the motion to proceed pro se. 1/18/17 Tr. At this hearing the trial court granted Appellant's motion and appointed Attorney DeFabio as standby counsel. 1/18/17 Tr. 16. The statements made at this hearing were if Appellant at any point determined he was "in over his head and wanted Attorney DeFabio to jump in" the attorney would be ready to, but might not necessarily be able to repair any damage Appellant caused by representing himself pro se. 1/18/17 Tr. 16-17, 20-21.

**{¶53}** The second hearing was on Appellant's motion for full assistance of standby counsel, which the trial court characterized as a request for Attorney DeFabio to be allowed to be actively and meaningfully involved in assisting Appellant. 3/31/17 Tr. 5. The trial court did not rule on the motion at this hearing, however, it did state that hybrid representation was not permitted. 3/31/17 Tr. 5. In the context of assuring standby counsel received all information Appellant was receiving from the state, the trial court indicated that it was necessary for all information to also be conveyed to standby counsel so if at any point Appellant felt he was "in over his head and wanted standby counsel to jump in" standby counsel would be prepared. 3/31/17 Tr. 6-7.

**{¶54}** The third hearing was the ruling on Appellant's motion for full assistance of standby counsel. 4/13/17 Tr. The trial court denied the motion finding Appellant was

essentially asking for hybrid representation. 4/13/17 Tr. 2. In making the ruling the trial court stated:

> And I know that I've told you in the past, and I will absolutely tell you today and continue telling you that, based upon your recognition that there are obstacles that you face, because you are not a lawyer and not familiar with the rules of evidence, and not familiar with procedures and evidentiary issues that are bound to come up, you, you should take advantage of Attorney DeFabio's experience, his education and ability.
>
> * * * Hybrid representation differs from standby representation in that the defendant and counsel act as co-counsel, sharing responsibilities in preparing and conducting trial.
>
> * * * You have the right either to appear pro se or to have counsel, but you have no corresponding right to act as co-counsel.
>
> And in *Martin*, the Supreme Court reaffirmed that holding, and stated that you have the right to representation by counsel or to proceed on your own with the assistance of standby counsel; but those two rights are independent of each other, and may not be asserted simultaneously.

4/13/17 Tr. 3-4.

**{¶55}** During this hearing, standby counsel stated:

> I just want to add, you know, I read *Martin*, and I've read all these cases, and there are no clearly defined roles for what I am or am not supposed to be doing, other than I know, when it comes to the jury trial, we're never to give the impression that anyone other than him is running the show. And I understand all that.
>
> But to facilitate some of these issues, I had asked last time that [the prosecutor] forward to me anything they're giving to him because, number

> one, obviously, if he needs help with something, I will have had to have read it and reviewed it to be able to say here's how you get this into evidence. That's I guess one of my roles.
>
> But secondly, in case I'm ever called upon in the trial to go forward, I have to know what's out there. So if we could just make sure that – I know she is set to start on the trial, but if I can get everything on PDF sent to me through my email that you provided to him.

4/13/17 Tr. 6-7.

**{¶56}** The trial court did not disagree with standby counsel's assessment of his role. 4/13/17 Tr. 7. In the judgment entry overruling Appellant's request, the trial court summarily denied the Motion for Full Assistance of Counsel. 4/14/17 J.E.

**{¶57}** Immediately prior to voir dire, the trial court further explained the role of standby counsel:

> THE DEFENDANT: May I ask, Your Honor, how do you define the responsibilities or the duties of standby counsel?
>
> THE COURT: If you decide now or during the trial that you are in over your head and ask me to have Attorney DeFabio step in, then he would come in as your attorney. It is nothing more and nothing less than that.
>
> THE DEFENDANT: So in essence, the only time he has a voice, then is if I say I relinquish my defense as pro se.
> THE COURT: Not your defense. That you relinquish your choice to proceed pro se.
>
> THE DEFENDANT: Okay. So my next question would be, if I – we have a trial right now and I wish to present evidence and I don't know how, he can do nothing then, right?

> THE COURT: Correct.
>
> THE DEFENDANT: Is he allowed to speak now?
>
> THE COURT: No. You filed a motion for, in effect hybrid representation, and we've gone over this, too. What you are asking is to have his advice, his counsel, his wisdom, his experience, his education to assist you during the trial, and the Supreme Court of Ohio has clearly said that's improper, that it's hybrid representation.
>
> So his role as standby counsel is if you realize that you are not able, that you don't have the experience or the education to handle your defense, that you say, Judge Durkin, I need Attorney DeFabio now as my attorney.

5/30/17 Trial Tr. 29-31.

**{¶58}** The record is clear the trial court did allow standby counsel to talk with and notify the investigator that was appointed by the trial court for Appellant. 5/30/17 Tr. 200-202. Also, it is clear Attorney DeFabio was at sidebar discussions or conferences held outside the presence of the jury. 5/30/17 Trial Tr. 202, 649-651, 777-778. The trial court's pretrial statements do not indicate Appellant could not ask counsel procedural or evidentiary questions. In fact, the trial court did not correct Attorney DeFabio when he indicated at one pretrial hearing that part of his job as standby counsel was to answer questions about how to get evidence into the record.

**{¶59}** The trial court's statement immediately prior to trial, when considered in isolation, might be seen as an indication Appellant could not ask counsel how to introduce evidence at trial. Case law from our sister districts indicated standby counsel is permitted to answer a defendant's questions regarding courtroom procedure. *Hardman*, 2016-Ohio-498 and *Owens*, 2008-Ohio-4161at ¶ 26. The introduction of evidence could be considered courtroom procedure. However, the statement cannot be considered in isolation; it must be considered in conjunction with all the other trial court instructions on

the role of standby counsel and in conjunction with Appellant's motion for full assistance of the standby counsel.

**{¶60}** In this case, it appears Appellant wanted counsel to be able to ask questions when he could not correctly formulate them and wanted counsel to introduce evidence, which would essentially amount to standby counsel acting as co-counsel. In the motion requesting full assistance of standby counsel, Appellant states standby counsel should be permitted to "proactively engage issues." 3/31/17 Motion. "Standby counsel need not and should not sit mute in the back of the courtroom, unable to actively consult with Defendant, or when necessary, speak on record to advance Defendant's legal and procedural goals in ways he himself is unable to do for want of a lawyer's training." 3/31/17 Motion. Appellant does indicate in the motion that counsel sitting at the table with him would be to ensure compliance with basic rules of procedure. 3/31/17 Motion. However, the statements he makes in this motion are more akin to hybrid representation even though he states he knows that is not permitted.

**{¶61}** From the record, we are unable to discern whether Appellant and standby counsel were permitted to have conversations during breaks. At no time did Appellant ask for a recess to consult with standby counsel. Furthermore, during the entire lengthy trial, Appellant did not have much trouble introducing evidence and questioning witnesses.

**{¶62}** Considering the entire record, we conclude the trial court did not improperly limit the role of standby counsel. This assignment of error lacks merit.

Third Assignment of Error

"Appellant's conviction for rape was based on insufficient evidence and/or was against the manifest weight of the evidence."

**{¶63}** Appellant raises both a sufficiency of the evidence argument and manifest weight of the evidence argument in regard to his rape conviction. "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), paragraph two of the syllabus. Although the concepts are different, some appellate courts have stated, "[a] determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency." *State v. Jones*, 12th Dist.

No. CA2012-03-049, 2013-Ohio-150, ¶ 19. *See also, State v. Freeman*, 8th Dist. No. 106374, 2018-Ohio-3587, ¶ 20; *State v. Dunn*, 4th Dist. No. 15CA1, 2017-Ohio-518, ¶ 85; *State v. Miller*, 2d Dist. No. 25504, 2013-Ohio-5621, ¶ 48; *State v. McCrary*, 10th Dist. No. 10AP-881, 2011-Ohio-3161, ¶ 11; *State v. Zich*, 6th Dist. No. L-09-1184, 2011-Ohio-6505, ¶ 122; *State v. Hill*, 11th Dist. No. 2009-L-004, 2010-Ohio-709, ¶ 15; *State v. Thomas,* 9th Dist. Nos. 22990 and 22991, 2006-Ohio-4241, ¶ 6; *State v. Armstead*, 5th Dist. No. 2004CA00311, 2005-Ohio-1718, ¶ 20. However, in interest of thoroughness each standard will be addressed.

1. Sufficiency of the Evidence

**{¶64}** Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the verdict. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In determining whether the evidence is legally sufficient to support a conviction, "'[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. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, 919 N.E.2d 190, ¶ 34, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. A verdict will not be disturbed unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001). In a sufficiency of the evidence inquiry, appellate courts do not assess whether the prosecution's evidence is to be believed but whether, if believed, the evidence supports the conviction. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79-80 (evaluation of witness credibility not proper on review for sufficiency of evidence).

**{¶65}** Appellant was convicted of first degree felony rape in violation of R.C. 2907.02(A)(2). That section states no person "shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." R.C. 2907.02(A)(2).

**{¶66}** Appellant contends the trial testimony fails to establish Appellant and the victim had sex, let alone that Appellant raped her. He contends the state's evidence

supporting the rape was that the victim's body was found naked, except for her brassiere, and the vaginal swab from the sexual assault kit positively identified seminal fluid. Appellant asserts that evidence did not specifically link him to the seminal fluid; the expert only indicated he could not be excluded as a possible contributor.

**{¶67}** The state counters arguing there was sufficient evidence of rape for the charge to be submitted to the jury. It relies on the fact that the victim was naked except for her brassiere, she was stabbed 81 times, a letter from the victim to her boyfriend in jail stated Appellant hated her and that she would not have sex with anyone else but the boyfriend, and expert testimony established Appellant and all his male paternal relatives could not be excluded as possible contributors to the seminal fluid. The state cites to *State v. Adams* for the proposition that testimony that the victim would have not engaged in sex with the defendant and DNA evidence matching the defendant to the semen sample was sufficient evidence to establish rape in violation of R.C. 2907.02. 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 276.

**{¶68}** Evidence admitted at trial revealed Appellant and the victim were together on October 13, 2013. The GPS coordinates from Appellant's phone indicated Appellant was in the area where the victim's body was found at the same time the victim was there. 5/30/17 Trial Tr. 472-477. This time span was from approximately 8:00 p.m. to 9:00 p.m. on October 13, 2013. 5/30/17 Trial Tr. 472-477. Text messages also showed Appellant and the victim had planned to meet on the night of October 13, 2013 to do drugs and they were going to use a vehicle with a "curtain." Tr. 482; 686. A toxicology analysis was performed during the autopsy; the victim had ecstasy, cocaine, and heroin in her system. 5/30/17 Trial Tr. 635-637. Surveillance video showed a dark colored van arrived to the area around 8:00 p.m. on October 13, 2013 and left around 9:00 p.m. on October 13, 2013. 5/30/17 Trial Tr. 554-555, 659; State's Exhibit 48. Blood on the steering wheel of Appellant's dark conversion van with a curtain was consistent with the victim's DNA and the expert who performed the testing stated that same profile would be found in 1 in 9,700,000,000 unrelated individuals. 5/30/17 Trial Tr. 516; State's Exhibit 150.

**{¶69}** Weaver gave the police jeans she thought Appellant was wearing on October 13, 2013. Those jeans had blood stains on them and were tested for Appellant and the victim's DNA. The test results determined the victim was a major contributor to

the DNA and Appellant was a minor contributor. 5/30/17 Trial Tr. 512; State's Exhibit 150. As to the victim, the expert would have had to test more than one trillion unrelated individuals before she would find one that would be consistent with the major profile on the jeans. 5/30/17 Trial Tr. 514; State's Exhibit 150. As to Appellant, the expert testified that she would have to test 684,900 individuals to find one individual that was consistent with the minor DNA profile. 5/30/17 Trial Tr. 514. A swabbing of the waistband of the jeans was also tested; it contained a mixture of DNA profiles, and it was found Appellant and the victim were both contributors to the DNA found on the waistband. 5/30/17 Trial Tr. 514; State's Exhibit 150.

**{¶70}** The testimony and evidence does indicate the victim was found naked except for her brassiere, which was positioned in a way that partially exposed one breast. 5/30/17 Trial Tr. 535. The coroner collected samples from the victim for a sexual assault kit. Y-STR testing was performed on the swabs taken from the sexual assault kit. Y-STR testing focuses on the male DNA, the Y chromosome. 5/30/17 Trial Tr. 583. The expert stated Y-STR testing is valuable in situations where there is a high quantity of female DNA and it masks the male DNA. 5/30/17 Trial Tr. 584. This happens in the vaginal cavity. 5/30/17 Trial Tr. 584. The testing of the swab taken from the vagina of the victim indicated Appellant and all of his male paternal relatives could not be excluded as a possible contributor. 5/30/17 Trial Tr. 590-591; State's Exhibit 151. The expert explained why in Y-STR testing the term used is "cannot be excluded" as opposed to a regular DNA test where it is an indication of the number of the population. 5/30/17 Trial Tr. 595. The expert further testified:

> For the vaginal swabs, the partial profile, it was seen 0 times in 6,190 individuals of the African American population and 0 times in 7,348 individuals of the Caucasian population. Now, saying that it was seen 0 times does make it a unique profile and it doesn't mean that it came from that individual. So we do a further statistical calculation to come up with a frequency of that profile, like how many times is it possible to see that particular profile.

> And that number, for the African-American population, the frequency of that profile is 1 in 2,070 individuals, but that means that 99.9 percent of the world's population is excluded and could have contributed to that profile. And for the Caucasian population, the number is 1 in 2,457 individuals, and again, 99.99 percent of the Caucasian population is also excluded as having donated that profile.

5/30/17 Trial Tr. 595-596.

**{¶71}** Despite Appellant's insistence that the state did not present evidence the victim and Appellant had sex, this evidence, when viewed in the light most favorable to the state, indicates Appellant and the victim did have vaginal intercourse. The mere fact that the expert testified Appellant could not be excluded as a contributor to the seminal fluid, does not mean it was not his seminal fluid. The statistics as explained by the expert indicate there was a high probability he was a contributor of the seminal fluid. The evidence also shows they were together on October 13, 2013. Therefore, when viewed in the light most favorable to the prosecution, there was evidence of sexual conduct between Appellant and the victim on October 13, 2013. R.C. 2907.01(A)(Sexual conduct includes vaginal intercourse.).

**{¶72}** However, in order to be rape under R.C. 2907.02(A)(2) there must be force or threat of force. "'Force' means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1). The state presented evidence through text messages between the victim and Appellant that she was behind on paying Appellant for drugs. Tr. 679-686; State's Exhibit 159. The victim also told her boyfriend in a letter that she would only have sex with him. State's Exhibit 52. In that letter she also stated things were getting difficult at Appellant and Weaver's house, and Appellant hated her. State's Exhibit 52. Weaver testified Appellant was her boyfriend and she was not aware of any sexual relationship between Appellant and the victim. 5/30/17 Trial Tr. 324. Appellant's knife was identified as being consistent with the murder weapon and it was found close to where the victim's body was found. 5/30/17 Trial Tr. 266-267, 314. When this evidence is viewed in the light most favorable to the prosecution a reasonable person might conclude that Appellant forced the victim to have sex with him to pay off her drug debt and used the knife as the threat of force.

**{¶73}** Consequently, the state produced sufficient evidence of rape; the state met its burden of production.

2. Manifest Weight of the Evidence

**{¶74}** In determining whether a verdict is against the manifest weight of the evidence, an appellate court reviews the entire record, weighs the evidence and all reasonable inferences and determines whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins*, 78 Ohio St.3d at 387. A reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. *Id*. at 390. "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other'." *Id*. at 387.

**{¶75}** An appellate court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against conviction." *Id.* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). This is because determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the facts who sits in the best position to judge the weight of the evidence and the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *State v. Cowans*, 87 Ohio St.3d 68, 84, 717 N.E.2d 298 (1999), citing *State v. Fanning*, 1 Ohio St.3d 19, 20, 437 N.E.2d 583, (1982) (weight of evidence and witness credibility are for trier of fact). Thus, when there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, this court will not choose which one is more credible. *State v. Houston*, 7th Dist. No. 17 NO 0455, 2018-Ohio-2788, ¶ 19.

**{¶76}** As explained above, the state produced evidence Appellant and the victim were where her body was found from about 8:00 p.m. to 9:00 p.m. on October 13, 2013. The GPS coordinates from the phones and surveillance video did not correspond to where Weaver testified Appellant was or where Appellant told the police he was. Appellant claimed to be in Salem, Ohio during that time, but no phone records indicated his phone was in Salem. 5/30/17 Trial Tr. 483. Weaver testified Appellant was with her

for a period of time driving back and forth to church and then went to get her a coffee. 5/30/17 Trial Tr. 308-310. Furthermore, there was also evidence, as discussed above, which if believed by the jury, could lead to a reasonable person to conclude Appellant raped the victim.

**{¶77}** However, text messages to and from Appellant and the victim could lead a jury to believe another version of the events. The text messages do indicate the victim did owe Appellant for drugs and that she would steal things to pay for drugs. While the letter to her boyfriend indicates she would not have sex with anyone else but him, some text messages to and from Appellant could suggest otherwise. One of her text messages to Appellant states, "Just like its ok for me to steal and fuck for drugs and money cuz Im not a good person like ruth." State's Exhibit 159. Another text message implies she was giving oral sex for money to pay her drug debt. State's Exhibit 159. Thus, given some of the text messages it could be determined the sex was consensual, there was no force or threat of force, in exchange for paying off a drug debt.

**{¶78}** However, in order to believe the sex was consensual one would have to reconcile the fact that the victim was killed with a knife identified as the Appellant's. The victim's DNA was on that knife and the knife was found near her body. Also the victim was stabbed 81 times and left on the access road naked, except for her brassiere. She had defensive wounds on her hands. The victim's blood was found on Appellant's pants and in his van on the steering wheel. These factors do not indicate that the sexual encounter was consensual. Rather, it was obtained through force or threat of force.

**{¶79}** Therefore, given the evidence, we cannot conclude the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

3. Conclusion

**{¶80}** The sufficiency and manifest weight of the evidence arguments are meritless. This assignment of error lacks merit.

Fourth Assignment of Error

"Appellant's convictions for kidnapping were based on insufficient evidence and/or were against the manifest weight of the evidence."

**{¶81}** The standards for sufficiency of the evidence and manifest weight of the evidence are set forth above and apply to this assignment of error. As with the previous assignment of error, Appellant simultaneously asserts the kidnapping convictions are based on insufficient evidence and are against the manifest weight of the evidence.

**{¶82}** Appellant was indicted and convicted of two counts of kidnapping, one in violation of R.C. 2905.01(A)(2) and R.C. 2905.01(A)(4). Those sections of kidnapping are defined as:

> (A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:
>
> * * *
>
> (2) To facilitate the commission of any felony or flight thereafter;
>
> * * *
>
> (4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will;

R.C. 2905.01(A)(2)(4).

**{¶83}** In asserting the convictions for kidnapping are based on insufficient evidence and against the manifest weight of the evidence, Appellant relies on the coroner's report which indicated the victim was stabbed 81 times, some of which were inflicted after death. The doctor could not testify in which order the wounds were inflicted and indicated she could have died in as little as 60 seconds from when the attack began or as long as 2 minutes. Appellant asserts the doctor's testimony is all that is known of the attack. He indicates this testimony does not support the conclusion that the victim's liberty was restrained during the attack. He argues there is no way to tell how long the attack was and if it began and ended in the same place. Therefore, he contends the

convictions for kidnapping must be reversed. Appellant then asserts since the rape conviction must also be reversed, the aggravated murder conviction must be modified to murder since the aggravated murder charge was premised on the underlying charges of rape and/or kidnapping.

1. Sufficiency of the Evidence

**{¶84}** Appellant's arguments focus on restraining liberty. To restrain a person of their liberty means to limit or restrain their freedom of movement. *State v. Taylor*, 10th Dist. No. 14AP-254, 2015-Ohio-2490, ¶ 18; *State v. Wingfield*, 8th Dist. No. 69229, 1996 WL 100847 (Mar. 7, 1996). "The restraint need not be for any specific duration or in any specific manner." *Taylor; Wingfield*. Momentary restraint is sufficient to qualify as restraint; the duration of the restraint does not have to be prolonged. *State v. Alghamdi*, 9th Dist. No. 28837, 2018-Ohio-3158, ¶ 5; *State v. Young*, 10th Dist. No. 12AP-314, 2013-Ohio-1247, ¶ 19.

**{¶85}** A knife was used during the commission of the offenses; the victim was stabbed 81 times. The doctor testified:

> [T]here's no wound that causes immediate incapacitation. The most serious wound is the one of the left neck that goes in that carotid artery. If that's the first of the 81 stab wounds, she's going to be incapacitated in a matter of seconds, like 60 seconds' worth of seconds. If that's the last one, then it's less than 60 seconds afterwards because she's already had damage to her lungs and such. So it would be within two minutes of the first wound when she would become incapacitated.

5/30/17 Trial Tr. 639.

**{¶86}** Although the evidence could not establish the order in which the victim was stabbed or how long the attack lasted, that testimony established she was incapacitated within 60 seconds to 2 minutes. The doctor's testimony also established the victim had defensive wounds on her hands and bruising on her left shin and lower leg. 5/30/17 Trial Tr. 626, 630. The duration leading to incapacitation in combination with evidence of defensive wounds and the number of times she was stabbed, when viewed in the light

most favorable to the state, was sufficient to establish the victim's liberty was restrained, even if it was only restrained momentarily.

**{¶87}** The state cites this court to the Ninth Appellate District *Wong* case for the proposition that stabbing someone numerous times could lead a reasonable person to believe the victim's liberty was restrained. *State v. Wong*, 9th Dist. No. 27486, 2016-Ohio-96, ¶ 29. In that case, the stabbing lasted a number of minutes and occurred throughout the house. *Id*. The victim was stabbed 103 times and the appellate court described the attack as "long and brutal" and the victim suffered from an extensive amount of defensive wounds. *Id*. at ¶ 28. Although the victim tried to move away from the aggressor to different rooms in the house that did not mean the victim's liberty was not restrained; a jury could reasonably conclude stabbing a person 103 times was restraining her liberty. *Id*. at ¶ 29.

**{¶88}** That reasoning is sound and applicable to the situation at hand. Consequently, there was sufficient evidence of restraint.

**{¶89}** The other elements are the kidnapping occurring during the commission of another felony and/or the victim's liberty was restrained so Appellant could engage in sexual activity with the victim without her consent. The resolution of the third assignment of error was that there was sufficient evidence of rape. There was also evidence Appellant murdered the victim. His knife was found in close proximity to the victim's body. Cell phone GPS placed the victim and Appellant's phone at the location where the victim's body was found from approximately 8:00 p.m. to 9:00 p.m. on October 13, 2013, the night the victim was killed. Records of text messages between the victim and Appellant indicated the two were meeting that night to use drugs, and the text messages also indicated Appellant was the victim's drug dealer and she was behind in paying him. This evidence was sufficient to establish the remaining elements of kidnapping.

2. Manifest Weight of the Evidence

**{¶90}** Appellant's argument that the kidnapping convictions are against the manifest weight of the evidence is the same argument as the sufficiency argument.

**{¶91}** The jury was in the best position to judge and weigh the evidence presented by the state to establish the elements of kidnapping. Given the evidence presented at trial, a reasonable inference could be drawn that the victim's liberty was restrained. The

logical conclusion is the use of a knife and stabbing a person multiple times is a restraint on the victim's liberty. This court cannot conclude the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

3. Conclusion

**{¶92}** For the above stated reasons, this assignment of error lacks merit. There was sufficient evidence establishing the elements of kidnapping. Likewise, the jury's determination that Appellant committed the crime of kidnapping was not against the manifest weight of the evidence.

Fifth Assignment of Error

"The trial court committed plain error in instructing the jury on a theory of kidnapping that [the victim] was removed from one place to another, as to each of the kidnapping counts, that it had dismissed by way of Crim.R. 29, thereby depriving Appellant of a fair trial and due process as contemplated by both the State and United States Constitutions."

**{¶93}** This assignment of error addresses the jury instruction and the trial court's ruling on the Crim.R. 29 Motion to Dismiss. At the conclusion of the state's case, Appellant moved for a Crim.R. 29 Motion to Dismiss asserting the state presented no evidence of rape or kidnapping. 5/30/17 Trial Tr. 732. In ruling on the motion in regard to the kidnapping charge, the court stated:

> And I'm going to go backwards as it relates to Count Three, the charge of kidnapping, that there is absolutely no evidence that the defendant purposely removed [the victim] from the place where she was found. But it is pled in the alternative. And in the alternative is that or restrained her liberty.
>
> I think construing the evidence in light most strongly in favor of the state, which the court must, the number of stab wounds inflicted on the victim one can argue restrained her of her liberty. The commission of a felony certainly could be the murder. So the Rule 29 motion or judgment of acquittal as to Count Three, kidnapping count, is overruled.

5/30/17 Trial Tr. 739-740.

**{¶94}** During the jury instructions, when the trial court instructed on kidnapping it included an instruction on removing her from the place where she was found. 5/30/17 Trial Tr. 834, 839-840. Appellant contends this instruction was incorrect and should not have been given considering its earlier statement that there was no evidence of removing the victim from where she was found. Appellant admits the plain error doctrine is applicable to this argument because he did not object to the jury instruction as given.

**{¶95}** The state counters arguing Appellant cannot establish plain error because it presented sufficient evidence to support a finding of guilt under the alternative theory. Furthermore, it asserted in regard to alternative forms of kidnapping, jurors are not required to agree on a single means for committing kidnapping.

**{¶96}** Pursuant to Crim.R. 30(A), a party is required to object to a jury instruction after the instruction has been given but before the jury retires in order to raise the issue on appeal. Furthermore, an appellate court is not required to consider an alleged error if it was never brought to the attention of the trial court "at a time when such error could have been avoided or corrected by the trial court." *State v. Carter*, 89 Ohio St.3d 593, 598, 734 N.E.2d 345 (2000). Failing to lodge an objection with the trial court, waives all but plain error. *Id*.

**{¶97}** Pursuant to Crim.R. 52(B), "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. An error in a jury instruction does not constitute a plain error unless, but for the error, the outcome of the trial clearly would have been otherwise. *Id*. at paragraph two of the syllabus.

**{¶98}** There were two counts of kidnapping in the indictment. Both counts were pled in the alternative; the indictment alleged Appellant removed the victim from the place she was found **or** restrained her liberty. 10/24/13 Indictment. The instruction as given is correct on the elements of kidnapping. Although the trial court stated there was no evidence Appellant removed the victim from the place she was found, it found there was evidence of restraint. As explained under the fourth assignment of error, the evidence

does clearly establish restraint. This is not a situation where this court will recognize plain error. The outcome of the trial would not have been different if the jury was only instructed on restraint and not instructed on removal of the victim from the place she was found. This is not an exceptional circumstance where notice of plain error should be taken.

**{¶99}** This assignment of error is meritless.

Conclusion

**{¶100}** All assignments of error lack merit. The convictions are affirmed.

Waite, P.J., concurs.

D'Apolito, J., concurs.

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

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

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**