[Cite as *State v. Barnes*, 2011-Ohio-5226.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-06-009
	:	O P I N I O N
- vs -		10/11/2011
	:	
CLARENCE BARNES,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 2007-2157

Jessica A. Little, Brown County Prosecuting Attorney, Mary McMullen, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

Michael K. Allen, 810 Sycamore Street, 4th Fl., Cincinnati, Ohio 45202, for defendant-appellant

PIPER, J.

{¶1} Defendant-appellant, Clarence W. Barnes, appeals from his conviction and sentence in the Brown County Court of Common Pleas on one count of gross sexual imposition.

{¶2} Appellant was indicted on June 21, 2007 on seven counts of gross sexual imposition in violation of R.C. 2907.05(A)(4), felonies of the third degree. The charges stemmed from allegations that appellant sexually abused his granddaughters, E.M. and R.M.,

when the children visited appellant at his home in Brown County.[1] After playing outdoors, the children would take turns showering. While E.M. showered, appellant would enter the bathroom, claiming he had to check E.M. for ticks. According to E.M., appellant would briefly check her hair and behind her ears, but would then spend 45 to 60 seconds rubbing her vaginal area.

{¶3} During a bench trial, the trial court dismissed Count Six for lack of evidence. At the conclusion of trial, the court found Barnes guilty on Count Seven. Having been found guilty on Count Seven, appellant pleaded guilty to Count One relating to R.M., which the state reduced to gross sexual imposition in violation of R.C. 2907.05(A)(5), a fourth-degree felony.

{¶4} Appellant was sentenced to prison terms of 18 months on Count One and five years on Count Seven, to be served concurrently. The trial court also classified appellant as a Tier I and Tier II sex offender for registration purposes.

{¶5} Appellant timely appeals, raising nine assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "DEFENDANT-APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED DUE TO THE OVERBROAD AND UNSPECIFIC TIME FRAME FOR THE ALLEGED OFFENSE SET FORTH IN THE INDICTMENT."

{¶8} Assignment of Error No. 2:

{¶9} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY ALLOWING THE STATE OF OHIO TO AMEND THE INDICTMENT BY EXPANDING THE TIME FRAME OF THE ALLEGED CRIMINAL ACTIVITY BEYOND THAT DETERMINED BY THE GRAND JURY."

1. Only Counts Six and Seven related to offenses against E.M., the victim in this case. Counts One through Five pertained to allegations involving E.M.'s sister, R.M. The trial court held separate trials for each victim.

{¶10} In his first assignment of error, appellant argues he was deprived of due process with respect to the lack of specificity in the indictment and bill of particulars. Appellant argues the time range stated in the indictment was too broad to permit him to prepare a defense. This alleged failure also gives rise to appellant's second assignment of error that claims the trial court erroneously permitted the state to extend the time frame of the alleged offense to include an additional three months not specified in the original indictment. Because these assignments of error are based upon the same argument, we will address them concurrently.

{¶11} The precise date and time of the alleged sexual activity are not essential elements of gross sexual imposition. See *State v. Wagers*, Preble App. No. CA2009-06-018, 2010-Ohio-2311, ¶17-18 (where "the crimes alleged in the indictment constitute sexual offenses against children, indictments need not state with specificity the dates of alleged abuse, so long as the state establishes that the offense was committed within the time frame alleged"). Thus, a certain degree of inexactitude in averring the date of the alleged offense is not per se impermissible or fatal to the prosecution. *State v. Sellards* (1985), 17 Ohio St.3d 169, 171. Nevertheless, where an accused requests a bill of particulars, the state must supply specific dates and times for the alleged offense if it possesses that information. Id.

{¶12} In many cases involving child sexual abuse, child victims are simply unable to remember exact dates and times, particularly where the crimes involved a repeated course of conduct over an extended period of time. See *Wagers* at ¶17; *State v. Mundy* (1994), 99 Ohio App.3d 275. "The problem is compounded where the accused and the victim are related or reside in the same household, situations which often facilitate an extended period of abuse. An allowance for reasonableness and inexactitude must be made for such cases considering the circumstances." *State v. Elkins*, Licking App. No. 2010-CA-104, 2011-Ohio-3611, ¶26.

{¶13} In the case at bar, the record reveals the state disclosed information regarding the dates and times of the present offense to the best of its ability. Originally, the indictment alleged the offense occurred between June 14, 1999 and June 13, 2000.[2] However, through a series of amendments, the state finally narrowed the time range for the offense between March 22, 2000 and September 22, 2000. Given the record before this court, there is no indication that the state was not forthcoming with the dates as known to it.

{¶14} The only question remaining is whether the state's inability to provide more specific dates and times resulted in a material detriment to appellant's ability to defend himself. Appellant argues that even the six-month time period between March and September 2000 was overbroad, and that with a more specific time frame, he would "likely" have found witnesses to establish he was on vacation during the time of the offense. We disagree.

{¶15} The state's failure to provide specific dates and times in an indictment is more likely to prejudice an accused in cases where the age of the victim is an element of the crime charged and the victim bordered on the age required to make the conduct criminal. See *Sellards*, 17 Ohio St.3d at 172. A second common situation resulting in prejudice is where "the defendant had been imprisoned or was indisputably elsewhere during part but not all of the intervals of time set out in the indictment." Id. In the case at bar, we are confronted with neither situation, where E.M. was approximately seven years old when the offenses occurred, and appellant was not imprisoned during this time.

{¶16} We find the six-month time period did not prejudice appellant's ability to prepare a defense. While appellant claims the inexactitude of the indictment and bill of particulars

2. We note the original bill of particulars alleged the offenses occurred between June 1, 1993 through June 11, 1994, however, a review of the document indicates this was merely a typographical error. In response to appellant's motion for a more specific bill of particulars, the state amended the document to reflect the dates as listed in the original indictment.

denied him the ability to present an alibi defense, appellant never filed a notice of intent to rely on an alibi as is required by Crim.R. 12.1. See id. Instead, appellant's defense centered on his claims that E.M.'s allegations were the result of "false memory," and that he never engaged in sexual activity with E.M, regardless of the dates the alleged abuse took place. Cf. *State v. Yaacov*, Cuyahoga App. No. 86674, 2006-Ohio-5321. Because appellant has failed to show how he was prejudiced by the time range, his first and second assignments of error are overruled.

{¶17} Assignment of Error No. 3:

{¶18} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY ADMITTING INSTANCES OF OTHER BAD ACT EVIDENCE."

{¶19} In his third assignment of error, appellant argues the trial court erred in permitting the state to introduce evidence of other sexual activity that occurred during the same time period covered by the indictment. This argument concerns the admission of evidence about sexual activity between appellant and E.M. at appellant's Clermont County residence, in addition to evidence that appellant entered the bathroom while his other grandchildren showered at the Brown County residence. Over defense counsel's objection, E.M. was permitted to testify about her "unpleasant feelings" regarding sexual activity on a couch in appellant's Clermont County residence. In addition, E.M.'s childhood companion, G.C., was permitted to testify that E.M. felt "hateful" toward the same couch. The trial court also admitted a recording of E.M.'s interview with a social worker that related solely to sexual activity in the Clermont County residence. Appellant also challenges the trial court's decision to permit E.M.'s sister, R.M., and E.M.'s cousin, D.M., to testify that appellant entered the bathroom while they showered at the Brown County residence.

{¶20} The state argues such evidence is admissible to negate appellant's contention that he was checking E.M.'s vaginal area for ticks, and instead engaged in the contact for the

purpose of sexual arousal or gratification. See R.C. 2907.05(A)(4). Conversely, appellant argues this evidence served no legitimate purpose and only tarnished his character in the eyes of the court. Additionally, appellant argues the testimony of R.M. and D.M. was not related to the charges before the court and was thus unfairly prejudicial.

{¶21} Evid.R. 404(B) provides: "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Likewise, R.C. 2945.59 provides: "[i]In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tends to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

{¶22} Such evidence is admissible if it meets one of the above requirements and there is substantial proof that the alleged other acts were committed by the defendant. See *State v. Miley*, Richland App. Nos. 2005-CA-67, 2006-CA-14, 2006-Ohio-4670, ¶60. Further, the prior acts must not be too remote and must be closely related in nature, time, and place to the offense charged. Id. at ¶61. This is so because prior acts that are too distant in time or too removed in method or type have no probative value. Id.

{¶23} We note the decision to admit or exclude relevant evidence is within the sound discretion of the trial court, and its decision will not be disturbed absent an abuse of that discretion. *State v. Bey*, 85 Ohio St.3d 487, 490, 1999-Ohio-283; *State v. Combs* (1991), 62 Ohio St.3d 278. The term "abuse of discretion" implies more than an error of law or

judgment. Rather, the term suggests the trial court acted in an unreasonable, arbitrary, or unconscionable manner. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. We also note for the benefit of this argument, and all of appellant's subsequent arguments challenging evidentiary issues, that because this was a bench trial, it is presumed that the court only considered admissible evidence. *State v. Penwell*, Fayette App. No. CA2010-08-019, 2011-Ohio-2100, ¶10.

{¶24} In the case at bar, the trial court found E.M.'s testimony as to sexual activity at the Clermont County residence was admissible, reasoning:

{¶25} "[The court finds] testimony by E.M. herself as to the alleged incident occurring in Clermont County on or about the same time period and involving the same type of touching wherein [appellant] claimed he was looking for ticks, as being permitted under Evid.R. 404(B) and O.R.C. §2945.59 as establishing the motive or intent of [appellant], the absence of mistake or accident on his part, and or [appellant's] scheme, plan, or system as to the alleged offenses. The Court finds that this is not violative of Evid.R. 403(A) in that the probative value is not outweighed by the danger of any unfair prejudice to [appellant.]"

{¶26} Initially, we note that because "R.C. 2945.59 and Evid.R. 404(B) codify an exception to the common law with respect to evidence of other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict." *State v. Broom* (1988), 40 Ohio St.3d 277, 282.

{¶27} In *State v. Curry* (1975), 43 Ohio St.2d 66, 73, the Ohio Supreme Court held "other acts" evidence is typically admissible under the "scheme, plan, or system" exception of R.C. 2945.59 in two situations: (1) when the other acts form "part of the immediate background of the crime charged in the indictment," or (2) when the identity of the perpetrator of the crime is at issue. In the case at bar, there is no dispute that if E.M.'s testimony was truthful, appellant was the perpetrator of the alleged crime. As such, identity was not at

issue. Id.; *State v. Schaim*, 65 Ohio St.3d 51, 61, 1992-Ohio-31.

{¶28} In order to be part of the "immediate background" of the crime charged, the evidence must concern events that are "inextricably intertwined" with that crime. Id. The Ohio Supreme Court has held other acts are "inextricably intertwined" with a charged crime when they are "so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof; or tends logically to prove any element of the crime charged." *State v. Wilkinson* (1980), 64 Ohio St.2d 308, 317. (Citations omitted.)

{¶29} We find appellant's sexual activity with E.M. at the Clermont County residence was "inextricably intertwined" with the alleged crimes at the Brown County residence. Specifically, we find the sexual activity in Clermont County tends logically to prove appellant's true intent in touching E.M. at the Brown County residence. See, e.g., *State v. Fortson*, Cuyahoga App. No. 92337, 2010-Ohio-2337, ¶32.

{¶30} At trial, the court permitted E.M. to testify appellant touched her "inappropriately" while watching television on the couch at the Clermont County residence. E.M. also testified she was "uncomfortable" being around the couch as a result of these encounters. The trial court also admitted a recorded interview between E.M. and a social worker, Cecilia Freihofer, during which E.M. described appellant's conduct on the Clermont County couch.[3]

{¶31} This evidence reveals appellant touched E.M. on other occasions without any concern for ticks, making it clear this explanation was nothing more than pretext. When stripped of this excuse, the trial court could logically conclude appellant engaged in the sexual activity for an entirely different purpose, namely, sexual gratification. R.C. 2907.01(B);

3. The interview was not made part of the record, however, neither party disputes that the interview relates solely to other acts alleged to have occurred in Clermont County.

R.C. 2907.05(A)(4). In other words, we find the aforementioned evidence regarding the Clermont County residence was "necessary to give the complete picture of what occurred" at the Brown County residence. *Wilkinson*, 64 Ohio St.2d at 318. See, also, *State v. Sinclair*, Greene App. No. 2002-CA-33, 2003-Ohio-3246, ¶35.

{¶32} Accordingly, we find E.M.'s testimony and the recorded interview relating to appellant's conduct in Clermont County were properly admitted to prove appellant's motive or intent, an element of the crime charged, which appellant placed at issue. Evid.R. 404(B). See, also, R.C. 2907.05(E).

{¶33} Appellant also challenges the trial court's decision to permit R.M. and D.M. to testify appellant entered the bathroom while they showered at the Brown County residence. We find the acts to which R.M. and D.M. testified, though they concerned the same time period and location alleged in the indictment, were wholly separate from the charged crime. The fact that appellant entered the bathroom while R.M. and D.M. showered is not part of the *immediate* background of the crimes alleged against E.M., particularly where the state did not proffer any proof that appellant engaged in sexual activity with R.M. or D.M., as he did with E.M. *Curry*, 43 Ohio St.2d at 73. Therefore, this evidence does not tend to show a scheme, motive, or intent. R.C. 2945.59.

{¶34} Despite the admission of the testimony, we find the probative value of such testimony to be so insignificant that any prejudice was harmless beyond a reasonable doubt. Crim.R. 52(A). We fail to see how appellant was prejudiced by evidence that he was near R.M. and D.M. in a bathroom, as opposed to evidence that he engaged in sexual activity with E.M.

{¶35} Lastly, appellant argues the trial court erroneously permitted E.M.'s childhood companion, G.C., to testify regarding E.M.'s feelings toward the couch at the Clermont County residence. Appellant challenges G.C.'s testimony that E.M. felt "very hateful" toward

the couch and was "very uncomfortable * * * with it present." As with appellant's argument regarding R.M. and D.M.'s testimony, we fail to see how G.C.'s testimony prejudiced appellant, even if we were to find it inadmissible. In fact, the challenged testimony is in large part corroborative of the feelings E.M. described during testimony we have already deemed relevant and admissible to show appellant's motive and intent. See Evid.R. 404(B). Furthermore, cumulative evidence is not necessarily inadmissible. See Evid.R. 403. Accordingly, G.C.'s testimony, even if believed to be cumulative, was of such a nature, we find any alleged error did not affect appellant's substantial rights or create unfair prejudice and therefore constitutes harmless error. Crim.R. 52(A). *State v. Hensley*, Warren App. No. CA2009-11-156, 2010-Ohio-3822, ¶23.

{¶36} We also note that during trial, the court routinely suggested it would not consider stricken or otherwise improper evidence, therefore appellant cannot overcome the presumption that the court only considered admissible evidence in reaching its decision. See *Penwell*, 2011-Ohio-2100 at ¶10.

{¶37} Appellant's third assignment of error is overruled.

{¶38} Assignment of Error No. 4:

{¶39} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY PERMITTING A STATE'S WITNESS TO VOUCH FOR THE CREDIBILITY OF THE ALLEGED VICTIM."

{¶40} In his fourth assignment of error, appellant argues the trial court erred in allowing a social worker to testify as an expert witness regarding a forensic interview with E.M.

{¶41} At trial, the state presented the testimony of Cecilia Freihofer, a social worker at the Mayerson Center at Cincinnati Children's Hospital. The Mayerson Center is a child-advocacy unit of the hospital that evaluates children who are suspected victims of physical

and sexual abuse. Freihofer testified she interviewed E.M. on April 27, 2007 to inquire about allegations E.M. made "in regards to fondling" by appellant. Over appellant's objection, Freihofer testified E.M.'s statements during the interview were "consistent with inappropriate sexual * * * contact[.]"

{¶42} Appellant's argument regarding Freihofer's testimony is threefold. We will address each argument in turn.

{¶43} First, appellant argues the trial court erroneously qualified Freihofer as an expert in forensic interviewing. In support of his argument, appellant relies on the testimony of his own expert witness, Dr. Jolie Brams, an "eminently credentialed physiologist," who opined Freihofer's testimony and interview techniques were "worrisome" and "frightening." Dr. Brams also indicated Freihofer failed to ask appropriate questions in order to avoid planting "false memories" in E.M.'s mind.

{¶44} The determination of the admissibility of expert testimony is within the discretion of the trial court and its decision will not be disturbed absent an abuse of that discretion. See *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, ¶9. As previously discussed, "abuse of discretion" suggests the trial court acted in an unreasonable, arbitrary, or unconscionable manner. *Blakemore*, 5 Ohio St.3d at 219.

{¶45} Evid.R. 702 provides:

{¶46} "A witness may testify as an expert if all of the following apply:

{¶47} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

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

{¶49} "(C) The witness' testimony is based on reliable scientific, technical, or other

specialized information."

{¶50} Under Evid.R. 702(B), a witness may testify as an expert if he or she is qualified by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony. *State v. Cooper* (2000), 139 Ohio App.3d 149, 167. Several Ohio appellate districts have applied the criteria in Evid.R. 702(B) to find that a social worker's education, training, and experience are sufficient to qualify him or her as an expert. Id.; *In re Rodriguez* (Feb. 19, 1988), Ottawa App. No. OT-87-18, 1988 WL 15667; *In re Wilson Children* (May 20, 1996), Stark App. No. 95CA0231, 1996 WL 363434; *State v. Curtis* (Oct. 20, 1988) Cuyahoga App. No. 54525, 1988 WL 112856.

{¶51} In the case at bar, Freihofer testified she had a master's degree in social work, she was a licensed social worker in the state of Ohio, and that she continued her forensic training through various classes during the course of her career. In addition, Freihofer testified that during her three and one-half year tenure with the Mayerson Center, she conducted over 800 interviews with children alleging physical or sexual abuse. Moreover, prior to appellant's trial, Freihofer had testified as an expert witness a "minimum of three times[.]"

{¶52} We find Freihofer had the education, training, and substantial experience such that she was qualified to give her expert opinion on forensic interviewing under Evid.R. 702(B). See *State v. Dial*, Cuyahoga App. No. 83847, 2004-Ohio-5860 (social worker was qualified expert concerning psychological responses of sexual abuse victims, even though social worker lacked doctorate, where witness had master's degree, interviewed over 700 children in alleged sexual abuse cases, and provided prior expert testimony).

{¶53} Accordingly, we overrule appellant's first argument and find the trial court did not abuse its discretion in qualifying Freihofer as an expert in forensic interviewing.

{¶54} Next, appellant argues the trial court erroneously permitted Freihofer to testify

as to her opinion on E.M.'s veracity.

{¶55} Regarding improper vouching, appellant correctly states that in *State v. Boston* (1989), 46 Ohio St.3d 108, the Ohio Supreme Court held that an expert witness may not testify as to the veracity of a child victim's statements because it is the fact-finder who bears the burden of assessing the credibility and veracity of witnesses. Further, where the sole foundation of an expert's opinion that a child has been sexually abused is an assessment of the child's veracity, admission of the opinion is error. *State v. Burrell* (1993), 89 Ohio App.3d 737, 746.

{¶56} In *Burell*, a pediatrician testified that what he was "really saying" on direct examination was that he "*believed*" the victim. (Emphasis added.) The Ninth District Court of Appeals found this testimony brought the case within the prohibition against an expert testifying as to his opinion of the veracity of a child victim's statements. Id.

{¶57} However, in the case at bar, Freihofer did not testify that she "believed" E.M. Instead, Freihofer testified that E.M.'s statements were "*consistent* with inappropriate sexual * * * contact[.]" (Emphasis added.) Although appellant claims the effect of Freihofer's testimony bolstered E.M.'s credibility, this court has held that "indirect bolstering of a victim's credibility is not the same as the direct rendering of an opinion as to a victim's veracity that was involved in *Boston.*" *State v. Cappadonia*, Warren App. No. CA2008-11-138, 2010-Ohio-494, ¶18. See, also, *State v. Stowers*, 81 Ohio St.3d 260, 1998-Ohio-632 (expert testimony that child victims' statements were "consistent with the problems experienced by children who had been sexually abused" was admissible and did not constitute improper vouching).

{¶58} Moreover, Freihofer repeatedly testified she did not interview alleged victims of sexual abuse for "truth or falseness," but rather to gather information to assess the child's medical and psychological needs. Freihofer testified she entered all forensic interviews with

an "open mind," and stated she based her opinion on E.M.'s statements, as well as statements from an outside source, namely, E.M.'s mother, Kyle.

{¶59} Lastly, unlike the child victim in *Boston* who was unavailable to testify, E.M. testified at trial and described the abuse in detail. E.M. was subject to cross-examination regarding her allegations and the trial court was clearly able to independently assess her credibility. See, e.g., *Cappadonia*, 2010-Ohio-494 at ¶20.

{¶60} Under these circumstances, we find the trial court did not abuse its discretion in permitting Freihofer to testify that E.M.'s statements were "consistent" with children who had experienced inappropriate sexual contact. See *State v. Kaufman*, Mahoning App. No. 08 MA 57, 2010-Ohio-1536, ¶125.

{¶61} Lastly, appellant argues that even if Freihofer was properly recognized as an expert in forensic interviewing, her opinion that E.M.'s statements were "consistent" with sexual abuse went beyond the scope of her expertise. However, Freihofer testified at length regarding the purpose of forensic interviewing: "to assess the medical needs of a child who has disclosed abuse as well as the [child's] psychological needs," and to report what the child says if the statements are "consistent with or concerning for sexual abuse[.]" Our review of the record indicates Freihofer acted in accordance with these purposes in assessing, reporting, and testifying to E.M.'s statements. Accordingly, we overrule appellant's argument.

{¶62} Appellant's fourth assignment of error is overruled.

{¶63} Assignment of Error No. 5:

{¶64} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY ADMITTING IMPERMISSIBLE HEARSAY EVIDENCE."

{¶65} In his fifth assignment of error, appellant argues the trial court erroneously permitted two witnesses to testify regarding E.M.'s nonverbal conduct.

{¶66} First, appellant challenges G.C.'s testimony regarding E.M.'s actions at G.C.'s

home in March 2007. G.C. testified that when E.M. disclosed appellant's sexual abuse, E.M. was "very upset * * * her knees were up to her chest and her hands were around her knees. She was curled up in a fetal position ball. She was rocking back and forth and shaking, a little bit. She was also crying." Appellant argues these comments amounted to testimony of "nonverbal conduct" and therefore qualified as inadmissible hearsay statements.

{¶67} Upon review of the record, we find no error in the trial court's decision to permit G.C.'s testimony where E.M.'s nonverbal conduct did not have the characteristics of a belief or statement.

{¶68} Hearsay is defined in Evid.R. 801(C) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A "statement" is either: "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Evid.R. 801(A). See *State v. Frankenberry*, Licking App. No. 08-CA-131, 2009-Ohio-3853, ¶33.

{¶69} In the case at bar, we find G.C.'s testimony of E.M.'s nonverbal conduct does not involve an assertion that could be proved true or false. See *State v. Carter* (1995), 72 Ohio St.3d 545, 549. "An 'assertion' for hearsay purposes 'simply means *to say that something is so, e.g.,* that an event happened or that a condition existed.'" Id. (Emphasis sic.) G.C.'s testimony falls into this nonassertive category, where E.M.'s conduct simply provided context within which to understand the stressful and traumatic nature of the events prompting E.M.'s disclosure. See, e.g., *State v. Simuel*, Cuyahoga App. No. 89022, 2008-Ohio-913.

{¶70} Appellant also argues the trial court erroneously permitted E.M.'s mother, Kyle, to testify regarding similar conduct at the time E.M. disclosed the alleged abuse to her family. Specifically, over appellant's objection, Kyle testified E.M. was "crying," that her "face contorted," and her "lips were quivering[.]" However, as with G.C.'s testimony, Kyle's

testimony was not offered for its truth, but to describe the stressful nature of the events leading up to E.M.'s disclosure.

{¶71} We also note such testimony is fairly duplicative of E.M.'s testimony that she felt "extremely uncomfortable" during the sexual activity, that the activity felt "wrong and funny," that she did not have "good memories" of the Brown County residence, and that she currently felt "angry" toward appellant.

{¶72} Under such circumstances, we find the trial court did not abuse its discretion in permitting G.C.'s and Kyle's testimony because E.M.'s nonverbal conduct was not hearsay under Evid.R. 801(C).

{¶73} Appellant's fifth assignment of error is overruled.

{¶74} Assignment of Error No. 6:

{¶75} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT AND VIOLATED HIS FEDERAL AND STATE DUE PROCESS RIGHTS BECAUSE HIS CONVICTION FOR GROSS SEXUAL IMPOSITION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶76} Assignment of Error No. 7:

{¶77} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT AS HIS CONVICTION FOR GROSS SEXUAL IMPOSITION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶78} In appellant's sixth and seventh assignments of error, he argues his conviction is not supported by the manifest weight or sufficiency of the evidence.

{¶79} Manifest weight and sufficiency of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would

support a conviction. *State v. Hernandez*, Warren App. No. CA2010-10-098, 2011-Ohio-3765, ¶24. When addressing sufficiency, "the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶80} While the test for sufficiency requires an appellate court to determine whether the state has met its burden of proof at trial, a manifest weight challenge examines the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *Hernandez* at ¶25. "In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Id.

{¶81} While appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, "these issues are primarily matters for the trier of fact to decide[.]" *State v. Walker*, Butler App. No. CA2006-04-085, 2007-Ohio-911, ¶26. Therefore, an appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances to correct a manifest miscarriage of justice, and only when the evidence presented at trial weighs heavily in favor of acquittal. *Thompkins*, 78 Ohio St.3d at 387.

{¶82} In the case at bar, appellant was charged with gross sexual imposition in violation of R.C. 2907.05(A)(4), which states:

{¶83} "(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the

offender; or cause two or more other persons to have sexual contact when any of the following applies:

{¶84} "* * *

{¶85} "(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person."

{¶86} "'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).

{¶87} Appellant first argues there was insufficient evidence to prove he touched E.M. for the purpose of sexually arousing or gratifying either person. However, upon review of the record, we find sufficient circumstantial evidence exists to support the trial court's finding that the purpose of appellant's actions was for sexual gratification.

{¶88} In determining whether sexual contact occurred, "the proper method is to permit the trier of fact to infer from the evidence presented at trial whether the purpose of the defendant was sexual arousal or gratification by his contact with those areas of the body described in R.C. 2907.01. In making its decision, the trier of fact may consider the type, nature and circumstances of the contact, along with the personality of the defendant. From these facts, the trier of facts [sic] may infer what the defendant's motivation was in making the physical contact with the victim. If the trier of fact determines that the defendant was motivated by desires of sexual arousal or gratification, and that the contact occurred, then the trier of fact may conclude that the object of the defendant's motivation was achieved." *State v. Gesell*, Butler App. No. CA2005-08-367, 2006-Ohio-3621, ¶24, quoting *State v. Cobb* (1991), 81 Ohio App.3d 179, 185.

{¶89} While the purpose of sexual arousal or gratification is an essential element of

gross sexual imposition, there is no requirement that there be direct testimony regarding sexual arousal or gratification. *Gesell* at ¶25.

{¶90} In the case at bar, E.M. testified she was approximately seven years old when appellant began checking her "for ticks" at the Brown County residence. E.M. testified appellant would enter the bathroom while she showered, stating that "he needed to check [her] 'potty,' which was [her] vagina and labia, and he would rub around there for much longer than required." E.M. testified appellant would rub his hand around her vagina and labia for approximately 45 to 60 seconds. On cross-examination, E.M. testified she could remember how long appellant touched her vagina and labia because she could remember "back to how long [she] was standing there." Additionally, when asked how large her genital area was at seven years old, E.M. put the tip of her thumb to the tip of her index finger, indicating a very small area.

{¶91} Given this evidence, we find the trial court could reasonably believe appellant's actions of placing his hand over E.M.'s vagina and labia for 45 to 60 seconds were made for the purpose of sexually arousing or gratifying himself, rather than checking for ticks. Despite appellant's argument that E.M.'s testimony is "simply too incredible to be believed," it is even less believable that an innocent inspection for ticks would require any rubbing at all, let alone 45 to 60 seconds worth of contact over an area so small. Accordingly, we find the "sexual arousal or gratification" element was based on sufficient evidence and we reject appellant's argument. R.C. 2907.01(B).

{¶92} Appellant also argues his conviction is against the manifest weight of the evidence because the only evidence supporting the verdict was E.M.'s testimony regarding abuse that occurred many years prior to her testimony. In support of his argument, appellant places great weight upon the fact that E.M. was 16 years old when she testified about events that occurred when she was seven.

{¶93} During trial, appellant presented the testimony of Dr. Jolie Brams, an expert in clinical and forensic psychology, sexual abuse with children, and child and adolescent development with memory related issues. Dr. Brams testified that seven-year-olds generally lack an accurate perception of time, and therefore questioned E.M.'s ability to recall the duration of the alleged abuse at that age. However, the state's expert, Cecilia Freihofer, testified "[e]very person remembers things differently, and * * * my education and experience tells me that children remember traumatic instances more so than just a general '[o]h, that's right, when I was seven-years-old, I went to the park.'"

{¶94} When experts present conflicting testimony, this court will not overturn the trial court's verdict on a manifest weight of the evidence challenge solely because the trier of fact chose to believe a certain witness' testimony over the testimony of others. See, e.g, *State v. Whitaker* (Oct. 12, 1998), Warren App. No. CA97-12-123, 1998 WL 704348, at *4; *State v. Smith*, Summit App. No. 25305, 2011-Ohio-3943, ¶29.

{¶95} In reviewing the record, we cannot say the trial court erred in choosing to believe the state's expert over appellant's. Freihofer's testimony corroborated E.M.'s detailed testimony describing the abuse that occurred when she was seven years old. While E.M. did not describe the events as "traumatic," she testified she felt "extremely uncomfortable," and "knew that something felt wrong and funny" while appellant touched her vagina and labia.

{¶96} We also reject appellant's argument that E.M.'s testimony is meritless simply because E.M. did not immediately disclose every detail about the abuse at the Brown County residence. Freihofer opined that disclosing sexual abuse is a "process" for many children, where they "remember some things, and they remember more." See, also, Not Enough Time?: The Constitutionality of Short Statutes of Limitations for Civil Child Sexual Abuse Litigation (1989), 50 Ohio St.L.J. 753, 756 (research has demonstrated that repression of sexual abuse is one aspect of the coping behavior of survivors).

{¶97} After reviewing the record, in weighing the evidence and all reasonable inferences, in considering the credibility of the witnesses, and in resolving any conflicts in evidence, we find appellant's conviction is supported by sufficient evidence and is not against the manifest weight of the evidence.

{¶98} Appellant's sixth and seventh assignments of error are overruled.

{¶99} Assignment of Error No. 8:

{¶100} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY SENTENCING HIM TO A MAXIMUM PRISON SENTENCE."

{¶101} In his eighth assignment of error, appellant argues his sentence is excessive and unreasonable. Specifically, appellant argues the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, overruled the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and consequently revived the requirements of judicial fact-finding prior to sentencing. Appellant uses *Ice* to argue: "[i]f judicial fact finding is acceptable for the imposition of consecutive sentences, then there should also be no problem with requiring judicial fact finding for the imposition of a maximum or more than the minimum sentence." However, appellant cites no authority to support this contention.

{¶102} In *Foster*, the Ohio Supreme Court found sections of Ohio's felony sentencing statutes, R.C. 2929.14(E)(4) and R.C. 2929.41(A), unconstitutional. In deciding *Foster,* the Ohio Supreme Court held that trial courts "have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id. at ¶100.

{¶103} Moreover, the Ohio Supreme Court recently rejected the contention that *Ice* revived R.C. 2929.14(E)(4) and R.C. 2929.41(A). *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320. In *Hodge*, the court stated: "the decision of the United States Supreme Court in

Oregon v. Ice does not revive Ohio's former consecutive sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster.* Because the statutory provisions were not revived, trial judges are 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." Id. at ¶39.

{¶104} In accordance with the Ohio Supreme Court's holding in *Hodge,* we reject appellant's argument that after *Ice*, there is "nothing wrong with requiring judicial fact finding[.]" [sic]

{¶105} We also find the trial court did not abuse its discretion in ordering appellant to serve a maximum prison term. Following *Foster,* appellate review of felony sentencing is controlled by the two-step procedure outlined by the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. First, we must "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." Id. at ¶4. If this first prong is satisfied, the trial court's decision is then reviewed for an abuse of discretion. Id. An abuse of discretion is more than an error of law or judgment; it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore*, 5 Ohio St.3d at 219.

{¶106} First, we find the trial court's sentence is not contrary to law. A sentence is not clearly and convincingly contrary to law where the trial court considers the overriding purposes and principles of felony sentencing as outlined in R.C. 2929.11 and the seriousness and recidivism factors listed in R.C. 2929.12, properly applies postrelease control, and sentences the defendant to a term within the permissible range. *Kalish* at ¶18. In the case at bar, the trial court expressly stated it considered the purposes and principles of sentencing under R.C. Chapter 2929.11, and balanced the seriousness and recidivism factors under R.C. 2929.12 in great detail. In addition, the court properly applied postrelease

control and sentenced appellant to a term within the permissible range for the offense. R.C. 2929.14(A)(3). Accordingly, the sentence is not clearly and convincingly contrary to law.

{¶107} Secondly, we find the trial court did not abuse its discretion in ordering appellant to serve the maximum sentence of five years for gross sexual imposition in violation of R.C. 2907.05(A)(4). A trial court does not abuse its discretion in rendering a sentence so long as it gives careful and substantial deliberation to the relevant statutory considerations. *Kalish*, 2008-Ohio-4912 at ¶20. In the case at bar, the trial court considered the presentence investigation report, victim impact statements, and letters from various family members. The trial court also permitted appellant to express his remorse, but balanced this against the fact that appellant's actions created psychological "issues" for E.M. and "devastated" her entire family.

{¶108} In view of these considerations, we conclude the trial court's sentencing decision was not unreasonable, arbitrary, or unconscionable. See *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶109} Appellant's eighth assignment of error is overruled.

{¶110} Assignment of Error No. 9:

{¶111} "THE TRIAL COURT'S CLASSIFICATION OF DEFENDANT-APPELLANT AS A TIER I AND TIER II SEX OFFENDER AND ITS ACCOMPANYING DUTIES AND REQUIREMENTS ARE UNCONSTITUTIONAL."

{¶112} In his ninth assignment of error, appellant argues his classification as a Tier I and Tier II sex offender violates the doctrine of separation of powers, the prohibition against double jeopardy, and constitutes cruel and unusual punishment. Appellant argues that because he committed the offense prior to the effective date of the Adam Walsh Act,

employing the act to classify him would result in these constitutional violations.[4]

{¶113} In 1996, the General Assembly enacted Am.Sub.H.B. 180 ("Megan's Law"), which amended the state's sex offender registration process. *State v. Cook*, 83 Ohio St.3d 404, 406, 1998-Ohio-291. Portions of Megan's Law became effective January 1, 1997, and other portions of the law became effective July 1, 1997. Id.

{¶114} In 2007, the General Assembly enacted Am.Sub.S.B. 10, which repealed Megan's Law and replaced it with Ohio's version of the Adam Walsh Act ("S.B. 10"). *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶20. S.B. 10 eliminated the categories of "sexually oriented offender," "habitual sex offender," and "sexual predator" under Megan's Law and replaced them with a three-tier classification system. Id. at ¶21.

{¶115} Under the new classification system adopted by S.B. 10, a trial court must designate the offender as either a Tier I, II, or III sex offender. R.C. 2950.01. "The new classification system places a much greater limit on the discretion of the trial court to categorize the offender, as S.B. 10 requires the trial court to simply place the offender into one of the three tiers based on their offense." *In re Copeland*, Allen App. No. 1-08-40, 2009-Ohio-190, ¶10.

{¶116} Recently, in *State v. Williams*, Slip Opinion No. 2011-Ohio-3374, defendant Williams pleaded guilty to engaging in unlawful sexual conduct with a minor. The offense occurred prior to the enactment of S.B. 10. The Ohio Supreme Court held that applying S.B. 10 to Williams or "[other] defendants who committed sex offenses prior to its enactment, violates Section 28, Article II of the Ohio Constitution, which prohibits the General Assembly from passing retroactive laws." Id. at ¶20. As such, the court reversed and remanded for resentencing under the law in effect at the time defendant committed the offense, i.e.,

4. The Adam Walsh Act went into effect on January 1, 2008.

Megan's Law. Id. at ¶22.

{¶117} In the case at bar, appellant committed the offense in 2000, therefore he must be sentenced under Megan's Law, not S.B. 10. During the sentencing hearing, the trial court admitted as such, stating: "[t]his case is pursuant to sentencing statutes as they existed at the date of the offenses." However, during the same hearing, the trial court classified appellant as a "Tier I" sexual offender as a result of his guilty plea for one count of gross sexual imposition in violation of R.C. 2907.05(A)(5), a fourth-degree felony. The trial court also classified appellant as a "Tier II" sexual offender for his conviction on one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), a third-degree felony. As a "Tier I" offender, the trial court ordered appellant to register annually for 15 years. As a "Tier II" offender, the trial court ordered appellant to register every 180 days for 25 years.

{¶118} Under Megan's Law, depending on their classification, sexual offenders were required to register annually for periods of ten or 20 years, or, for the highest-risk offenders, every 90 days for life. See former R.C. 2950.06(B); R.C. 2950.07(B). See, also, *Bodyke*, 2010-Ohio-2424 at ¶23-28.

{¶119} Thus, despite the trial court's apparent intention to apply the law as it existed at the time appellant committed the offense, the terminology and registration requirements imposed indicate the court followed the more stringent requirements of S.B. 10, rather than Megan's Law. In so doing, the trial court erroneously saddled appellant with "new or additional burdens, duties, obligations, or liabilities as to a past transaction[.]" *Williams*, 2011-Ohio-3374 at ¶19.

{¶120} Accordingly, we find appellant must be reclassified in accordance with Megan's Law. The decision is reversed solely on the grounds of sex offender classification and is remanded for further proceedings consistent with this opinion. Id. at ¶16.

{¶121} Judgment affirmed in part, reversed in part, and remanded.

HENDRICKSON, P.J., and HENDRICKSON, J., concur.

Hendrickson, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.