[Cite as *State v. Richardson*, 2015-Ohio-824.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
		CASE NOS. CA2014-03-023
Plaintiff-Appellee,	:	CA2014-06-044
		CA2014-06-045
	:	
- vs -		O P I N I O N
	:	3/9/2015
MICHAEL SCOTT RICHARDSON,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2011-CR-01089

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M. POWELL, J.

{¶ 1} Defendant-appellant, Michael Scott Richardson, appeals from his convictions and sentence in the Clermont County Court of Common Pleas for rape, gross sexual imposition, and felonious assault. For the reasons stated below, we affirm in part and reverse in part the decision of the trial court.

{¶ 2} Following accusations of sexual abuse by Richardson's three nephews, Dy.B., Da.B., and C.K-H., charges were brought against Richardson. At the time of the abuse

allegations, Dy.B. was ten years old, Da.B. was seven years old, and C.K-H. was four years old. On December 28, 2011, Richardson was indicted in Case No. 2011-CR-1089, on four counts of rape in violation of R.C. 2907.02(A)(1)(b), with the specification that the victim was less than 13 years of age and four counts of gross sexual imposition in violation of R.C. 2907.05(A)(4), with the specification that evidence other than the testimony of the victim corroborates the violation. The charges arose out of the allegations that between December 1, 2011 and December 15, 2011, Richardson orally and anally raped Da.B. and C.K-H. and touched the penis or buttock of Da.B., C.K-H., and Dy.B. or made Da.B., C.K-H., and Dy.B. touch Richardson's penis.

{¶ 3} On July 25, 2013, Richardson was indicted a second time in Case No. 2013-CR-0454 on two counts of rape in violation of R.C. 2907.02(A)(1)(b), with the specification that the victim was less than ten years of age and two counts of rape in violation of R.C. 2907.02(A)(2). These charges arose out of allegations that between November 2011 through December 15, 2011, Richardson orally and anally raped Dy.B.

{¶ 4} Lastly, on August 22, 2013, Richardson was indicted in Case No. 2013-CR-0505 on three counts of felonious assault in violation of R.C. 2903.11(A)(1). The felonious assault charges arose out of allegations that between November 2011 through December 15, 2011, Richardson engaged in sexual conduct that caused Dy.B., Da.B., and C.K-H. to suffer serious physical harm, including posttraumatic stress disorder (PTSD). Thereafter, the three cases were consolidated for trial.

{¶ 5} After the claims of sexual abuse came to light, the children's Mother took Dy.B., Da.B., and C.K-H. to the Emergency Department of Cincinnati Children's Hospital where the children were interviewed by a social worker and examined by medical personnel. Several days later, the boys were taken to the Mayerson Center for Safe and Healthy Children at

Cincinnati Children's Hospital to be interviewed by Cecelia Freifhofer, a social worker and forensic interviewer. The Mayerson Center is a child advocacy center. Each child was interviewed individually and the interviews were video-recorded. After the completion of the interviews, the videos were forwarded to Union Township Police Department Detective John Pavia and other law enforcement personnel conducting the investigation.

{¶ 6} Prior to trial, the state filed a motion to introduce the videotaped interviews of Dy.B., Da.B., and C.K-H. at the Mayerson Center pursuant to the hearsay exception outlined in Evid.R. 803(4), for medical diagnosis and treatment. The trial court ruled that the video of the interviews of Dy.B. and Da.B. may be played for the jury if Dy.B. and Da.B. testified at trial. However, the court found that the video of C.K-H.'s interview may not be admitted regardless of whether he testified at trial.

{¶ 7} In September 2013, Dy.B. and Da.B. were diagnosed with herpes simplex virus, type 1. Thereafter, Detective Pavia filed an affidavit in support of a search warrant to draw and test Richardson's blood for the herpes simplex virus. In the affidavit, Detective Pavia referenced medical records obtained from the Clermont County Jail which indicate Richardson was treated for herpes while imprisoned. On October 10, 2013, the search warrant was granted. Richardson's blood was drawn and tested positive for herpes, type 1. Later, C.K-H. was also tested and diagnosed with herpes, type 1.

{¶ 8} Richardson made two motions in regards to his jail medical records. First, he filed a motion in limine to prevent the introduction of the medical records because the records are protected by the physician-patient privilege under R.C. 2317.02(B)(1). Second, Richardson made an oral motion to suppress the blood test results because the affidavit to support the search warrant relied on these privileged medical records. On December 13, 2013, the trial court granted Richardson's motion in limine finding that the medical records

are privileged. However, the court denied Richardson's motion to suppress the blood test results, reasoning that the affidavit for the search warrant, excluding any reference to the privileged medical records, demonstrated sufficient probable cause to grant the search warrant.

{¶ 9} On January 6, 2014, Richardson's case proceeded to a jury trial. During trial, Dy.B. and Da.B. testified that Richardson engaged in anal intercourse, fellatio, and forced each boy to either touch Richardson's penis or had their penises touched by Richardson. Freifhofer also testified regarding her interviews with Dy.B., Da.B., and C.K-H. and the videotape of Da.B.'s interview was played for the jury. In regards to C.K-H., Freifhofer testified that C.K-H. described anal and oral intercourse by Richardson and that Richardson touched C.K-H.'s penis. Mother also testified to the statements the boys made to her regarding the sex abuse and that she believed their allegations. The state also presented evidence that Dy.B., Da.B., and C.K-H. suffer from PTSD as a result of the abuse. Richardson took the stand in his own defense and denied all the charges against him.

{¶ 10} The jury found Richardson guilty of eight counts of rape, four counts of gross sexual imposition, and three counts of felonious assault. At the sentencing hearing, in Case No. 2013-CR-0454, the trial court merged the two rape convictions in violation of R.C. 2907.02(A)(2) into the two rape convictions in violation of R.C. 2907.02(A)(1)(b). The court sentenced Richardson to ten years to life on both rape counts. In Case No. 2011-CR-1089, the trial court sentenced Richardson to ten years to life on the four rape counts and a five-year mandatory prison term on each of the gross sexual imposition counts. Lastly, in Case No. 2011-CR-0505, the court merged the felonious assault counts with Richardson's rape convictions. The court ordered all sentences to be served consecutively, for a total aggregate prison term of 80 years to life.

{¶ 11} Richardson now appeals, asserting four assignments of error.

{¶ 12} Assignment of Error No. 1:

{¶ 13} THE TRIAL COURT ERRED AS A MATTER OF LAW BY OVERRULING APPELLANT'S MOTION TO SUPPRESS.

{¶ 14} Richardson challenges the trial court's decision denying his motion to suppress evidence of his blood test results. Richardson argues the search warrant to draw and test his blood was based on insufficient probable cause because the affidavit in support of the warrant relied on privileged and inadmissible medical records.

{¶ 15} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, 12th Dist. Preble No. CA2006-10-023, 2007-Ohio-3353. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. *Id.* Therefore, when reviewing the denial of a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, 12th Dist. Butler No. CA2005-03-074, 2005-Ohio-6038. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶ 12.

{¶ 16} The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures and provides that " * * * no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Evidence that is obtained in violation of the Fourth Amendment is subject to exclusion. *State v. Quinn*, 12th Dist. Butler No. CA2011-06-116, 2012-Ohio-3123, ¶ 20. However, the exclusionary rule does not apply

when police properly execute a legal warrant issued by a detached magistrate and supported by probable cause. *Id.*, citing *State v. George*, 45 Ohio St.3d 325 (1989).

{¶ 17} Pursuant to Crim.R. 41(C), a warrant shall issue on an affidavit sworn to or communicated to a judge and the court's determination that "probable cause for the search exists." In determining whether probable cause exists to support the issuance of a warrant, courts employ a "totality-of-the-circumstances" test, which requires an issuing judge "'to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit * * * including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *State v. Moore*, 12th Dist. Butler No. CA2005-08-366, 2006-Ohio-4556, ¶ 11, quoting *George* at 329.

{¶ 18} A court that is reviewing a finding of probable cause based upon a search warrant affidavit "may not substitute their own judgment for that of the issuing [judge] by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which the reviewing court would issue the search warrant." *George* at 330. "The duty of the reviewing court is simply to ensure that the [issuing judge] had a substantial basis for concluding that probable cause existed." *Moore* at ¶ 12. Any after-the-fact scrutiny should accord great deference to the issuing judge's determination and "doubtful or marginal cases should be resolved in favor of upholding the warrant." *George* at 330.

{¶ 19} In the case at bar, the affidavit in support of the search warrant contains 15 paragraphs which outline the abuse allegations against Richardson and the presence of herpes in two of the three boys. In 3 of the 15 paragraphs, the affiant, Detective Pavia, states he had been advised that Richardson was treated for herpes while incarcerated and Richardson's inmate medical records indicate he was treated for symptoms similar to herpes.

Whether or not the medical records could be referenced in the affidavit, we find the search warrant was valid because excluding these three paragraphs, the remaining portions of the affidavit contains sufficient probable cause to support the issuance of the search warrant.

{¶ 20} The United States Supreme Court has instructed that when false statements are included in an affidavit for a search warrant, "a warrant based on the affidavit is still valid unless, 'with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause * * *.'" *Franks v. Delaware*, 438 U.S. 154, 156, 98 S.Ct. 2674 (1978); *see State v. Bell*, 12th Dist. Clermont No. CA2008-05-044, 2009-Ohio-2335, ¶ 9, citing *Waddy* at 441. While there are no allegations that the affidavit contains false statements or omissions, we find this analysis instructive. *See State v. Swift*, 12th Dist. Butler No. CA2013-08-161, 2014-Ohio-2004, ¶ 25 (probable cause even if some information stale); *United States v. Sawyers*, 6th Cir. No. 04-5050, 2005 WL 647774, *8 (Mar. 22, 2005).

{¶ 21} The remaining 12 paragraphs of the affidavit describe how the sexual abuse allegations came to light, detail the allegations, identify Richardson as the perpetrator, recount that Da.B. and Dy.B. had genital lesions, claimed their genitals itched, and tested positive for herpes, type 1.

{¶ 22} Based on our review of the record, after excluding the paragraphs referencing Richardson's medical records, the remaining contents of the affidavit are sufficient to establish probable cause for the issuance of the search warrant. Specifically, because herpes is a sexually transmitted disease, the averments in the affidavit that Dy.B. and Da.B. suffered from the same strain of herpes, and alleged that they were sexually abused by Richardson in the recent past gives rise to a reasonable belief that Richardson may also be infected as a result of either having communicated herpes to the children or having contracted it from them. If Richardson is also infected with the same strain of herpes as the

children, such is evidence of a crime in that it lends credence to the children's claims of sexual abuse. Therefore, the issuing judge had a substantial basis to conclude that probable cause existed to issue the search warrant.

{¶ 23} Richardson's first assignment of error is overruled.

{¶ 24} Assignment of Error No. 2:

{¶ 25} THE TRIAL COURT ERRED AS A MATTER OF LAW BY ALLOWING THE STATE TO INTRODUCE HEARSAY STATEMENTS WHICH VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL.

{¶ 26} Richardson argues that several statements admitted during trial are inadmissible hearsay. Specifically, Richardson challenges the admission of (1) the video and Freifhofer's notes of Da.B.'s Mayerson Center interview, (2) Freifhofer's testimony and notes regarding C.K-H.'s statements during his Mayerson Center interview, and (3) Mother's testimony of her children's statements and her testimony that she believes the allegations of her sons.

Mayerson Center Interviews of Da.B. and C.K-H.

{¶ 27} Richardson argues the video and Freifhofer's notes of Da.B.'s Mayerson Center interview and Freifhofer's testimony and notes regarding C.K-H.'s Mayerson Center interview are inadmissible because the interviews were done for forensic and investigatory purposes and not for the purpose of medical diagnosis and treatment.

{¶ 28} The admission or exclusion of evidence by the trial court is reviewed under an abuse of discretion standard. *State v. Robb*, 88 Ohio St.3d 59, 68 (2000). Hearsay is defined 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." Evid.R. 801(C). Hearsay is generally not admissible unless an exception applies. Evid.R. 802. Evid.R.

803(4) provides an exception to the hearsay rule as follows:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Hearsay statements made to a social worker may be admissible if they are made for purposes of medical diagnosis or treatment. *See State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267.

{¶ 29} The Ohio Supreme Court recently considered the admissibility of statements given during interviews at child advocacy centers. *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742. *Arnold* noted that these types of interviews seek to elicit two types of statements, to wit: statements for the purposes of medical diagnosis and treatment and forensic statements. *Id.* at ¶ 33. *Arnold* focused on the admissibility of these statements under the Confrontation Clause, rather than Evid.R. 803(4). *Id.*

{¶ 30} *Arnold* held that, to the extent this evidence is obtained to assist police in a "forensic investigation" of abuse, it is "testimonial," and is therefore barred by the Confrontation Clause. *Id.* at ¶ 36. However, to the extent the evidence is obtained to medically diagnose and treat a child, the evidence is "nontestimonial" and not barred from admission at trial. *Id.* at ¶ 41.

{¶ 31} *Arnold* went on to identify which of the child-victim's statements to the interviewer in that case were necessary for medical diagnosis. These included the child's statements regarding the identity of the perpetrator, the type of abuse alleged, the time frame of the alleged abuse, and the identification of the areas where the child had been touched. *Id.* at ¶ 32, 38.

{¶ 32} On the other hand, the court determined that statements such as the child's

assertion that the offender shut and locked the door before raping her, the child's description of where others were in the house at the time of the rape, the child's statement that the offender removed her underwear, and the child's description of the offender's boxer shorts, were statements relating primarily to the investigation, and therefore, were prohibited by the Confrontation Clause. *Id.* at ¶ 34, 36.

{¶ 33} In the present case, Freifhofer, a social worker and forensic interviewer at the Mayerson Center, testified that Dy.B., Da.B., and C.K-H. came into the Emergency Department on the night of December 15, 2011. At the Emergency Department, the children were interviewed by a social worker and examined by medical personnel. Freifhofer interviewed Da.B. on December 19, 2011, and Dy.B. and C.K-H. on December 27, 2011. After the interviews, the videos and Freifhofer's notes were forwarded to law enforcement.

{¶ 34} In regards to Da.B, the video of his Mayerson Center interview is 55 minutes long and was played in its entirety for the jury. The video begins by Freifhofer asking general questions of Da.B. unrelated to the sexual abuse and explaining her role as a social worker at the Mayerson Center. Thereafter, Da.B. describes two incidents of sexual abuse regarding Richardson. The first instance occurred when Richardson grabbed him out of Mother's bedroom during the night, shut the bedroom door and locked it, and took Da.B. to the living room. In the living room, Da.B. states that Richardson put his penis in his mouth and bottom, "gooey stuff" came out of Richardson's penis, he used a washrag to wipe it off, and he later got a rash in his mouth. Da.B. described the positions he and Richardson were in, the clothing they were wearing, the order of the sex acts, Richardson's statements to him, and Richardson's threat to kill Da.B. if he told anyone.

{¶ 35} Da.B. also described a second incident where Richardson took him out of Mother's bedroom during the night into Da.B.'s bedroom and put his penis in Da.B.'s mouth,

on Da.B.'s penis and leg, and inside Da.B.'s bottom. Da.B. stated that Richardson was lying on top of him and he was lying on his belly, "gooey stuff" came out of Richardson's penis, and Da.B. wiped it off with a red washrag. Also during the interview, Da.B. put marks on an anatomically correct drawing to identify the body parts Richardson touched. Freifhofer's notes, which were admitted at trial, reiterate Da.B.'s statements made in the video.

{¶ 36} Initially, we note that we are not presented with a Confrontation Clause issue, because Da.B. testified at trial and was subject to cross-examination. *See State v. Pence*, 12th Dist. Warren No. CA2012-05-045, 2013-Ohio-1388, ¶ 37. Nevertheless, we find that *Arnold* compels the conclusion that most of Da.B.'s statements to Freifhofer were made for purpose of medical diagnosis and treatment, and thus they were admissible under Evid.803(4). These include Da.B.'s statements that Richardson was the perpetrator, Richardson's penis touched Da.B.'s penis, Richardson engaged in oral and anal sex with Da.B., Richardson ejaculated on Da.B., Da.B. got a rash inside his mouth after the incident, and the timeline when the sex acts occurred.

{¶ 37} However, several statements made by Da.B. primarily served a forensic or investigative purpose. These include statements that Richardson grabbed Da.B. out of Mother's room and took him into the living room or bedroom, that he shut and locked the bedroom door, the description of the clothing Da.B. and Richardson were wearing, and that Da.B. used a washrag to clean himself afterward. Thus, pursuant to *Arnold*, these statements were unrelated to a medical diagnosis, and should not have been admitted. *See State v. Gray*, 12th Dist. Butler No. CA2011-09-176, 2012-Ohio-4769, ¶ 46.

{¶ 38} While some of the statements Da.B. made in the interview did not fall under the hearsay exception for medical diagnosis and treatment, and therefore the admission of those statements was error, such error was harmless as the state presented ample evidence

against Richardson to sustain his convictions. Crim.R. 52(A). *See State v. Shouse*, 12th Dist. Brown No. CA2013-11-014, 2014-Ohio-462, ¶ 23. At trial, Da.B. testified regarding the details of the incident where Richardson took him to the living room and engaged in oral and anal sex. Additionally, evidence was admitted which established that Da.B. was diagnosed with the same strain of herpes as Richardson and the other boys and was diagnosed with PTSD. As a result, it cannot be said that the result of the trial would have been otherwise absent the inclusion of the video of Da.B.'s interview. We therefore find that the trial court's error in admitting some of the statements in the video was harmless.

{¶ 39} In regards to C.K-H., Freifhofer testified to the statements C.K-H. made during his interview at the Mayerson Center. C.K-H. told Freifhofer that Richardson had left the house because he touched C.K-H.'s body "with objects on his penis, and on his butt, and in his butt" as well as Richardson touching C.K-H.'s butt on the inside with Richardson's penis. C.K-H. stated he was made to touch Richardson's penis with his hand. Freifhofer explained that C.K-H. "described ejaculation when he described gooey stuff going into his butt when [Richardson] touched his – the inside of his butt with [Richardson's] wiener." On cross-examination, Freifhofer acknowledged that C.K-H. stated Richardson touched his private area with a stick and a wire.

{¶ 40} Freifhofer's notes of the interview were also admitted into evidence. The notes state that during the interview, C.K-H. said Richardson rubbed his penis on C.K-H.'s penis, Richardson's butt touched C.K-H.'s penis and moved back and forth. C.K-H. stated that Richardson ejaculated on C.K-H.'s butt and later his butt was "itchin." C.K-H. stated these incidents occurred in the living room as well as his bedroom and C.K-H. told Richardson "no" and tried to call for Mother but Richardson covered his mouth.

{¶ 41} We find that the vast majority of Freifhofer's notes and testimony concerning

C.K-H.'s statements were made for the purposes of medical diagnosis or treatment. These statements include (1) that Richardson touched C.K-H., (2) the type of contact Richardson had with C.K-H., (3) Richardson ejaculated into C.K-H.'s butt and afterward C.K-H.'s butt itched, and (4) Richardson touched C.K-H.'s private area with a stick and a wire. However, some of the statements were made for an investigatory purpose, including (1) C.K-H.'s description of the room where the abuse occurred, and (2) C.K-H. stated "no" and called for Mother during these incidents but Richardson covered his mouth.

{¶ 42} C.K-H. did not testify at trial and therefore the statements that primarily served a "forensic or investigative purpose are testimonial and are inadmissible pursuant to the Confrontation Clause when the declarant is unavailable for cross-examination." *Arnold*, 2010-Ohio-2742 at ¶ 33. However, the testimonial statements made primarily for the investigatory purposes do not warrant a reversal of Richardson's convictions in regards to C.K-H., as any error is harmless. When evidence has been improperly admitted at trial "in derogation of a criminal defendant's constitutional rights, the admission is harmless 'beyond a reasonable doubt' if the remaining evidence alone comprises 'overwhelming' proof of [a] defendant's guilt." *Gray*, 2012-Ohio-4769 at ¶ 49-50.

{¶ 43} Even after excluding the statements that were testimonial, there was still overwhelming evidence of Richardson's guilt. Freifhofer's testimony established that C.K-H. was compelled to engage in anal intercourse and fellatio with Richardson and C.K-H. was forced to touch Richardson's penis with his hand. Also evidence was admitted which established that C.K-H. was diagnosed with the same strain of herpes as Richardson and the other two boys. Additionally, C.K-H. was diagnosed with PTSD. Finally, the evidence that Richardson had sexually abused Da.B. and Dy.B. is further evidence of Richardson guilt as it constitutes "same or similar" conduct under Evid. R. 404(B). Consequently, we find that the

statements made by C.K-H. during his interview which served a primarily forensic or investigative purpose did not violate Richardson's constitutional rights as the admission of the statements constituted harmless error beyond a reasonable doubt.

{¶ 44} Therefore, the trial court did not err in admitting the video of Da.B.'s interview and Freifhofer's notes of the interview or admitting Freifhofer's testimony and notes regarding C.K-H.'s interview.

Mother's Testimony

{¶ 45} Richardson also argues that the court erred in permitting Mother to testify that Da.B. told C.K-H. to "do it like [Richardson] does it" and other statements made by the children in regards to the abuse because the statements were inadmissible hearsay. Additionally, Richardson argues it was error to allow Mother to testify that she believes her sons.

{¶ 46} Richardson concedes that he did not object to Mother's testimony on this basis and therefore, on appeal, has waived any error except plain error. "[P]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). Plain error does not exist unless, but for the error, the outcome of the trial would have been different. *State v. Blacker*, 12th Dist. Warren No. CA2008-07-094, 2009-Ohio-5519, ¶ 39.

{¶ 47} As stated above, hearsay is inadmissible and is "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." Evid.R. 801(C); Evid.R. 802. A "statement" is defined for hearsay purposes, as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." Evid.R. 801(A). "An 'assertion' for hearsay purposes 'simply means *to say that something is so, e.g.,* that an event happened or that a condition

existed.'" (Emphasis sic.) *State v. LaMar*, 95 Ohio St.3d 181, 197, 2002-Ohio-2128, ¶ 61. A directive is not an assertion because it is incapable of being proved either true or false and, therefore, cannot be offered to prove the truth of the matter asserted. *State v. Young*, 8th Dist. Cuyahoga No. 78058, 2001 WL 370460, *5 (Apr. 12, 2001).

{¶ 48} At trial, Mother testified that when she was getting ready to take a shower, she overheard Da.B. tell C.K-H. to "Do it like [Richardson] does it." She stated Da.B. repeated this statement loudly, three or four times. Mother also testified that as she was driving the boys to Cincinnati Children's Hospital, Da.B. told her Richardson "had been doing nasty stuff to him and his brothers." Once at the hospital, Dy.B. told her Richardson made him "do stuff to him." Mother also stated she believed the accusation of sexual abuse made by Dy.B., Da.B., and C.K-H.

{¶ 49} Whether or not the trial court erred in admitting Mother's testimony regarding the children's statements about the alleged abuse, we find the error harmless, as Mother's testimony was cumulative to the testimony of Dy.B. and Da.B. *See Pence*, 2013-Ohio-1388, ¶ 38. Additionally, Da.B.'s statement to C.K-H. to "Do it like [Richardson] does it" is not an assertion. Da.B.'s statement was not made to say that an event happened or a condition existed but instead was a directive to C.K-H. to do a certain act. Consequently, the trial court did not commit plain error in admitting Mother's testimony of the children's statements.

{¶ 50} Further, in regards to Mother's testimony that she believes the abuse allegations of her sons, Richardson has failed to cite any legal authority in support of his contention that the admission of this testimony was in error. App.R. 16(A)(7) requires an appellant's brief to include an argument containing the appellant's contentions with respect to each assignment of error presented for review and "the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which

appellant relies." Therefore, we will disregard this portion of Richardson's argument for his failure to comply with App.R. 16(A)(7). *See State v. Howard*, 12th Dist. Butler No. CA2014-04-091, 2015-Ohio-158, ¶ 13-14. Furthermore, the admission of this testimony does not constitute plain error, as the outcome of the trial would not have been different if it had been excluded in view of the other evidence of Richardson's guilt.

{¶ 51} Richardson's second assignment of error is overruled.

{¶ 52} Assignment of Error No. 3:

{¶ 53} THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW AND/OR AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO SUSTAIN APPELLANT'S CONVICTIONS.

{¶ 54} Richardson argues that his convictions for rape, gross sexual imposition, and felonious assault were against the manifest weight of the evidence and based on insufficient evidence. "[W]hile a review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct concepts, a finding that a conviction is supported by the weight of the evidence will be dispositive of the issue of sufficiency." *State v. English*, 12th Dist. Butler No. CA2013-03-048, 2014-Ohio-441, ¶ 66. With that in mind, we first examine whether appellant's conviction is supported by the manifest weight of the evidence.

{¶ 55} A manifest weight challenge 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. *State v. Hensley*, 12th Dist. Warren No. CA2014-01-011, 2014-Ohio-5012, ¶ 10. To determine whether a conviction is against the manifest weight of the evidence, the reviewing court must look at the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving the 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. *State v. Chasteen*, 12th Dist. Butler No. CA2013-12-223, 2014-Ohio-4622, ¶ 10. As a result, we will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances when the evidence presented at trial weighs heavily in favor of acquittal. *State v. Little*, 12th Dist. Butler No. CA2014-01-020, 2014-Ohio-4756, ¶ 11. For ease of discussion, we will analyze the convictions as they relate to each child.

Dy.B.

{¶ 56} In regards to Dy.B., Richardson was convicted of two counts of rape in violation of R.C. 2907.02(A)(1)(b)[1], which provides:

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

"Sexual conduct" includes "anal intercourse, fellatio, and cunnilingus between persons regardless of sex; 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. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." R.C. 2907.01(A).

{¶ 57} Richardson was also convicted of two counts of gross sexual imposition in

1. Richardson was also convicted of two counts of rape in violation of R.C. 2907.02(A)(2). These two counts of rape were alternative charges to the two counts of rape in violation of R.C. 2907.02(A)(1)(b) and at sentencing the R.C. 2907.02(A)(2) rape charges were merged into the R.C. 2907.02(A)(1)(b) charges. Richardson has not raised whether these alternative charges were against the manifest weight of the evidence or not supported by sufficient evidence and therefore we will not address those charges.

violation of R.C. 2907.05(A)(4), which provides:

> (A) No person shall have sexual contact with another, not the spouse of the offender * * * when any of the following applies:
>
> * * *
>
> (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.

"Sexual contact" is defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region * * *." R.C. 2907.01(B).

{¶ 58} Lastly, Richardson was convicted of one count of felonious assault as provided in R.C. 2903.11(A)(1), which provides: "[n]o person shall knowingly * * * cause serious physical harm to another or to another's unborn." "Serious physical harm" includes "[a]ny mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment." R.C. 2901.01(A)(5)(a).

{¶ 59} During trial, Dy.B. testified that he, Mother, and his brothers lived with Richardson in November and December 2011. In November 2011, the family moved into Richardson's apartment that was located in Cincinnati, Ohio. After a couple weeks, he, his brothers, Mother, and Richardson all moved into an apartment in an area commonly referred to as Piccadilly. The Piccadilly apartment had two bedrooms, Mother and her boyfriend would sleep in one bedroom while Dy.B., Da.B., and C.K-H. would often sleep in the second bedroom. Richardson would sleep in the living room.

{¶ 60} Dy.B. stated that while in the Piccadilly apartment, Richardson would wake him up during the night and take him into the living room or the bathroom to sexually assault him. He stated this happened about ten times. Dy.B. described an incident where Richardson woke him up when he was sleeping in a bedroom with his brothers and took him into the bathroom. Richardson "messed" with Dy.B.'s penis and made Dy.B. touch Richardson's

penis. After Richardson made Dy.B. touch his penis, "white, sticky, nasty stuff" came out and Richardson made Dy.B. wash his hands. Additionally, in the bathroom, Richardson put his penis in Dy.B.'s mouth, told Dy.B. to "suck" his penis. Dy.B. stated that while Richardson's penis was in his mouth "then it was nasty, so I spit it out in the sink, and washed my mouth with water."

{¶ 61} Dy.B. also described a second incident where Richardson woke him up during the night and took him into the living room. In the living room, Richardson made Dy.B. touch his penis, Richardson put his penis in Dy.B.'s mouth, and "white stuff" came out of it. Then Richardson "messed with [Dy.B.'s] butt with his privates, scraping it with his private all around it." Richardson's private went inside Dy.B.'s butt and "white stuff" came out. Dy.B. testified that it hurt when Richardson put his penis inside his butt. Dy.B. also stated after each episode of abuse, Richardson threatened to hurt Dy.B. and his family if Dy.B. ever told anyone.

{¶ 62} During his testimony, Dy.B. acknowledged that other men stayed at their apartment frequently but identified Richardson as the perpetrator. Dy.B. also stated that since the abuse, he gets "cold sores" on his mouth, on his private, and on his butt. He explained that while he used to get these sores before Richardson, he only got them around his mouth in the winter and the sores were less severe. Dy.B. stated that after the abuse, he has nightmares and trouble sleeping and gets angrier with his brothers. Dy.B. also testified he did not disclose all the sexual abuse to the social workers that interviewed him because he was not comfortable with them.

{¶ 63} Several medical personnel who treated Dy.B. and his brothers at Children's Hospital also testified at trial. The Emergency Department social worker testified that she met with Dy.B. when he was brought into Children's Hospital by Mother on December 15,

2011. She stated Dy.B. told her Richardson molested him and his brothers, made him touch Richardson's penis, and touched his penis. Freifhofer also testified that during her interview at the Mayerson Center with Dy.B., he stated that Richardson made him touch Richardson's penis and that Richardson touched his penis. Freifhofer conducted the Trauma Symptom Checklist for Young Children and Dy.B. ranked in the "clinically significant range for signs of emotional distress in almost all of the trauma related scales including post-traumatic stress as well."

{¶ 64} Dr. Robert Shapiro, an expert in pediatric child abuse, testified Dy.B. was diagnosed with the same strain of herpes as Da.B., C.K-H., and Richardson. Dr. Shapiro stated it was "clinically significant" that all three children, who had alleged sex abuse against Richardson, developed the same strain of herpes as Richardson. Dr. Shapiro also stated that it is common for children not to immediately disclose all of the sexual abuse that occurred to them. Dr. Shapiro concluded that based on medical history, physical examination, and the laboratory tests, his opinion based on a reasonable degree of medical certainty is that Dy.B. was the victim of sexual abuse.

{¶ 65} Greg Raush, a clinical social worker who treated Dy.B. and his brothers, stated that Dy.B. was diagnosed with PTSD resulting from the sexual abuse from Richardson. He stated that as a result of the abuse, Dy.B. had stomach aches, headaches, intense fear, nightmares, difficulty sleeping, anger, and irritability.

{¶ 66} At trial, Richardson testified in his own behalf and denied all of the sexual abuse allegations. He stated that he moved in with Mother and her children to help the family out. Richardson also stated that other men spent time in the Piccadilly apartment, including Mother's boyfriend.

{¶ 67} After reviewing the entire record, weighing the inferences, and examining the

credibility of witnesses, we find Richardson's convictions relating to Dy.B., for two counts of rape, two counts of gross sexual imposition, and one count of felonious assault were not against the manifest weight of the evidence and were supported by sufficient evidence. The state presented testimony and evidence from which the jury could have found all the elements of the crimes proven beyond a reasonable doubt. While Dy.B. did not fully disclose all of the sexual abuse allegations to the social workers involved in the case, the credibility of the witnesses and weight to be given to their testimony are ultimately matters for the trier of fact to resolve. *State v. Amburgey*, 12th Dist. Clermont No. CA2005-01-007, 2006-Ohio-1000, ¶ 6, citing *State v. DeHass*, 10 Ohio St.2d 230, 231 (1967).

Da.B.

{¶ 68} With respects to Da.B., Richardson was convicted of two counts of rape in violation of R.C. 2907.02(A)(1)(b), one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), and one count of felonious assault in violation of R.C. 2903.11(A)(1).

{¶ 69} At trial, Da.B. described an incident where Richardson sexually abused him in the living room of the Piccadilly apartment. Richardson carried Da.B. from his bedroom into the living room and Richardson put his hand on Da.B.'s penis and moved it "back and forth." Da.B. started screaming and Richardson covered his mouth and told Da.B. that if he told anyone, Richardson would kill him. Richardson then put his private in Da.B.'s mouth, and grabbed Da.B.'s head and pushed it back and forth. Richardson also put his penis in Da.B.'s "bottom" and "gooey stuff" came out of Richardson's penis. Da.B. cleaned up with a washrag and threw it over the balcony. Da.B. also stated that since Richardson has done these things to him, he gets sores on his mouth, bottom, and penis.

{¶ 70} The video-taped interview of Da.B. by Freifhofer at the Mayerson Center was played for the jury. During the video, Da.B. describes two incidents of sexual abuse, one that

occurred in the living room and one that occurred in his bedroom. In the living room, Da.B. stated that Richardson's penis went in his mouth and bottom and "gooey stuff" came out of Richardson's penis. In the bedroom, Da.B. stated that Richardson put his penis in Da.B.'s mouth, on Da.B.'s penis, on his leg, and inside his bottom, and "gooey stuff" came out of Richardson's penis. At trial, Freifhofer also testified regarding her interview with Da.B. and stated that Da.B. ranked in the "clinically significant range for signs of emotional distress in almost all of the trauma related scales including post-traumatic stress as well."

{¶ 71} The Emergency Department social worker testified that when Da.B. was brought into the Emergency Department, Da.B. told her Richardson put his penis inside his mouth, on his private, and in his bottom. The Sexual Assault Nurse Examiner (SANE), who treated the children at the Emergency Department, stated she observed lesions on the tip of Da.B.'s penis and scrotum and he had a petechial injury to the hard palate of his mouth. She explained that a "petechial injury is a lesion in hard palate of mouth and only occurs in the hard palate when there has been trauma, like when a male erect penis has gone into the mouth and hits the hard palate."

{¶ 72} Dr. Shapiro also testified that based on a reasonable degree of medical certainty, he believes Da.B. was the victim of sexual abuse. This diagnosis is based on Da.B.'s narrative of the abuse, Da.B.'s diagnosis for the same strain of herpes as his brothers and Richardson, the lesions on Da.B.'s penis, the petechial injury in Da.B.'s mouth, and Da.B.'s behavioral changes since the alleged abuse occurred. Further, Raush, the social worker who treated Da.B., also diagnosed Da.B. with PTSD resulting from Richardson's sexual abuse. He stated that Da.B. was very fearful if Richardson was ever released from prison, had persistent stomach aches, nightmares, anger, irritability, and trouble concentrating.

{¶ 73} After reviewing the entire record, weighing the inferences, and examining the credibility of witnesses, we find that Richardson's convictions relating to Da.B. for two counts of rape, one count of gross sexual imposition, and one count of felonious assault were not against the manifest weight of the evidence and were supported by sufficient evidence.

C.K-H.

{¶ 74} In regards to C.K-H., Richardson was convicted of two counts of rape in violation of R.C. 2907.02(A)(1)(b), one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), and one count of felonious assault in violation of R.C. 2903.11(A)(1).

{¶ 75} At trial, the SANE explained that when C.K-H. was brought into the Emergency Department, he had a lesion on his penis but did not have other trauma to his genital or anal areas. The Emergency Department social worker testified that C.K-H. indicated Richardson had touched him on his penis. C.K-H. also reported "oral/genital contact" to the attending physician during his physical exam.

{¶ 76} Additionally, Freifhofer testified to the statements C.K-H. made to her during his interview at the Mayerson Center. During the interview, C.K-H. told Freifhofer that Richardson had touched C.K-H.'s body "with objects on his penis, and on his butt, and in his butt" as well as Richardson touching C.K-H.'s butt on the inside with Richardson's penis. C.K-H. stated he was made to touch Richardson's penis with his hand and that Richardson touched C.K-H.'s private area with a stick and a wire. C.K-H. described "gooey stuff" going into his butt from Richardson's penis. Freifhofer's notes from the interview also indicate C.K-H. stated Richardson rubbed his penis on C.K-H.'s penis, Richardson's butt touched C.K-H.'s penis, and Richardson moved back and forth.

{¶ 77} Dr. Shapiro testified that based on a reasonable degree of medical certainty, he believes C.K-H. was the victim of sexual abuse. This diagnosis is based on C.K-H.'s

narrative of the abuse, C.K-H.'s diagnosis for the same strain of herpes as his brothers and Richardson, and the lesions on C.K-H.'s penis. Additionally, Dr. Shapiro stated that it is normal for a young child to use words like "stick" and "wire" to describe sexually inappropriate touching. Lastly, Raush, the social worker who treated C.K-H, also diagnosed C.K-H. with PTSD resulting from Richardson's sexual abuse. C.K-H. avoided talking about the abuse, was very fearful if Richardson would be released from jail, had nightmares, and difficulty concentrating.

{¶ 78} After reviewing the entire record, weighing the inferences, and examining the credibility of witnesses, we find Richardson's convictions relating to C.K-H. for two counts of rape, one count of gross sexual imposition, and one count of felonious assault were not against the manifest weight of the evidence and were supported by sufficient evidence.

{¶ 79} Richardson's third assignment of error is overruled.

{¶ 80} Assignment of Error No. 4:

{¶ 81} THE TRIAL COURT ERRED AS A MATTER OF LAW BY IMPROPERLY SENTENCING APPELLANT.

{¶ 82} Richardson also challenges his sentence. Richardson argues that his rape and gross sexual imposition convictions were allied offenses of similar import. Additionally, Richardson maintains that the court erred in imposing consecutive sentences and the court did not consider the purposes and principles of sentencing.

Allied Offenses

{¶ 83} Richardson was convicted and sentenced for six counts of rape; two counts for Dy.B., two counts for Da.B., and two counts for C.K-H. Richardson was also convicted and sentenced for four counts of gross sexual imposition; two counts for Dy.B., one count for Da.B., one count for C.K-H. Richardson argues that the court erred in sentencing him

separately for the rape and gross sexual imposition as to each child because his single act of engaging in sexual activity, starting from when Richardson forced each child to touch his penis to fellatio and anal intercourse, would not amount to different encounters, but only a single act performed with a single state of mind.

{¶ 84} At the outset, we note Richardson never raised the issue of merger in the trial court as it related to the rape and gross sexual imposition counts, and therefore, has waived all but plain error. Crim.R. 52(B). Regardless, the imposition of multiple sentences for allied offenses of similar import amounts to plain error. *State v. Accorinti*, 12th Dist. Butler No. CA2012-10-205, 2013-Ohio-4429, ¶ 9. Therefore, this court will review Richardson's allied offenses argument for plain error. *Id.*

{¶ 85} Pursuant to R.C. 2941.25, Ohio's multiple-count statute, the imposition of multiple punishments for the same criminal conduct is prohibited. *State v. Ozevin*, 12th Dist. Clermont No. CA2012-06-044, 2013-Ohio-1386, ¶ 9. As R.C. 2941.25 states:

> (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.

{¶ 86} The Ohio Supreme Court established a two-part test for determining whether offenses are allied offenses of similar import under R.C. 2941.25 in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. Under *Johnson*, the first inquiry focuses on whether it is possible to commit both offenses with the same conduct. *Johnson* at ¶ 48. In making this determination, it is not necessary that the commission of one offense would always result in

the commission of the other, but instead, the question is simply whether it is possible for both offenses to be committed with the same conduct. *Id.*

{¶ 87} If it is possible to commit both offenses with the same conduct, courts must then determine whether the offenses were in fact committed by the same conduct, that is, by a single act, performed with a single state of mind. *Johnson* at ¶ 49. If so, the offenses are allied offenses of similar import and must be merged. *Id.* at ¶ 50. However, if the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge. *Id.* at ¶ 51.

{¶ 88} In this case, the jury found Richardson committed two counts of rape when he engaged in fellatio and anal intercourse with Da.B. and committed gross sexual imposition when he forced Da.B. to touch his penis. In regards to C.K-H., Richardson committed the two counts of rape when he engaged in fellatio and anal intercourse with C.K-H. and committed gross sexual imposition when he forced C.K-H. to touch his penis. As to Dy.B., Richardson engaged in anal intercourse and fellatio. Richardson then committed gross sexual imposition when he made Dy.B. touch Richardson's penis on two separate occasions, once in the bathroom and once in the living room.

{¶ 89} It is well established that distinct, different kinds of sexual activity constitute separate offenses for sentencing purposes. *State v. Chamberlain*, 12th Dist. Brown No. CA2013-04-004, 2014-Ohio-4619, ¶ 71. Richardson's conduct that constituted the rape charges can be differentiated from the conduct constituting the gross sexual imposition charges. Therefore, his convictions for rape and gross sexual imposition were not based on a single act, committed with a single state of mind. *See State v. Roush*, 10th Dist. Franklin No. 12AP-201, 2013-Ohio-3162, ¶ 7; *State v. Ferrell*, 8th Dist. Cuyahoga No. 1006589, 2014-

Ohio-4377, ¶ 33. Accordingly, the trial court did not commit plain error by failing to merge the offenses for sentencing.

Felony Sentencing

{¶ 90} Richardson also argues his sentence is clearly and convincingly contrary to law because the court did not make the requisite findings before imposing consecutive sentences and the court did not consider the purposes and principles of sentencing.

{¶ 91} "'The standard of review set forth in R.C. 2953.08(G)(2) shall govern all felony sentences.'" *State v. Crawford*, 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, ¶ 6, quoting *State v. A.H.*, 8th Dist. Cuyahoga No. 98622, 2013-Ohio-2525, ¶ 7. Pursuant to R.C. 2953.08(G)(2), when hearing an appeal of a trial court's felony sentencing decision, "the appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing." However, as explicitly stated in R.C. 2953.08(G)(2), "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion."

{¶ 92} Instead, an appellate court may take any action authorized under R.C. 2953.08(G)(2) only if the court "clearly and convincingly finds" that either: (1) "the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant," or (2) "[t]hat the sentence is otherwise contrary to law." A sentence is not clearly and convincingly contrary to law where the trial court considers the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible statutory range. *Crawford* at ¶ 9; *State v. Elliott*, 12th Dist. Clermont No. CA2009-03-020, 2009-Ohio-5926, ¶ 10.

{¶ 93} Pursuant to R.C. 2929.14(C)(4), a trial court must engage in a three-step analysis and make certain findings before imposing consecutive sentences. *State v. Dillon*, 12th Dist. Madison No. CA2012-06-012, 2013-Ohio-335, ¶ 9; *see also State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, syllabus. First, the trial court must find that the consecutive sentence is necessary to protect the public from future crime or to punish the offender. R.C. 2929.14(C)(4). Second, the trial court must find that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. *Id.* Third, the trial court must find that one of the following applies:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4)(a)-(c).

{¶ 94} "A trial court satisfies the statutory requirement of making the required findings when the record reflects that the court engaged in the required analysis and selected the appropriate statutory criteria." *State v. Setty*, 12th Dist. Clermont Nos. CA2013-06-049 and CA2013-06-050, 2014-Ohio-2340, ¶ 113. In imposing consecutive sentences, the trial court is not required to provide a word-for-word recitation of the language of the statute or articulate reasons supporting its findings. *Id.* Nevertheless, the record must reflect that the trial court engaged in the required sentencing analysis and made the requisite findings. *Id.*

The court's findings must thereafter be incorporated into its sentencing entry. *Id.*

{¶ 95} Here, the record reflects that the trial court made the findings required by R.C. 2929.14(C)(4) when it ordered Richardson's sentences be served consecutively. Specifically, the trial court made the following findings:

> In considering the consecutive structure of the sentences, Mr. Brad—Mr. Richardson, I've also considered 2914(C)(4)(a) and (b), and I would find that under the facts and circumstances of this horrendous case, there were multiple victims—that these consecutive sentences are necessary to protect the public from future crime and to punish you; that they are not disproportionate to the seriousness of the – of your conduct and the danger that you pose to the public; that they were committed as part of one or more offenses and the harm caused two or more of these offenses is so great and I do find it's the most serious offense.
>
> These children—the PTSD that they will incur, the sexually transmitted disease that they now have is – is so great and so unusual that no single prison term for any of these offenses would adequately reflect the seriousness of these various offenses that you stand convicted of, and therefore again the consecutive structure is – will be ordered.

The trial court later memorialized these findings within its sentencing entry.

{¶ 96} From the trial court's statements at the sentencing hearing and the language utilized in the sentencing entry, it is clear that the trial court properly complied with the dictates of R.C. 2929.14(C)(4). *See Crawford*, 2013-Ohio-3315 at ¶ 17. Therefore, the trial court did not err in imposing consecutive sentences in this matter.

{¶ 97} We also disagree with Richardson's contention that his sentence was in error because the trial court did not properly consider the principles and purposes of felony sentencing under R.C. 2929.11 or weigh the seriousness and recidivism factors under R.C. 2929.12. The sentencing entries for Richardson's rape and gross sexual imposition convictions specifically state that the trial court considered "the purposes and principles of sentencing under 2929.11 and 2929.12." While the trial court did not state during the hearing

that it had considered R.C. 2929.11 or R.C. 2929.12, it is well-settled that a trial court speaks through its journal entries. *State v. Sturgill*, 12th Dist. Butler No. CA2011-08-166, 2012-Ohio-4102, ¶ 26. Accordingly, the trial court properly considered the purposes and principles of felony sentencing.

{¶ 98} While we have found the trial court properly imposed consecutive sentences and considered the purposes and principles of sentencing, we sua sponte address the constitutionality of Richardson's mandatory prison sentence for his gross sexual imposition convictions according to the recent Ohio Supreme Court decision, *State v. Bevly*, Slip Opinion No. 2015-Ohio-475.[2]

{¶ 99} Gross sexual imposition committed in violation of R.C. 2907.05(A)(4) or (B) is a third-degree felony for which there is a presumption that a prison term be imposed. R.C. 2907.05(C)(2). A court shall impose upon an offender convicted of gross sexual imposition in violation of R.C. 2907.05(A)(4) or (B), a mandatory person term if "evidence other than the testimony of the victim was admitted in the case corroborating the violation." R.C. 2907.05(C)(2)(a).

{¶ 100} In this case, the jury found Richardson guilty of four counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4), and found the corroborating-evidence specification under R.C. 2907.05(C)(2)(a) for each count. The trial court then sentenced Richardson to a mandatory prison term of five years on each of his four gross sexual imposition convictions, to be served consecutively consistent with the statute.

{¶ 101} In *Bevly*, the Supreme Court held that "the provision in R.C. 2907.05(C)(2)(a) that requires a mandatory prison term for a defendant convicted of gross sexual imposition

2. "An appellate court has the discretion to recognize an issue not raised by the parties so long as the record contains a sufficient basis for deciding the issue." *State v. Stamper*, 12th Dist. Butler No. CA2012-08-166, 2013-Ohio-5669, fn. 1, citing *Hungler v. Cincinnati*, 25 Ohio St.3d 338 (1986). This court has a sufficient basis for deciding the issue.

when the state has produced evidence corroborating the crime" violates the due process protections of the Fifth and Fourteenth Amendments to the United States Constitution. *Bevly*, Slip Opinion No. 2015-Ohio-475 at paragraph one of the syllabus. The Supreme Court found that the corroborating-evidence specification violates due process because it "lacks a rational basis for distinguishing between cases on the basis of the presence or absence of corroborating evidence * * *." *Id.* at ¶ 1.

{¶ 102} In so holding, the Supreme Court reasoned "there is no rational basis for imposing greater punishment on offenders based only on the state's ability to produce additional evidence to corroborate the crime." *Id.* at ¶ 18. In fact, "[c]orroborating evidence is irrelevant to determining the culpability of the offender, the severity of the offense, or the likelihood of recidivism. It bears no relation to ensuring that punishment is graduated or proportional, and it does not serve any other theory of penal sanctions such as retribution, incapacitation, or rehabilitation." *Id.* Additionally, the corroborating evidence offered, Bevly's confession, "is merely cumulative of his admission of guilty at the plea hearing and provides no additional information that proves the offense or justifies an enhanced penalty." *Id.*

{¶ 103} The Ohio Supreme Court also held that "as applied," the corroborating-evidence specification found in R.C. 2907.05(C)(2)(a) violated Bevly's right to a jury trial under the Sixth and Fourteenth Amendment of the United States Constitution. *Bevly* at ¶ 1-2. Bevly's right to a jury trial was violated because he had pled guilty to gross sexual imposition, but at the sentencing hearing, corroborating evidence was introduced in regards to the mandatory prison term. *Bevly* at ¶ 1-2.

{¶ 104} Therefore, the Supreme Court reversed and remanded for resentencing for two reasons. *Bevly* at ¶ 28. The imposition of a mandatory term pursuant to R.C. 2907.05(C)(2)(a) violates the due process protections of the Fifth and Fourteenth

Amendments to the United States Constitution because there is no rational basis for the corroborating evidence specification. *Bevly* at ¶ 29. Second, the imposition of a mandatory term under R.C. 2907.05(C)(2)(a) violated Bevly's right to trial by jury under the Sixth and Fourteenth Amendments of the United States Constitution because a finding of corroborating evidence is an element that must be found by a jury. *Id.*

{¶ 105} Pursuant to *Bevly*, the corroborating-evidence specification found in R.C. 2907.05(C)(2)(a) is unconstitutional. Consequently, we find the portion of Richardson's sentence which imposed a mandatory term of imprisonment for the gross sexual imposition convictions pursuant to R.C. 2907.05(C)(2)(a) is clearly and convincingly contrary to law, and this matter must be remanded for resentencing. However, Richardson's right to a jury trial was not violated because, unlike *Bevly*, Richardson was found guilty by a jury of four counts of gross sexual imposition *and* the corroborating evidence specification. While Richardson's constitutional right to a jury trial was not violated, *Bevly* made clear that the corroborating evidence specification violated equal protection and due process and is an independent basis for reversing the previous judgment and remanding for a new sentencing hearing. *Bevly* at ¶ 28, 29.

{¶ 106} Richardson's fourth assignment of error is overruled in part and sustained in part.

{¶ 107} Judgment affirmed in part, reversed in part, and remanded to the trial court for resentencing consistent with this opinion.

PIPER, P.J., and RINGLAND, J., concur.