[Cite as *State v. J.M.*, 2015-Ohio-5574.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	No. 14AP-621
v.	:	(C.P.C. No. 13CR-714)
J.M.,	:	(REGULAR CALENDAR)
Defendant-Appellant/ Cross-Appellee.	:	

D E C I S I O N

Rendered on December 24, 2015

Ron O'Brien, Prosecuting Attorney, *Valerie Swanson* and *Seth L. Gilbert*, for appellee/cross-appellant.

Clark Law Office, and *Toki M. Clark*, for appellant/cross-appellee.

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Defendant-appellant/cross-appellee, J.M., appeals from a judgment of the Franklin County Court of Common Pleas sentencing him to a term of imprisonment pursuant to convictions on charges of rape and gross sexual imposition. Plaintiff-appellee/cross-appellant, State of Ohio, cross-appeals from the judgment, arguing that the trial court erred by merging J.M.'s convictions. For the following reasons, we affirm J.M.'s convictions but sustain in part and overrule in part the state's assignment of error regarding merger and thus reverse the trial court's judgment and remand for resentencing.

I. FACTS

{¶ 2} On the morning of January 30, 2013, J.M. awoke in the home he shared with his then-wife, T.A. Also living in the home were T.A.'s ten-year-old daughter, S.M., and T.A.'s other two older children. During the morning, T.A. prepared to go to work and the children got ready for school, but J.M. was not scheduled to work that day.

{¶ 3} S.M. would later testify at trial that, after T.A. went to work, she told J.M. she needed help applying lotion to her back for eczema. S.M. stated that, while rubbing lotion on her back and legs, J.M. told her to take her robe off, and pulled her bra and underpants down halfway. She testified that she was "okay" with his help up to this point. (Tr. Vol. II, 121.)

{¶ 4} However while applying lotion to her back and legs, he also rubbed lotion near her genitals. She testified that, as J.M. rubbed the lotion on her genitals, his finger went into her genitals. She said "ow," and J.M. apologized and said it would not happen again. (Tr. Vol. II, 128.) S.M. testified that J.M. then put his finger into her genitals again and it "hurted inside." (Tr. Vol. II, 128.) S.M. said "[o]uch" and J.M. again apologized. (Tr. Vol. II, 128.) S.M. further testified that at some point during the encounter, J.M. pushed her face down on the bed with her feet still on the floor, applied lotion to himself, and then attempted to insert his penis into her "butt." (Tr. Vol. II, 123.) She moved and his penis came out; whereupon J.M. put it in again. S.M. testified that she could not tell how far it went in, but it was "painful." (Tr. Vol. II, 132.) S.M. also confirmed that by looking back through her own legs she could see J.M.'s penis as he attempted to put it in her anus. She testified that it was "sticking out" of his underwear and that it appeared long and "kind of thick." (Tr. Vol. II, 130, 155.) Twice S.M. attempted to escape and twice J.M. restrained her. S.M. testified that while this was going on, J.M. was making inarticulate "[u]nh" sounds which she agreed were "[k]ind of moaning sounds." (Tr. Vol. II, 159.) However S.M. testified that after a time, J.M. stopped pushing her down toward the bed and allowed her to leave.

{¶ 5} She went to her room, got dressed, and both text-messaged and called her mother, T.A. T.A. came home from work and confronted J.M. Later that same day, T.A. took S.M. to Nationwide Children's Hospital, where S.M. was interviewed by a forensic interviewer and examined by a nurse.

{¶ 6} On February 11, 2013, J.M. was indicted on four charges of rape and two charges of gross sexual imposition. Trial commenced on May 27, 2014. At trial, the state presented testimony from S.M. and T.A., as well as testimony from personnel who investigated and analyzed the evidence in the case. Among other evidence, the state was permitted to play a video recording of an interview between J.M. and police during which J.M. admitted to much of the misconduct. Specifically, in the recording J.M. admitted that he inappropriately touched S.M.'s buttocks and genitals while applying lotion and that he rubbed against S.M. with his penis (although he did not expressly admit to inserting his penis into her anus). J.M. chose not to testify in his own defense and presented no witnesses. At the conclusion of trial and deliberation, on May 30, 2014, the jury found J.M. guilty of all counts.

{¶ 7} On July 9, 2014, the trial court held a sentencing hearing. The trial court concluded that all counts should be merged, and it sentenced J.M. on a single count of rape. The jury verdict had determined that J.M. used force in committing the rape and that S.M. was under 13 years old at the time. Consequently, the trial court sentenced J.M. to a term of imprisonment of 25 years to life.

II. ASSIGNMENTS OF ERROR

{¶ 8} J.M. appeals from the trial court's judgment, assigning seven errors for this court's review:

> [I.] THE VERDICT OF GUILTY IS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE.
>
> [II.] THE CONVICTION OF APPELLANT FOR RAPE AND GSI IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> [III.] PROSECUTORIAL MISCONDUCT OCCURS IN CLOSING ARGUMENT WHEN THE PROSECUTOR USURPS A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.
>
> [IV.] A CRIMINAL DEFENDANT IN A RAPE CASE INVOLVING DNA ANALYSIS FAILS TO GET EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILS TO CALL AN EXPERT TO SUPPORT HIS SCIENTIFIC CLAIMS.

> [V.] A CRIMINAL DEFENDANT IN A RAPE CASE INVOLVING A CONFESSION FOLLOWING A SUICIDE ATTEMPT FAILS TO GET EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILS TO MOVE TO SUPPRESS A DAMAGING STATEMENT.
>
> [VI.] A CRIMINAL DEFENDANT IN A RAPE CASE INVOLVING A JUVENILE FAILS TO GET EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILS TO HAVE MEDICATIONS TESTED UNDER CIRCUM-STANCES BEGGING FOR IT.
>
> [VII.] A CRIMINAL DEFENDANT IN A GROSS SEXUAL IMPOSITION CASE INVOLVING A JUVENILE FAILS TO GET EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL ANNOUNCES IN CLOSING ARGUMENT THAT THE DEFENDANT IS GUILTY OF GROSS SEXUAL IMPOSITION.

{¶ 9} The state cross-appealed, assigning one error for this court's review:

> THE TRIAL COURT ERRED BY MERGING DEFENDANT'S MULTIPLE RAPE AND GROSS SEXUAL IMPOSITION CONVICTIONS.

A. J.M.'s First Assignment of Error – Whether Sufficient Evidence Supported the Conviction

{¶ 10} In his first assignment of error, J.M. alleges that his convictions were not supported by sufficient evidence. Sufficiency is:

> "a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." * * * In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law.

Eastley v. Volkman, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 11, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997); *Black's Law Dictionary* 1433 (6th Ed.1990). "In reviewing a record for sufficiency, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v.*

Monroe, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶ 47, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 11} The first through fourth counts of the indictment alleged counts of rape. In relevant part, the statute defining the offense of rape provides that "[n]o person shall engage in sexual conduct with another * * * when * * * [t]he other person is less than thirteen years of age." R.C. 2907.02(A)(1)(b). "Sexual conduct" includes "vaginal intercourse * * * anal intercourse * * * and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another." R.C. 2907.01(A). Further, the statute prohibits "engag[ing] 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).

{¶ 12} T.A. and S.M. both testified that S.M. was ten years old on January 30, 2013. S.M. testified that while J.M. was applying lotion to her back and legs, he also rubbed lotion near her genitals. She testified that, as J.M. rubbed the lotion, his finger went into her genitals. She said "ow," and J.M. apologized and said it would not happen again. (Tr. Vol. II, 128.) S.M. testified that J.M. then put his finger into her genitals again and it "hurted inside." (Tr. Vol. II, 128.) S.M. said "[o]uch" and J.M. again apologized. (Tr. Vol. II, 128.) S.M. further testified that at some point during the encounter, J.M. pushed her face down on the bed with her feet still on the floor, applied lotion to himself, and then attempted to insert his penis into her "butt." (Tr. Vol. II, 123.) She moved and his penis came out; whereupon J.M. put it in again. S.M. testified that she could not tell how far it went in, but it was "painful." (Tr. Vol. II, 132.) S.M. also confirmed that by looking back through her own legs she could see J.M.'s penis as he attempted to put it in her anus. She testified that it was "sticking out" of his underwear and that it appeared long and "kind of thick." (Tr. Vol. II, 130, 155.) According to S.M.'s testimony, she twice attempted to escape and was twice restrained by J.M. In addition, the state played a recording at trial of an interview between J.M. and police during which J.M. admitted to the misconduct. Specifically, in the recording, J.M. admitted that he inappropriately touched S.M.'s buttocks and genitals while applying lotion and that he rubbed against S.M. with his penis (although he did not expressly admit to inserting his penis into her anus). This testimony and evidence is sufficient to allow a fact-finder to find that S.M.

was under 13 years old, that she was penetrated in her vaginal or anal opening multiple times, and that she was compelled to submit by force. R.C. 2907.02(A)(1)(b), (A)(2); 2907.01(A).

{¶ 13} Breaking the analysis down by count, the first and second counts of the indictment, as amended, charged that J.M. committed rape through digital penetration of the anus or anal intercourse. S.M. testified that J.M. twice inserted his penis between her buttocks. Although she could not specify how far J.M. went between her buttocks, she testified that it was far enough that she could feel it and that it hurt. Sexual conduct includes both anal intercourse and (without privilege to do so) the insertion of any part of the body into the anal opening of another. R.C. 2907.01(A). Construing the evidence in favor of the prosecution, S.M.'s testimony was sufficient to allow a rational fact-finder to conclude that J.M. inserted his penis into her anal opening, thus engaging in sexual conduct. *See State v. Bulls*, 9th Dist. No. 27029, 2015-Ohio-276, ¶ 15 ("Moreover, [the victim] told Ms. Shrout that she experienced pain in her butt and stomach the day after Mr. Bulls assaulted her. Had Mr. Bulls placed his penis on [the victim's] buttocks, his doing so would not have caused her any physical pain. A rational trier of fact could have found that the reason [the victim] experienced pain was that Mr. Bulls had actually penetrated her anally.").

{¶ 14} The third and fourth counts of the indictment, as amended, charged that J.M. committed rape through digital penetration of the vagina. S.M.'s testimony that J.M. twice put his finger "a little bit in" when rubbing near her genitals and that it "hurted inside" would allow a rational fact-finder to conclude that J.M.'s finger entered S.M.'s vaginal opening. (Tr. Vol. II, 127-28.) Construing the evidence in favor of the prosecution, this testimony was sufficient to establish the sexual conduct element of rape through digital penetration of S.M.'s vagina. R.C. 2907.01(A); *cf, State v. Frazier*, 10th Dist. No. 05AP-1323, 2007-Ohio-11, ¶ 27 (When there was no such penetration, we found, "[a]lthough [the victim] testified that [the] appellant touched her vagina or 'private parts' with his hand, [she] did not testify that [the] appellant inserted his hand or fingers into her vagina. Because the prosecution failed to present any evidence that [the] appellant digitally penetrated [the victim's] vagina, the evidence is insufficient to support the convictions for rape by digital vaginal penetration.").

{¶ 15} The evidence was also sufficient to support J.M.'s convictions for gross sexual imposition. The statute defining the offense of gross sexual imposition provides, in relevant part, that "[n]o person shall have sexual contact with another, not the spouse of the offender * * * when * * * [t]he other person * * * is less than thirteen years of age." R.C. 2907.05(A)(4). "Sexual contact" is defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

{¶ 16} S.M. described J.M. rubbing lotion on and around her genitals and buttocks, which establishes that he touched her erogenous zones as defined by statute. J.M. also admitted in his interrogation that he rubbed against S.M.'s genital area and buttocks. Evidence of a purpose of sexual arousal or gratification may be inferred from the type, nature, and circumstances of the contact. *State v. Douglas*, 10th Dist. No. 09AP-111, 2009-Ohio-6659, ¶ 54. S.M. indicated that, when she saw J.M.'s penis, it was "sticking out" of his underwear and that it appeared long and "kind of thick." (Tr. Vol. II, 130, 155.) S.M. also testified that while J.M. was rubbing her and touching her with his penis he was making inarticulate "[u]nh" sounds which she agreed were "[k]ind of moaning sounds." (Tr. Vol. II, 159.) S.M.'s testimony, in short, suggests that J.M.'s penis was turgid and that he was sexually aroused or deriving sexual gratification from the experience; this is sufficient to permit a rational trier of fact to infer that J.M. acted with the purpose of sexually arousing or gratifying himself when touching S.M. J.M., moreover, admitted in his videotaped interview with police that he was probably erect while rubbing his penis against S.M.

{¶ 17} J.M. argues that the evidence was insufficient to support the convictions because of a lack of forensic evidence. J.M. asserts that his DNA was not identified on swabs taken from S.M.'s body and that no semen or bodily fluids were found on swabs taken from S.M. or samples taken from her clothing. There was, in fact, some DNA evidence; partial Y chromosome DNA was found on S.M.'s underwear which was consistent with J.M.'s DNA. But the DNA found did not consist of sperm cells, would match 1 in every 566 men, and could also have come to be on S.M.'s underwear if J.M. had touched the garment even in a way unconnected with the rape and gross sexual

imposition offenses. However the strength or weakness of the forensic corroboration is irrelevant here because the question is sufficiency, not weight, and S.M.'s testimony, if believed, is sufficient to establish all the elements of rape and gross sexual imposition. *See State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶ 53.

{¶ 18} Accordingly, we overrule J.M.'s first assignment of error.

B. J.M.'s Second Assignment of Error – Whether the Convictions Were Against the Manifest Weight of the Evidence

{¶ 19} J.M. asserts in his second assignment of error that his convictions were against the manifest weight of the evidence.

> 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. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief."

(Emphasis omitted.) *Eastley* at ¶ 12, quoting *Thompkins* at 387; *Black's* at 1594. In manifest weight analysis "the appellate court sits as a 'thirteenth juror' and disagrees with the jury's resolution of the conflicting testimony." *Thompkins* at 388, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). " 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses 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.' " *Id.* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 20} J.M. argues that his conviction was against the manifest weight of the evidence because S.M. was not a credible witness. J.M. claims that S.M. has a reputation as a known liar and that she admitted to lying about certain things during her trial testimony. On cross-examination, T.A. testified that S.M. will sometimes take her older sister's clothes and deny having taken them. T.A. also testified about an incident involving some money to be used for purchasing lottery tickets. When the money went missing, T.A. believed that S.M. or her brother had taken it. Both children initially denied

taking the money, but S.M. ultimately admitted it and returned the money when faced with the prospect of corporal punishment. S.M. admitted on cross-examination that she had lied to her parents in the past about "taking stuff" but denied lying about taking money. (Tr. Vol. II, 146.) The jury was aware of this testimony and was able to consider it in weighing S.M.'s credibility. We cannot conclude that the jury clearly lost its way in finding S.M. to be a credible witness with respect to her testimony about the encounter with J.M., particularly in the face of J.M.'s corroborating admissions in a police interview.

{¶ 21} J.M. also argues that the jury lost its way in finding him guilty because there was a second, unidentified, male DNA profile located on the sample taken from S.M.'s underwear. J.M. claims that the lack of further testing of this sample warrants reversal of his conviction. However, the presence of other male DNA on S.M.'s underwear is irrelevant to this case. Neither J.M. nor S.M. has ever claimed that anyone else touched S.M. inappropriately or that S.M. could have been mistaken about the identity of J.M. The question in this case was whether and to what extent J.M. inappropriately touched S.M.

{¶ 22} Moreover, the DNA evidence in this case (even the major profile) was largely inconclusive to the dispositive issues in the case. The forensic scientist with the Ohio Bureau of Criminal Investigation, testified that the partial Y chromosome DNA in S.M.'s underwear was consistent with J.M. but that 1 in every 566 males would also match the DNA found. In addition, though such DNA could have been present in S.M.'s underwear as a result of the touching of J.M.'s hand or penis to S.M.'s vaginal or anal openings or even her buttocks and thereby being transferred to her underwear when she placed them on afterward, it could also have come to be present from J.M. handling S.M.'s underwear in carrying out routine household chores as her step-father. The failure to identify the minor contributor to the DNA mixture found on S.M.'s underwear does not create a conflict in the evidence that led the jury to clearly lose its way in finding J.M. guilty.

{¶ 23} Finally, J.M. also claims that there was a significant gap in the evidence because the lotion was not collected, photographed, tested, or presented as evidence. However, there were no claims that the lotion was special or unique in any way, and J.M.

fails to explain how the lack of the lotion as part of the state's evidence led the jury to lose its way in finding him guilty of rape and gross sexual imposition.

{¶ 24} Accordingly, we overrule J.M.'s second assignment of error.

C. J.M.'s Third Assignment of Error – Whether Reversal is Required Based on the Prosecutor's Remarks about the State's Right to a Fair Trial

{¶ 25} In his third assignment of error, J.M. argues that prosecutorial misconduct deprived him of his constitutional right to a fair trial. J.M. claims that the prosecutor committed misconduct in closing argument, when she stated:

> You know, [J.M.'s trial counsel] sits there; he has his client next to him. I sit here by myself. I don't have a client next to me. But in an off way, I represent the State of Ohio. In an offshoot, I represent the interests of the State of Ohio and of [S.M.] and of [T.A.], and I have just as much rights as they do for a fair trial here.
>
> With all those rights, I submit to you the end of this case, which is where we are.
>
> He absolutely has a right to be found guilty of what he did to this little girl. He has that right, society has that right, and [S.M.] has that right.

(Tr. Vol. IV, 433.) J.M. argues that this constituted misconduct because the constitution only grants a right to a fair trial to the defendant, not to the prosecution.

{¶ 26} In delivering closing remarks in a trial, attorneys " 'are entitled to latitude as to what the evidence has shown and what inferences can be drawn therefrom.' " *State v. Ballew*, 76 Ohio St.3d 244, 255 (1996), quoting *State v. Richey*, 64 Ohio St.3d 353, 362 (1992). The closing argument must be reviewed in its entirety to determine prejudicial error. *Id*., citing *State v. Frazier*, 73 Ohio St.3d 323, 342 (1995); *State v. Moritz*, 63 Ohio St.2d 150, 157 (1980). We note that J.M.'s counsel did not object to the prosecutor's statement at trial and, therefore, he has waived all but plain error.

{¶ 27} "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). Accordingly, "the accused bears the burden of proof to demonstrate plain error on the record, and must show an error, i.e., a deviation from a legal rule that constitutes an obvious defect in the

trial proceedings. However, even if the error is obvious, it must have affected substantial rights, and we have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial. The accused is therefore required to demonstrate a reasonable probability that the error resulted in prejudice—the same deferential standard for reviewing ineffective assistance of counsel claims." (Citations omitted; internal quotation marks omitted.) *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, ¶ 22; *see also State v. Lynn*, 129 Ohio St.3d 146, 2011-Ohio-2722, ¶ 13; *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶ 62; *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002).

{¶ 28} J.M. is correct that both the United States Constitution and Ohio Constitution guarantee certain rights to criminal defendants. United States Constitution, Fifth Amendment; Ohio Constitution, Article I, Sections 5 and 10. Moreover these amendments do not guarantee the same rights to the state in a criminal case. For instance, in the text of the Fifth Amendment to the United States Constitution, it is the person who is at risk of being "deprived of life, liberty, or property" who is entitled to "due process of law." United States Constitution, Fifth Amendment. In the Ohio Constitution, the rights are accorded to "the party accused." Ohio Constitution, Article I, Section 10. This is not to suggest that the state's representative has no cause to insist on fairness or correct process. The state has, after all, a limited right to appeal in criminal cases when errors occur. R.C. 2945.67(A); 2953.08(B). But the state and the defendant in a criminal case do not have the same rights. Thus, the prosecutor's statement in this case, that "I have just as much rights as they do for a fair trial here," was not a correct statement of constitutional rights or the law. (Tr. Vol. IV, 433.) Nor was it correct or proper to state that "[J.M.] absolutely has a right to be found guilty of what he did to this little girl. He has that right, society has that right, and [S.M.] has that right." (Tr. Vol. IV, 433.) Yet, we do not find that the prosecutor's incorrect remarks in this case about the purported extent of her rights, the state's rights, or S.M.'s rights affected a substantial right held by J.M. or affected the result of this trial, particularly in the face of J.M.'s own admissions. *Rogers* at ¶ 22.

{¶ 29} Accordingly, we do not find plain error, and we overrule J.M.'s third assignment of error.

D. J.M.'s Fourth through Seventh Assignments of Error – Whether Trial Counsel Rendered Ineffective Assistance

{¶ 30} J.M.'s fourth through seventh assignments of error involve claims of ineffective assistance of counsel. "A convicted defendant alleging ineffective assistance of counsel must demonstrate (1) defense counsel's performance was so deficient that he or she 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 or her of a trial whose result is reliable." *State v. Campbell*, 10th Dist. No. 03AP-147, 2003-Ohio-6305, ¶ 24, citing *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus.

1. J.M.'s Fourth Assignment of Error – Failure to Obtain an Expert

{¶ 31} In his fourth assignment of error, J.M. asserts that his trial counsel provided ineffective assistance by failing to present an independent expert witness to testify regarding the state's forensic evidence.

{¶ 32} The decision whether to call a witness is generally a matter of trial strategy. *State v. Roush*, 10th Dist. No. 12AP-201, 2013-Ohio-3162, ¶ 40. J.M. in effect argues that his trial counsel should have presented an expert witness to criticize the lack of DNA evidence identified in the state's forensic evidence. However, the transcript indicates that J.M.'s trial counsel addressed this issue through cross-examination. J.M.'s trial counsel questioned both forensic scientists called by the state regarding samples that did not contain semen, other bodily fluids, or evidence of J.M.'s DNA. Generally, the failure to call an expert witness and to instead rely on cross-examination does not constitute ineffective assistance of counsel. *Id*.

{¶ 33} Moreover, even if J.M.'s trial counsel had performed deficiently by failing to call an expert witness, J.M. has failed to demonstrate that he was prejudiced by this alleged error. " 'To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.' " *State v. Griffin*, 10th Dist. No. 10AP-902, 2011-Ohio-4250, ¶ 42, quoting *Bradley* at paragraph three of the syllabus. As discussed above, all that was shown by the DNA evidence in this case was that, at some point J.M. or some other male with DNA somewhat similar to J.M.,

had handled the underwear or had touched S.M. in a place that touched the underwear. Even if the jury had entirely disregarded this evidence, the jurors still could have relied on the testimony of S.M. describing the incident as well as the video recording in which J.M. confessed to having touched S.M. inappropriately and to having rubbed her with his penis, which S.M. testified was what could be described as erect. In light of this evidence, J.M. has failed to demonstrate prejudice from his counsel's failure to call a DNA expert on his behalf, even assuming, contrary to the state of the law, that such failure constituted deficient performance.

{¶ 34} Accordingly, we overrule J.M.'s fourth assignment of error.

2. J.M.'s Fifth Assignment of Error – Failure to Move to Suppress Statements to Police

{¶ 35} In J.M.'s fifth assignment of error, he argues that his trial counsel provided ineffective assistance by failing to move to suppress his statements from the police interrogation following his arrest. However, because a defendant must show prejudice in order to establish ineffective assistance under the second aspect of the test set forth in *Strickland*, a " 'conviction will not be reversed on the ground of ineffective assistance of counsel solely because defense counsel failed to file a timely motion to suppress evidence, where the record does not demonstrate that the evidence was illegally obtained.' " *State v. Blagajevic,* 21 Ohio App.3d 297, 299-300 (8th Dist.1985), quoting *State v. Gibson*, 69 Ohio App.2d 91 (8th Dist.1980), paragraph two of the syllabus.

{¶ 36} J.M. argues that the interrogation during which he confessed was conducted while he was in the midst of an emotional breakdown following a suicide attempt. Thus, J.M. appears to claim that his statements during the interrogation should have been suppressed because his waiver of the right to remain silent and his statements to police were not made knowingly, voluntarily, and intelligently. " 'In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.' " *State v. Twyford*, 94 Ohio St.3d 340, 360 (2002), quoting *State v. Edwards* 49 Ohio St.2d 31 (1976), paragraph two of the syllabus.

{¶ 37} While we recognize that J.M. was likely under stress because of his situation and recent suicide attempt, in reviewing the evidence related to J.M.'s interrogation and confession, there is no indication that J.M. was not acting knowingly, voluntarily, and intelligently when he waived his right to remain silent and confessed to touching S.M. inappropriately. J.M. is an adult of apparently normal intelligence. At the beginning of the interrogation, J.M.'s rights were read to him and he signed a form acknowledging those rights. He indicated that he had recently attempted suicide and that he had recently consumed alcohol. He also indicated that he had recently taken his blood pressure medication. However, the police officer who conducted the interrogation testified that J.M. seemed coherent and lucid. The video recording of the interrogation supports this conclusion; J.M. does not appear to be confused or disoriented when answering questions and discussing the incident. The interrogation lasted less than 30 minutes, and there was no indication of coercion or threats from the interrogating officers. This was just the second time that police interviewed J.M. We find nothing in the record to demonstrate that under the totality of the circumstances, J.M.'s confession was illegally obtained and, by extension, that J.M.'s trial counsel was ineffective in failing to file a motion to suppress.

{¶ 38} Accordingly, we overrule J.M.'s fifth assignment of error.

3. J.M.'s Sixth Assignment of Error – Failure to Test Blood Pressure Medication

{¶ 39} J.M. claims in his sixth assignment of error that his trial counsel provided ineffective assistance of counsel by failing to have his blood pressure medication tested. As support, J.M. cites T.A.'s testimony that J.M. was acting oddly on the morning of the incident. During the police interview later in the day on January 30, 2013, J.M. indicated that he had taken blood pressure medication that day. In his brief on appeal, J.M. argues that his trial counsel provided ineffective assistance by failing to have this medication tested. It appears that J.M. is implicitly arguing that there may have been some connection between the medication and his actions. However, there is no indication in the record of this case relating to the effects of J.M.'s medication or what any testing of that medication might have or could have revealed. There is no basis in the record for this court to conclude that J.M.'s trial counsel provided ineffective assistance by failing to have his medication tested. Therefore, we find no deficiency in trial counsel's failure to pursue

such testing. *See State v. Davis*, 10th Dist. No. 05AP-193, 2006-Ohio-5039, ¶ 19 ("When allegations of ineffective assistance of counsel hinge on facts not appearing in the record, the proper remedy is a petition for post-conviction relief rather than a direct appeal.").

{¶ 40} Accordingly, we overrule J.M.'s sixth assignment of error.

4. J.M.'s Seventh Assignment of Error – Concession on the Gross Sexual Imposition Counts

{¶ 41} In his seventh assignment of error, J.M. argues that his trial counsel provided ineffective assistance of counsel by conceding in closing argument that J.M. was guilty of gross sexual imposition.

{¶ 42} The Supreme Court of Ohio has noted that "[c]oncessions of guilt, in any form, are among the most troublesome actions a defense counsel can make during representation of a defendant." *State v. Goodwin*, 84 Ohio St.3d 331, 336 (1999). While acknowledging the troubling nature of concessions of guilt, the court held that claims of ineffectiveness based on conceding guilt must be reviewed under the two-part *Strickland* test. *Goodwin* at 337. In conducting this review, "[c]oncessions of guilt by defense counsel must be considered on a case-by-case basis. All of the facts, circumstances, and evidence must be considered." *Id*. at 338.

{¶ 43} The Supreme Court concluded in Goodwin that defense counsel's concession of guilt on certain charges was a strategic decision in an attempt to avoid the most severe penalty for his client. The defendant participated in the robbery of a market with two other men; in the course of the robbery, a clerk working at the market was shot and killed. *Id*. at 331-33. The defendant's trial counsel stated in opening and closing argument that the defendant was guilty of robbery but that he did not kill the clerk. *Id*. at 336. On review, the Supreme Court held that this concession did not constitute deficient performance nor result in prejudice to the defendant. It was not deficient performance because it was a strategic concession intended to preserve the credibility of the only plausible defense theory. *Id*. at 338. Moreover, the court concluded that the concession did not prejudice the defendant because the evidence against him was overwhelming. The testimony indicated that the gun used to kill the clerk belonged to the defendant and that it was in his possession when he entered the market; the defendant had also confessed to police that he shot the clerk. *Id*. In light of this evidence, the court concluded that the

defense attorney's statements made no practical difference in the result of the trial. *Id*. at 339. The Supreme Court concluded that "a statement by defense counsel regarding the guilt of a defendant that does not represent abandonment of the defense, and therefore may be construed as tactical or strategic, does not constitute ineffective assistance of counsel." *Id*.; *see also State v. Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, ¶ 61 ("[B]y conceding Scott's guilt to those charges for which the state had overwhelming evidence of guilt, including Scott's confession, counsel enhanced his credibility with the jury to plead for Scott's life.").

{¶ 44} In the present case, J.M.'s counsel stated twice in closing argument that J.M. was guilty of gross sexual imposition but that the state had failed to prove beyond a reasonable doubt that he was guilty of rape. The jury had been presented with considerable evidence of J.M.'s guilt on the gross sexual imposition charges, including S.M.'s account of the incident and J.M.'s confession to police that he had rubbed against S.M. and touched her inappropriately. By contrast, the evidence of penetration (and thus of rape) was weaker. That is, S.M.'s testimony about penetration was not clinically specific, and J.M. did not admit to having penetrated either of her vaginal or anal openings. In addition, the two gross sexual imposition charges were third-degree felonies, while the four rape charges were first-degree felonies. J.M.'s counsel appears to have made a strategic decision to retain credibility with the jury by admitting J.M.'s guilt on the lesser charges of gross sexual imposition (because J.M. had, himself, admitted it to police on video). J.M.'s counsel's strategy appears to have been that he was therefore able to more credibly argue that the state failed to prove J.M.'s guilt on the rape charges because the prosecution had failed to prove penetration beyond a reasonable doubt. Under the circumstances presented in this case, we conclude that J.M.'s defense counsel's concession was a tactical or strategic decision, similar to that in *Goodwin* and that it did not constitute ineffective assistance of counsel.

{¶ 45} Accordingly, we overrule J.M.'s seventh assignment of error.

E. State's Assignment of Error – Whether it was Appropriate for the Trial Court to Have Merged All Counts

{¶ 46} The state cross-appealed, arguing that the trial court erred by merging all of J.M.'s convictions for purposes of sentencing. The state claims that the offenses were not

allied offenses of similar import because each offense was based on separate conduct and that J.M. had a separate animus for each offense.

{¶ 47} The Ohio statute on allied offenses provides as follows:

> (A) Where the same conduct by defendant 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.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct 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. This statute's application has evolved through a significant number of interpretations by the Supreme Court. *See, e.g.*, *State v. Logan*, 60 Ohio St.2d 126 (1979); *State v. Blankenship*, 38 Ohio St.3d 116 (1988); *State v. Rance*, 85 Ohio St.3d 632 (1999); *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625; *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314.

{¶ 48} In the latest evolution, the Supreme Court requires courts in Ohio to interpret R.C. 2941.25 as follows:

> 1. In determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors—the conduct, the animus, and the import.
>
> 2. Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.
>
> 3. Under R.C. 2941.25(B), a defendant whose conduct supports multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus.

State v. Ruff, 143 Ohio St.3d 114, 2015-Ohio-995, paragraphs one through three of the syllabus. When it is determined that the defendant has been found guilty of allied

offenses of similar import, " 'the trial court must accept the state's choice among allied offenses, "merge the crimes *into a single conviction for sentencing*, and impose a sentence that is appropriate for the merged offense." ' " (Emphasis sic.) *State v. Bayer*, 10th Dist. No. 11AP-733, 2012-Ohio-5469, ¶ 21, quoting *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, ¶ 13.

{¶ 49} In this case, the trial court determined that all of the charges were based on one act with the same animus and, therefore, all of the convictions were allied offenses of similar import. The state elected to proceed to sentencing on the rape charge under the fourth count of the indictment. The trial court merged all convictions into Count Four and imposed a sentence of 25 to life imprisonment. We review a trial court's ruling on whether convictions merge as allied offenses de novo. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, ¶ 28; *State v. Bryant*, 10th Dist. No. 14AP-333, 2014-Ohio-5306, ¶ 25, citing *State v. Vargas*, 10th Dist. No. 12AP-692, 2014-Ohio-843, ¶ 13.

{¶ 50} The state argues that none of J.M.'s rape convictions should have merged because each instance of penetration constituted a distinct act—i.e., they were committed separately. That is, the state argues that each act of penetration was separated by an intervening act, which precludes merger of the offenses.

{¶ 51} In this case, J.M.'s convictions for rape through anal penetration under the first two counts of the indictment should not have merged with his convictions for rape through vaginal penetration under the third and fourth counts of the indictment. Although all of the offenses occurred during a single assaultive event, the evidence presented at trial established that J.M. committed these offenses separately. S.M. testified that J.M.'s finger slightly penetrated her vaginal opening when he was rubbing lotion in her genital area. She further testified that, after J.M. had twice penetrated her with his finger, she saw his penis and heard what sounded like J.M. applying lotion to himself. J.M. then put his penis between S.M.'s buttocks. Thus, the acts of vaginal penetration were committed to a different part of J.M.'s body than the anal penetration, and they were separated by the act of J.M. applying lotion to himself. Because the rape by vaginal penetration was committed separately from the rape by anal penetration, the trial court erred by merging J.M.'s convictions on Counts One and Two of the indictment with the convictions on Counts Three and Four of the indictment. *See State v. Nicholas*, 66 Ohio

St.3d 431, 435 (1993) (holding that three rape charges arising from vaginal intercourse, cunnilingus, and digital penetration of the vagina did not merge because they were based on separate conduct).

{¶ 52} We must further consider whether the two rape convictions based on anal penetration, as set forth in Counts One and Two of the indictment, should have been merged, and whether the two rape convictions based on vaginal penetration, as set forth in Counts Three and Four of the indictment, should have been merged. With respect to both the vaginal penetration and the anal penetration, the state claims that intervening acts separated the instances of penetration. Courts have previously held that multiple convictions based on the same type of sexual conduct are not subject to merger when the conduct is separated by intervening acts. *See State v. Jones*, 78 Ohio St.3d 12, 14 (1997); *State v. Burgess*, 162 Ohio App.3d 291, 2005-Ohio-3747, ¶ 37 (2d Dist.).

{¶ 53} With respect to the vaginal penetration, S.M. testified that she said "[o]uch" after J.M.'s finger penetrated her the first time and that he said "sorry" and added that it would not happen again. (Tr. Vol. II, 128.) But then J.M. did it again. Similarly, S.M. testified that, when J.M. penetrated her buttocks, she cried out and J.M. said "sorry." She also testified that she moved when J.M. placed his penis between her buttocks, which caused his penis to move out. J.M. then placed his penis between her buttocks again. Once again, S.M. moved and it came out. Thus with respect to both vaginal and anal penetration, the evidence indicates that there was an interruption in the penetration and that J.M. was made aware that he was hurting S.M. In each instance J.M. acknowledged the harm he caused by apologizing and temporarily ceasing, but then affirmatively acted to resume the penetration and inflict new harm upon S.M. Under these circumstances, where J.M. was made aware of the hurt he was causing and where there was a period of cessation, each renewed penetration was committed separately. Therefore, the trial court erred by merging the two anal penetration convictions together and by merging the two vaginal penetration convictions together.

{¶ 54} Finally, the state asserts that the trial court should not have merged J.M.'s two convictions for gross sexual imposition with each other and should not have merged them with the rape convictions. S.M. testified that J.M. rubbed lotion on and near her

genitals, thighs, and buttocks. When questioned by police, J.M. admitted that he rubbed against S.M.'s genital area and her buttocks.

{¶ 55} In a similar case, a victim testified that the defendant touched her vagina and anus with his penis and fingers several times. *State v. Washington*, 10th Dist. No. 01AP-727, 2002-Ohio-2086, ¶ 11. This court found that the instances of contact, although occurring in close proximity, constituted multiple offenses rather than a single, simultaneous act. *Id*. Therefore, the trial court did not err by not merging the defendant's two convictions for gross sexual imposition based on those acts. *Id*.; *see also State v. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶ 19-33 (concluding that touching the victim's breast and then later touching her vaginal area were separate offenses). J.M.'s actions in rubbing S.M.'s genital region and rubbing her buttocks were separate and distinct acts and accomplished with different appendages; therefore, the two convictions for gross sexual imposition based on those two acts were not allied offenses of similar import because they were committed separately. *Ruff* at paragraph three of the syllabus. Thus, the trial court erred by merging the convictions for gross sexual imposition with each other.

{¶ 56} However, the trial court did not err by merging the gross sexual imposition counts with the related counts of rape.

> Gross sexual imposition is a lesser included offense of rape. *State v. Johnson* (1988), 36 Ohio St.3d 224, 522 N.E.2d 1082, paragraph one of the syllabus. Consequently, 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. In this case, S.M. testified that, as J.M. rubbed lotion on her private parts, he went inside her with his finger twice. In other words, the digital vaginal penetration was accomplished literally with the same gesture, during the same moment, with the same animus as the gross sexual imposition and to the same harmful effect. Similarly, S.M. testified (and J.M.'s recorded confession confirmed) that he rubbed her buttocks with his penis during his attempt to penetrate her anally. Accordingly, the trial court was correct to have merged the gross sexual imposition counts with the rape counts. *Ruff* at paragraphs one through three of the syllabus.

{¶ 57} We sustain in part and overrule in part the state's sole assignment of error.

III. CONCLUSION

{¶ 58} For the foregoing reasons, we overrule J.M.'s seven assignments of error and sustain in part and overrule in part the state's sole assignment of error. We reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for resentencing in accordance with law and consistent with this decision.

Judgment reversed;
cause remanded for resentencing.

HORTON, J., concurs.
DORRIAN, J., concurs in part and dissents in part.

DORRIAN, J., concurring in part and dissenting in part.

{¶ 59} I concur with the majority to overrule the first, fourth, fifth, sixth, and seventh assignments of error. I concur with the majority's disposition of the second and third assignments of error; however, I would overrule these assignments of error for more limited reasons.

{¶ 60} I concur in part and dissent in part as to the majority's conclusion regarding the state's sole assignment of error.

{¶ 61} I concur with the majority that (1) the trial court erred by merging J.M.'s convictions on Counts One and Two of the indictment with the convictions on Counts Three and Four of the indictment (¶ 51); (2) the trial court erred by merging J.M.'s convictions on Counts One and Two of the indictment based on anal penetration (¶ 53); (3) the trial court erred by merging J.M.'s convictions on Counts Three and Four of the indictment based on vaginal penetration (¶ 53); and (4) the trial court erred by merging J.M.'s convictions for gross sexual imposition together (¶ 55).

{¶ 62} I respectfully dissent, however, from the majority's conclusion that the trial court did not err by merging the gross sexual imposition counts with the related counts of rape (¶ 56). Accordingly, I would sustain the state's assignment of error in its entirety.

———————————————