[Cite as *State v. Shifflet*, 2015-Ohio-4250.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	
	:	Case No. 13CA23
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
THOMAS E. SHIFFLET,	:	
	:	
Defendant-Appellant.	:	**Released: 09/28/15**

APPEARANCES:

Timothy P. Young, Ohio State Public Defender, and Peter Galyardt, Assistant State Public Defender, Columbus, Ohio, for Appellant.

Keller J. Blackburn, Athens County Prosecutor, and Merry M. Saunders, Assistant Prosecuting Attorney, Athens, Ohio, for Appellee.

Elizabeth A. Well, The Justice League of Ohio, Powell, Ohio, for Amicus Curiae.

McFarland, A.J.

{¶1} Thomas Shifflet filed a notice of appeal from the judgment entry of conviction entered on April 22, 2013 and from the amended judgment entry entered on April 23, 2013. Appellant raises six assignments of error, contending the trial court erred by: (1) accepting his *Alford* plea which was not knowing, voluntary, and intelligent; (2) depriving him of his constitutional right to effective assistance of counsel; (3) depriving him of his constitutional right to trial by jury by finding corroboration under R.C. 2907.05(C)(2)(a); (4) imposing restitution for

unqualified economic losses; (5) permitting a designated support person pursuant to R.C. 2945.481 to testify as a witness in his trial; and (6) convicting him of gross sexual imposition, R.C. 2907.05(A)(4), when the verdict was against the manifest weight of the evidence. For the reasons which follow, we affirm the judgment of the trial court as to all assignments of error except for assignment of error number three, which has merit. As such, we remand this matter for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} On July 25, 2011, Appellant was indicted by the Athens County Grand Jury on one count of rape, R.C. 2907.02(A)(2), a felony of the first degree. He was arraigned on July 28, 2011, a bond was set and he was released on his own recognizance. A jury trial was initially scheduled for October 2011. The parties engaged in pretrial discovery.

{¶3} On May 3, 2012, the Athens County Prosecutor filed a superseding indictment, listing the original rape charge and including three additional counts of gross sexual imposition, R.C. 2907.05(A)(4), all felonies of the third degree. The final count was sexual imposition, R.C. 2907.06(A)(1), a misdemeanor of the third degree. Appellant, a long-time resident of Athens County and an army veteran, was age 76 by the time the matters came on for trial. Appellant had two adult daughters, Jody Dearth and Tammy Gura, who operated daycare centers in Athens County. All alleged victims were minor children who either came in contact with

Appellant at the daycare centers where he frequently visited, or knew him through family members.

{¶4} On May 30, 2012, Appellant was arraigned on the new charges and again released on his own recognizance. Appellant's counsel filed a motion to dismiss the newly filed counts on speedy trial grounds. The trial court subsequently denied Appellant's motion to dismiss. The matters were again set for trial on November 26, 2012. After two in camera hearings, on October 29, 2012 the court filed a journal entry finding the child victims to be competent witnesses.

{¶5} Appellant filed a motion for relief from prejudicial joinder. The State of Ohio filed a motion that the child witnesses be allowed to testify via closed circuit television. The State also filed a motion to allow additional witnesses, other than victims of the indicted crimes, to testify to prior acts in proof of motive. The State also filed a motion for a determination of the admissibility of previously recorded interviews of the child victims. Both parties filed motions regarding expert witnesses. The trial court denied the motion for joinder and the motion to allow testimony regarding prior occurrences. The trial court granted the motion regarding the admissibility of the recorded interviews and the motion to allow the victims to testify via closed circuit television.

{¶6} A fifteen-day jury trial took place beginning on February 27, 2013. Jury selection took three days and testimony took nine days. Count 1, rape,

allegedly occurring on or about June 27, 2011, involved a four-year-old female, M.V. M.V. attended Jody's daycare center in Athens County until June 27, 2011. Appellant often visited the daycare center and some of the children called him "Papaw Shifflet." When M.V.'s mother picked her up on June 27, 2011, M.V. told her the vaginal area hurt. M.V. was examined at numerous health care facilities and child abuse was suspected. M.V. testified Appellant sat down in a chair at the daycare center and motioned for her to sit on his lap. When she did, Appellant put his hands down her pants and put his finger and a piece of plastic in her vagina.

{¶7} Count 2, gross sexual imposition, allegedly occurring on or about June 27, 2011, involved a three-year-old female, A.P. A.P. testified Appellant frequently brought suckers for the children to the daycare center. She testified on June 27, 2011, Appellant called A.P. over and placed her in his lap. As she sat in his lap, Appellant tickled her and touched the skin on her vagina. Additional facts regarding this count will be set forth in Part VI below.

{¶8} Count 3, gross sexual imposition, allegedly occurring between February 1, 2011 and June 30, 2011, involved a seven-year-old female, L.C. L.C. attended another daycare center operated by Appellant's other daughter, Tammy Gura. L.C. testified that Appellant brought suckers to the daycare center and was left alone with the children at times. Appellant called the children over. He motioned for L.C. to sit in his lap and when she did, he touched her "private spot."

She testified most days Appellant was at the daycare center, he touched her. She also testified the little girls at the daycare talked about how to protect themselves from Appellant, by sitting down, crossing their legs, and putting their hands in their laps.

{¶9} Count 4, gross sexual imposition, allegedly occurring between March 1, 2010 and March 31, 2010, involved eleven-year-old female, J.H.[1] J.S. testified her grandmother, Janet Lonas, was friends with Appellant and his wife Beverly. On a trip home from Circleville, Ohio, while Janet Lonas and Beverly Shifflet were sitting in the front of Lonas's vehicle, J.S. was riding in the back with Appellant. Appellant began tickling her belly, however, he kept putting his hand further down her waistline until he had his hand down her pants and on her vagina. The incident lasted 2-3 minutes.

{¶10} Count 5, sexual imposition, allegedly occurred on or about November 27, 2010 to a twelve-year-old female, M.H. M.H. is related to J.S. and knew Appellant and his family through Janet Lonas. M.H. testified she was with her grandmother and J.S. at a holiday open house next to Jody's daycare center when Appellant grabbed her breast, vaginal area, and buttocks while she hugged him good-bye. M.H. testified when that happened, she asked J.S. if she saw what

[1] A motion to amend the superseding indictment to reflect count four victim's initials as "J.S." was subsequently granted.

happened. In doing so, J.S. reported that something worse had happened to her previously. Ultimately, however, Appellant was found not guilty on Count 5.

{¶11} At the conclusion of trial on March 19, 2013, Appellant was found guilty of Count 2, not guilty of Count 5, and the jury did not reach any verdict as to Counts 1, 3, and 4.[2] On April 4, 2013, the trial court filed a journal entry declaring a mistrial on Counts 1, 3, and 4 and a judgment of acquittal on Count 5. Apparently the State of Ohio and Appellant engaged in negotiations with regard to sentencing. On April 3 and 5, 2013, Appellant appeared in court and entered an *Alford*/no contest plea to Count 1, which was amended from rape to gross sexual imposition. Appellant also entered *Alford*/no contest pleas to Counts 3 and 4.

{¶12} By judgment entry filed April 22, 2013, Appellant was sentenced to a five-year mandatory prison term on each count, to be served concurrently. Appellant was ordered to pay restitution to the victims J.S., A.P., L.C., M.V., and their families for a total restitution amount of $5,610.90. Appellant was ordered to have no contact with the victims and their families. He was declared a Tier II Sexual Offender and apprised of registration and reporting requirements. On April 23, 2013, the trial court filed an amendment to the previous judgment entry correcting the amount of restitution ordered to $5,340.90 instead of the amount previously journalized. This timely appeal followed.

[2] Appellant's counsel filed various post-trial motions and supplemental memoranda, including a motion for acquittal on counts 1-4, and a motion for new trial.

ASSIGNMENTS OF ERROR

"I. THOMAS SHIFFLET WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS WHEN THE TRIAL COURT ACCEPTED AN UNKNOWING, UNINTELLIGENT, AND INVOLUNTARY GUILTY PLEA.

II. THOMAS SHIFFLET WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

III. THE TRIAL COURT ERRED AND VIOLATED THOMAS SHIFFLET'S CONSTITUTIONAL RIGHT TO TRIAL BY JURY WHEN IT FOUND CORROBORATION UNDER R. C. 2907.05(C)(2)(a).

IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED RESTITUTION FOR UNQUALIFIED ECONOMIC LOSSES.

V. THE TRIAL COURT ERRED AND VIOLATED THOMAS SHIFFLET'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT PERMITTED THE DESIGNATED SUPPORT PERSON FOR THE CHILD'S CLOSED-CIRCUIT-TELEVISION TESTIMONY TO ALSO TESTIFY AS A WITNESS.

VI. THE TRIAL COURT ERRED AND VIOLATED THOMAS SHIFFLET'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN, AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, IT CONVICTED HIM OF GROSS SEXUAL IMPOSITION."

Assignment of Error I

"I. THOMAS SHIFFLET WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS WHEN THE TRIAL COURT ACCEPTED AN UNKNOWING, UNINTELLIGENT, AND INVOLUNTARY GUILTY PLEA."

Standard of Review

{¶13} " 'When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution.' " *State v. Davis*, 4th Dist. Scioto Nos. 13CA3589, 13CA3593, 2014-Ohio-5371, ¶ 31, quoting *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 7, *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). An appellate court determining whether a guilty plea was entered knowingly, intelligently, and voluntarily conducts a de novo review of the record to ensure that the trial court complied with the constitutional and procedural safeguards. *Davis, supra,* citing *State v. Smith*, 4th Dist. Washington No. 12CA11, 2013-Ohio-232, ¶ 10.

Legal Analysis

{¶14} Under the first assignment of error, Appellant points out that no contest pleas preserve some, but not all, pretrial rulings,[3] and do not preserve trial errors on hung counts. Appellant argues he cannot present trial errors to the appellate court on the three hung counts to which he pleaded no contest although he entered his no contest pleas with the expectation of

[3] See *State v. Richards*, 4th Dist. Athens No. 14CA1, 2015-Ohio-669, ¶ 51-52, and *State v. Felts*, 4th Dist. Ross No. 13CA3407, 2014-Ohio-2378, ¶ 16.

challenging them. Appellant contends the trial court accepted his no contest pleas without informing him he would not be able to appeal trial errors from the hung counts. Appellant concludes that his no contest pleas were not knowing, voluntary, and intelligent.

{¶15} In response, Appellee argues it is clear from the record that the Appellant understood the agreement he entered into. Appellee points out the trial court complied with Crim.R. 11. Appellee further points out that none of the issues contained in Appellant's brief are trial errors, but are issues either argued pretrial, at sentencing, or at the restitution hearings.[4] As such, Appellant has not been precluded from raising errors properly preserved.

{¶16} By way of Appellant's reply brief, Appellant argues that the Crim.R. 11 analysis is irrelevant because it is not aimed at protecting the consequences of one's plea. Appellant urges that the consequences of his no contest pleas on the hung counts, his inability to appeal them, "crafted by defense counsel and the State, and permitted by the trial court" make the pleas unknowing, involuntary, and unintelligent. In our research, we have been unable to locate any Ohio case which addresses the precise issue of whether or not an appellant can raise trial errors on hung counts.

[4] In the alternative, Appellee argues that if this court should find the no contest plea agreement to be void, it would lack jurisdiction to hear the merits of Appellant's arguments because the hung counts would still be pending. Therefore, the trial court's judgment would not be a final appealable order and the appeal must be dismissed.

{¶17} Our review of the record demonstrates Appellant's sentencing took place over three days. The sentencing transcript on April 3, 2013 reveals the trial court requested the State of Ohio to describe the developments which would resolve the remaining hung counts. The prosecutor stated:

> "After some back and forth we reached, have agreed to resolve this matter with an enter of a no contest *Alford* plea to Counts 1, 3, and 4. Count 1 being amended from Rape to Gross Sexual Imposition. 2907.05(A)(4) a felony of the third degree." **(See 8, p.2.)**

{¶18} The prosecutor further elaborated:

> "Acknowledging the Defendant has a right to appeal all these counts and is filing an appeal based on the rulings of the Court and the pre-trial and jury trial. Uh, from all pre-trial motions and jury trials all objections that were timely made as well as if for some reason that the Court of Appeals deem there was no justification for an appeal on Counts 1, 3, and 4 that the Defendant would (sic) the option of filing a motion to withdraw his plea in this matter. If any motion to withdraw the plea is granted the State would uh, or the Court would then reinstate the rape count as originally indicted. That, those are the terms of the plea agreement."

{¶19} Defense counsel was then given the chance to further explain the agreement and stated as follows:

> "What I want to be crystal clear is three things. Number one under *Alford v. North Carolina.* That's United States Supreme case. (sic.) It essentially adopted what Keller said. That an *Alford* plea is the Defendant not taking responsibility for the actions or admitting guilt but is doing it for some other reasons. This is a species of a *Alford* plea. This is actually a *Alford* no contest plea. And what I want to make crystal clear for the record is Tom Shifflet is not admitting guilt on any counts. Number two, to put certainty in his life at seventy-six

years of age. And number three to be able to fully address all questions that were raised both pre-trial and during the jury trial in that appeal with the expectation that the judgment will ultimately one day be reversed and it will be up to the State whether or not to retry him at that time. So he is not pleading guilty. He is not admitting the charges. He's going to stand quiet on sentencing with the State's recommendation to merely facilitate a quicker appeal and it's in the spirit of *Alford* against *North Carolina* that we're making this no contest plea today." (**8 at 10)**

{¶20} The trial court thereafter imposed sentence as follows:

By the Judge: So we're going to talk about a no contest plea Mr. Shifflet and this is the plea agreement as stated here by the attorneys, is this the plea agreement that you are entering into with the State of Ohio as represented by Prosecutor Keller Blackburn?

By the Defendant: Uh/huh. Yea.

* * *

By the Judge: Now with regard to this six page plea of no contest form I'm holding up is that your signature at the bottom of.

By the Defendant: Yes it is.

By the Judge: All six pages?

By the Defendant: Yes sir.

By the Judge: Did you read this form yourself and discuss the same with Mr. Lavelle and Mr. Pettey before you signed it?

By the Defendant: Yea.

By the Judge: You did?

By the Defendant: Yea.

By the Judge: And did you sign this plea of no contest form voluntarily while understanding its contents?

By the Defendant: Yea. I'm not guilty no.

By the Judge: Your pleading, are you pleading no contest?

By the Defendant: No contest and I'm not guilty.

By Attorney LaVelle: Your honor his understanding of that I think consists of what we just said.

By the Judge: Alright so your pleading. What I'm interested in is your pleading no contest to Counts 1, 3, and 4 charging you with the third degree felonies of uh, Gross Sexual Imposition?

By the Defendant: Yea.

By the Judge: Is that correct?

By the Defendant: Yea.

By the Judge: And you understand the consequences in making those no contest pleas?

By the Defendant: Uh/huh.

By the Judge: Yes.

By the Defendant: Yea.

By the Judge: Okay. Now just to, just to go back over that in case I didn't cover it. Are you pleading no contest voluntarily to Count 1, Count 3, and Count 4 of the indictment charging you with Gross Sexual Imposition, a third degree felony?

By the Defendant: Yea.

{¶21} The trial court went on to explain the maximum penalties involved,

the fines involved, and the possibility of a consecutive sentence. The court further explained the nature of a mandatory prison term. At all times, Appellant indicated affirmatively that he understood what was being explained. The trial court continued as follows:

> By the Judge: Okay. Thank you. Now you of course sat through this trial. Which went three days of jury selection. Nine days of evidence and plus there were three days of deliberation. Do you understand the nature of the charges that your pleading no contest to.
>
> By the Defendant: Yea.
>
> By the Judge: In the Counts 1, 3, and 4?
>
> By the Defendant: Yea.
>
> By the Judge: Do you understand that? Alrighty. Now do you understand by this plea of no contest that you are not making any admission of guilty, uh, that you are telling the Court that the Court can make a finding of guilt based upon the evidence and everything that took place at the trial. Is that what your telling me?
>
> By the Defendant: Yea.
>
> By the Judge: You understand that?
>
> By the Defendant: Yea.
>
> By the Judge: Yes?
>
> By the Defendant: Yea.
>
> By the Judge: Okay. And do you also understand that uh, the Court will find you guilty on your three counts 1, 3, and 4 on your no contest pleas? Do you understand that?
>
> By the Defendant: Yea. **(8. p 32)**

{¶22} At this point, the sentencing transcript reflects the trial court explained to Appellant his constitutional rights to have a jury trial, to require the State of Ohio prove the charges against him beyond a reasonable doubt, to refrain from testifying, to cross-examine all witnesses called against him, and to subpoena witnesses. At all times, Appellant indicated he understood his rights. Appellant further indicated he understood that by pleading no contest, he was voluntarily agreeing to give up those rights. Appellant again indicated he was voluntarily pleading no contest to Counts 1, 3, and 4 of the indictment and that he understood the consequences in voluntarily pleading as such. (8, 36). Finally, at the continued sentencing on April 5, 2013, the trial court stated:

> "This is a continuation of the sentencing hearing of a couple days ago. * * * At that time the Court neglected to advise Mr. Shifflet of his Criminal Rule 32(B) rights regarding notification of appeal and Mr. Shifflet I'm going to do that at this time. You have the right to appeal your convictions of all four counts. The one for which you were found guilty and the three that you were found guilty after your no contest plea. * * * Do you understand those rights Mr. Shifflet?" **(vol. 384 p.2.)**

{¶23} Again, Appellant answered affirmatively.

{¶24} The transcript herein clearly reveals that all parties agreed Appellant was entering an *Alford*/no contest plea. *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970), provides a method by which a defendant is able to maintain his factual innocence yet enter a plea of guilty.

> "A defendant who believes himself to be innocent of the charges against him may rationally conclude that the evidence against him is so incriminating that there is a significant likelihood that a jury would find him guilty of the offense. (Citation omitted.) Consequently, the defendant may rationally conclude that accepting a plea bargain is in his best interests, since he will avoid the risk of greater punishment if found guilty by a jury. (Citation omitted.) When a defendant so chooses to enter this plea, it is known as an *Alford* plea of guilty." *State v. Byrd*, 4th Dist. Athens No. 07CA29, 2008-Ohio-3909, ¶ 16, quoting *State v. Banjoko*, 2nd Dist. Montgomery No. 21978, 2008-Ohio-402, at ¶ 12.

{¶25} The language of *North Carolina v. Alford* demonstrates originally an *Alford* plea was to be entered in conjunction with a guilty plea. It is equally clear from the record Appellant herein intended to enter an *Alford*/no contest plea. In our research, we discovered some debate as to whether or not an *Alford*/no contest plea exists. In *State v. Lewis,* 7th Dist. Mahoning No. 97CA161, 1999 WL 599280, *3, the appellate court adopted the position (attributed to the 2nd and 6th appellate districts) that an *Alford* plea acts as a guilty plea as related to the waiver of issues on appeal. Even more recently, the 5th appellate district declared it had "never before heard of an *Alford* 'no contest' plea." *State v. Scott,* 5th Dist. Licking No. 13-CA-45, 2014-Ohio-456, ¶ 14.

{¶26} However, in *State v. Morton*, 2nd Dist. Montgomery No. 17225, 1999 WL 280428, *1, the appellate court found no legally significant distinction between *Alford* guilty pleas and *Alford*/no contest pleas. The court stated:

> "First an *Alford* plea - whether of guilty or no contest - is accompanied by a protestation of innocence. Second, although a no

> contest plea, by definition, is not an admission of guilt, it is an admission of the truth of the facts alleged in the indictment. Crim.R.11(B). Finally, because of the protestation of innocence, no *Alford* plea - guilty or no contest - may be accepted until the trial court satisfies itself that there is a factual basis for the plea." See also, *State v. Denton*, 2nd Dist. Montgomery No. 11376, 1989 WL 159195, *5.

{¶27} Similarly, in *State v. Ramos*, 11th Dist. Geauga No. 2007-G-2773, 2007-Ohio-6934, ¶ 22, the *Ramos* court quoted *Alford* in stating: "[t]he fact that his plea was denominated a plea of guilty rather than a plea of *nolo contendere* is of no constitutional significance with respect to the issue now before us, for the Constitution is concerned with the practical consequences, not the formal categorizations, of state law." *Id.* at 37.

{¶28} While our Court has never directly addressed the issue of whether an *Alford*/no contest plea exists, this court held in *State v. Longnecker,* 4th Dist. Washington No. 01CA2, 2002-Ohio-3139, ¶ 61, that "[A] plea of no contest is still valid even if the accused insists that he did not commit the acts described in the indictment or otherwise offers mitigating evidence." *State v. Post,* 32 Ohio St.3d 380, 387, 513 N.E.2d 754 (1987), citing *Alford, supra,* 91 S.Ct. 160 (1970). And, *Post,* 513 N.E.2d 754 (1987), has been interpreted as extending "*Alford"* pleas to include "no contest pleas." *State v. McCullough*, 5th Dist. Licking No. 98CA00129, 1999 WL 333202, *2. The *McCullough* appellate court noted that although the *Alford* case involved a guilty plea, Crim.R. 11(C) applies to both no contest and guilty pleas; and, therefore, the rulings in *Alford* applied with equal

force in McCullough's case. Based on the above, we will proceed with the conclusion that there exists a species of *Alford*/no contest plea, and the question of whether Appellant entered his plea knowingly, voluntarily, and intelligently will be reviewed under the standard appropriate for an *Alford* plea.

{¶29} The Supreme Court of Ohio has held that, in the context of an *Alford* plea, the plea is voluntarily and intelligently made "[w]here the record affirmatively discloses that: (1) defendant's guilty plea was not the result of coercion, deception or intimidation; (2) counsel was present at the time of the plea; (3) counsel's advice was competent in light of the circumstances surrounding the indictment; (4) the plea was made with the understanding of the nature of the charges; and, (5) defendant was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial, or both * * *." *State v. Piacella*, 27 Ohio St.2d 92, 271 N.E.2d 852 (1971), at the syllabus. *Byrd, supra*, at ¶ 17. Here, the record reflects Appellant's *Alford*/no contest plea was not the result of coercion, deception, or intimidation, that counsel was present when Appellant entered his plea, and that Appellant indicated he understood the nature of the charges.

{¶30} The record further reflects counsel's advice was competent in light of the circumstances surrounding the indictment, and that Appellant was motivated by a desire to seek a lesser penalty. Defense counsel pointed out Appellant was

seventy-six years of age and wished to "facilitate a quicker appeal." Counsel explained Appellant had taken these factors into consideration. Counsel further explained that per the agreement reached between the parties, the maximum potential sentence was five years of mandatory incarceration on each of the four charges, to run concurrently. Counsel emphasized that his understanding of the agreement was that there was no possibility the State would recommend anything beyond five years total, and no possibility that Appellant would be sentenced to ten, fifteen, or twenty years. These latter statements of counsel lead to the inference that Appellant was motivated by the desire to seek a lesser sentence and avoid another trial.[5] Finally, the "Plea of No Contest" document, signed by Appellant, explicitly states:

> "By pleading as set forth above, I DO NOT admit committing the offense but I enter this plea only to avoid the risk of conviction on a more serious offense if I went to trial on the original charge and the possibility of a higher penalty as a result."

{¶31} The case law cited above further indicates *Alford* guilty and no contest pleas must be sound under Crim. R. 11(C). Crim.R. 11(C)(2) provides as follows:

> (2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

[5] Defense counsel explained Appellant was going to "stand quiet" on sentencing. The sentencing transcript reveals Appellant responded to the court's inquiries but never made any statement on his own behalf.

> (a) Determining that the defendant is making the plea voluntarily, with the understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
>
> (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
>
> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶32} A review of the colloquy set forth above between the trial court and Appellant demonstrates the trial court fully complied with the dictates of Crim.R. 11(C)(2).

{¶33} Based on the above, we find Appellant's *Alford*/no contest plea was knowingly, voluntarily, and intelligently made. Furthermore, we find no merit to Appellant's argument that his unknowing plea prevented him from appealing the hung counts. Appellant's brief presents the following assignments of error, all of which we have considered: (1) the knowledge and voluntariness of his plea; (2) the claimed ineffective assistance of counsel; (3) the constitutionality of sentencing him based on the corroborating evidence requirement of R.C. 2907.05(C)(2)(a);

(4) the restitution order; (5) the pretrial rulings with regard to testimony by a designated support person pursuant to R.C. 2945.581; and, (6) the manifest weight of the evidence as to his conviction on Count 2. At no point in his brief does he identify any additional issues specifically regarding the hung counts he would have raised on appeal but for his allegedly involuntary and unknowing *Alford* plea. See *State v. Seelig*, 2nd Dist. Champaign No. 07-CA-33, 2009-Ohio-163, ¶ 9.

{¶34} As a final consideration, Appellant argues below in Part 4 that prejudice should be presumed because the designated support person was allowed to testify as a witness in the trial, violating R.C. 2945.481. Appellant's argument below is limited to Count 2, the count on which he was convicted by the jury. Defense counsel objected pretrial and preserved his objections during trial on this issue. As our discussion below will explain, as pertains to Count 2, we found no error by the trial court's decision. As such, there would be no error had we considered this argument in the context of the hung counts. And even if the trial court had erred, such error would be harmless as to the three hung counts because Appellant was not found guilty by the jury.

{¶35} Accordingly, Appellant's first assignment of error is overruled.

Assignment of Error II

"II. THOMAS SHIFFLET WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL."

Standard of Review

{¶36} Criminal defendants have a right to counsel, including a right to the effective assistance from counsel. *State v. Walters,* 4th Dist. Washington No. 13CA33, 36, 2014-Ohio-4966, ¶ 22, citing *McMann v. Richardson*, 397 U.S. 759, 770, 90 S.Ct. 1441 (1970). To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Davis,* 4th Dist. Scioto Nos. 13CA3589, 13CA3593, 2014-Ohio-5371, ¶ 27, citing *State v. Short,* 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113, *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Knauff,* 4th Dist. Adams No. 13CA976, 2014-Ohio-308, ¶ 3. Failure to satisfy either part of the test is fatal to the claim. *Davis, supra; Strickland* at 697; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989). If one element is dispositive, a court need not analyze both. *Walters, supra,* citing *State v. Madrigal,* 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000).

{¶37} In Ohio, a properly licensed attorney is presumed competent. *Davis, supra; State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77,

¶ 62; *State v. Moore,* 4th Dist. Adams No. 13CA965, 2014-Ohio-3024, ¶ 25. When considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Walters, supra,* at ¶ 23; *Strickland,* 466 U.S. at 689. Thus, "the defendant must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy." *Id.* There are countless ways to provide effective assistance in any given case; therefore, judicial scrutiny of counsel's performance must be highly deferential. *Walters, supra,* at ¶ 24; *State v. Ward,* 6th Dist. Ottawa No. OT-13-001, 2014-Ohio-426, ¶ 28, citing *State v. Bradley,* 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), citing *Strickland,* at 689.

Legal Analysis

{¶38} Appellant argues he did not receive effective assistance of counsel because his attorney advised him to enter no contest pleas for the purpose of appealing trial errors from the hung counts, when such challenges are not permitted. Appellant contends without this deficiency, there is a reasonable probability that he would not have entered the no contest pleas and the result of Appellant's proceedings would have been different.

{¶39} Appellee responds that since Appellant's plea of no contest to Counts 1, 3, and 4 was knowingly, voluntarily, and intelligently made, Appellant's second

assignment of error is rendered moot. Furthermore, Appellee points out Appellant's trial counsel negotiated a favorable sentence wherein Appellant was to receive five years on each count to run concurrent to each other for a five-year mandatory prison sentence. If Appellant were tried again and convicted, he could have received a much longer sentence, including the possibility of a life sentence on Count 1, the rape charge. Defense counsel's trial strategy assured that the State could not retry the three hung counts.

{¶40} We agree and find no merit to Appellant's second assignment of error. Appellant has failed in establishing that his trial counsel's performance fell below an objective standard of reasonable representation. The agreement trial counsel negotiated was of substantial benefit to Appellant. At the time of trial he was 76 years of age. He was found guilty on one count and was facing retrial on three counts. At a subsequent trial on the hung counts, he would be proceeding on one rape charge and two additional charges as a convicted sex offender. He resolved four serious sex offenses for a total of five years. Given the nature of the charges against him, the fact of his conviction on Count 2, the nature of potential maximum and consecutive prison sentences he could have received if found guilty at a subsequent trial on the hung counts, and his age, we must not speculate that prejudice exists simply because, as in *Walters, supra,* Appellant wishes he would have proceeded differently. We must also not speculate prejudice exists in light of

the fact that the record, as set forth at length above in assignment of error number one, reveals that the trial court engaged in a lengthy colloquy with Appellant regarding his federal and constitutional rights, as well as satisfactorily complying with the dictates of Crim.R. 11(C)(2).

{¶41} Based on the foregoing, we find no deficiency in counsel's performance or resulting prejudice to the defendant. Appellant's second assignment of error is overruled.

Assignment of Error III

"III. THE TRIAL (SIC) ERRED AND VIOLATED THOMAS SHIFFLET'S CONSTITUTIONAL RIGHT TO TRIAL BY JURY WHEN IT FOUND CORROBORATION UNDER R.C. 2907.05(C)(2)(a)."

Standard of Review

{¶42} In *State v. Brewer,* 2014-Ohio-1903, 11 N.E.3d 317, we recently held that when reviewing felony sentences, we apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Pulliam,* 4th Dist. Scioto No. 14CA3609, 2015-Ohio-759, ¶ 5. *Brewer* at ¶ 33 ("we join the growing number of appellate districts that have abandoned the *Kalish* plurality's two step abuse-of-discretion standard of review; when the General Assembly reenacted R.C. 2953.08(G)(2), it expressly stated '[t]he appellate court's standard of review is not whether the sentencing court abused its discretion' "). See also *State v. Graham,* 4th Dist. Highland No. 13CA11, 2014-Ohio-3149, ¶ 31. R.C. 2953.08(G)(2) specifies that an appellate

court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either that "the record does not support the sentencing court's findings" under the specified statutory provisions or "the sentence is otherwise contrary to law."

Legal Analysis

{¶43} Gross sexual imposition 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 shall be imposed. R.C. 2907.05(C)(2). Further, R.C. 2907.05(C)(2)(a) provides as follows:

> "The court shall impose on an offender convicted of gross sexual imposition in violation of division (A)(4) or (B) of this section a mandatory prison term equal to one of the prison terms prescribed in section 2929.14 of the Revised Code for a felony of the third degree if either of the following applies:
>
> (a) Evidence other than the testimony of the victim was admitted in the case corroborating the violation."

{¶44} Appellant argues that R.C. 2907.05(C)(2)(a) violates the constitutional right to trial by jury by permitting judicial fact-finding to increase its maximum sentence. Appellant argues a mandatory sentence is an increased sentence because it eliminates the eligibility for judicial release. Appellant directs us to the Supreme Court of Ohio's recent decision in *State v. Bevly*, 142 Ohio St.3d 41, 2015-Ohio-475, 27 N.E.3d 516.

{¶45} Appellee argues that nothing in R.C. 2907.05(C)(2)(a) requires a prison sentence be increased. The statute simply provides if corroboration is

found, the presumption of prison becomes a mandatory prison sentence. Appellee argues the corroboration was admitted into the evidence through numerous witnesses.

{¶46} In *State v. 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 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. *Id.* 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. "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.' " *State v. Richardson,* 12th Dist. Clermont Nos. CA2014-03-023, CA2014-06-044, CA2014-06-045, 2015-Ohio-824, ¶ 102, quoting *Bevly,* 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 sanction 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.*

{¶47} Furthermore, the Supreme Court of Ohio also held that "as applied," the corroborating evidence specification found in R.C. 2970.05(C)(2)(a) violated Bevly's right to a jury trial under the Sixth and Fourteenth Amendments of the United States Constitution. *Richardson, supra,* at ¶ 103; *Bevly* at ¶ 12. 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. *Richardson, supra*; *Bevly,* at ¶ 1-2. Therefore, the Supreme Court reversed and remanded for resentencing for both reasons.[6]

{¶48} In the case sub judice, the trial court's entry, regarding corroboration, states as follows:

> "The Court previously found corroboration on Count Two of the indictment. The Court finds corroboration as to Counts One, Three, and Four from the evidence admitted at trial as stated at the April 3, 2013 hearing."

[6] In *Richardson,* the appellate court also found the portion of Richardson's sentence which imposed a mandatory term of imprisonment pursuant to R.C. 2907.05(C)(2)(a) was clearly and convincingly contrary to law and must be remanded for sentencing. 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. *Richardson, supra,* at ¶ 105.

The *Richardson* court stated that "*Bevly* made [it] clear that the corroborating evidence specification violated equal protection and due process and [was] an independent basis for reversing the previous judgment and remanding for a new sentencing hearing." *Id. Bevly*, *supra*, at ¶ 28-29. Therefore, based on the Supreme Court's decision in *Bevly*, we find the trial court's finding of corroboration and imposition of a mandatory prison sentence based on the application of the unconstitutional statutory provision was not authorized by law. We sustain Appellant's third assignment of error and remand the matter for resentencing in accordance with this opinion.

Assignment of Error IV

"IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED RESTITUTION FOR UNQUALIFIED ECONOMIC LOSSES."

Standard of Review

{¶49} Generally, a decision to award restitution lies in a trial court's sound discretion and its decision will not be reversed on appeal absent an abuse of discretion. *State v. Stump*, 4th Dist. Athens No. 13CA10, 2014-Ohio-1487 ¶ 11; see, *State v. Dennis*, 4th Dist. Highland No. 13CA6, 2013-Ohio-5633, at ¶ 7; *State v. Jennings*, 8th Dist. Cuyahoga No. 99631, 2013-Ohio-5428, at ¶ 40. An abuse of discretion suggests the trial court's decision is unreasonable, arbitrary, or unconscionable. *State v. Perkins*, 3rd Dist. Marion No. 9-13-52, 2014-Ohio-2242, ¶ 10, citing *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). "Under this standard of

review, an appellate court may not simply substitute its judgment for that of the trial court." *Perkins, supra,* quoting *State v. Adams,* 3rd Dist. Defiance No. 4-09-16, 2009-Ohio-6863, ¶ 33. A trial court abuses its discretion in ordering restitution in an amount that was not determined to bear a reasonable relationship to the actual loss suffered." *State v. Portentoso,* 3rd Dist. Seneca No. 13-07-05, 2007-Ohio-5490, ¶ 8 (internal citations omitted.). See, also, *State v. Bulstrom*, 997 N.E.2d 162, 2013-Ohio-3582, ¶ 19 (4th Dist.).

Legal Analysis

{¶50} Appellant argues the trial court's order of restitution for lost wages to the parents of victims for work missed due to the trial or the inability to secure child care, along with mileage reimbursement for trips to the courthouse by parents of the victims was unreasonable. Appellant contends that the language of R.C. 2929.01(L) "lost time at work because of any injury caused to the victim," does not include attending trial or an inability to secure child care. Appellant also contends that neither lost wages in this context, nor mileage reimbursement for travel to the courthouse, are "a direct and proximate result of the offense." Appellant concludes the requested lost wages and mileage reimbursements are not valid restitution claims but rather "consequential costs incurred subsequent to [the offenses]." See *State v. Lalain*, 136 Ohio St.3d 248, 2013-Ohio-3093, 994 N.E.2d 423, ¶ 25. As such, Appellant argues the trial court abused its discretion.

{¶51} R.C. 2929.18 Financial sanctions – felony, provides in pertinent part:

> "(A) * * * Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:
>
> (1) Restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the *victim's economic loss*. If the court imposes restitution, the court shall order that the restitution be made to the *victim* in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court. If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that *the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense*. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount. All restitution payments shall be credited against any recovery of economic loss in a civil action brought by the victim or any survivor of the victim against the offender." (Emphasis added.)

{¶52} We begin by reviewing the judgment entry of restitution, journalized on April 19, 2013, in which the trial court made the following findings:

> "The Defendant next submits that he only may be liable for restitution to the four child victims and not their parents pursuant to R.C. 2929.18(A)(1) and R.C. 2929.01(L). However, the Court finds that because the children are dependents of their parents, any economic loss to the parents because of the crimes to their child will affect the economic well-being of the child.
>
> * * *

> Also, the parents have been designated as the victim representatives pursuant to R.C. 2930.02. The Court finds that in this case the victim representative takes the place of the child-victim for purposes of restitution. The parents are not third-persons.
>
> * * *
>
> The children are too young to drive themselves to court or to the counselor. They are not the wage earners so that they can pay medical, counseling and other allowed expenses.
>
> * * *
>
> The children are dependent on their parents to do what they cannot. It would not be just that the parents incur economic loss on behalf of their dependants (sic) and then not be reimbursed by the Defendant, the person who caused them to incur the economic loss.
>
> * * *
>
> The Court also finds that all parents had the right to observe each trial day. If doing so caused them to miss work, the Court finds that they should be reimbursed for the economic loss of their wages."

{¶53} The total restitution amount was $5,610.90. However, on April 23, 2013, the trial court filed an amendment to the judgment entry on restitution, due to a clerical error, correcting the total amount to $5,340.90. For the reasons which follow, we do not find the trial court erred and abused its discretion in ordering restitution to the parents of the child victims who lost work due to attending trial or due to an inability to secure child care. We also find no error or abuse of discretion by the court's order reimbursing the parents for mileage due to their attendance at trial. The trial court's decision is supported by competent credible

evidence which shows the restitution amount bears a reasonable relationship to the actual loss suffered.

{¶54} Although Appellant apparently concedes that the parent/victim representatives are entitled to restitution, we briefly consider, sua sponte, whether the trial court's award to them was permissible. The question of who constitutes a crime "victim" for purposes of the statute is a question of law that we review de novo. *Stump, supra; State v. Hunter*, 2nd Dist. Montgomery No. 22521, 2013-Ohio-3759 at ¶ 7; *State v. Kizer*, 2nd Dist. Montgomery No. 24419, 2011-Ohio-5551, at ¶ 14. "Victim" as used in R.C. 2929.28(A)(1) is not defined by statute, so it must be construed in context according to the rules of grammar and common usage. *State v. Durham*, 4th Dist. Meigs No. 13CA2, 13CA3, 2014-Ohio-4915, ¶ 22. See *State ex rel. Linnabary v. Husted*, 138 Ohio St.3d 535, 2014-Ohio-1417, 8 N.E.3d 940, ¶ 22; R.C. 1.42. In this context, a victim is generally defined as the person who was the object of the crime, e.g., the victim of a robbery is the person who was robbed. *Durham, supra*. See *Leslie*, 4th Dist. Hocking Nos. 10CA17 and 10CA18, 2011-Ohio-2727, ¶ 32; Black's Law Dictionary 1598 (8th Ed. 2004) (defining "victim" as "[a] person harmed by a crime"). R.C. 2930.01(H)(1) defines "victim" as:

> "(1) A person who is identified as the victim of a crime or specified delinquent act in a police report or in a complaint, indictment, or information that charges the commission of a crime and that provides

> the basis for the criminal prosecution or delinquency proceeding and subsequent proceedings to which this chapter makes reference.
>
> * * *
>
> (I) 'Victim's representative' means a member of the victim's family or another person who pursuant to the authority of section 2930.02 of the Revised Code exercises the rights of a victim under this chapter."

{¶55} The trial court did not err and abuse its discretion by finding the parent "victim representatives" stood in the place of the child victims for purposes of restitution. The Revised Code states a victim's representative exercises the rights of the victim. In *State v. Huston,* 12th Dist. Clinton No. CA2010-12-020, 2011-Ohio-3912, the appellant asked the court to overturn a trial court decision which ordered him to pay restitution to the victim's mother to reimburse her for the cost of the victim's medical screening. In affirming, the appellate court noted Huston was ordered to pay the cost of testing the victim for sexually transmitted diseases which was an economic loss incurred by the victim as a direct and proximate result of the commission of the offense. The victim's parent was responsible for the medical costs incurred by her minor daughter; therefore, the appellate court did not view the trial court's decision as being the equivalent to ordering restitution to an improper third party. Here, as the trial court noted, the parents were the victim representatives. The parents incurred economic losses as a result of acting as representatives for their children and exercising the rights of the

child victims. In their capacity as victim representatives, the parents suffered economic losses.

{¶56} We further find the trial court did not err and abuse its discretion by the total amount of restitution awarded. "The amount of restitution must be supported by competent credible evidence in the record from which the court can discern the amount of restitution to a reasonable degree of certainty." *State v. Perkins, supra,* at ¶ 12, quoting *State v. Didion,* 173 Ohio App.3d 130, 2007-Ohio-4494, ¶ 20 (3rd Dist.) (Internal citation omitted.) Pursuant to R.C. 2929.18, a victim has the right to restitution for economic loss suffered as a direct and proximate result of the commission of the offense. A victim's economic loss may include "any loss of income due to lost time at work because of any injury caused to the victim." R.C. 2929.01(L). *State v. Perkins*, 3rd Dist. Marion No. 9-13-52, 2014-Ohio-2242, ¶ 28. See, also, R.C. 2929.18(A)(1); *State v. Belbachir,* 7th Dist. Belmont No. 08BE24, 2009-Ohio-1511, ¶ 23 (affirming the trial court's restitution award for lost wages based on the victim's testimony that she missed work because the defendant damaged the door of her mobile home.) However, economic loss "does not include fixed overhead costs that would have been incurred regardless of the offense." *Perkins, supra,* quoting *State v. Brown,* 167 Ohio Misc.2d 45, 2011-Ohio-6994, ¶ 10 (M.C.)

{¶57} In the case at bar, the trial court found as follows:

> "The Court finds Callie Vore, Trevor Post, Eric Coffman and Toni Smith to be very credible witnesses. They did not exaggerate their economic losses. If anything, they were very conservative in their estimates. Although sometimes they did not support their requests by documentation, the Court finds their testimonies alone sufficient to award restitution."

{¶58} A trial court is under no duty to itemize or otherwise explain how it arrived at the amount of restitution it orders, so long as the trial court can discern the amount of restitution to a reasonable degree of certainty from competent credible evidence in the record. *Perkins, supra,* at ¶ 23; *Didion, supra,* at ¶ 20. " 'The court is free to accept or reject all, part, or none of the testimony of each witness.' " *Bulstrom, supra,* at ¶ 24, quoting *In re A.E.,* 2nd Dist. Greene No. 2006-CA153, 2008-Ohio-1864, ¶ 15.

{¶59} Here the trial court found the testimonies of the victim representatives alone sufficient on which to base the award of restitution. The trial court was free to accept or reject, all, part, or none of the witnesses testimonies. Courts have noted that "voluntarily incurred expenses are not compensable as restitution damages." *Portentoso, supra,* at ¶ 9. The record before us demonstrates none of the expenses of the victim representatives were voluntarily incurred or would have been incurred regardless of the commission of Appellant's offenses. For the foregoing reasons, we find the trial court did not err or abuse its discretion because the trial court's findings are supported by competent, credible evidence. Accordingly, the fourth assignment of error is also overruled.

Assignment of Error V

"V. THE TRIAL COURT ERRED AND VIOLATED THOMAS SHIFFLET'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT PERMITTED THE DESIGNATED SUPPORT PERSON FOR THE CHILD'S CLOSED-CIRCUIT-TELEVISION TESTIMONY TO ALSO TESTIFY AS A WITNESS."

Standard of Review

{¶60} The admission or exclusion of evidence is within the sound discretion of the trial court, and the trial court's decision to admit or exclude such evidence cannot be reversed absent an abuse of discretion. *State v. Johnson*, 4th Dist. Gallia No. 13CA16, 2014-Ohio-4032, ¶ 34, citing *State v. Craft*, 4th Dist. Athens No. 97CA53, 1998 WL 255442, *7 (Internal citations omitted.) The term "abuse of discretion" connotes more than an error of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable; *Craft, supra*, citing *State v. Xie*, 62 Ohio St.3d 521, 583 N.E.2d 715 (1992); *State v. Montgomery*, 61 Ohio St.3d 410, 575 N.E.2d 167 (1991). When applying the abuse of discretion standard of review, we are not free to merely substitute our judgment for that of the trial court. *Craft, supra*, citing *In re Jane Doe 1*, 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181 (1991), citing *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990).

Legal Analysis

{¶61} Here, Appellant's argument is two-fold. First, Appellant argues the designated support person for the "Count 2 child" also testified in the case, and this action violated R.C. 2945.481(A)(3) and (C). Appellant contends that prejudice should be presumed because the court did not detail the standard it used in making its determination that the designated support person could also testify, and that no case law identifies the proper standard. Second, Appellant points out the designated support person's husband also testified, but the court did not instruct the designated support person that "she shall not discuss the testimony of the child victim with any other witness in the proceeding." Appellant contends since no such instruction was given, and the husband was a witness in the trial, prejudice should again be presumed. Appellant urges these alleged errors are not harmless because the violations created the opportunity for non-verbal communication, (intentional or unintentional) and communication outside the courtroom regarding the child-witness testimony.[7]

{¶62} In response, Appellee argues no error occurred because each minor victim designated a parent to act as their victim representative. Pursuant to R.C. 2930.02(A), victim's rights: "If a victim is a minor * * * or if the victim chooses to designate another person, a member of the victim's family or another person, may

[7] In support of his argument under this assignment of error, Appellant directs us to several law review articles discussing the problem of human limitations with false allegations of sexual abuse, including the *Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 71 (2000), and *Taint Hearings for Child witnesses? A Step in the Wrong Direction*, 46 Baylor L. Rev. 873, 880-884 (1994).

exercise the rights of the victim under this chapter as the victim's representative." The Count 2 child designated her mother to be her representative. The mother accompanied her child victim to the room where she was testifying via closed circuit television. The mother testified prior to the child victim. As such, listening to her child's testimony did not influence or change the mother's testimony. The "Count 2 mother" was allowed to sit in the courtroom during the pendency of the trial because she was a victim representative. Appellee argues there was no harm in allowing her to sit in the corner of the closed circuit television room.

{¶63} R.C. 2945.481, testimony of child victim, provides:

> "(A)(2) In any proceeding in the prosecution of a charge of a violation of section * * * 2907.05 * * * of the Revised Code * * * and in which an alleged victim of the violation or offense was a child who was less than thirteen years of age when the complaint, indictment, or information was filed, whichever occurred earlier, the judge of the court in which the prosecution is being conducted, upon motion of an attorney for the prosecution, shall order that the testimony of the child victim be taken by deposition. The prosecution also may request that the deposition be videotaped in accordance with division (A)(3) of this section. * * *."

{¶64} The statute further provides:

> "(3) If the prosecution requests that a deposition to be taken under division (A)(2) of this section be videotaped, the judge shall order that the deposition be videotaped in accordance with this division. If a judge issues an order that the deposition be videotaped, *the judge shall exclude from the room in which the deposition is to be taken every person except the child victim giving the testimony, the judge, one or more interpreters if needed, the attorneys for the prosecution and the defense, any person needed to operate the equipment to be used, one person chosen by the child victim giving the deposition, and any*

> *person whose presence the judge determines would contribute to the welfare and well-being of the child victim giving the deposition. The person chosen by the child victim shall not be a witness in the proceeding and, both before and during the deposition, shall not discuss the testimony of the child victim with any other witness in the proceeding.* (Emphasis added.)"

{¶65} R.C. 2945.481 further provides:

> "(C) In any proceeding in the prosecution of any charge of a violation listed in division (A)(2) of this section * * * and in which the alleged victim of the violation or offense was a child who was less than thirteen years of age when the complaint, indictment, or information was filed, whichever occurred earlier, the prosecution may file a motion with the judge requesting the judge to order the testimony of the child victim to be taken in a room other than the room in which the proceeding is being conducted and be televised, by closed circuit equipment, into the room in which the proceeding is being conducted to be viewed by the jury, if applicable, the defendant, and any other person who are not permitted in the room in which the testimony is to be taken but who would have been present during the testimony of the child victim had it been given in the room in which the proceeding is being conducted. * * * The judge may issue the order upon motion of the prosecution filed under this section, if the judge determines that the child victim is unable to testify in the room in which the proceeding is being conducted in the physical presence of the defendant, for one or more of the reasons set forth in division (E) of this section. *If a judge issues an order of that nature, the judge shall exclude from the room in which the testimony is to be taken every person except a person described in division(A)(3) of this section.*"

{¶66} We have been unable to locate any case specifically dealing with alleged violations of R.C. 2945.481 or similar to the facts presented here. However, we have found one instance in which a court of appeals has held that the decision to allow a witness to act as the child's support person during her in camera testimony was not unreasonable, arbitrary, or unconscionable, *In re Morris*,

12th Dist. Butler No. CA2002-03-054, 2002-Ohio-5881. *Morris* involved an appeal of a Butler County Court of Common Pleas, Juvenile Division, finding that appellant was the perpetrator of sexual abuse against his daughter. Butler County Children Services Board filed a complaint alleging that the victim was an abused and dependent child and appellant was the perpetrator of the abuse.[8] During the proceedings, the trial court granted a motion to allow the victim to testify by deposition. The nine-year-old victim asked for her therapist to be her designated support person while testifying in camera. Although appellant's counsel asked for a separation of witnesses, the trial court allowed the therapist, as a support person, to sit in the room with the victim as she testified. Subsequently, the victim was found to be an abused and dependent child, and found appellant to be the perpetrator.

{¶67} Morris assigned as error the denying of his motion for separation of witnesses. The appellate court began by recognizing that a trial court has broad discretion in ruling on evidentiary matters. *Morris, supra*, at ¶ 12. *State v. Sage,* 31 Ohio St.3d 173, 510 N.E.2d 343 (1987). A trial court's decision as to the exclusion of witnesses will not be reversed absent an abuse of discretion. *Morris, supra*. The appellate court also pointed out Evid.R. 615, which states:

> "(A) Except as provided in division (B) of this rule, at the request of a party the court shall order witnesses excluded so that they cannot hear

[8] The appeals court emphasized this was not a criminal complaint of child abuse.

> the testimony of other witnesses, and it may make the order of its own motion. An order directing the 'exclusion' or 'separation' of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses.
>
> (B) This rule does not authorize exclusion of any of the following persons from the hearing:
>
> (4) In a criminal proceeding, a victim of the charged offense to the extent that the victim's presence is authorized by statute, enacted by the General Assembly. As used in this rule, "victim" has the same meaning as in the provisions of the Ohio Constitution providing rights for victims of crimes."

{¶68} The appellate court went on to note that pursuant to R.C. 2152.81, when a juvenile is charged with committing a sexual offense, the victim may testify in a room other than that in which the proceeding is being held with a support person in the room, if the child sex-abuse victim is under 13. The appellate court also cited this language in R.C. 2152.81(A)(3):

> "[T]he judge shall exclude from the room in which the deposition is to be taken every person except the child victim giving the testimony, the judge * * *, one person chosen by the child victim giving the deposition, and any person whose presence the judge determines would contribute to the welfare and well-being of the child victim giving the deposition. The person chosen by the child victim shall not himself be a witness in the proceeding, and both before and during the deposition shall not discuss the testimony of the child victim with any other witness in the proceeding."

{¶69} The *Morris* court reasoned as follows:

> "Even though the accused in this case is the victim's 81-year-old father, and R.C. 2152.81 only applies to cases where the accused is a juvenile, the procedure applies by analogy. Merely because there is

> no specific statutory authority for a juvenile court's action does not mean reversible error has occurred. See *In re Henderson* (Nov. 28, 1997), Lake App. No. 96-L-0068, at 5. The juvenile court is given broad discretion to order the proceedings before it so that they comport with the best interest of the child at issue, so long as the proceedings do not infringe upon the constitutional rights of the parties. See R.C. 2151.31. *Morris, supra*, at ¶ 15.
>
> In *State v. Lipp* (Jan. 29, 1988), Erie App. No. CA-E-86-74, the appellant complained that a 'support person,' the child victim's counselor, testified at trial. Although the decision in *Lipp* relied upon R.C. 2945.481, the language of R.C. 2945.481 is substantially similar to R.C. 2152.81. The court in *Lipp* found that while allowing the counselor to testify at trial is contrary to statute, a review of the testimony demonstrated that nothing substantive was testified to and that the primary purpose of the counselor's appearance was to assure that she in no way coached the child victim during her testimony. Therefore, the court held that in the absence of any substantive testimony the appellant was not prejudiced by the testimony of the child victim's counselor. *Id. Morris, supra*, at ¶ 16.
>
> Likewise, in this case, appellant was not prejudiced by [the therapist's] testimony. Appellant was the first witness to testify, called by the state as if on cross-examination. [The therapist] was the second witness and her direct testimony was completed before she acted as a support person for the victim." *Id.* at ¶ 17.

{¶70} As noted above, the decision to allow the therapist/witness to act as the victim's support person was not unreasonable, arbitrary, or unconscionable, and was in the victim's best interest. Although in the case sub judice our review is not in the context of a juvenile court decision, we find the reasoning to be generally applicable. We also located several decisions in which the appellate courts determined no prejudice occurred by way of violations of separation of witnesses' orders. See, also, *State v. Johnson*, 10th Dist. Franklin No. 00AP-428,

2001-WL 69330, *5 (Under the facts presented, the behavior of the state's victim assistant advocate in making statements to the minor children in the courtroom had no bearing on the child witnesses' earlier photo array identifications of Appellant); *State v. Cook*, 6th Dist. Ottawa No. OT-07-020, 2008-Ohio-89, ¶ 57 (Although defense counsel saw a witness talking to a victim's advocate during break and, as such, State had violated an instruction not to talk to witnesses during recess, upon in chambers inquiry into the matter, the trial court concluded there was no impropriety); *State v. Cowen*, 8th Dist. Cuyahoga No. 96969, 2012-Ohio-3682, ¶ 27 (Where appellant complained of violation of trial court's order regarding separation of witnesses, trial judge did not observe any improper responses or gestures from victim's advocate present in room during child victim's testimony and assignment of error alleging witness misconduct had no merit.)

{¶71} Here, the record reflects Appellant's counsel objected to the use of closed circuit television, and the interpretation of R.C. 2945.481, before and throughout the trial. At the beginning of the trial, when a separation of witnesses was ordered, the victim's representatives were identified by name. Specifically, on Day 6 of trial, the court gave this instruction:

> "Okay for those of you who uh are potential witnesses uh, or who have testified you are not to discuss your testimony or what you heard in this Courtroom with anyone else. Okay. Regarding this case. * * * Right. Yea. Anybody uh, whose (sic) testified or is expected to testify cannot discuss this case. What's going on in this Courtroom or anything about this case with uh, anybody who has testified or is

> expected to testify. And I think that covers it. Anybody not understand that instruction? Alright. Okay. Now show of hands back there. Okay. Now do we need to identify who heard this?"

At this point, the court called out the witnesses' names to verify the instruction was heard and understood. The record reflects Carolee Post (the Count 2 mother) was present and responded affirmatively.

{¶72} On Day 7, the defense again argued the court's interpretation of R.C. 2945.481 was going to violate the separation of witnesses order. The trial court ruled:

> "* * * We have child representatives who have been present throughout this proceeding and have heard the testimony of everybody whose (sic) been a witness. If those child representatives would not go up to the room, they would still have the opportunity to see the testimony on the monitor. They have the right to, as representatives of the child, to be present throughout this trial. Now the Court views that the room upstairs as an extension of this Courtroom. This is not a video tape deposition which is going to take place several days, several weeks, several months prior to the actual trial. It's going on at this time. Since Mrs. excuse me, Coffman has already testified I don't see any prejudice to having her to go up into that room."

{¶73} On Day 9, Carolee Post and Travis Post, the parents of A.P., testified prior to A.P.'s testimony. We find, as in *Morris*, that although the trial court's decision to allow Mrs. Post, a witness, to act as A.P.'s designated support person and sit in the room where A.P. testified via closed circuit television was contrary to statute, the decision was not unreasonable, arbitrary, or unconscionable. Mrs. Post's testimony was completed before her daughter testified. Mrs. Post's purpose

in being in the room was to support her daughter and nothing in the record indicates anything improper or prejudicial occurred. We have reviewed the record in its entirety, including the videotape of A.P.'s testimony. During breaks in the testimony, A.P. appeared to be waving at the television screen in front of her which showed the courtroom. When defense counsel questioned her as to what she was doing, she responded that she was waving to her grandmother on the other side of the television screen. We presume if defense counsel had noticed any other questionable or improper occurrences, any improper communication verbal or nonverbal, between A.P. and her mother, defense counsel would have alerted the trial court and cited to the transcript in arguing this assignment of error. Our review of the videotape does not demonstrate that A.P. and her mother had improper verbal or nonverbal communication. The record does not indicate anything improper occurred. Therefore, we do not find the trial court's decision abused its discretion by allowing Mrs. Post, the designated support person for her daughter, to also testify as a witness. And, as noted above, Mrs. Post was instructed near the beginning of trial not to discuss her testimony, or what she heard in the courtroom, with anybody who had testified or anybody who was expected to testify. This instruction would include her husband. We have no reason to believe Mrs. Post did not abide by the court's instruction and order. For

the foregoing reasons, we find no merit to Appellant's fifth assignment of error. Accordingly, it is hereby overruled.

Assignment of Error VI

"VI. THE TRIAL COURT ERRED AND VIOLATED THOMAS SHIFFLET'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN, AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, IT CONVICTED HIM OF GROSS SEXUAL IMPOSITION."

Standard of Review

{¶74} "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Smith,* 4th Dist. Meigs No. 09CA16, 2011-Ohio-965, ¶ 5, quoting *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. Sufficiency tests the adequacy of the evidence, while weight tests "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." *Smith, supra,* quoting *State v. Sudderth,* 4th Dist. Lawrence No. 07CA38, 2008-Ohio-5115, at ¶ 27, quoting *Thompkins* at 387, 678 N.E.2d 541.

{¶75} "Even when sufficient evidence supports a verdict, we may conclude that the verdict is against the manifest weight of the evidence, because the test under the manifest weight standard is much broader than that for sufficiency of the evidence." *Smith, supra,* at ¶ 6, quoting *State v. Smith,* 4th Dist. Pickaway No. 06CA7, 2007-Ohio-502, at ¶ 1. When determining whether a criminal conviction

is against the manifest weight of the evidence, we "will not reverse a conviction where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *Smith,* 2011-Ohio-965, at ¶ 6, quoting *State v. Eskridge,* 38 Ohio St.3d 56, 526 N.E.2d 304 (1988), paragraph two of the syllabus. We "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice that the conviction must be reversed and a new trial granted." *Smith,* 2011-Ohio-965, at ¶ 6, quoting *Smith,* 2007-Ohio-502, at ¶ 1, citing *State v. Garrow,* 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814 (4th Dist. 1995); *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st. Dist. 1983). However, "[o]n the trial of a case, * * * the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *Smith,* 2011-Ohio-965, ¶ 6, quoting *State v. DeHass,* 10 Ohio St.2d 230, 227 N.E.2d 212 (1967).

Legal Analysis

{¶76} Appellant was convicted of Count 2, gross sexual imposition involving A.P., a violation of R.C. 2907.05(A)(4) which states: "(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 * * * is less than thirteen

years of age, whether or not the offender knows the age of that person." R.C. 2907.01(B) defines "sexual contact" as: "any touching of an erogenous zone of another, including without limitation, the thigh, genitals, buttock, pubic region or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." Appellant argues his conviction on Count 2 is against the manifest weight of the evidence.

{¶77} Appellant characterizes the Count 2 event as a "false allegation" arising after A.P.'s parents received a phone call informing them of other similar allegations, and after A.P.'s parents had a discussion with her about "private parts" and the fact that "nobody could touch them." Appellant further argues that A.P.'s testimony shifted in one significant detail: when she testified that Appellant's daughter was not present when the Count 2 events happened, but later testified on cross examination that Appellant's daughter was present and nearby. Appellant argues the record reveals A.P. is a "precocious child capable of intuiting any suggestions inherent in questions." Appellant points out A.P.'s testimony was particularly long for a child of her age and she even articulated at one point that she did not want to be testifying anymore. Appellant concludes that A.P.'s testimony is the only testimony as to the Count 2 event and while not attacking A.P.'s credibility, Appellant argues A.P.'s testimony is simply an illustration of the human limitations that contribute to false allegations and false convictions.

{¶78} In response, Appellee points out the jury heard testimony from Gail Horner, a Pediatric Sexual Assault Nurse Examiner (PSANE), A.P.'s parents, and A.P. The jury was able to weigh the credibility of the witnesses when they testified. A.P. testified consistently that she was sitting on Appellant's lap when he "tickled" her, touching under her clothes the skin on her "private part."

{¶79} At trial, Gail Horner testified as to her education, background, and employment with Nationwide Children's Hospital in Columbus, Ohio. She identified her curriculum vitae. Ms. Horner testified she is recognized as a clinical expert in child maltreatment. She has written articles for a journal for sexual assault nurse examiners. Ms. Horner testified she has testified in court approximately 200 times and has been recognized as a PSANE expert.

{¶80} Ms. Horner testified she was on call on June 28, 2011. She identified M.V.'s medical records of that date, and testified she was called in due to a concern of sexual abuse. Although another social worker interviewed M.V.'s family, Horner relied on this interview in her treatment and diagnosis. She testified M.V. had an essentially normal ano-genital exam. However, she testified a normal exam does not negate the possibility of sexual abuse.

{¶81} Ms. Horner further testified she examined A.P. the same date as M.V., who presented with a problem of possible sexual abuse and vaginal pain with urination. She prepared a rape evidence kit, collected the forensic evidence,

and performed a head to toe assessment including colposcopic anal genital exam. Ms. Horner identified A.P.'s medical records which she used for purposes of diagnosis and treatment. She testified A.P. also had a normal non-specific anal genital exam, and reiterated that this does not negate the possibility of sexual abuse.

{¶82} On cross-examination, Ms. Horner testified that urinary tract infections can be mistaken for sexual abuse because of accompanying symptoms. She reiterated that both girls had essentially normal ano-genital exams, with no findings of bruises, abrasions, or lesions. However, on redirect exam, Ms. Horner testified that a child's disclosure of sexual abuse is the strongest indicator of abuse having occurred. She also testified symptoms of a urinary tract infection would be a non-specific finding. She testified that the most important factor in determining whether a child has been sexually abused is the history the child gives and the physical examination.

{¶83} A.P.'s parents also testified. Carolee Post testified she had taken A.P. to Jody Dearth's daycare center beginning in November 2009. She testified on June 27, 2011, she picked up A.P. from the daycare center. That evening, she received a phone call from M.V.'s mother, Callie Vore. After that, she discussed the phone call with her husband and subsequent to that, she had a conversation with A.P. She asked A.P. if she knew what her "private parts" were. She also

advised A.P. that nobody could touch her private parts and if they did, A.P. should clearly tell them to stop. She also advised A.P. to report it to someone. Mrs. Post testified she did not accuse anyone of touching A.P. After their conversation, A.P. was in the backyard by herself, driving her Power Wheels jeep. A.P verbalized "something" that caused Mrs. Post to feel "sad, shocked, and devastated." At this point, Mrs. Post called Callie Vore. Mrs. Post testified she did not call the sheriff's department, and neither she nor her husband reported the incident to anyone that day.

{¶84} Mrs. Post testified the next morning, she noticed A.P. had severe redness on the inside and outside of her vagina. Mrs. Post acknowledged A.P. had suffered from UTI infections prior to May 2011. On the morning after her disclosure to her parents, A.P. didn't want her mother touch her vagina with the prescription crème. Mrs. Post testified it "seemed as though it bothered her." Mrs. Post testified her husband contacted the sheriff's office. After reporting to the sheriff's department, Mr. and Mrs. Post and A.P. reported to the Child Advocacy Center. The Vore family was present with their daughter in the lobby. Mrs. Post denied discussing the allegations with anyone.

{¶85} Mrs. Post and A.P. were interviewed at the Center. Afterwards, they went home and later to Nationwide Children's Hospital. Mrs. Post was present with A.P. as she was examined. Mrs. Post testified that A.P. does fantasize.

However, she opined that her daughter's statement to her in the backyard was truthful. Mrs. Post acknowledged she had met with the prosecutor's office approximately 8 times.

{¶86} On cross-examination, Mrs. Post testified A.P. went to Jody's daycare on weekdays for approximately two years. She acknowledged she had previously worked with Callie Vore. She denied discussing the allegations with Callie Vore, other than two phone calls. Mrs. Post testified because the children attend activities together, she does communicate with Mrs. Vore. Mrs. Post testified when she went to the Child Advocacy Center, she was interviewed by Donna Robinson. She testified she had read the transcript of the interview once prior to her testimony. She also read the transcript of her daughter's interview with investigators. She met with the prosecutor's office approximately 8 times, and she was provided a transcript.

{87} Mrs. Post testified she watched her daughter's interview from an observation room. She acknowledged telling Donna Robinson that "[W]ith a three year old you really don't know what to believe." Mrs. Post testified she had never spoken to Appellant but had seen him in passing.

{¶88} Travis Post, A.P.'s father, testified he works for Greenleaf Landscapes. He had treated Jody Dearth's lawn a couple of times. Prior to June 27, 2011, he was impressed by the daycare facility and trusted Jody. On the

evening of June 27, 2011, his wife received a phone call from Callie Vore which she discussed with him. Mr. Post testified it was a "serious allegation," and he wanted it to come from his daughter's "own mouth." Later that evening, A.P. was in the backyard riding her tricycle play toy when she disclosed "something" which made him feel "bad."[9]

{¶89} The next morning Mr. Post contacted his brother and then the sheriff. The Posts took A.P. to the Child Advocacy Center. Although the Vores were there, they did not discuss the allegations. After leaving the Center, they proceeded to Children's Hospital in Columbus. Mr. Post went into the examination room with his daughter where she was placed in stirrups and examined.

{¶90} On cross-examination, Mr. Post testified prior to the trial, he never discussed the allegations with the Vores. He denied being present when the Vores or the children would have discussed the situation.

{¶91} Finally A.P. testified via closed circuit television. Her direct, cross, redirect, and recross examinations were lengthy. A.P. testified she used to go to daycare at Jody's. She could not remember how long ago she went there and she did not know Jody's last name. She testified she liked going to Jody's and playing on the playground. A.P. testified other grownups came by Jody's, namely

[9] Neither Carolee nor Thomas Post was allowed to testify as to what A.P. actually told them in the backyard on the basis that it would be inadmissible hearsay.

"Shifflet." A.P. testified Shifflet would bring different colored suckers. A.P.'s testimony is set forth in part as follows:

Q: Uh, did he do anything else when he was at Jody's.

A. Yes.

Q. What did he do?

A. He'd tickle me.

Q. Where would he tickle you?

A. On private part.

Q. On your private part, okay? How many times did he tickle you there?

A. One.

Q. And was, do you remember when that was?

A. Last day that I was at Jody's.

Q. The last day you were at Jody's. And where was Jody when he tickled you on your private part?

A. I think she was inside making the lunch. Yea she was inside the kitchen though.

Q. Inside the kitchen making you lunch? Okay. Who else, was anybody else outside when he tickled you in your private part?

A. All my other friends but they weren't watching so.

Q. Where were they outside?

A. They were on the playground.

Q. On the playground. Were any of them on the porch?

A. Yes.

{¶92} The prosecutor next showed A.P. an exhibit which was an outline drawing of a female human body. A.P. identified various body parts and "private part." The prosecutor asked her to identify where Appellant tickled her. A.P. testified that she laughed when he did it, but "It was a little bit kind of sad." A.P. testified she was sitting on Appellant's lap and he touched her skin. She further testified:

Q. How did you go, why did you go see Shifflet?

A. Cause he told me to come there.

Q. What did he do?

A. Tickle me.

* * *

Q. And when he tickled you on your private part did he do it on top of your private part or something else.

A. He done it on top of my private part but he touched my skin.

* * *

Q. Okay. Now was anybody else on the porch when Shifflet tickled you there?

A. Yes.

Q. Who was on the porch?

A. [M.]

Q. [M.] Okay. Was anybody else?

A. No.

Q. Okay and how did you get on Shifflet's lap?

A. He called my name to get on his lap?

Q. Okay. Did you climb up on to his lap? Did he put you there or something else?

A. I just got on his lap.

Q. Okay. Was he holding anybody?

A. He was holding Marissa.[10]

{¶93} The prosecutor also asked A.P. about speaking to Donna Robinson. A.P. testified she was truthful when she spoke to Robinson. She testified it was a long time ago. At this point, the prosecutor played the videotaped interview with Robinson. A.P. testified she had seen the video previously but she was not sure how many times.

{¶94} On cross-examination, A.P. testified she met Callie Vore at Donna Robinson's. She testified M.V. had spent the night at her house but she didn't

[10] "Marissa," M.V.'s younger sister, was an infant.

know how many times. She testified she remembered giving testimony in a big courtroom and the Judge was there. She recalled that telling the truth is the most important thing. She recalled viewing the tape of her interview with Donna. She didn't recall a tape of her talk with the Judge.

{¶95} A.P. testified she did remember coming to the courthouse and talking with the Judge previously in June.[11] However, after the initial response, A.P. had difficulty remembering and answered many questions "I don't know." A.P. indicated the events happened a "long time ago." A.P. testified Appellant was at Jody's "sometimes" which was contrary to earlier testimony that he was there "every day." A.P. acknowledged when she was talking with Donna she didn't think she had problems at daycare. She acknowledged telling Donna "no" when she was asked if anything happened to her that she didn't like. A.P. indicated during this portion of questioning, and on redirect twice, that she wanted "to get out."

{¶96} During redirect, she said "she didn't know," she "didn't even care," and she "wasn't sure" about being in the same room with Appellant. When asked how Appellant could hold the baby and tickle her, A.P. testified Appellant gave the baby to Jody and told them to come there. A.P. testified Jody and the baby were outside on the porch watching the kids when she was tickled.

[11] This references the competency hearings A.P. and the other alleged victims participated in.

{¶97} In closing, the prosecutor argued that the elements of gross sexual imposition had been proven beyond a reasonable doubt on all counts. However, Appellant's counsel characterized the situation as an "emotional response" to allegations of sexual abuse at a daycare center, which "swept through the community" and were not based on reality. In particular, Counsel argued A.P.'s interview with Donna Robinson was tainted by subtle questioning. He pointed out when A.P., then a three-year-old child, was asked open-ended questions in a non-leading fashion, she twice denied problems at daycare. Counsel argued the physical evidence corroborated a lack of gross sexual imposition. Counsel pointed out A.P.'s "story" was that the incident happened on the porch while Jody Dearth watched nearby. Counsel argued the children were all "wrestling around" to get on Appellant's lap. Counsel emphasized A.P.'s recollection of the incident changed as to the number of times it happened, whether or not A.P. had witnessed other incidents of abuse, whether or not it happened on the porch, and whether or not Jody was nearby. He also criticized the State's failure to investigate Appellant's house and failure to call Donna Robinson to testify.

{¶98} We have reviewed the entire record. We find there was substantial evidence upon which the jury could reasonably have concluded all the elements of Count 2, gross sexual imposition involving A.P., were proven beyond a reasonable doubt. This court and others have firmly held that there is nothing in the law

which requires a rape victim's testimony be corroborated as a condition precedent to conviction. *State v. Nichols*, 85 Ohio App.3d 65, 619 N.E.2d 80 (4th Dist. 1993), citing *State v. Lewis*, 70 Ohio App.3d 624, 638 591 N.E.2d 854, 863 (4th Dist. 1990). This same principle would apply to convictions on the lesser included offense of gross sexual imposition. *Nichols*, *supra.*

{¶99} A jury sitting as the trier of fact is free to believe all, part, or none of the testimony of any witness who appears before it. *State v. Grube*, 987 N.E.2d 287, 2013-Ohio-692, ¶ 31 (4th Dist.) See *State v. Long*, 127 Ohio App.3d 328, 335, 713 N.E.2d 1 (4th Dist. 1998); *State v. Nichols*, 85 Ohio App.3d 65, 76, 619 N.E.2d 90 (4th Dist. 1993). A jury is in the best position to view the witnesses and to observe witness demeanor, gestures and voice inflections, and to use those observations to weigh credibility. *Grube*, *supra*, citing *Myers v. Garson*, 66 Ohio St.3d 610, 615, 614 N.E.2d 742 (1993); *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). Appellate courts should not generally second guess juries on matters of weight and credibility. *Grube, supra.* See *State v. Vance*, 4th Dist. Ross No. 03CA27, 2004-Ohio-5370, at ¶ 10.

{¶100} While Appellant points out A.P.'s testimony had inconsistencies, the transcript shows A.P. clearly testified sexual contact occurred by Appellant's touching her on her "private part," which she indicated was her vagina. A.P. identified Appellant as the perpetrator. The videotape demonstrates A.P. explained

the contact by identifying female anatomy and circling on a State's exhibit the vaginal area, her "private part," where she was tickled. A.P. also demonstrated the contact using a doll during her testimony. A jury "has the right to place considerable weight on the testimony of the victim." *State v. Persinger*, 9th Dist. Lorain No. 13CA010397, 2014-Ohio-4125, ¶ 16, quoting *State v. Felder*, 9th Dist. Lorain No. 91 CA005230, 1992 WL 181016, *1 (July 29, 1992).

{¶101} In *Persinger*, while the appellate court noted disparities in the details of the victim's testimony, the court pointed out the jury was "free to believe all, part, or none of the testimony of each witness," *Persinger, supra*, quoting *Prince v. Jordan*, 9th Dist. Lorain No. 04CA008423, 2004-Ohio-7184, ¶ 35, citing *State v. Jackson*, 86 Ohio App.3d 29, 33, 619 N.E.2d 1135, (4th Dist. 1993), and was instructed as such. Furthermore, we note, as in *Persinger*, the conflicting detail, such as whether or not Appellant's daughter was present during the incident with A.P. does not speak to any element of the offense charged. It was within the province of the jury to reconcile the inconsistency. Again, this is because the jury is best able to judge the credibility of the witnesses. And, on Count 2, the jury did have the additional testimony, although it was not eyewitness testimony, of others to consider.

{¶102} Based on the above, we cannot conclude that the jury lost its way and created a manifest miscarriage of justice in finding Appellant guilty of Count

2, gross sexual imposition involving A.P. and Appellant's final assignment of error is overruled. Accordingly the judgment of the trial court is affirmed in part and reversed in part and remanded to the trial court.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the **JUDGMENT BE AFFIRMED IN PART, REVERSED IN PART AND THE CAUSE REMANDED,** and the parties shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J.: Concurs in Judgment and Opinion.
Hoover, P.J.: Concurs in Judgment and Opinion as to A/E I, II, III, IV, VI; Dissents as to A/E V.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.