[Cite as *State v. Pellikan*, 2015-Ohio-1656.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	
BRANDON PELLIKAN	:	Case No. 2014CA00056
	:	
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2013-CR-1120
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	April 27, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO Prosecuting Attorney	EARLE E. WISE, JR. 122 Central Plaza, North Canton, OH 44702
By: RENEE M. WATSON Assistant Prosecuting Attorney 110 Central Plaza, South – Suite 510 Canton, OH 44702-1413	

Baldwin, J.

{¶1} Plaintiff-appellant Brandon Pellikan appeals his conviction and sentence from the Stark County Court of Common Pleas on three counts of gross sexual imposition. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 30, 2013, the Stark County Grand Jury indicted appellant on three counts of gross sexual imposition in violation of R.C. 2907.05(A)(4), felonies of the third degree, and one count of attempted gross sexual imposition in violation of R.C. 2907.05(A)(4) and 2923.02(A), a felony of the fourth degree. The indictment alleged that the offenses occurred as a continuous course of conduct from on or about November 23, 2008 to on or about November 26, 2012 and involved two different victims. At his arraignment on August 30, 2013, appellant entered a plea of not guilty to the charges.

{¶3} On September 9, 2013, appellee filed a Motion to Determine the Admissibility of Statements, seeking a hearing from the court to determine the admissibility of statements that the alleged minor victim had made to CJ Taylor, the forensic interviewer, at the Children's Network. The motion was made pursuant to the Ohio Supreme Court holding in *State v. Arnold*, 126 Ohio St.3d 290, 2010–Ohio–2742, 933 N.E.2d 775. Appellant filed a response in opposition to such motion on September 20, 2013.

{¶4} Appellant, on September 20, 2013, also filed a Motion to Suppress statements that he had made to the police during his second interview on the basis that the police had failed to re-Mirandize appellant before the second interview. Appellant, in his motion, stated that appellant had agreed to come to the police station for an

interview on December 11, 2012 and was advised of his rights at the time, but that he was not readvised before being interviewed again the next day. Appellee filed a response to the Motion to Suppress on September 25, 2013. Appellant, on January 16, 2014, filed a Supplemental Motion to Suppress, seeking to suppress statements made by appellant during his first interview with police on December 11, 2012. During the interview, appellant admitted to touching his eight year old cousin's vagina over her clothes on one occasion. Appellant argued that such statement was not voluntary.

{¶5} On January 22, 2014, the trial was rescheduled from February 18, 2014 to February 24, 2014.

{¶6} As memorialized in a Judgment filed on January 30, 2014, the trial court, following a hearing held on October 16, 2013, held that the statements that the minor child had made at the Children's Network were admissible because the majority of the statements made were important to diagnosis and treatment of the minor child and were non-testimonial. The trial court presented the parties with a redacted copy of the forensic interview.

{¶7} Thereafter, on February 21, 2014, appellant filed a Motion to Continue the trial. Appellant, in his motion, stated that appellee had indicated that it was seeking an amendment of the indictment to amend the dates on which the crimes allegedly occurred. Appellant argued that he would be prejudiced by the amendment if a reasonable continuance was denied. Appellant, on the same date, also filed an Objection to Jurisdiction pursuant to R.C. 2152.03, arguing that the juvenile court had jurisdiction because appellant, who was born on June 5, 1993, was under the age of 18

for the majority of the time frame set forth in the Indictment. Appellant also filed a Request for a More Specific Bill of Particulars.

{¶8} Appellee, on February 21, 2014, filed a Motion to Amend the Indictment and Bill of Particulars. Appellee sought to amend the indictment and Bill of Particulars to allege that the offenses occurred as a continuous course of conduct from on or about June 5, 2011, which was appellant's 18th birthday, to on or about November 23, 2012.

{¶9} On February 24, 2014, appellant filed a request for the Grand Jury testimony or, in the alternative, for an in camera review. Appellant, in his request, argued that it was possible that he was indicted based on evidence of wrongdoing allegedly committed prior to June 5, 2011. On the morning of trial, a hearing was held. The trial court granted the Motion to Amend the Indictment and Bill of Particulars and denied appellant's motion seeking a continuance of the trial and request for Grand Jury testimony. Appellant renewed his objection to the admission of *Arnold* testimony.

{¶10} On February 24, 2014, prior to the commencement of trial, an in camera interview of the victim, who was nine and a half years old at the time, was held to determine her competency. The trial court found her competent to testify.

{¶11} At trial, KM, whose date birth is June 28, 2004, testified that appellant, who is her cousin, used to babysit her. She testified that he had watched her from the time she was a baby until she was eight years old. KM testified that when she was eight years old, she had to tell her mother that appellant had been touching her private parts with his hand more than once. According to KM, her friends told her to tell her mother or else they would. When asked, KM agreed that appellant had touched her more than once when she was eight years old and more than once when she was seven years old.

The touching took place in either the living room or her bedroom. KM also testified that appellant had touched her both over and under her clothes. She also testified that appellant made her touch his private with her private once she was six, seven or eight years old.

{¶12} On cross-examination, KM testified that when she initially told her mother, she did not mention that appellant had made her touch him. She indicated that she did not recall anything ever being inside of her. KM testified that she thought that appellant made her touch him when she was seven years old. When asked how many times appellant had touched her, KM testified "a hundred times." Trial Transcript, Volume II at 28. She further indicated that while, during her forensic interview, she had indicated that appellant had penetrated her, she did not understand the question at the time. KM denied on the stand at trial that any penetration had occurred.

{¶13} At trial, KM's mother, Vanessa, testified that appellant was her first cousin and KM's second cousin. Vanessa testified that just before Thanksgiving in November of 2012, appellant was present in her home when KM approached her and asked to speak with her privately. The two went into the kitchen where KM told her mother that appellant had been touching her inappropriately. Vanessa testified that KM told her that it had not happened that day, but that KM knew she had to tell her mother because appellant was sleeping over that night. According to Vanessa, KM indicated that the touching had happened "many times." Trial Transcript, Volume II at 60.

{¶14} Appellant was asked to leave the house. Later the same week, after making sure that KM was not mad at appellant or confused, Vanessa contacted the Massillon Police Department.

{¶15} Detective Bobby Grizzard of the Massillon Police Department testified that he received a case involving appellant in November of 2012. He testified that he interviewed appellant on December 11, 2012 at the police department for 45 minutes and again on December 12, 2012 for just under 30 minutes. Appellant signed a written waiver of his constitutional rights on both dates. Both interviews were recorded and portions of the interviews were played for the jury. During the first interview, appellant admitted touching KM's vagina one time over her clothing in the living room. During the second interview, appellant stated that the abuse took place on October 19, 2012. Appellant left after both interviews.

{¶16} At trial, Crista Taylor testified that she used to be known as CJ Cross and was a forensic interviewer with the Department of Job and Family Services. She testified that she interviewed KM on December 10, 2012 at the Child Advocacy Center and that the interview was recorded. She testified that KM told her that appellant had touched her both inside and outside her clothes and had penetrated her. The touching occurred in the living room or in KM's bedroom. KM, during the interview, indicated that appellant had grabbed her vagina. KM also told Taylor that appellant had made her touch his private area once when she was seven or eight years old. Portions of the forensic interview were played for the jury.

{¶17} Carrie Schnirring, a psychology assistant at Northeast Ohio Behavioral Health, testified that she saw KM for a psychological assessment twice in January and once in February of 2013 when KM was eight and a half years old. She obtained information from sources including KM's caseworker and reviewed the DVD recording of the forensic interview that was conducted by CJ Taylor. Schnirring testified that when

she questioned KM about her cousin, “she immediately looked down and stopped making eye contact” and indicated that she did not like to talk about appellant. Trial Transcript, Volume II at 183. KM told her that appellant had touched her vagina on the outside of her pants and on the inside of her pants many times and that the touching happened in the living room when appellant was babysitting or KM’s mother was in a different part of the house. According to Schnirring, KM told her that she was too embarrassed to tell appellant to stop and made excuses to get the touching to stop. KM, for example, would tell appellant that she had to clean her room or go the bathroom. Schnirring also testified that KM explained to her how she would pull her knees up to her chest to cut off appellant’s access to her crotch.

{¶18} The following is an excerpt from Schnirring’s testimony:

{¶19} “She reported to me that the touching happened the first time that she was in second grade, but also a second time that she was in the second grade. She was retained so she repeated second grade and she was able to clarify for me, in terms of a timeline, it happened both of those years.

{¶20} “She was also able to tell me that the last episode of touching with Brandon happened at some point after she turned age eight while she was in the second grade for the second time.”

{¶21} Trial Transcript, Volume II at 185.

{¶22} Schnirring testified that she diagnosed KM with an adjustment disorder with anxiety and recommended ongoing therapy. She testified that KM’s history and behaviors were consistent with those of sexually abused children. When asked why, she, in part, as follows**:**

{¶23} "A: Um, she – she was able to provide to me a very specific and very detailed narrative of what happened to her. Not only was it specific in detail, but she also included in the information what we call idiosyncractic details. That refers to the very specific and very unique details that a child, or even an adult, might offer to shed some light on what was their unique experience. For example, [KM] was able to talk to me about how she would lift her knees up to her chest to thwart the stop – to stop the touching. That's a very unique experience that was hers.

{¶24} "She also had the idiosyncractic details of how she would make excuses to get out of the room because she was too embarrassed to tell him to stop. Those types of very specific, very unique details I found to be very significant.

{¶25} "I also found it to be very significant that she had – her affect was so upset while she talked about these things. She seemed genuinely embarrassed to be trying to put these things into words, and she oftentimes didn't even know what words to use. She was kind of just stumbling along with her own child lingo to try to get across what happened to her."

{¶26} Trial Transcript, Volume II at 188-189. Schnirring noted that KM's school performance had drastically improved after KM disclosed what had happened.

{¶27} At trial, Nurse Practitioner Alyssa Edgein testified she had physically examined KM on January 22, 2013 and that her physical exam was normal. She testified that her diagnosis for child sexual abuse was inconclusive, but noted that she had very little information at the time.

{¶28} At the conclusion of the evidence and the end of deliberations, the jury, on February 26, 2014, found appellant guilty of three counts of gross sexual imposition

(counts one, two and three) and not guilty of attempted gross sexual imposition (count four).[1] Pursuant to a Judgment Entry filed on March 7, 2014, appellant was sentenced to an aggregate total of 162 months in prison and was classified as a Tier II sex offender.

{¶29} Appellant now raises the following assignments of error on appeal:

{¶30} I. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT BY OVERRULING DEFENDANT'S MOTION TO SUPPRESS.

{¶31} II. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT WHEN IT ALLOWED THE STATE TO AMEND THE INDICTMENT AND BILL OF PARTICULARS THE MORNING OF THE TRIAL BY CHANGING THE TIME FRAME OF THE ALLEGED COURSE OF CONTIUOUS (SIC) CONDUCT FROM A FOUR YEAR PERIOD TO A PERIOD OF ONE YEAR AND FIVE MONTHS, THUS DRASTICALLY CHANGING THE SUBSTANCE OF THE ALLEGED CONDUCT AND THE ABILITY OF THE DEFENSE TO MOUNT AN EFFECTIVE DEFENSE.

{¶32} III. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT DENIED APPELLANT'S MOTION TO RELEASE OR TO CONDUCT AN *IN CAMERA* INSPECTION OF THE GRAND JURY TESTIMONY.

{¶33} IV. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN AFTER GRANTING THE STATE'S MOTION TO AMEND THE INDICTMENT, THE COURT DENIED APPELLANT'S MOTION FOR A REASONABLE CONTINUANCE, THUS DENYING APPELLEANT (SIC) A FAIR TRIAL IN VIOLATION OF HIS RIGHTS TO DUE PROCESS UNDER FIFTH AND FOURTEENTH

[1] The alleged victim with respect to this charge was KM's younger sister.

AMENDMENTS TO THE U.S. CONSTITUTION AND SECTION 10 ARTICLE I OF THE OHIO CONSTITUTION.

{¶34} V. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT BY ALLOWING THE TAPE RECORDED FORENSIC INTERVIEW OF THE CHILD VICTIM TO BE PLAYED FOR THE JURY IN VIOLATION OF APPELLANT'S RIGHT TO CONFRONT THE TESTIMONY AGAINST HIM PURSUANT TO THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION AND APPLICABLE PROVISIONS OF THE OHIO CONSTITUTION.

{¶35} VI. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT BY ENTERING CONVICTIONS ON THREE FELONY COUNTS (COUNTS 1, 2 AND 3) BASED UPON AN INDICTMENT THAT FAILED TO PROVIDE ADEQUATE NOTICE AND THUS DENIED HIS RIGHT TO DUE PROCESS OF LAW AND IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND SECTION 10 ARICLE (SIC) OF THE OHIO CONSTITUTION.

{¶36} VII. THE TRIAL COURT ERRED TO THE PRDJUDICE (SIC) OF THE DEFENDANT WHEN IT FAILED TO PROPERLY INSTRUCT THE JURY AS TO WHICH COUNT OF THE INDICTMENT RELATED TO WHICH OF THE TWO ALLEGED VICTIMS.

{¶37} VIII. THE TRIAL COURT ERRED BY ENTERING CONVICTIONS ON COUNTS 1, 2 AND 3 OF GROSS SEXUAL IMPOSITION FELONIES OF THE THIRD DEGREE BASED UPON DEFICIENT VERDICT FORMS PURSUANT TO R.C 2945.75

WHICH DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL IN VIOLATION U.S. AND OHIO CONSTITUTIONS.

{¶38} IX. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS AND THE VERDICTS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIENCE (SIC).

{¶39} X. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION TO THE PREJUDICE OF THE DEFENDANT BY FAILING TO PREVENT CUMMULATIVE (SIC) ERROR, WHICH PREVENTED DEFENDANT FROM RECEIVING A FAIR TRIAL.

I

{¶40} Appellant, in his first assignment of error, argues that the trial court erred in overruling appellant's Motion to Suppress.

{¶41} Appellate review of a trial court's decision to deny a motion to suppress involves a mixed question of law and fact. *State v. Long,* 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist .1998). During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Brooks,* 75 Ohio St.3d 148, 154, 1996–Ohio–134, 661 N.E .2d 1030. A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Medcalf,* 111 Ohio App.3d 142, 145, 675 N.E.2d 1268 (4th Dist.1996). Accepting these facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal

standard. *State v. Williams,* 86 Ohio App.3d 37, 42, 619 N.E.2d 1141 (4th Dist.1993), overruled on other grounds.

{¶42} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See, *State v. Fanning,* 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Klein,* 73 Ohio App.3d 486, 597 N.E.2d 1141 (4th Dist.1991). Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See, *Williams,* supra. Finally, an appellant may argue, as here, the trial court has incorrectly decided the ultimate or final issues raised in a motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry,* 95 Ohio App.3d 93, 96, 620 N.E.2d 906 (8th Dist.1994).

{¶43} Appellant specially argues that his confession to the police was not voluntary, but was coerced. As is stated above, appellant filed a Motion to Suppress on September 20, 2013 and, on January 16, 2014, filed a Supplemental Motion to Suppress. Appellant sought to suppress statements made by appellant during his interviews with police on December 11, 2012 and December 12, 2012. During the first interview, appellant had admitted to touching his eight year old cousin’s vagina over her clothes on one occasion. During the second interview, appellant testified that the

incident happened in October of 2012 and that the touching only occurred once. He argued in his motions that such statements were not voluntary.

{¶44} In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards,* 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), paragraph two of the syllabus, *vacated on other grounds,* 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155 (1978). As noted by the Ohio Supreme Court in *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588 at paragraph 93:

> Nevertheless, "the use of an inherently coercive tactic by police is a prerequisite to a finding of involuntariness." *State v. Perez,* 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 71, citing *Colorado v. Connelly,* 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Consequently, unless a coercive tactic was used, we need not assess the totality of the circumstances. *State v. Treesh,* 90 Ohio St.3d 460, 472, 739 N.E.2d 749 (2001); *Perez* at ¶ 71. "Evidence of use by the interrogators of an inherently coercive tactic (*e.g*., physical abuse, threats, deprivation of food, medical treatment, or sleep) will trigger the totality of the circumstances analysis." *State v. Clark,* 38 Ohio St.3d 252, 261, 527 N.E.2d 844 (1988).

{¶45} Appellant does not allege that he was subjected to physical abuse, threats, or deprivation of food, medical treatment or sleep. Nor does he allege that he was yelled at during the two interviews. Rather, appellant alleges that his confession was involuntary because Detective Grizzard lied to him and played on his emotions.

{¶46} Appellant, who was nineteen years old at the time, was interviewed two separate times. The first interview was for 45 minutes and the second was for 25 minutes. Both were recorded[2]. Appellant agreed to come in for the first interview and signed a waiver of his constitutional rights that day. Detective Grizzard testified at the suppression hearing that he picked appellant up for the interview the next day. He testified that appellant was again advised of his constitutional rights and signed a written waiver. The waivers were admitted as Exhibits at trial. Detective Grizzard testified that appellant indicated that he had never been read his rights or interrogated before.

{¶47} Appellant, in support of his argument that his confession was coerced, notes that at the suppression hearing, Detective Grizzard admitted that he told appellant that KM loved him and that his family was on his side, forgave him and wanted to help him. Detective Grizzard further admitted that he told appellant that the investigation showed that he did it and could get a second chance if he admitted that he had touched KM. Appellant also argues that, at the suppression hearing, the Detective admitting to playing on his emotions and love for the victim by asking him if he would "do anything" to prevent her from having to go through the process. Detective Grizzard, at the hearing, admitted that he told appellant that KM said that she was "willing to get over it" when, in fact, she had not. Transcript of suppression hearing at 51. Detective Grizzard

[2] A DVD of the interviews was not played at the suppression hearing, but was admitted as an exhibit.

also admitted that he "played hard on this let's save [KM]." Transcript of suppression hearing at 54.

{¶48} At the suppression hearing, Detective Grizzard was questioned about the second interview. He testified that he brought appellant in for a second interview because he did not believe that appellant had told him everything that had happened. When asked, he admitted telling appellant that he thought that appellant was scared and frightened the day before and that things had gone too fast. Appellant argues that at the second interview, the Detective continued playing on his emotions and love for the victim. He also notes that after appellant said that he was done talking, Detective Grizzard told appellant that he was not. At the suppression hearing, on redirect, Detective Grizzard testified that when he said no to appellant, he was not telling appellant that he was not free to leave and that, in fact, appellant left a few minutes later. Detective Grizzard clarified that after appellant said that he was done talking because he believed that they had all of the information they needed, he told appellant that he was not because they needed more information. Appellant then continued talking to Detective Grizzard.

{¶49} We find that the record does not demonstrate that appellant's statements to Detective Grizzard were coerced and involuntarily made. While appellant argues that he was a 19 year old who had not been read his rights or interrogated before, he had been informed of his *Miranda* rights, he had indicated that he comprehended those rights, and he had expressly waived those rights. The two interviews were not lengthy or intense and no deprivation or threats occurred. At the end of the first interview, appellant went home and then agreed to come back the next day. At the beginning of

the second interview, appellant told Detective Grizzard that he felt better after admitting what he had done was wrong. He had asked Detective Grizzard to pick him up for the second interview and then left after such interview.

{¶50} Considering the totality of the circumstances surrounding appellant's statements to Detective Grizzard, we find that appellant's statements were voluntary and not coerced. The trial court, therefore, did not err in denying his Motion to Suppress or his Supplemental Motion to Suppress .

{¶51} Appellant's first assignment of error is, therefore, overruled.

II, IV

{¶52} Appellant, in his second assignment of error, argues that the trial court erred in granting appellee's Motion to Amend the Indictment and Bill of Particulars on the morning of trial. In his fourth assignment of error, he argues that the trial court erred in denying his request for a reasonable continuance after it granted such motion.

{¶53} Crim.R. 7(D) specifies, in relevant part, when a trial court may permit an amendment to an indictment:

> The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or

> complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury.

{¶54} A criminal indictment serves several purposes. First, by identifying and defining the offenses of which the individual is accused, the indictment serves to protect the individual from future prosecutions for the same offense. *State v. Sellards* , 17 Ohio St.3d 169, 170, 478 N.E.2d 781, 783–78 (1985). In addition, the indictment compels the government to aver all material facts constituting the essential elements of an offense, thus affording the accused adequate notice and an opportunity to defend. *Id*. at 170.Further, Crim.R. 7(D) allows a trial court to amend an indictment to conform to the evidence presented at trial so long as it does not change the identity of the offense. *State v. O'Brien*, 30 Ohio St.3d 122, 508 N.E.2d 144 (1987).

{¶55} When an amendment is allowed that does not change the name or identity of the offense charged, the accused is entitled to a discharge of the jury or a continuance, “unless it clearly appears from the whole of the proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to

which the amendment is made." *State v. Honeycutt,* 2nd Dist. No. 19004, 2002–Ohio–3490, quoting Crim.R. 7(D).

{¶56} A trial court's decision to permit the amendment of an indictment is reviewed under an abuse of discretion standard. *State v. Beach,* 148 Ohio App.3d 181, 2002–Ohio–2759, 772 N.E.2d 677, *appeal not allowed,* 96 Ohio St.3d 1516, 2002–Ohio–4950. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140(1983), *quoting State v. Adams,* 62 Ohio St.2d 151, 157, 404 N.E.2d 144(1980). To demonstrate error, appellant must show not only that the trial court abused its discretion, but that the amendment prejudiced his defense. *Blakemore.*

{¶57} In the case sub judice, appellee sought to amend the indictment and Bill of Particulars to allege that the offenses occurred as a continuous course of conduct from on or about June 5, 2011, which was appellant's 18th birthday, to on or about November 23, 2012 rather than from on or about November 23, 2008 to on or about November 26, 2012 as in the original indictment. We concur that the amendment did not change the name or identity of the offenses charged. In the case sub judice, both the original and the amended indictments properly informed appellant that he was charged with gross sexual imposition in violation of 2907.05(A)(4) and attempted gross sexual imposition in violation of R.C. 2907.05(A)(4) and 2923.02(A). As noted by appellee, the amendment did not include any new dates, but rather shortened the time frame.

{¶58} We further find that the trial court did not err in denying appellant's request for a reasonable continuance after the indictment and Bill of Particulars were amended.

Appellant was not prejudiced in preparing his defense because he was given adequate notice of the exact nature of the allegations and what the State intended to prove at trial. As the trial court noted at the hearing on February 24, 2014, "[a]mending the indictment is actually narrowing the window." Transcript of February 24, 2014 motion hearing at 8.

{¶59} Appellant's second and fourth assignments of error are, therefore, overruled.

III

{¶60} Appellant, in his third assignment of error, argues that the trial court erred in denying appellant's request for the Grand Jury testimony or for an in camera review of the same.

{¶61} Ohio Crim. R. 6(E) provides, in part, that "[d]eliberations of the grand jury and the vote of any grand juror shall not be disclosed." However, if the defense shows a "particularized need" for disclosure that outweighs the need for secrecy, all relevant portions of a grand jury transcript should be produced. *State v. Greer,* 66 Ohio St.2d 139, 420 N.E.2d 982 (1981), paragraph two of the syllabus. A "particularized need" exists "when the circumstances reveal a probability that the failure to provide the grand jury testimony will deny the defendant a fair trial." *State v. Davis,* 38 Ohio St.3d 361, 365, 528 N.E.2d 925 (1988). A claim of particularized need cannot be replete with speculation and innuendo. *State v. Stojetz,* 84 Ohio St.3d 452, 460, 1999–Ohio–464, 705 N.E.2d 329. The decision whether to release grand jury testimony "is within the discretion of the trial court." *Greer,* supra, at paragraph one of the syllabus. A decision

to deny release will not be reversed absent an abuse of discretion. *State v. Brown,* 38 Ohio St.3d 305, 308, 528 N.E.2d 523 (1988). In order to find an abuse of discretion, the reviewing court must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶62} As is stated above, after the indictment was amended, appellant sought the Grand Jury testimony, alleging that it was possible that he was indicted based on evidence of wrongdoing allegedly committed prior to June 5, 2011, which was his 18th birthday. At the February 24, 2014 motion hearing, defense counsel argued he was entitled to such testimony to determine if such was the case because "if they [the Grand Jury] found probable cause to indict him on four counts of incidents that occurred before…June 5th of 2011, then again, it mixes with my argument that this Court- - this case is not in - - in the proper jurisdiction and does not hold proper jurisdiction over this,…" Transcript of February 24, 2014 motion hearing at 17-18. Appellant had argued that jurisdiction was proper in the juvenile court. Appellant argued, therefore, that he had shown a "particularized need" for the testimony.

{¶63} We find that the trial court did not abuse its discretion in denying appellant's request because appellant did not show a particularized need for the Grand Jury testimony. As the trial court noted in denying appellant's request, the allegations were that appellant had touched one person three times and attempted to touch another person one time as a course of conduct during a specified time frame. The trial court noted that the Grand Jury "had ruled on that said, yes, there is probable cause sometime during that time frame." Transcript of February 24, 2014 motion hearing 22.

Appellant has merely speculated that the Grand Jury testimony may provide more specific dates for the offenses than were specified in the Bill of Particulars. The trial court's decision was not arbitrary, unconscionable or unreasonable.

{¶64} Appellant's third assignment of error is, therefore, overruled.

V

{¶65} Appellant, in his fifth assignment of error, argues that the trial court erred in allowing the tape recorded forensic interview of KM to be played for the jury in violation of his right to confront the testimony against him. Appellant argues that his rights under the Sixth and Fourteenth Amendments were violated at trial. We disagree.

{¶66} The Confrontation Clause of the Sixth Amendment to the U.S. Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *." In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that testimonial statements of a witness who does not appear at trial may not be admitted or used against a criminal defendant unless the declarant is unavailable to testify, and the defendant has had a prior opportunity for cross-examination.

{¶67} We first note that in *State v. Arnold,* 126 Ohio St.3d 290, 2010–Ohio–2742, 933 N.E.2d 775, the Ohio Supreme Court applied the "primary purpose" test, in a case involving victim statements made to a social worker at a child-advocacy center. The Supreme Court concluded that statements made primarily for forensic or investigative purposes are testimonial and thus inadmissible under the Confrontation Clause when the declarant is unavailable; but statements made for diagnosis and

treatment are nontestimonial and thus admissible without offending the confrontation clause. *Id .* at paragraphs one and two of the syllabus.

{¶68} Nonetheless, it is well-established that the Confrontation Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain the statement. *See State v. Siler,* 164 Ohio App.3d 680, 2005–Ohio–6591, 843 N.E.2d 863 at paragraph 51 (5th Dist), quoting *State v. Marbury,* 2nd Dist. App.No. 19226, 2004–Ohio–1817, ¶ 38, citing *Crawford* at 59, f.n. 9.

{¶69} In the case sub judice, it is undisputed that the child victim, who was nine years old by the time of trial, took the stand and testified. We therefore find no Confrontation Clause violation under the circumstances of the case sub judice. We further find no merit in appellant's claim of cumulative error regarding the victim's statements. See *State v. Bell*, 5th Dist. Stark No. 2013 CA 00110, 2014-Ohio-663.

{¶70} Appellant's fifth assignment of error is, therefore, overruled.

VI

{¶71} Appellant, in his sixth assignment of error, argues that the trial court erred by entering convictions against appellant on three felony counts of gross sexual imposition when the indictment contains no differentiation between the three counts. Appellant notes that the counts relate to the same victim and "allege the same conduct in identical language over the same identical course of continuous conduct." Appellant argues that the indictment failed to provide him with adequate notice, denied him his right to due process of law and deprived him of double jeopardy protection.

{¶72} We note that appellant never objected. Therefore we must find plain error to reverse. Evid. R. 103. In order to prevail under a plain error analysis, appellant bears

the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *State v. Long,* 53 Ohio St.2d 91, 372 N.E.2d 804 (1978). Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* at paragraph three of the syllabus.

{¶73} Appellant relies upon a federal court decision, *Valentine v. Konteh*, 395 F.3d 626 (C.A. 6, 2005). Valentine involved an indictment alleging 20 counts of child rape and 20 counts of felonious sexual penetration occurring over an eleven-month period. The offenses were identically alleged and no further information was included to differentiate one count from another. The *Valentine* court stated:

> In its charges and in its evidence before the jury, the prosecution did not attempt to lay out the factual bases of forty separate incidents that took place. Instead, the 8-year-old victim described 'typical' abusive behavior by Valentine and then testified that the 'typical' abuse occurred twenty or fifteen times. Outside of the victim's estimate, no evidence as to the number of incidents was presented." *Id.* at 632-633.

{¶74} The *Valentine* court noted that, "[w]hen prosecutors opt to use such carbon-copy indictments, the defendant has neither adequate notice to defend himself, nor sufficient protection from double jeopardy. * * * Importantly, the constitutional error in this case is traceable not to the generic language of the individual counts of the indictment but to the fact that there was no differentiation among the counts." Id at 636.

{¶75} However, as we have previously stated, the *Valentine* court did not rule out multiple-count indictments, finding instead that, "[t]he due process problems in the indictment might have been cured had the trial court insisted that the prosecution delineate the factual bases for the forty separate incidents either before or during the trial." *State v. Crawford,* 5th Dist. Richland No. 07-CA-116, 2008-Ohio-6260 at paragraph 30, citing *Valentine,* at 634.

{¶76} In the case sub judice, the Bill of Particulars, which was filed on September 9, 2013, sufficiently differentiated among the counts charged. The Bill of Particulars alleged that Count One took place in the victim's bedroom and that during such incident, appellant fondled her vagina. With respect to Count Two, the Bill of Particulars alleged that appellant fondled the victim's vagina in the living room of her house. Finally, with respect to Count Three, the Bill of Information alleged that appellant caused the victim to fondle his penis while in the living room of her house. All alleged the same continuous course of conduct.

{¶77} In addition, appellant was provided with discovery that included his taped interview with Detective Grizzard. As is stated above, during the first interview appellant admitted to touching KM's vagina through her clothes. Appellant also was provided with a transcript of the forensic interview with KM and KM's sex abuse evaluation with Northeast Ohio Behavioral Health.[3] We find that the factual bases for the three counts was delineated and find no plain error. See *State v. Triplett*, 11th Dist Ashtabula No. 2013-A-0018, 2013-Ohio-5190.

{¶78} Appellant's sixth assignment of error is, therefore, overruled.

VII

[3] While this document was not entered into evidence, Carrie Schnirring testified as to its contents at trial.

{¶79} Appellant, in his seventh assignment of error, argues that the trial court erred in failing to properly instruct the jury as to which count of the indictment related to which of the two alleged victims. Both victims were identified in the indictment as "Jane Doe." Appellant further notes that the verdict forms did not distinguish between the two victims.

{¶80} We note that appellant never objected to the instructions that were given or to the verdict forms. Therefore we must find plain error to reverse. Evid. R. 103. In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *State v. Long,* 53 Ohio St.2d 91, 372 N.E.2d 804 (1978). Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* at paragraph three of the syllabus.

{¶81} During closing arguments, appellee made it clear that the first three counts pertained to KM while "[w]ith respect to count four, that's Mia." Trial Transcript, Volume III at 200. Mia was KM's younger sister. While the jury found appellant guilty of the three counts of gross sexual imposition involving KM, it found him not guilty of the lone count of attempted gross sexual imposition involving Mia. The jury, therefore, was able to distinguish which count(s) pertained to which victim. Appellant cannot establish plain error.

{¶82} Appellant's seventh assignment of error is, therefore, overruled.

VIII

{¶83} Appellant, in his eighth assignment of error, argues that the verdict forms in this case were deficient because they did not specify the level of the charged offense

as a felony of the third degree and did not state that an aggravated circumstance had been found by the jury to elevate the charged offenses from a felony of the fourth degree to a felony of the third degree. Appellant contends, therefore, that the trial court erred in entering convictions of three counts of gross sexual imposition, felonies of the third degree.

{¶84} Appellant cites to R.C. 2945.75 which states:

{¶85} "(A) When the presence of one or more additional elements makes an offense one of a more serious degree:

{¶85} "(1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise, such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.

{¶86} "(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

{¶87} In *State v. Pelfrey,* the Ohio Supreme Court determined that pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense. 112 Ohio St.3d 422, 2007–Ohio–256, 860 N.E.2d 735, syllabus. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged. R.C. 2945.75(A)(2).

{¶88} Appellant in this case was convicted of gross sexual imposition in violation of R.C. 2907.05(A)(4). In *State v. Nethers,* 5th Dist. Licking No. 07 CA 78, 2008–Ohio–2679, this Court found that R.C. 2907.05(A)(4) contains all of the necessary elements of the offense, is a felony of the third degree, and requires no additional elements or circumstances "over and above the elements of the offense set forth [in] R.C. 2907.05(A)(4) that enhance the penalty for the conviction." *Id.* at paragraph 57. See also *State v. Shuster*, 5th Dist. Morgan Nos. 13AP0001, 13AP0002, 2014 -Ohio- 3486, in which this Court held that *Pelfrey* did not apply to R.C. 2907.05(A)(4) gross sexual imposition .

{¶89} We find, therefore, that the jury verdict forms are not deficient.

{¶90} Appellant's eighth assignment of error is, therefore, overruled.

IX

{¶91} Appellant, in his ninth assignment of error, argues that his convictions are against the manifest weight and sufficiency of the evidence.

{¶92} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins,* 78 Ohio St.3d 380, 1997–Ohio–52, 678 N.E.2d 541, paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held as follows:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine

> whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

{¶93} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered." *State v. Thompkins,* supra, 78 Ohio St.3d at 387. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶94} Appellant, in the case sub judice, was convicted of gross sexual imposition in violation of R.C. 2907.05(A)(4). Such section prohibits sexual contact with a person under the age of thirteen. Sexual contact is defined by R.C. 2907.01(B) 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."

{¶95} At trial, KM, who was born on June 28, 2004, testified that when she was eight years old, appellant touched her on her private parts with his hand more than

once. She further testified that he touched her more than once when she was seven years old and that the touching occurred in either the living room or her bedroom. KM testified that appellant touched her both on the outside and inside of her clothes and that once he had her touch his private parts with her private parts when she was six, seven or eight years old. On cross-examination, she indicated that she thought that she was seven years old at the time.

{¶96} Based on the foregoing, we find that, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime of gross sexual imposition proven beyond a reasonable doubt. KM's testimony supports three convictions for gross sexual imposition.

{¶97} Appellant contends that KM was not a credible witness. He argues that her testimony was inconsistent and notes that she alleged that she was touched inside her vagina during the taped forensic interview, but then denied that any penetration occurred on the stand at trial. Appellant also argues that during the taped interview, KM alleged that her sister Mia was touched by appellant and that, at trial, she testified that appellant attempted to touch her sister's private parts with his hand. Appellant notes that the jury found appellant not guilty of attempted gross sexual imposition with respect to KM's sister. However, the jury as trier of fact, was in the best position to assess KM's credibility. Cleary, the jury found her credible with respect to the three separate counts of gross sexual imposition involving KM. Moreover, with respect to the issue of penetration, at trial, KM testified that she had nut understood the question during the forensic interview.

{¶98} Appellant's ninth assignment of error is, therefore, overruled.

X

{¶99} Appellant, in his tenth assignment of error, that he was prejudiced by cumulative error, as set forth in his preceding assignments of error.

{¶100}Pursuant to the doctrine of cumulative error, a judgment may be reversed where the cumulative effect of errors deprives a defendant of his constitutional rights, even though the errors individually do not rise to the level of prejudicial error. *State v. Garner* 74 Ohio St.3d 49, 64,1995-Ohio- 168, 656 N.E.2d 623. *Accord, State v. Brown,* 100 Ohio St.3d 51, 2003–Ohio–5059, 796 N.E.2d 506.

{¶101}In the case sub judice, we have not found multiple instances of error, harmless or otherwise. The doctrine of cumulative error therefore does not apply.

{¶102}Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Baldwin, J.

Gwin, P.J. and

Farmer, J. concur.