[Cite as *State v. Roush*, 2013-Ohio-3162.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 12AP-201
v.	:	(C.P.C. No. 10CR-08-4518)
Robert B. Roush,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 18, 2013

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Yeura R. Venters, Public Defender, and *Timothy E. Pierce*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Robert B. Roush ("defendant"), appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to a jury verdict, of four counts of gross sexual imposition in violation of R.C. 2907.05, one count of disseminating matter harmful to a juvenile in violation of R.C. 2907.31, and five counts of rape in violation of R.C. 2907.02. Because (1) the manifest weight of the evidence supports defendant's convictions, (2) defendant was not deprived of the effective assistance of counsel, (3) a statement from an expert allegedly bolstering the veracity of a child declarant amounted to harmless error, (4) defendant's convictions for gross sexual imposition and rape were not allied offenses of similar import subject to

merger, and (5) the trial court failed to make the findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences, we affirm in part and reverse in part, remanding the case for resentencing.

{¶ 2} On August 2, 2010, plaintiff-appellee, State of Ohio ("State"), indicted defendant on four counts of gross sexual imposition, felonies of the third degree, one count of disseminating matter harmful to a juvenile, a felony of the fourth degree, and five counts of rape, felonies of the first degree. The sole victim alleged in the charges was defendant's stepdaughter, K.R. The events giving rise to the indictment occurred between October 2007 and June 2010, when K.R. was between the ages of eight and eleven years old. The abuse came to light in July 2010 when K.R. was diagnosed with genital herpes.

{¶ 3} Defendant had his case tried to a jury. K.R., who was 13- years old at the time of trial, testified before the jury; defendant also testified on his own behalf. After four days of trial, the jury found defendant guilty of each crime charged in the indictment. The court proceeded directly to sentencing, imposing a prison term of five years on each gross sexual imposition conviction, twelve months on the disseminating matter harmful to a juvenile conviction, and ten years to life on each rape conviction. The court ordered that defendant serve the gross sexual imposition and rape sentences consecutively to each other, for an aggregate prison term of 70 years to life. The court classified defendant as a Tier III sex offender.

I. ASSIGNMENTS OF ERROR

{¶ 4} Defendant appeals, assigning the following errors:

> [I.] Counsel for the defense provided ineffective assistance to the Appellant during the trial in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution.
>
> [II.] The Appellant suffered prejudice when Dr. Rodriguez was permitted over objection to offer an opinion which bolstered the veracity of [K.R.'s] statements and as a result the Appellant's right to a fair trial as memorialized in the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution was impugned.

> [III.] The verdict was not supported by the manifest eight of the evidence.
>
> [IV.] The trial court erred in not merging the four gross sexual imposition convictions with the rape convictions in violation of R.C. Section 2941.25(A).
>
> [V.] The trial court erred in imposing consecutive sentences for the gross sexual imposition and rape convictions without making the necessary findings in violation of R.C. 2929.14(C)(4).

{¶ 5} For ease of discussion, we address defendant's third assignment of error first.

II. THIRD ASSIGNMENT OF ERROR—MANIFEST WEIGHT OF THE EVIDENCE

{¶ 6} Defendant's third assignment of error asserts that the manifest weight of the evidence presented at trial does not support his convictions.

{¶ 7} When presented with a manifest-weight argument, we engage in a limited weighing of evidence to determine whether sufficient competent, credible evidence permits reasonable minds to find guilt beyond a reasonable doubt. *State v. Conley*, 10th Dist. No. 93AP387 (Dec. 16, 1993). *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997) (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). In the manifest weight analysis the appellate court considers the credibility of the witnesses and determines whether 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." *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1983). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The jury may take note of any inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, at ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

{¶ 8} Gross sexual imposition in violation of R.C. 2907.05 prohibits any person from having "sexual contact with another, not the spouse of the offender; [or] caus[ing] another, not the spouse of the offender, to have sexual contact with the offender" when the other person "is less than thirteen years of age." R.C. 2907.05(A)(4). "Sexual contact" means "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B). Disseminating matter harmful to a juvenile in violation of R.C. 2907.31(A)(2) provides that "[n]o person, with knowledge of its character or content, shall recklessly * * * exhibit, * * * or present to a juvenile * * * any material or performance that is obscene or harmful to juveniles." Rape in violation of R.C. 2907.02 provides that "[n]o person shall engage in sexual conduct with another who is not the spouse of the offender," if the "other person is less than thirteen years of age." R.C. 2907.02(A)(1)(b). "Sexual conduct" includes vaginal intercourse, fellatio, cunnilingus, and "the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal * * * opening of another." R.C. 2907.01(A).

{¶ 9} The evidence presented at trial demonstrated that K.R.'s mother, M.R., married defendant in October 2007 when K.R. was eight-ears old. M.R., defendant, and K.R. moved into a house located off of Bixby Road in Columbus, Ohio in January 2008; in June 2008, M.R. gave birth to defendant's son and K.R.'s half-brother.

{¶ 10} K.R. explained that defendant began to sexually abuse her shortly after he married M.R. The abuse occurred predominately between 3:00 p.m., when K.R. would return from school, and 5:00 p.m., when her mother would return from work. K.R. explained that the abuse occurred "[a] whole lot of times," but stated that it was hard for her to remember because she "tr[ies] to forget." (Tr. 95.)

{¶ 11} K.R. was able to testify to the various sexual acts which occurred between her and defendant. She stated that defendant used his fingers to touch both the "[i]nside and outside" of her vagina, explaining that this happened "[m]ore than one time." (Tr. 95, 97.) She stated that defendant used his hand to touch her breasts "under [her] clothes" and that it happened "[m]ore than one time." (Tr. 100, 101.) K.R. stated that defendant used "his tongue and his mouth" to touch her breasts and that it

happened "[m]ore than one time." (Tr. 107.) K.R. testified that defendant made her "move [her] mouth up and down" while his penis was inside her mouth, explaining that this happened "more than one time." (Tr. 110.)

{¶ 12} K.R. told the jury that defendant had used his tongue to touch the inside of her vagina and that it happened "[m]ore than one time." (Tr. 103.) K.R. stated that defendant also put his penis "inside the hole of [her] vagina," explaining that it felt uncomfortable. (Tr. 105.) She stated that he would put things on his penis before inserting it into her vagina, explaining that "one time he put this gel stuff on and another time he put a condom on." (Tr. 105.) Although K.R. did not know what a condom was when defendant used it, she eventually learned the name for that object. K.R. also stated that defendant put a vibrator inside her vagina, explaining that the thing was "silver and it was like * * * an oval shape, but skinny." (Tr. 108.) She stated that he put the vibrator inside her vagina "[m]ore than one time." (Tr. 108.)

{¶ 13} K.R. testified that defendant also showed her movies while they were alone in her mother's room. She explained that in these movies "[i]t was people touching other people" while their clothes were off, and that the people would be "putting their things inside of each other." (Tr. 112.) K.R. stated that she was eight or nine when defendant first showed her these movies, and stated that he showed her these movies "[m]ore than one time." (Tr. 113.)

{¶ 14} In early July 2010, when K.R. was eleven-and-one-half-years old, K.R. was preparing to leave Ohio to travel to Tennessee for her annual summer visit with her biological father. K.R. complained to M.R. "about her genital areas being itchy," and M.R. assumed K.R. had a yeast infection. (Tr. 248.) When K.R. arrived in Tennessee, she went swimming, but was only able to stay in the water for a few minutes. She got out of the water and told her father that "her privates were burning." (Tr. 557.) K.R.'s grandmother arranged for K.R. to see Dr. Humberto Rodriguez on July 7, 2010.

{¶ 15} Dr. Rodriguez examined K.R.'s vagina, noting that there were small ulcers around K.R.'s vagina, which appeared "very similar to what we call a herpes lesion." (Tr. 179.) Dr. Rodriguez noted that it was possible for viruses other than the genital herpes virus to cause such lesions, and accordingly drew K.R.'s blood and took swabs of the lesions to determine the cause of the ulcers. Dr. Rodriguez asked K.R. if anyone had

touched her inappropriately and K.R. "denied any molestation or anybody touching her in an inappropriate manner." (Tr. 179.) Dr. Rodriguez scheduled another appointment with K.R. in order to perform a thorough examination on K.R. while she was sedated.

{¶ 16} After the appointment with Dr. Rodriguez, K.R. called her mother and told her that defendant had been touching her inappropriately. K.R. explained that initially she only told her mom "[a] little bit" about the abuse because "it took a lot * * * to tell her a little bit." (Tr. 123.) K.R. called her mother back later that night and gave her more details about the abuse. K.R. described "specific names of DVDs, porn DVDs," and M.R. went and found the specific pornographic DVD K.R. had described. (Tr. 283.) K.R. told M.R. that defendant used some jelly type stuff on her, and M.R. went into her bedroom and found the bottle of K-Y jelly, noting that too much was missing from the bottle to account for the one time M.R. and defendant had used the product.

{¶ 17} M.R. confronted defendant that evening and told him that K.R. said "that he was touching her." (Tr. 251.) Defendant "looked shocked and he said, 'Well, why is she saying my name?' " (Tr. 251.) Defendant told M.R. that K.R. needed "to stop saying [his] name," and asked M.R. to convince K.R. to say that someone else had touched her. (Tr. 252-55.) M.R. traveled to Tennessee the next day and took K.R. to the local children's hospital to have a rape kit examination performed. M.R. spoke to defendant while she was in Tennessee, and defendant told M.R. that "it was important that [she] intervene" and talk to K.R. before K.R. had a chance "to talk to professionals." (Tr. 257.)

{¶ 18} On July 9, 2010, K.R. returned to see Dr. Rodriguez. K.R.'s father and grandmother informed Dr. Rodriguez that K.R. had confessed to them that defendant had touched her "in the wrong way, touch[ed] external genitalia, tr[ied] to kiss external genitalia, put[] his fingers inside and also, like she said, 'put his thing all of the way in and hurt [her] a lot.' " (Tr. 186-87.) K.R. also told Dr. Rodriguez about some of the abuse, admitting that it had been going on for quite a while, but explaining that she could not remember exactly how many times it had occurred. K.R. explained that she initially told Dr. Rodriguez that no one had molested her because she "was scared" and because it was not something that she wanted to talk about. (Tr. 121.)

{¶ 19} Dr. Rodriguez examined K.R., noting that the ulcers on her vagina were visible to the naked eye. He also noted that the "opening of the vagina was somewhat

bigger than normal for an eleven-and-a-half-year-old." (Tr. 197.) Dr. Rodriguez observed that K.R.'s hymen was attenuated and that she had "very discrete abrasions" on the inside of her vagina, both of which were evidence that something had gone into K.R.'s vagina. (Tr. 200.) K.R. denied self-stimulation and had not yet started her period. Dr. Rodriguez explained that, upon finding the herpes-like lesions, the attenuated hymen, and the abrasions, it was apparent that K.R. had been molested, as "[t]here [was] no other way to explain all of those findings." (Tr. 201.)

{¶ 20} When M.R. returned to Ohio, defendant confessed to touching K.R. inappropriately. Defendant told M.R. that, when K.R. was nine, she told defendant that she had watched one of his pornographic movies, and that she had some questions about it. Defendant told M.R. that K.R. "started asking him questions regarding touching and private parts and that she started touching him." (Tr. 263.) Defendant stated that he initially told K.R. to stop, but then he admitted that he started touching her. M.R. reported the details of her conversation with defendant to police the following morning.

{¶ 21} M.R. explained that during the time after K.R.'s allegations but before defendant was arrested, defendant suggested several things they could do to make it appear as though K.R. had falsely accused defendant. Defendant suggested that they say that K.R. was having sex with defendant's nephew, "pay the babysitter to have her say that [K.R.] was running around with older boys," and that defendant "go out and get a prostitute" in the hopes of catching a sexual transmitted disease "like chlamydia or something" other than herpes, to serve as evidence that defendant had not had sex with K.R. (Tr. 267-69.) Defendant told M.R. that he "was willing to go and get help * * * for his sickness" and that he would "sign over the deed of the house completely * * * if [she] would just make this all go away." (Tr. 269.)

{¶ 22} The swabs from the lesions on K.R.'s vagina revealed that the lesions were genital herpes. A medical technologist tested defendant's blood for antibodies which form after someone has been exposed to genital herpes. Defendant's blood tested positive for those antibodies, revealing that defendant has the genital herpes virus.

{¶ 23} When police searched the residence after defendant's arrest, they found K-Y jelly, a silver vibrator, pornographic DVDs, and a box of condoms in M.R. and

defendant's room of the Bixby Road house. K.R. provided the detectives with a detailed description of some of the writing on the pornographic DVDs, and the DVDs they collected matched the description K.R. provided.

{¶ 24} Defendant's mother and sister both testified on behalf of the defense. Defendant's mother explained that K.R. become "very jealous" when defendant married M.R., because "all of a sudden her mother's attention was going towards" defendant. (Tr. 594.) Defendant's sister also testified that as defendant and M.R. became closer, K.R. became more jealous of the time they were spending together. Defendant testified that he did not commit the crimes charged and that he would never touch K.R. inappropriately. He also stated that he had never had a herpes outbreak, and that nothing had ever happened to cause him to think that he had herpes.

{¶ 25} Defendant's arguments in support of his manifest-weight challenge primarily assert that K.R. and M.R. were not credible witnesses. Defendant notes that while M.R. testified that defendant "admitted to her that he had been sexually abusing [K.R.] this was directly refuted by [defendant's] own testimony," indicating that he did not commit the crimes charged. (Appellant's brief, 22.) Defendant contends that K.R.'s credibility can be challenged because she had a motive to lie about the abuse resulting from her jealousy towards defendant, her assertions regarding the abuse were vague, and because "in the face of questioning by Dr. Rodriguez, [K.R.] initially denied that anyone had been touching her inappropriately." (Appellant's brief, 22.) Dr. Rodriguez explained at trial that, in cases of chronic sexual molestation, it is "very, very characteristic" for the child to fail to disclose the abuse initially. (Tr. 189.)

{¶ 26} The instant case was tried to a jury. Determinations regarding credibility and the weight of the evidence remain within the province of the jury. *DeHass* at paragraph one of the syllabus. Although, under a manifest weight of the evidence analysis, we are able to consider the credibility of the witnesses, "in conducting our review, we are guided by the presumption that the jury, * * * is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *State v. Tatum*, 10th Dist. No. 10AP-626, 2011-Ohio-907, ¶ 5, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). The jury found K.R. and M.R. to be credible witnesses, as it

was entitled to do, and the trial evidence does not indicate that K.R. or M.R. were completely lacking in credibility.

{¶ 27} Defendant contends that Dr. Rodriguez's conclusion that K.R. has genital herpes is "suspect," because K.R.'s blood tests returned negative results and a separate medical report indicated that K.R. had streptococcus beta hemolytic. (Appellant's brief, 23.) Although the swabs of the lesions on K.R.'s vagina tested positive for genital herpes, K.R.'s blood tests returned negative results for the genital herpes antibodies. Dr. Rodriguez explained that the negative blood test results were not unusual, as the genital herpes antibodies form in the blood between eight to ten weeks after the first herpes outbreak and the July 2010 outbreak was K.R.'s first genital herpes outbreak. Moreover, M.R. and K.R. both testified that K.R. has genital herpes and has had approximately four outbreaks since her first one. M.R. explained that K.R. "has some medication that she has to take when she has an outbreak." (Tr. 272.)

{¶ 28} The urinalysis performed on K.R. at children's hospital revealed that she was "positive for streptoccus beta hemolytic," a bacteria which can cause strep throat or vaginitis in pre-pubescent girls. (Tr. 228.) Dr. Rodriguez explained that while vaginitis may cause vaginal discharge and itching, symptoms K.R. had when she came to his office, vaginitis would not cause ulcers, which were also present on K.R.'s vagina. Dr. Rodriguez explained that "if you have herpes, your immune system will be shocked by the herpes * * *. And as secondary things to the herpes, you could develop vaginitis and an overgrowth of bacteria in the vagina." (Tr. 234.) The jury heard the evidence regarding K.R.'s blood test results, the test results from the lesions on her vagina, the streptoccus diagnosis, and Dr. Rodriguez's testimony explaining how a streptoccus diagnosis and a genital herpes diagnosis are consistent with one another. There was evidence in the record to support the conclusion that K.R. had genital herpes.

{¶ 29} Defendant additionally asserts that K.R.'s allegations against defendant are subject to considerable doubt because the State amended Count 7 of the indictment, which charged defendant with rape premised on the sexual conduct of anal intercourse. The State asked K.R. whether anything ever happened to her "behind or [her] bottom," and she said "[n]o." (Tr. 109.) Following K.R.'s testimony, the State moved to amend Count 7, to change the sexual conduct from anal intercourse to vaginal intercourse, and

defendant did not object. Defendant asserts that the amendment demonstrates that K.R. was not trustworthy as "[p]resumably" she supplied the information to the State to support the rape charge alleging anal intercourse. Defendant's contentions regarding the amended charge lack merit. K.R. testified and the jury was able to judge her credibility firsthand. The amended rape charge does not support a finding that defendant's convictions were against the manifest weight of the evidence.

{¶ 30} Defendant's final contention under his manifest-weight challenge centers around DNA evidence recovered from two pairs of pajama bottoms found on the basement floor of the Bixby Road house. Detective John Banche, who found the pajamas, stated that the pajamas appeared to belong to a child. The State asked K.R. if she ever put on pajamas after defendant abused her, and she responded "I don't think so." (Tr. 117.) K.R. also stated that when she got home from school, which is when the abuse would typically occur, she would stay in her school clothes.

{¶ 31} Forensic scientists employed by the Bureau of Criminal Identification and Investigation tested the pajamas for the presence of semen, but did not find any. The pajamas did test positive for amylase, a bodily fluid which is found in high concentrations in salvia, but may also exist in smaller quantities in other bodily fluids. While the scientists identified K.R.'s DNA on the pajamas, the DNA results were inconclusive regarding defendant. The scientists sent the pajamas to another laboratory to have "Y-STR" testing performed, which is "just a male specific test." (Tr. 520.) Because Y-STR testing tests only for Y chromosome DNA, "paternal relatives, males in the same family line are going to have the same Y chromosome profile." (Tr. 434-35.) Thus, a positive match to defendant's Y chromosome DNA would equally match defendant's son, who also lived in the Bixby Road house.

{¶ 32} The first pair of pajamas contained Y chromosome DNA which was entirely consistent with defendant's Y chromosome DNA on all 17 markers. The second pair of pajamas revealed only a "partial profile," and matched defendant's Y chromosome DNA "at three of the 17 markers tested." (Tr. 448.) Defendant presented an expert who testified that, on the second pair of pajama pants foreign "alleles," or DNA fragments, were present which were "not consistent with either [K.R. or defendant], which would therefore be coming from another contributor." (Tr. 650.)

Defendant's expert admitted that there were no foreign alleles on the first pair of pajamas.

{¶ 33} Defendant asserts that "the recovery of [defendant's] DNA along with that of an unknown contributor makes the pajama bottom evidence ambiguous at best." (Appellant's brief, 24.) We agree with defendant that the evidence regarding the pajamas was ambiguous, but for different reasons. K.R. stated that she did not think she ever wore pajama pants after the abuse, the bodily fluid on the pajama pants was identified as amylase not semen, and, pursuant to the Y-STR testing, defendant's son, who also lived in the Bixby Road house, could not be ruled out as a possible contributor to the DNA found on the pajamas.

{¶ 34} In the instant case, however, the DNA evidence on the pajama pants was not critical because the remaining evidence amply supported defendant's convictions. K.R. testified at trial and detailed the various acts of sexual abuse which occurred between her and defendant while she was between the ages of eight and eleven. Dr. Rodriguez explained that K.R.'s vaginal opening was larger than normal for a girl her age, her hymen was attenuated, she had abrasions on the inside of her vagina, and she had genital herpes. Defendant's blood test revealed that he had genital herpes. Defendant also admitted to touching K.R. inappropriately. Defendant's conduct following K.R.'s allegations, such as suggesting various ways to make it appear as though K.R. had falsely accused him, was also highly indicative of defendant's guilt.

{¶ 35} Engaging in the limited weighing of the evidence which we are permitted, we cannot say the jury clearly lost its way when it found defendant guilty of four counts of gross sexual imposition, one count of disseminating a matter harmful to a juvenile, and five counts of rape, beyond a reasonable doubt. Accordingly, we find that the manifest weight of the evidence supports defendant's convictions. Defendant's third assignment of error is overruled.

III. FIRST ASSIGNMENT OF ERROR—INEFFECTIVE ASSISTANCE OF COUNSEL

{¶ 36} Defendant's first assignment of error asserts that he was denied the effective assistance of trial counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution. Defendant argues that his

counsel rendered ineffective assistance by failing to secure a certain physician to testify and by failing to object to statements made by Dr. Rodriguez.

{¶ 37} In order to succeed on a claim of ineffective assistance of counsel, defendant must satisfy a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Defendant must show that (1) defense counsel's performance was so deficient that he was not functioning as the counsel guaranteed under the Sixth Amendment to the United States Constitution, and (2) defense counsel's errors prejudiced defendant, depriving him of a trial whose result is reliable. *Id.* To establish that counsel's performance was deficient, defendant must prove that counsel's performance fell below an objective standard of reasonable representation. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 133. In evaluating counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances the challenged action 'might be considered sound trial strategy.' " *Strickland* at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955). To show prejudice, the appellant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 204. The failure to make either showing defeats a claim of ineffective assistance of counsel. *State v. Bradley*, 42 Ohio St.3d 136, 143 (1989), quoting *Strickland* at 697 (finding " 'there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one' ").

A. *Hometown Doctor's Testimony*

{¶ 38} Defendant asserts that his trial counsel was ineffective in failing to secure the presence and testimony of a doctor who examined defendant at Hometown Urgent Care & Workcare Center ("Hometown") in August 2010. Defense counsel explained at trial that he had attempted to contact the doctor, but discovered that the doctor was "in India for the next four months" and accordingly unavailable. (Tr. 26.) Defendant attempted to call the record custodian from Hometown to testify regarding an aftercare guide executed by the Hometown doctor. On the aftercare guide, the Hometown doctor

wrote the following statements: "herpes blood test is inconclusive in determining if someone will develop herpes or has herpes" and "Mr. Roush does not have herpes."

{¶ 39} Defense counsel explained that the Hometown doctor advised defendant "against a blood test because the blood tests are inconclusive." (Tr. 615.) The court asked defense counsel what the doctor's basis was for stating that defendant did not have herpes, and defense counsel responded "I have no idea." (Tr. 616.) Counsel stated that he did not know whether the doctor had run any tests at all. The State objected to defendant's attempt to admit the aftercare guide, asserting that the document was inadmissible hearsay. The court refused to allow the document into evidence.

{¶ 40} The decision to call a witness is generally a matter of trial strategy and, absent a showing of prejudice, does not deprive a defendant of effective assistance of counsel. *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639, ¶ 90 (10th Dist.), citing *State v. Williams*, 74 Ohio App.3d 686, 694 (8th Dist.1991). The failure to call an expert witness and instead rely on cross-examination does not constitute ineffective assistance of counsel. *Id.*, citing *State v. Hartman*, 93 Ohio St.3d 274, 299 (2001). Defense counsel did thoroughly cross-examine the medical technologist who tested defendant's blood for the presence of genital herpes antibodies.

{¶ 41} Defendant asserts that the Hometown doctor's "testimony would have undoubtedly buttressed [defendant's] assertions," because "[p]resumably" the doctor "would have explained his examination procedure and diagnosis of Appellant wherein he concluded that he did not have the [genital herpes] virus." (Appellant's brief, 9.) However, as defense counsel's testimony indicates, the Hometown doctor may not have performed any tests to support the conclusion that defendant did not have herpes. Regardless, because there is no affidavit or other evidence in the record indicating what the Hometown doctor would have said had he testified at trial, defendant's contention that the doctor's testimony would have helped his case is pure speculation. *See State v. Williams*, 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶ 35 (finding no evidence of prejudice resulting from trial counsel's failure to call Wallace to testify where the defendant "did not submit an affidavit from Wallace" and the court did not know "the substance of Wallace's testimony," thus rendering it "pure speculation to conclude that the result of appellant's trial would have been different had Wallace testified"); *State v.*

Stalnaker, 9th Dist. No. 21731, 2004-Ohio-1236, ¶ 9 (because the court had no way of knowing what the witness would have said at trial, it could not find that the witness's failure to appear prejudicially affected the defendant); *State v. Wiley*, 10th Dist. No. 03AP-340, 2004-Ohio-1008, ¶ 30 (same). *See also State v. Reinhardt*, 10th Dist. No. 04AP-116, 2004-Ohio-6443, ¶ 49, citing *State v. Gibson*, 69 Ohio App.2d 91, 95 (8th Dist.1980).

{¶ 42} Because we do not know what the Hometown doctor would have said if he testified at trial, we cannot find that the absence of the doctor's testimony prejudicially affected the outcome of defendant's trial.

B. *Dr. Rodriguez's Testimony*

{¶ 43} Defendant asserts his trial counsel rendered ineffective assistance by failing to object to Dr. Rodriguez's testimony generally under Evid.R. 702(B) and by failing to object to certain remarks made by Dr. Rodriguez. Although the majority of Dr. Rodriguez's testimony concerned his medical observations of K.R., Dr. Rodriguez also offered some opinion statements regarding general characteristics of sexually abused children.

{¶ 44} Defendant initially asserts that his counsel should have objected to Dr. Rodriguez's opinion testimony generally under Evid.R. 702(B) because Dr. Rodriguez did not possess specialized knowledge regarding behavioral characteristics of sexually abused children. Evid.R. 702(B) provides that a witness may testify as an expert when the witness qualifies as an expert by "specialized knowledge, skill, experience, training or education regarding the subject matter of the testimony." " 'It is a general rule that the expert witness is not required to be the best witness on the subject. * * * The test is whether a particular witness offered as an expert will aid the trier of fact in the search for the truth.' " *State v. Tomlin*, 63 Ohio St.3d 724, 728 (1992), quoting *Alexander v. Mt. Carmel Med. Ctr.*, 56 Ohio St.2d 155, 159 (1978). Thus, the individual offered as an expert need not have complete knowledge of the field in question, as long as the knowledge he or she possesses will aid the trier of fact in performing its factfinding function. *Hartman* at 285, citing *State v. Baston*, 85 Ohio St.3d 418, 423 (1999); *State v. D'Ambrosio*, 67 Ohio St.3d 185, 191 (1993).

{¶ 45} Dr. Rodriguez stated that he was an associate professor at the University of Tennessee, in the Department of Obstetrics and Gynecology. Prior to beginning his career at the University of Tennessee in 1986, Dr. Rodriguez obtained his medical degree, completed residency periods in both pediatrics and obstetrics and gynecology, and completed a fellowship in child and family development. Although, at the time of trial, Dr. Rodriguez worked in a program for pregnant teens and children with gynecological problems, he explained that seven years prior he had worked for the Department of Pediatrics as "kind of the second opinion person for the sexual abuse team," providing "[m]edical evaluations and opinions" in cases of sexual abuse. (Tr. 167.) He stated that he worked for the Department of Pediatrics' sexual abuse team for 20 years and evaluated hundreds of children in that position. The court declared Dr. Rodriguez an expert in obstetrics and gynecology.

{¶ 46} Counsel was not deficient in failing to object to Dr. Rodriguez's qualifications under Evid.R. 702(B). Dr. Rodriguez's testimony demonstrated that he was qualified to testify regarding characteristics of sexually abused children by both his medical knowledge and his first-hand experience evaluating hundreds of sexually abused children over the span of 20 years for the Department of Pediatrics' sexual abuse team. Because "[m]ost jurors would not be aware, in their everyday experiences, of how sexually abused children might respond to abuse," Dr. Rodriguez's testimony regarding characteristics of sexually abused children aided the jury in their factfinding function. *State v. Boston*, 46 Ohio St.3d 108, 128 (1989), overruled in part on other grounds by *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267. Although Dr. Rodriguez was admitted as an expert in obstetrics and gynecology, because of his experience in treating hundreds of sexually abused children, he was qualified to provide testimony regarding characteristics of sexually abused children. *Compare Hartman* at 288 (finding that although the expert "was not formally tendered as an expert in crime scene reconstruction bloodstain and blood spatter analysis, [the expert's] education and experience qualified him to provide expert testimony on blood transfers and the freshness of blood").

{¶ 47} Defendant next asserts that his trial counsel was ineffective in failing to object to certain statements made by Dr. Rodriguez. On direct examination, Dr.

Rodriguez explained that during her second visit to his office, K.R. disclosed to Dr. Rodriguez that defendant had been sexually molesting her for quite a while, but explained that she could not remember exactly how many times the abuse had occurred. The following exchange then occurred:

> Q. Now in your work with children in the sexual assault group there, in Tennessee, was that unusual or did you find that unusual that she couldn't remember exactly when it started?
>
> A. No. You need to remember that this little girl was probably about nine at the time that this situation had started, and also the fact that this person was the stepfather.
>
> Q. What impact do those things have on it?
> A. Those two things are important to see, to put yourself in the child's mind. On one hand, the stepfather is an authority figure. Second, also is a provider. And third, is the person that the mother likes.
>
> Then this is kind of a situation of loyalty to this person. At the very beginning what happened to those girls is the fact that they know that this is wrong, they know that this is not supposed to do, but usually by threatening them, and usually that is the first thing they do is to threaten them, if you say anything to anybody, either I kill you or I – anything, whatever threat they will be doing.
>
> Q. Could it be as simple as don't tell anybody?
>
> A. Yeah, don't tell anybody and that will be it. But later what they do is they try to provide gifts or do things for them, and that is the timing in which the child becomes very confused. On one hand, she knows this is not good. And in the other hand, it start liking the situation and become, to be more loyal to this person. And to the point that sometimes those girls don't say anything to anybody until they are outside the home when they are 16, 17, 18 and sometimes when they are in college.
>
> Q. And has that been your experience?
>
> A. Yes.

(Tr. 187-89.)

{¶ 48} Defendant asserts that his counsel should have objected to Dr. Rodriguez's statements regarding threats and gift-giving under Evid.R. 703 because the statements "represent an opinion of Rodriguez's that is not based on the facts presented" in the record. (Appellant's brief, 12-13.) While there was no evidence presented indicating that defendant gave K.R. gifts, K.R. did testify that defendant told her "not to tell," explaining that defendant "made one threat and [she] was scared." (Tr. 159.)

{¶ 49} Evid.R. 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." Defendant's argument regarding Evid.R. 703 is misplaced. Dr. Rodriguez did not testify that defendant had threatened K.R., nor did he state that defendant gave K.R. a gift. Rather, his testimony was that, based on his experience in treating child victims of sexual assault, generally the perpetrators of those offenses will threaten their victims or provide them with gifts in order to engender loyalty from the child.

{¶ 50} Evid.R. 703 requires that the expert testify regarding facts they have perceived, but does not require that the expert "testify on facts specific to the case." *State v. Kaufman*, 187 Ohio App.3d 50, 2010-Ohio-1536, ¶ 130 (7th Dist.). Thus, when an expert testifies regarding general facts they learned through "personal professional experience with children making allegations of sexual abuse," such testimony is "admissible pursuant to Evid.R. 703." *Id.* Dr. Rodriguez's testimony regarding threats and gift giving was based on his personal professional experiences and accordingly admissible under Evid.R. 703. Defendant's trial counsel was not deficient in failing to object to Dr. Rodriguez's statements under Evid.R. 703.

{¶ 51} The State next asked Dr. Rodriguez whether it was unusual that K.R. initially denied any inappropriate touching, only to return two days later and disclose that defendant had been abusing her consistently for quite some time. Dr. Rodriguez said it was not unusual and the following exchange occurred:

> Q. And in your experience with the other children that you have treated or seen, have you had other situations where children don't always tell when they have an opportunity to?

> A. Yes. It is very, very characteristic about what we call chronic sexual molestation in a situation of a stepfather, boyfriend, or the father himself; because those are the three main persons who will molest the children, the female children, is the father, the stepfather, and the boyfriend. And especially if the stepfather, I don't know how long this stepfather has been involved with this child, but the longer they have been involved, the more loyal is the child to that person.

(Tr. 189-90.)

Defendant asserts that his trial counsel should have objected to Dr. Rodriguez's statement regarding stepfathers, as the comment suggests that, since defendant was K.R.'s stepfather "he possessed a greater propensity for abusing female children inasmuch he fits the profile of offenders who typically molest female children." (Appellant's brief, 13.)

{¶ 52} Dr. Rodriguez's general statement that it is characteristic for children of chronic sexual molestation to fail to disclose the abuse was not objectionable. "An expert witness's testimony that the behavior of an alleged child victim of sexual abuse is consistent with behavior observed in sexually abused children is admissible under the Ohio Rules of Evidence." *State v. Stowers*, 81 Ohio St.3d 260, 261 (1998). Because the average factfinder may require assistance in understanding "the characteristics of typical child victims in regard to their disclosure of the abuse," an expert may provide testimony on that topic. *Kaufman* at ¶ 128.

{¶ 53} However, because defendant was K.R.'s stepfather, Dr. Rodriguez's statement that stepfathers are likely to molest female children should have warranted an objection from defense counsel on propensity grounds. *See* Evid.R. 404(A) (providing that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion"). Nonetheless, because of the strength of the evidence against defendant in this case, we cannot find that, had counsel objected to the above statement, the outcome of defendant's trial would have differed. As such, defendant cannot satisfy his burden under *Strickland*.

{¶ 54} Defendant lastly asserts that his counsel was ineffective in failing to object to a response Dr. Rodriguez provided on cross-examination. Defense counsel indicated that because K.R. had an abrasion inside her vagina, presumably she had been scratching herself. Dr. Rodriguez responded that children seldom scratch the inside of their vagina, and noted that K.R. had denied touching herself. Defense counsel then asserted that, because K.R. "had already failed to disclose" the abuse once, "she might have not disclosed [touching herself] to you?" (Tr. 229.) Dr. Rodriguez responded as follows:

> If you make statements about, in general, in general about children who have been abused, okay, children who have been abused, they will tell you the truth 99 percent of the time when given the right situation, they will tell you the truth. They don't lie or stretch anything. They just, given the chance and that they are protected and somebody will tell what will happen and nothing wrong will happen to you, probably they will tell the truth.

(Tr. 229-30.)

{¶ 55} Defendant asserts his counsel was ineffective in failing to object and move for a mistrial following the above statement. In *Boston*, the Supreme Court of Ohio held that "[a]n expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." *Id.* at syllabus. Although the above statement indicates Dr. Rodriguez's belief that generally child victims of sexual assault tell the truth, the statement does not directly constitute an opinion regarding K.R.'s veracity. *See State v. Fitch*, 2d Dist. No. 2002-CA-5, 2003-Ohio-203, ¶ 107 (counsel was not deficient in failing to object to a statement where the statement was simply "expert testimony that abuse complaints by a child generally are valid" and "did not constitute [the doctor's] personal opinion as to the veracity of B.F.'s complaints"). Even if we assume that counsel was deficient in failing to object to the above statement, given the strength of the evidence against defendant in the instant case, we cannot find that in the absence of the above noted statements the result of defendant's trial would have been different. *Compare State v. Dale*, 2d Dist. No. 91-CA-25 (July 14, 1992) (where the state's case consisted of the "essentially uncorroborated" testimony "of a nine year old boy who accused" his father's friend of molesting him, counsel's failure to object to opinion

testimony stating that the child was telling the truth amounted to ineffective assistance of counsel).

{¶ 56} Here, K.R.'s statements describing the abuse were corroborated through other testimony presented at trial, including K.R.'s ability to describe pornographic DVDs and K-Y jelly to her mother, the physical evidence indicating that K.R. had been molested, and defendant's confession to M.R. that he had inappropriately touched K.R. Dr. Rodriguez, K.R. and M.R. testified that K.R. suffers from genital herpes, and a medical technologist tested defendant's blood and found that defendant also has genital herpes. Against such evidence, it is apparent that trial counsel's failure to object to Dr. Rodriguez's statements did not prejudicially affect the outcome of defendant's trial.

{¶ 57} Based on the foregoing, defendant's first assignment of error is overruled.

IV. SECOND ASSIGNMENT OF ERROR—BOLSTERING

{¶ 58} Defendant's second assignment of error asserts that defendant was deprived of a fair trial when Dr. Rodriguez offered an opinion statement, over defendant's objection, which bolstered the veracity of K.R. "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus.

{¶ 59} The State asked Dr. Rodriguez on direct examination if it was unusual for a child to initially deny the abuse, only to return two days later and admit to the abuse. Dr. Rodriguez stated it was not unusual "because after [K.R.] was put in a corner, she didn't have any other option, I mean, she needed to say what was the truth." (Tr. 189.)

{¶ 60} Assuming that Dr. Rodriguez's statement was a statement improperly bolstering K.R.'s credibility, we find that any error in admitting the statement harmless. As noted above, in *Boston*, the Supreme Court of Ohio held that an expert may not give an opinion regarding the veracity of statements made by a child declarant. The child declarant in *Boston* was two and one-half years old when the alleged sexual abuse occurred, and the trial court determined that the child was incompetent to testify because of her young age. *Id.* at 109. A physician examined the child and testified at trial that the child "had not fantasized her abuse and * * * had not been programmed to make accusations against her father." *Id.* at 128. The court concluded that the

physician's statements regarding the child's veracity were prejudicial and amounted to reversible error. *Id.* at 129.

{¶ 61} "Recent case law states that '*Boston* does not apply when the child victim actually testifies and is subjected to cross-examination.' " *State v. Benjamin*, 8th Dist. No. 87364, 2006-Ohio-5330, ¶ 19, quoting *State v. Curren*, 5th Dist. No. 04 CA 8, 2005-Ohio-4315, ¶ 26. When the child victim testifies, the trier of fact is "able to ascertain the credibility of the victim; whereas, in *Boston*, there was no independent indicia of reliability save for the expert witness who vouched for the child victim." *Id.* at ¶ 16. *See also State v. Smith*, 12th Dist. No. CA2004-02-039, 2005-Ohio-63, ¶ 21-24 (finding the alleged *Boston* violation harmless because three of the four victims testified about the abuse and were subject to cross-examination, such that the "jury was able to perceive the child witnesses and decide for themselves the credibility of those three child witnesses"); *State v. Hupp*, 3d Dist. No. 1-08-21, 2009-Ohio-1912, ¶ 20 (noting that "[w]hen the victim testifies, the jury is able to hear the victim's answers, witness her demeanor and judge her credibility completely independent of the other's testimony concerning the veracity of the victim").

{¶ 62} Thus, any error in admitting expert testimony regarding the veracity of a child declarant "may be harmless beyond a reasonable doubt * * * if the victim testifies and is subject to cross examination, the state introduces substantial medical evidence of sexual abuse, and the expert's testimony is cumulative to other evidence." *State v. Kincaid*, 9th Dist. No. 94CA005942 (Oct. 18, 1995), citing *State v. Palmer*, 9th Dist. No. 2323-M (Feb. 8, 1995). "In contrast, a finding of harmless error is not justified if the case is a 'credibility contest' between the victim and the defendant." *Id.*, citing *State v. Burrell*, 89 Ohio App.3d 737, 746 (1993). Recently, "appellate courts have limited that part of the holdings in *Kincaid* and *Palmer* that require additional medical evidence to cases involving small children." *State v. Skidmore*, 7th Dist. No. 08 MA 165, 2010-Ohio-2846, ¶ 27. *See also State v. Morrison*, 9th Dist. No. 21687, 2004-Ohio-2669, ¶ 65.

{¶ 63} In the instant case, K.R. testified and was subject to cross-examination, such that the jury was able to judge K.R.'s credibility independently from Dr. Rodriguez's statements. There was also substantial medical evidence of sexual abuse.

The evidence demonstrated that K.R.'s hymen was attenuated, her vaginal opening was larger than normal for a girl her age, she had abrasions on the inside of her vagina, and both K.R. and defendant had genital herpes. Dr. Rodriguez's testimony, indicating that K.R. "was put in a corner" and "needed to say what was the truth," was cumulative to other evidence indicating that, after the initial herpes diagnoses, K.R. had to explain to her family how she could possibly have a sexually transmitted disease. (Tr. 189.)

{¶ 64} Accordingly, even if Dr. Rodriguez's comment was an improper statement regarding the veracity of K.R., it amounts to harmless error because K.R. testified and was subject to cross-examination, the State introduced substantial medical evidence of the sexual abuse, and because the statement was cumulative to other evidence. Based on the foregoing, defendant's second assignment of error is overruled.

V. FOURTH ASSIGNMENT OF ERROR—ALLIED OFFENSES

{¶ 65} Defendant's fourth assignment of error asserts the trial court erred in failing to merge the gross sexual imposition convictions with the rape convictions. At sentencing defendant requested that the court merge the convictions, asserting that there had not been "any finding that the gross sexual imposition offenses are separate and apart from the rape convictions." (Tr. 819.) The court found that the convictions were not subject to merger.

{¶ 66} R.C. 2941.25(A) provides that, where a defendant's same conduct "can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." Where, however, "the defendant's conduct constitutes two or more offenses of dissimilar import" or "results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them." R.C. 2941.25(B). R.C. 2941.25 is a legislative attempt "to codify the judicial doctrine of merger, i.e., the principle that 'a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime.' " *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 42, quoting *State v. Botta,* 27 Ohio St.2d 196, 201 (1971).

{¶ 67} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Supreme Court of Ohio reviewed and revised the analysis courts employ to determine whether offenses are allied offenses of similar import under R.C. 2941.25. *See id.* at ¶ 40 (summarizing the allied offenses jurisprudence prior to *Johnson*). Under the current allied offense analysis, courts must ask whether "multiple offenses can be committed by the same conduct" and "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' " *Id.* at ¶ 49, quoting *Brown* at ¶ 50 (Lanzinger, J., dissenting). If the answer to both questions is yes, the court must merge the allied offenses prior to sentencing. *Id.* at ¶ 50. "Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." (Emphasis sic.) *Id.* at ¶ 51. "[A] reviewing court should review the trial court's R.C. 2941.25 determination de novo." *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, ¶ 1.

{¶ 68} A defendant may not be convicted of both gross sexual imposition and rape when the counts arise out of the same conduct. *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, ¶ 143. "The corollary, of course, is that a defendant may be convicted of both offenses when the counts arise out of separate conduct." *State v. Millhoan*, 6th Dist. No. L-10-1328, 2011-Ohio-4741, ¶ 49, citing *Foust* at ¶ 144-45.

{¶ 69} K.R. testified that defendant raped her by vaginal intercourse, digital penetration, inserting a vibrator into her vagina, cunnilingus, and by forcing her to perform fellatio. Apart from that testimony, K.R. also described how defendant fondled her breasts. K.R. testified that defendant used his hand to touch her breasts, explaining that it happened "[m]ore than one time." (Tr. 100, 101.) K.R. also stated that defendant used "his tongue and his mouth" to touch her breasts, and that this happened "[m]ore than one time." (Tr. 107.)

{¶ 70} K.R.'s testimony supports a finding that defendant used his hands to touch her breasts at least twice, and used his mouth to touch her breasts at least twice. Accordingly, this evidence was sufficient to support the four gross sexual imposition convictions. *See State v. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶ 11; *State v. Austin*, 138 Ohio App.3d 547, 549-50 (3d Dist.2000).

{¶ 71} Defendant asserts that it "appears from [K.R.'s] testimony that [defendant's] act of touching her breasts (sexual contact) occurred while he was engaged in sexual conduct." (Appellant's brief, 27.) Defendant does not provide a citation to the record to support this statement, in violation of App.R. 16(A)(7) and 12(A)(2), and the record evidence does not support defendant's contention. While K.R. testified that the different types of contact with her breasts occurred more than once, there was no evidence indicating that defendant touched K.R.'s breasts while simultaneously engaging in other sexual conduct which supported the rape convictions. *See Foust* at ¶ 144-45 (because there was "no evidence that Foust committed" the acts which supported the gross sexual imposition charges while also vaginally raping the victim, the court found the gross sexual imposition "acts were distinct and separate from each other and from the rapes"). Even if defendant's conduct of touching K.R.'s breasts occurred in close proximity to any of the acts of rape, because defendant's touching of K.R.'s breast was conduct separate and distinct from the acts needed to complete the rapes, and because a separate animus existed for the sexual contact with K.R.'s breasts, the rape and gross sexual imposition convictions were not allied offenses of similar import subject to merger. *See State v. Cooper*, 2d Dist. No. 23143, 2010-Ohio-5517, ¶ 24 (noting that "[w]hen a defendant gropes his victim's breast and buttocks, as well as rapes her," the acts "of groping are not merely incidental to the rape, and a trial court does not err in separately sentencing the defendant for each of the counts of gross sexual imposition based upon those actions, as well as for the rape"); *State v. Byrd*, 4th Dist. No. 10CA3390, 2012-Ohio-1138, ¶ 110-11 (where the defendant "rubbed [the victim's] breasts, * * * ran his hands through her vagina, and * * * performed oral sex upon her," the court concluded that, "[e]ven assuming that Byrd's rape and gross sexual imposition offenses could be committed with the same conduct, they were committed with a separate animus").

{¶ 72} The rape and gross sexual imposition charges were not allied offenses of similar import subject to merger because each conviction concerned a separate act committed with a separate animus. Based on the foregoing, defendant's fourth assignment of error is overruled.

VI. FIFTH ASSIGNMENT OF ERROR—CONSECUTIVE SENTENCES

{¶ 73} Defendant's fifth assignment of error asserts the trial court erred by imposing consecutive sentences without making the findings required by R.C. 2929.14(C)(4).

{¶ 74} R.C. 2929.14(C)(4), effective September 30, 2011, provides:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 75} Passed as part of 2011 Am.Sub.H.B. No. 86 ("H.B. No. 86"), R.C. 2929.14(C)(4) now requires a sentencing judge to make certain findings before imposing consecutive sentences. Section 11 of H.B. No. 86 acknowledges that the Supreme Court of Ohio in *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, severed the former identical statute, concluding that judicial factfinding which increased a defendant's total punishment through consecutive sentences violated a defendant's Sixth Amendment right to trial by jury. *See id.* at ¶ 67. The Supreme Court later concluded in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, that its decision in *Foster* was incorrect in

light of the United States Supreme Court decision in *Oregon v. Ice*, 555 U.S. 160 (2009). The *Hodge* court found that *Oregon* did not revive Ohio's former consecutive-sentencing statutory provisions in R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *Foster*. The court concluded that trial court judges were "not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made." *Hodge* at paragraph three of the syllabus. Thus, in H.B. No. 86, the General Assembly first repealed the former consecutive sentencing statute, R.C. 2929.14(E)(4), and then revived the requirement that trial judges make certain findings prior to imposing consecutive sentences in R.C. 2929.14(C)(4). *See* Sections 2, 11, and 12 of H.B. No. 86.

{¶ 76} R.C. 2929.14(C)(4) now requires the trial court to make three findings before imposing consecutive sentences: (1) that consecutive sentences are necessary to protect the public from the future crime or to punish the offender; (2) that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public; and (3) that one of the subsections (a), (b), or (c) apply. *See State v. Farnsworth*, 7th Dist. No. 12 CO 10, 2013-Ohio-1275, ¶ 8. The trial court is not required to give reasons explaining these findings, nor is the court required to recite any "magic" or "talismanic" words when imposing consecutive sentences. *Id.*, citing *State v. Frasca*, 11th Dist. No. 2011-T-0108, 2012-Ohio-3746, ¶ 57; *State v. Murrin*, 8th Dist. No. 83714, 2004-Ohio-3962, ¶ 12. Nevertheless, the record must reflect that the court made the findings required by the statute. *Id.*

{¶ 77} The court sentenced defendant on February 3, 2012. Defendant contends that because he was sentenced after the effective date of H.B. No. 86, the trial court was required to make the findings set forth in R.C. 2929.14(C)(4) before imposing consecutive sentences. *See State v. Schirmer*, 2d Dist. No. 25147, 2012-Ohio-5543, ¶ 10 (noting that H.B. No. 86 applied to defendant "because he was sentenced after its effective date"). The State contends that the court was not obligated to make the findings required under R.C. 2929.14(C)(4) because defendant committed the offenses at issue prior to the effective date of H.B. No. 86. Relying on R.C. 1.58(B), the State asserts that the General Assembly "meant for R.C. 2929.14(C)(4) to apply only to offenders who commit their crimes after September 30, 2011." (Appellee's brief, 59.)

{¶ 78} R.C. 1.58(B) provides that where the penalty or punishment "for any offense is reduced by a reenactment or amendment of a statute, the penalty, * * * or punishment, if not already imposed, shall be imposed according to the statute as amended." The State asserts that R.C. 2929.14(C)(4) does not reduce the penalty for any offense as the statute simply requires the trial court to make certain findings on the record. The State further argues that the General Assembly did not intend for R.C. 1.58(B) to apply to H.B. No. 86 because the General Assembly used the word "revive," as opposed to the word "reenact," in Section 11 of H.B. No. 86 and because the General Assembly did not explicitly state that R.C. 2929.14(C)(4) was subject to R.C. 1.58(B). (Appellee's brief, 58-59.)

{¶ 79} We addressed these same arguments regarding H.B. No. 86 in *State v. Wilson*, 10th Dist. No. 12AP-551, 2013-Ohio-1520, ¶ 14-18. There, we noted that the "penalty or punishment for the offenses might arguably be reduced if the trial court were required to make the findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences." *Id.* at ¶ 17. We also found that while the "General Assembly used the term 'revive' in Section 11 of H.B. No. 86," the General Assembly "also employed the term 'reenactment' in Section 11." *Id.* Thus, we concluded that "by operation of R.C. 1.58(B), H.B. 86 applies" to a defendant sentenced after H.B. No. 86's effective date, even if the events giving rise to the conviction occurred before that date. *Id.*

{¶ 80} The trial court did not make any of the findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences. The court simply announced the sentence, and ordered that the rape and gross sexual imposition convictions be served consecutively for a total prison term of 70 years to life. Because the trial court sentenced defendant after the effective date of H.B. No. 86, and failed to make the findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences, we must vacate defendant's sentence and remand the case for resentencing. *See Wilson* at ¶ 18; *State v. Smith*, 8th Dist. No. 98280, 2013-Ohio-576, ¶ 74.

{¶ 81} Based on the foregoing, defendant's fifth assignment of error is sustained.

VII. CONCLUSION

{¶ 82} Having overruled defendant's first, second, third, and fourth assignments of error, but having sustained defendant's fifth assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas in part, but vacate defendant's sentence and remand the case for resentencing. On remand, the trial court must determine whether consecutive sentences are appropriate under R.C. 2929.14(C)(4) and enter the required findings on the record.

Judgment affirmed in part
and reversed in part;
cause remanded with instructions.

BROWN and McCORMAC, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the Ohio Constitution, Article IV, Section 6(C).

BROWN, J., concurring.

{¶ 83} I concur with the majority's decision to sustain defendant's fifth assignment of error based on this court's precedent in *State v. Wilson*, 10th Dist. No. 12AP-551, 2013-Ohio-1520. However, I remain convinced that H.B. No. 86 should not apply to defendant's case, as H.B. No. 86 did not reduce the penalty for any of the offenses of which defendant was convicted. *See id.* at ¶ 23 (Brown, J., concurring in part and dissenting in party) (noting the majority's finding that "the penalty for the offenses in this case *could* be reduced if the trial court were required to make R.C. 2929.14(C)(4) findings" was insufficient to require application of H.B. No. 86 to pending cases pursuant to R.C. 1.58(B), as R.C. 1.58(B) applies only "where a penalty, forfeiture or punishment for any offense *is* reduced by a re-enactment or amendment of a statute"). (Emphasis sic.)

_____