[Cite as *State v. Rossbach*, 2011-Ohio-281.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-09-1300

Appellee — Trial Court No. CR0200901708

v.

Thomas Rossbach — **DECISION AND JUDGMENT**

Appellant — Decided: January 21, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and Mark T. Herr, Assistant Prosecuting Attorney, for appellee.

James J. Popil, for appellant.

* * * * *

COSME, J.

{¶1} Appellant, Thomas Rossbach, appeals from a judgment of the Lucas County Common Pleas Court, following a jury trial in which appellant was found guilty of four counts of gross sexual imposition, violations of R.C. 2907.05(A)(4), felonies of

the third degree. The trial court sentenced appellant to maximum, consecutive terms, for an aggregate of 20 years incarceration. For the reasons that follow, we affirm.

I. BACKGROUND

{¶2} It was alleged that appellant molested his six-year-old niece, V.R., multiple times during the period from August 25, 2008, through November 24, 2008. V.R., born in 2002, was five-years-old at the time of the alleged molestation.

{¶3} Several actions by V.R. prompted her parents to question her behavior. One of the events was a nightmare during which she apparently said "No, I don't want to touch it, I don't want to touch it." When her father woke her up, he asked her if she could remember the dream. She couldn't, but when questioned further she ran into her room and said, "I'm bad, I have to -- I have to go to time out."

{¶4} The next action occurred when V.R. put her tongue inside her mother's mouth when giving her a kiss. When asked by her mother why she was kissing with her tongue, V.R. indicated that she had learned it from "Uncle Butch." Appellant, whom V.R. called "Uncle Butch," is V.R.'s mother's brother. Appellant and his 12 year old son were living with V.R.'s family at the time of the allegations.

{¶5} V.R.'s father confronted appellant who denied that anything improper had occurred. After appellant protested to his sister that nothing had happened, V.R. looked at him and said "Uncle Butch, you're a liar."

{¶6} V.R.'s parents informed the police of their belief that V.R. had been molested. Appellant admitted to Detective Stooksbury that V.R. had twice touched his

penis, but claimed that V.R. did so of her own free will. A medical examination of V.R. at the Children's Advocacy Center 11 days later did not reveal any physical indicators of abuse.

{¶7} Because of V.R.'s young age, appellant's counsel sought a competency hearing. The trial judge conducted an examination of V.R., and based on her observations and V.R.'s responses to her questions, ruled V.R. competent to testify.

{¶8} Appellant filed a motion in limine asking that the prosecutor not refer to V.R. as the "victim" at trial, asserting that there is no victim until proven otherwise. The trial court granted the request. However, at trial, the prosecutor referred to V.R. as the "victim" three times each during opening and closing statements. Appellant asserts that the prosecutor's use of "victim" was prejudicial and affected the outcome of the trial.

{¶9} V.R. testified appellant touched her genitals five times and touched her anus at least once. She testified that all of the touching occurred before her sixth birthday, and occurred on different days, in different rooms, but always at her home. She further testified that her parents were not at home when the touching occurred, but that sometimes appellant's son was home, upstairs in his room. She also related that appellant made her rub lotion on his penis. She stated that the touching made her uncomfortable and they did not talk when touching occurred.

{¶10} Appellant raises seven assignments of error.

II. COMPETENCY OF CHILD WITNESS

{¶11} In his first assignment of error, appellant maintains:

{¶12} "The trial court erred and abused its discretion, by finding a six (6) year old child competent to testify."

{¶13} Appellant complains that V.R. was not competent because she could not recall her friends' names, what she received for her birthday, her home address, street name, or phone number. He also cites her inability to recite her ABC's or do simple math (i.e., one plus one equals two). Appellant complains that V.R. could not relate accurate impressions of fact or accurately recollect those impressions.

{¶14} We disagree.

{¶15} In *State v. Frazier* (1991), 61 Ohio St.3d 247, syllabus, certiorari denied (1992), 503 U.S. 941, the Supreme Court of Ohio set the standard for competency guidelines of child witnesses:

{¶16} "In determining whether a child under ten is competent to testify, the trial court must take into consideration (1) the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child's ability to recollect those impressions or observations, (3) the child's ability to communicate what was observed, (4) the child's understanding of truth and falsity and (5) the child's appreciation of his or her responsibility to be truthful." See Evid.R. 601(A). See, also, *Turner v. Turner* (1993), 67 Ohio St.3d 337, 343.

{¶17} In *State v. Clark* (1994), 71 Ohio St.3d 466, 469, the Supreme Court of Ohio stated that "the burden falls on the proponent of the witness to establish that the

witness exhibits certain indicia of competency." See *State v. Said* (1994), 71 Ohio St.3d 473, 476.

{¶18} It is well-settled that, as the trier of fact, trial judges are required to make a preliminary determination as to the competency of all witnesses, including children, and that absent an abuse of discretion, competency determinations of the trial judge will not be disturbed on appeal. *Clark*, 71 Ohio St.3d at 469; *Frazier*, 61 Ohio St.3d at 251. See *State v. Moreland* (1990), 50 Ohio St.3d 58, 61. See, also, *State v. Uhler* (1992), 80 Ohio App.3d 113, 118; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph one of the syllabus, certiorari denied (1990), 497 U.S. 1011; *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶19} A trial court is given wide latitude in determining whether a prospective witness is competent to testify. *Clark*, supra. The trial judge has the opportunity to observe the child's appearance, manner of responding to questions, general demeanor, and ability to relate facts accurately and truthfully. *Frazier*, supra.

{¶20} In conducting an examination of a minor, the court must satisfy itself of the elements enumerated in *Frazier*. See *In re J.M.*, 8th Dist. No. 85546, 2006-Ohio-1203, ¶ 10. See, also, *State v. Swartsell*, 12th Dist. No. CA2002-06-151, 2003-Ohio-4450, ¶ 12. After conducting the examination, the trial court may rule on the competency of the witness, keeping in mind whether the witness's age substantially negates the trustworthiness of his or her testimony. See *Huprich v. Paul W. Varga & Sons, Inc.*

(1965), 3 Ohio St.2d 87, 91 (concerning a witness's mental impairment), overruled in part on other grounds, *Clark*, supra, at 471.

{¶21} In *State v. McNeill* (1998), 83 Ohio St.3d 438, 443, the Supreme Court of Ohio found no abuse of discretion by the trial court in determining the children were competent to testify even though "the children could not answer every question posed." Relying on the transcript, the *McNeill* court concluded that "they were in fact able to receive, recollect, and communicate impressions of fact, and appreciate the responsibility to be truthful." Id. See *In re L.M.*, 8th Dist. No. 90322, 2008-Ohio-3543, ¶ 15. See, also, *State v. Allen* (1990), 69 Ohio App.3d 366, 369.

{¶22} Here, the trial judge questioned six-year-old V.R., observed her demeanor, and found her competent. At the competency hearing, V.R. was able to relate specific facts to the trial judge about her birthday, her age, where her birthday party was held, what she did at the party, the type of birthday cake she had, who her best friend is, the color of her house, the name of her school, her teacher's name, who lives in her house, the age of her sister, the names of her pets, what she got for Christmas, her mother's name and her father's name. In addition, the trial judge asked V.R. about telling a truth and a lie. V.R.'s response was, "you get in trouble" if you lie. When asked if she promised to tell the truth, she responded, "Yes." When asked whether everything she told the trial judge was the truth, she responded, "Yes."

{¶23} The trial judge concluded that that V.R. was competent, despite V.R.'s inability to recollect some facts, stressing that V.R. understood the difference between the

truth and a lie, and importantly, was forthcoming about not being able to answer certain questions. The trial judge noted that when V.R. was asked a question to which she could not remember an answer, her response was, "I forgot." The trial court also observed that V.R. was "less timid and shy * * * than a lot of children her age put into such a situation."

{¶24} Applying the foregoing to the record before us, we find the trial court did not abuse its discretion in determining V.R. competent to testify.

{¶25} A six-year-old will rarely, if ever, be a perfect witness. Nevertheless, this six-year-old was capable of receiving and relating accurate impressions of fact. V.R. accurately recalled those impressions, and related those impressions truthfully.

{¶26} Accordingly, appellant's first assignment of error is not well-taken.

III. RIGHT TO A FAIR TRIAL

{¶27} In his second assignment of error, appellant maintains:

{¶28} "The trial court failed to declare a mistrial and denied appellant due process of law in violation of his constitutional rights where the prosecutor repeatedly referred to the child accuser as 'victim', despite an order from the court prohibiting the prosecutor from using that reference."

{¶29} Appellant insists that a prosecutor may not express a personal opinion as to the credibility of a witness and that there is a reasonable probability that but for the prosecutor's misconduct, the outcome of the trial would have been different. Appellant

also argues that he is entitled to a mistrial because the prosecutor's conduct violated a pre-trial order.

{¶30} We disagree.

{¶31} Appellant's second assignment of error is composed of two parts. The first part is the allegation of prosecutorial misconduct resulting from the prosecutor's reference to V.R. as the "victim," and the second part is the claim that the trial court should have declared a mistrial.

A. Prosecutorial Misconduct

{¶32} The Supreme Court of Ohio has limited the instances when a judgment may be reversed on grounds of prosecutorial misconduct. See *State v. Lott* (1990), 51 Ohio St.3d 160, 166; *State v. Mundy* (1994), 99 Ohio App.3d 275, 300. In *State v. Overholt*, 9th Dist. No. 02CA0108-M, 2003-Ohio-3500, ¶ 46, discretionary appeal not allowed, 100 Ohio St.3d 1472, 2003-Ohio-5772, the court held, "The analysis of cases alleging prosecutorial misconduct focuses on the fairness of the trial and not the culpability of the prosecutor. * * * A reviewing court is to consider the trial record as a whole, and is to ignore harmless errors 'including most constitutional violations.' * * * Accordingly, a judgment may only be reversed for prosecutorial misconduct when the improper conduct deprives the defendant of a fair trial." (Citations omitted.)

{¶33} Further, "[i]n deciding whether a prosecutor's conduct rises to the level of prosecutorial misconduct, a reviewing court must determine if the remarks were improper, and, if so, whether they actually prejudiced the substantial rights of the

defendant. * * * Isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning." (Citations omitted.) Id. at ¶ 47. Appellant must show that there is a reasonable probability that but for the prosecutor's misconduct; the result of the proceeding would have been different. *State v. Loza* (1994), 71 Ohio St.3d 61, 78, overruled on other grounds.

{¶34} In this case, appellant alleges that during the state's opening and closing statements, the prosecutor inappropriately bolstered the victim's truthfulness when she referred to V.R. as the "victim" a total of six times.

{¶35} Appellant also claims that the prosecutor improperly stated during closing statement that V.R. was a "victim." However, a prosecutor may comment on "'what the evidence has shown and what reasonable inferences may be drawn therefrom.'" *Lott*, 51 Ohio St.3d at 165, quoting *State v. Stephens* (1970), 24 Ohio St.2d 76, 82.

{¶36} The trial court had instructed the jury at the outset that opening and closing statements were not evidence. Thus, the effect of any prosecutorial misconduct "'must be considered in the light of the whole case.'" *State v. Rahman* (1986), 23 Ohio St.3d 146, 154, quoting *State v. Maurer* (1984), 15 Ohio St.3d 239, 266. See *Dunlop v. United States* (1897), 165 U.S. 486, 498.

{¶37} Although the remarks made by the prosecutor were improper because the trial court had instructed the prosecutor not to refer to V.R. as the "victim," appellant's trial counsel did not object to the remarks. Thus, in the absence of plain error affecting substantial rights, we need not consider whether the prosecutor's references to V.R. as a

victim were improper. See *State v. Ramos*, 9th Dist. No. 21286, 2003-Ohio-2637, ¶ 7; *State v. Twyford* (2002), 94 Ohio St.3d 340, 357. See, also, *State v. Clemons* (1998), 82 Ohio St.3d 438, 451.

{¶38} Even if we were to find that appellant had preserved this issue for appeal, we must conclude that the use of the term "victim" six times by the prosecutor was harmless error. Crim.R. 52(A) defines harmless error as "any error, defect, irregularity, or variance which does not affect substantial rights [and] shall be disregarded." Appellant has failed to demonstrate that his substantial rights have been affected.

B. Mistrial not Warranted

{¶39} A mistrial is an extreme remedy, "declared only when the ends of justice so require and a fair trial is no longer possible." *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, citing *Illinois v. Somerville* (1973), 410 U.S. 458, 462-463. While a review of the trial court's decision denying a motion for mistrial ordinarily falls under an abuse of discretion standard, *State v. Stanley* (1997), 121 Ohio App.3d 673, 699, citing *State v. Sage* (1987), 31 Ohio St.3d 173, 182, appellant's failure to object at trial precludes such a review. Instead, the trial court's refusal to declare a mistrial is reviewed under plain error analysis.

{¶40} In reviewing a claim that a mistrial should have been granted, the Supreme Court of Ohio in *State v. Glover* (1988), 35 Ohio St.3d 18, 19, noted, "[t]his court has instead adopted an approach which grants great deference to the trial court's discretion in this area, in recognition of the fact that the trial judge is in the best position to determine

whether the situation in his courtroom warrants the declaration of a mistrial. [*State v.*] *Widner* [(1981), 68 Ohio St.2d 188]. See, also, *Wade v. Hunter* (1949), 336 U.S. 684, 687, 69 S.Ct. 834, 836, 93 L.Ed. 974."

{¶41} Under this standard, the error is deemed waived unless the outcome of the trial would have been different, but for the error. *State v. Wickline* (1990), 50 Ohio St.3d 114, 119-120. An appellate court should only take notice of plain error under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Landrum* (1990), 53 Ohio St.3d 107, 111; *State v. Carpenter* (1996), 116 Ohio App.3d 615, 621. *State v. Howard* (June 14, 2002), 2d Dist. No. 18884.

{¶42} In this case, the few references to V.R. as the "victim" during opening and closing statements did not prejudice appellant. While the prosecutor's use of this term in this case was improper and a violation of the court's order, we do not consider these remarks, in the light of the whole case, to have risen to the level of plain error requiring reversal.

{¶43} Accordingly, appellant's second assignment of error is not well-taken.

IV. MANIFEST WEIGHT OF THE EVIDENCE

{¶44} In his third assignment of error, appellant maintains:

{¶45} "The conviction against appellant Thomas Rossbach was against the manifest weight of the evidence."

{¶46} Appellant insists that the jury verdict was against the manifest weight of the evidence since there was no evidence that either appellant or V.R. was sexually aroused

or gratified by his touching of an erogenous zone, a required element under R.C. 2907.05(A)(4).

{¶47} We disagree.

{¶48} Our function is to examine the evidence admitted at trial and to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. 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 proved beyond a reasonable doubt. Id.

{¶49} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42. See *State v. Otten* (1986), 33 Ohio App.3d 339, 340. The appellate court, "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id. quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. A conviction may be upheld even when the evidence is

susceptible to some possible, plausible, or even reasonable theory of innocence. See *Jenks*, 61 Ohio St.3d at 272.

{¶50} Weight of evidence and credibility of witnesses are matters for the trier of fact. A reviewing court must, therefore, accord due deference to the credibility determinations made by the factfinder. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of syllabus. See *State v. Gilliam* (Aug. 12, 1998), 9th Dist. No. 97CA006757. "Ohio courts have exhibited a consistent willingness to hold that the testimony of the victim, if believed, is sufficient to support a conviction, even without further corroboration." *State v. Knowles*, 9th Dist. No. 04CA008476, 2004-Ohio-6080, ¶ 9. See *State v. Sparks*, 9th Dist. No. 22111, 2005-Ohio-2154, ¶ 11; *State v. Jennings*, 9th Dist. No. 22016, 2004-Ohio-5447, ¶ 15.

{¶51} R.C. 2907.05(A) provides in pertinent part:

{¶52} "(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

{¶53} "* * *

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

{¶55} Sexual contact means: "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is

a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B). "Sexual arousal" and "sexual gratification" are not defined in the Ohio Revised Code. See *In re Anderson* (1996), 116 Ohio App.3d 441, 443. However, "R.C. 2907.01(B) contemplate[s] any touching of the described areas which a reasonable person would perceive as sexually stimulating or gratifying." *State v. Gesell*, 12th Dist. No. CA2005-08-367, 2006-Ohio-3621, ¶ 23, quoting *State v. Astley* (1987), 36 Ohio App.3d 247, 250.

{¶56} Stating that "R.C. Chapter 2907 is designed to protect victims of sexual crimes," the Tenth District Court of Appeals in *State v. Astley* (1987), 36 Ohio App.3d 247, 250, held that "R.C. 2907.05(A)(3) is a strict liability offense and requires no precise culpable state of mind. All that is required is a showing of the proscribed sexual contact."[1]

{¶57} In *State v. Valdez* (Oct. 25, 1991), 6th Dist. No. 90-OT-007, this court adopted the rule of *Astley*, holding that evidence that the defendant touched the victim, who was less than thirteen years of age, on her vagina and buttocks was sufficient to

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[1]In *Astley*, the statute in effect at that time, R.C. 2907.05(A)(3), provided:

"(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons, to have sexual contact when any of the following apply:

"* * *

"(3) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of such person."

support inference of the defendant's purpose to sexually arouse or gratify either person. See *State v. Duszynski*, 6th Dist. No. L-08-1215, 2009-Ohio-2284, ¶ 7; *State v. Green*, 5th Dist. No. 08-CA-20, 2009-Ohio-2065, ¶ 26; *State v. Lawwill*, 8th Dist. No. 91032, 2009-Ohio-484, ¶ 11; *State v. Tanner*, 5th Dist. No. 06CA56, 2007-Ohio-1803, ¶ 17; *State v. West*, 10th Dist. No. 06AP-11, 2006-Ohio-6259, ¶ 17; *State v. Crotts*, 8th Dist. No. 81477, 2006-Ohio-1099, ¶ 6, discretionary appeal not allowed, 109 Ohio St.3d 1497, 2006-Ohio-2762; *State v. York*, 6th Dist. No. WD-03-017, 2003-Ohio-7249, ¶ 13; *State v. Sherman* (May 5, 1989), 6th Dist. No. S-88-6.

{¶58} According to *Astley*, the precise language of the gross sexual imposition statute does not contain a specific culpable mental state. It is axiomatic that when a statute reads, "No person shall * * *," absent any reference to the requisite mental state, the statute is clearly indicative of a legislative intent to impose strict liability. *State v. Cheraso* (1988), 43 Ohio App.3d 221, 223. See *In re Grigson* (Apr. 15, 1991), 4th Dist. No. 1881.

{¶59} In *State v. Mundy* (1994), 99 Ohio App.3d 275, 287, the Second District Court of Appeals rejected the analysis in *Astley*, to the extent that it imposes strict liability for sexual contact. According to *Mundy*, since "sexual contact" as defined in R.C. 2907.01(B) is an essential element of R.C. 2907.05(A)(4), the state must prove that there has been a "touching of an erogenous zone of another * * * for the *purpose* of sexually arousing or gratifying either person." R.C. 2907.01(B). (Emphasis supplied) See *State v. Harrold* (Oct. 31, 2000), 3d Dist. No. 13-2000-02; *In re Williams* (Dec. 22,

2000), 1st Dist. No. C-990841, C-990842; *In re Grigson*, supra; *State v. Williams* (1989), 52 Ohio App.3d 19, 21.

{¶60} Thus, Ohio courts disagree whether a precise culpable state of mind is required in addition to a showing of the proscribed sexual contact for the commission of the offense of gross sexual imposition on a person thirteen years or younger. *Astley* imposes strict liability for any sexual contact with a young child such that the mental culpability of a defendant need not be proven. *Mundy* insists that evidence of the mental culpability is required by the statute, but that such evidence can be inferred by the type, nature, and circumstances of the contact, or else the action is likely accidental or innocent touching.

{¶61} Although the court in *Mundy* refused to adopt the reasoning in *Astley*, it did not limit the evidence possible to prove a defendant's subjective purpose of specific intention to only explicit evidence of sexual gratification or arousal. Instead, the court relied on *In re Grigson*, supra, *State v. Lott* (1990), 51 Ohio St.3d 160, 168, and *State v. Cobb* (1991), 81 Ohio App.3d 179, 184, in holding:

{¶62} "Whether that touching was undertaken for the purpose of sexual arousal or gratification must be inferred from the type, nature, and circumstances surrounding the contact. In other words, would an ordinary prudent person or a reasonable person sitting as a juror perceive from the defendant's actions, and all of the surrounding facts and circumstances, that *the defendant's purpose* or specific intention was arousal or gratification of sexual desire[?]" *Mundy*, supra, at 289. See, *In re Bloxson* (Feb. 6,

1998), 11th Dist. No. 97-G-2062. See, also, *State v. Said* (Mar. 26, 1993), 11th Dist. No. 92-L-018, affirmed on other grounds (1994), 71 Ohio St.3d 473.

{¶63} The court in *Mundy* goes on to state that:

{¶64} "R.C. 2907.05(A)(4) provides explicit standards for those charged with enforcing that provision. The language utilized, and more particularly the culpable mental state requirement that the offender's touching of the prohibited areas of the body be done for the purpose or specific intention of sexual arousal or gratification, leaves no discretion as to application and enforcement of that statute. It is not simply any or all contact with the proscribed areas of the body which the statute forbids; that would leave law enforcement officials to ask whether contact in any particular factual context constitutes criminal behavior or innocent conduct. Rather, it is a touching for the specific purpose of sexual arousal or gratification which violates the statute. It is this culpability, the specific intent or purpose to achieve sexual arousal or gratification from the touching, which distinguishes criminal conduct from noncriminal, innocent behavior, such as accidental touching or a touching of the prohibited areas incidental to bathing, changing a diaper, or playful wrestling. R.C. 2907.05(A)(4) provides constitutionally adequate guidelines which enable law enforcement officers to enforce and apply that provision in an evenhanded manner." *Mundy*, supra, at 289.

{¶65} The distinction between the decisions in *Astley* and *Mundy* appears in the "strict liability" reading of the prohibition against sexual contact with a person under the age of 13. *Astley* held that strict liability under R.C. 2907.05(A)(4) prohibited any act of

sexual contact with a young child and thus did not require evidence of purpose or intent. The court in *Mundy*, on the other hand, held that the evidence of a sexual purpose or intent must be present or else the action is likely accidental or innocent touching.

{¶66} Key to understanding why these two seemingly different positions do not necessarily lead to different outcomes is the fact that the "strict liability" position must infer from the same evidence regarding the type, nature, and circumstances of any contact whether that contact would reasonably be considered "sexual contact." Thus, courts following the "strict liability" position are still making the kind of discretionary inferences that the court in *Mundy* holds to be a required element in proving a violation of R.C. 2907.05(A)(4).

{¶67} What this means in the present case, then, is a distinction without a difference for appellant. He claims that because neither he nor V.R. said anything during the contact that the required element of sexual arousal or gratification was not proved. However, the jury clearly found that other evidence regarding the type, nature, and circumstances of the contact was credible and convincing in determining that the contact was sexual.

{¶68} Although a future case may necessitate differentiating the decisions in *Astley* and *Mundy*, in the present case we decline to do so because it is clear that courts are basing their judgments on the same evidence of conduct, regardless of the state of mind applied in *Astley* (strict liability) or *Mundy* (purposefully).

{¶69} In this case, the evidence in the record shows that the jury reasonably found that there was sexual contact between appellant and V.R. The elements of gross sexual imposition were present, and appellant's conviction is not against the manifest weight of the evidence.

{¶70} Accordingly, appellant's third assignment of error is not well-taken.

V. SUFFICIENCY OF THE EVIDENCE

{¶71} In his fourth assignment of error, appellant maintains:

{¶72} "The conviction against appellant Thomas Rossbach was not supported by the sufficiency of the evidence."

{¶73} Appellant insists that the evidence admitted at trial was insufficient to find him guilty beyond a reasonable doubt.

{¶74} We disagree.

{¶75} The standard of review of a claim of insufficient evidence was established by the Supreme Court of Ohio in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

{¶76} "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.

(*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)" See *Thompkins*, 78 Ohio St.3d at 386. See, also, *State v. Smith* (1997), 80 Ohio St.3d 89, 113.

{¶77} Appellant argues that there is insufficient evidence to support a conviction of gross sexual imposition because there is no evidence that appellant touched the victim for the purpose of sexual arousal or gratification. See *State v. Goins* (Dec. 3, 2001), 12th Dist. No. CA2000-09-190. The record however, includes sufficient evidence regarding the circumstances of the contact to find appellant guilty of violating R.C. 2907.05(A)(4). *Valdez*, supra; *Astley*, 36 Ohio App.3d at 250.

{¶78} Appellant also argues that there was insufficient evidence to prove that the sexual contact occurred during the time period specified within the indictment. However, the precise date and time sexual contact occurs is not an essential element of the crime. *State v. Madden* (1984), 15 Ohio App.3d 130, 131. Moreover, "particularly in cases involving sexual misconduct with a child, the precise times and dates of the alleged offense or offenses oftentimes cannot be determined with specificity." *State v. Daniel* (1994), 97 Ohio App.3d 548, 556. See *Mundy*, 99 Ohio App.3d at 296.

{¶79} It was not unreasonable for the jury to believe that V.R. was unable to remember exact dates and times, especially considering that the same conduct occurred multiple times over a four month period.

{¶80} Viewing the state's evidence in a light most favorable to the prosecution, a rational trier of fact could have found all of the elements of gross sexual imposition of V.R., proven beyond a reasonable doubt.

{¶81} Accordingly, appellant's fourth assignment of error is not well-taken.

VI. MAXIMUM AND CONSECUTIVE SENTENCES

{¶82} In his fifth assignment of error, appellant maintains:

{¶83} "The trial court committed abuse of discretion when it imposed maximum and consecutive sentences without adequate justification."

{¶84} Appellant complains that the trial court abused its discretion in imposing more than the minimum sentence because he was a first-time offender, had no record other than two traffic offenses, and there were no physical indicators of abuse, or serious emotional or physical harm to V.R. Appellant also complains that the facts in the record do not justify maximum, consecutive sentences.

{¶85} We disagree.

{¶86} After *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the sentencing judge does not have to make the R.C. 2929.14(B) findings to impose more than the minimum first prison sentence, but the statutory policy remains: "[A] first prison term should be the minimum sentence within the range absent reason to impose a greater sentence." *State v. Bowshier*, 2d Dist. No. 08-CA-58, 2009-Ohio-3429, ¶ 11. When a trial court imposes more than a minimum sentence for a first-time offender, support for

the sentence "should appear in the record [in order] to facilitate the appellate court's review." Id., citing Griffin and Katz, Ohio's Felony Sentencing Law (2007) 208.

{¶87} The imposition of a sentence that is unsupported in the record is contrary to law. "'[C]ontrary to law' means that a sentencing decision manifestly ignores an issue or factor which a statute requires a court to consider." *State v. Hawkins*, 2d Dist. No. 06CA79, 2007-Ohio-3581, ¶ 8, quoting *State v. Lofton*, 2d Dist. No. 19852, 2004-Ohio-169, ¶ 11. Even though *Foster* frees the trial judge from making the findings, support for the sentence should appear in the record to facilitate the appellate court's review.

{¶88} The transcript reflects that the trial court took note of the fact that V.R. was a child of tender years, that appellant had betrayed a position of trust, and caused "this child serious emotional and psychological harm and the effect of that will stay with her for the rest of her life."

{¶89} It is clear from the comments made by the trial court at appellant's sentencing that it believed that a minimum prison sentence would demean the seriousness of appellant's conduct and would not protect the public from future criminal conduct by him. Thus, the trial court did not abuse its discretion in imposing more than the minimum sentence.

{¶90} Appellant also complains the trial court abused its discretion in imposing maximum, consecutive sentences.

{¶91} Shortly after *Foster*, the Supreme Court of Ohio outlined a two-prong test for determining if a sentence merited reversal. *State v. Kalish*, 120 Ohio St.3d 23, 2008-

Ohio-4912. In accordance with *Kalish*, this court must first determine whether the sentence complies with all applicable statutes and rules. Sentencing errors assigned regarding the trial court's application of R.C. 2929.11 and 2929.12 are reversible or modifiable only upon a finding by clear and convincing evidence that the sentence is contrary to law. *Hawkins*, 2007-Ohio-3581, ¶ 8. See *Bowshier*, 2009-Ohio-3429, ¶ 6, citing *Kalish*, supra; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855.

{¶92} If this court determines that the first prong is met, the sentence is reviewed only for an abuse of discretion. *Kalish* at ¶ 26. In order for a trial court to have abused its discretion, there must be "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, citing *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶93} When a trial court imposes a sentence that falls within the applicable statutory range, the court is required to consider the purposes and principles set forth in R.C. 2929.11, as well as the recidivism factors enumerated in R.C. 2929.12. *Hawkins* at ¶ 8, quoting *Mathis*, supra. However, the court need not make any specific findings in order to demonstrate its consideration of those factors. Id., citing *State v. Arnett* (2000), 88 Ohio St.3d 208, 215; *Foster*, supra, at ¶ 42.

{¶94} In this case, before pronouncing its sentence, the trial court stated that it had "considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing as set forth in R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12."

{¶95} Because the trial court has stated that it considered the factors set out in both R.C. 2929.11 and 2929.12 in imposing appellant's sentence, that sentence is not contrary to law. See, e.g., *Hawkins*, 2007-Ohio-3581, ¶ 10, citing *State v. Peck*, 2d Dist. No. 2003-CA-30, 2004-Ohio-6231.

{¶96} Appellant's sentences fell within the statutory range. Furthermore, nothing in the record suggests that the court's imposition of maximum, consecutive sentences was unreasonable, arbitrary, or unconscionable, and therefore we find no abuse of discretion.

{¶97} Accordingly, appellant's fifth assignment of error is not well-taken

VII. POSTRELEASE CONTROL

{¶98} In his sixth assignment of error, appellant maintains:

{¶99} "The trial court erred in failing to impose a sentence that included postrelease control."

{¶100} Appellant claims that while the trial court properly advised him that he "would be subject to five (5) years of post release control," the judgment entry filed on August 27, 2009 does not include this reference. Appellant asserts that the sentencing entry which states:

{¶101} "Defendant given notice of appellate rights under R.C. 2953.08 and post release control notice under R.C. 2929.19(B)(3) and R.C. 2967.28[,]" is insufficient to inform him of postrelease control. As such, appellant contends that his sentences are void.

{¶102} We disagree.

{¶103} A trial court is required to order postrelease control as part of the sentence for all offenders convicted of first and second-degree felonies, or violent third-degree felonies. R.C. 2929.19(B)(3). It is undisputed that the trial court notified appellant at his sentencing hearing that he would be subject to five years mandatory postrelease control. However, appellant asserts that the sentencing entry fails to include proper notification concerning postrelease control pursuant to R.C. 2929.19.

{¶104} R.C. 2929.19(B)(3) requires that the sentencing court notify the offender that he will be supervised under R.C. 2967.28 after the completion of his prison term. The Supreme Court of Ohio has interpreted these provisions as requiring a trial court to give notice of postrelease control both at the sentencing hearing and by incorporating it into the sentencing entry. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph one of the syllabus. See *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, ¶ 16. See, also, *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶ 22.

{¶105} In *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, the Supreme Court of Ohio considered the language necessary to provide notice of postrelease control in sentencing entries. The court held that sentencing entries were sufficient if they "afford notice to a reasonable person that the courts were authorizing postrelease control as part of each * * * sentence." Id. ¶ 51.

{¶106} In *State v. Maddox*, 6th Dist. No. L-09-1237, 2010-Ohio-1476, ¶ 13, this court considered sentencing entries that omitted reference to R.C. 2976.28 or "postrelease control." In *Maddox*, this court deemed sufficient a sentencing entry that provided,

"Defendant has been given notice under R.C. 2929.19(B)(3)." Id. Relying upon this court's prior decisions in *State v. Blackwell*, 6th Dist. No. L-06-1296, 2008-Ohio-3268, ¶ 15; *State v. Milazo*, 6th Dist. No. L-07-1264, 2008-Ohio-5137, ¶ 18, the *Maddox* court held that the "judgment entry of the trial court met the statutory requirements to incorporate notice of postrelease control into the sentencing entry." Id. at ¶ 16.

{¶107} In these prior cases, this court concluded that notice under R.C. 2929.19(B)(3) was provided to the defendant, since the version of R.C. 2929.19(B)(3) in effect at the time of the judgment required notice of supervision under R.C. 2976.28. *Blackwell*, supra, at ¶ 15; *Milazo*, supra.

{¶108} According to R.C. 2967.28(B) in effect at the time, appellant's sentence included a mandatory period of five years of postrelease control. In this case, the trial court informed appellant at his sentencing hearing that five years mandatory postrelease control was a part of his sentence. Further, the sentencing entry notified appellant, pursuant to R.C. 2929.19(B)(3) and R.C. 2967.28, that he was subject to a mandatory five year term of postrelease control.

{¶109} Accordingly, appellant's sixth assignment of error is not well-taken.

VIII. INEFFECTIVE ASSISTANCE OF COUNSEL

{¶110} In his seventh assignment of error, appellant maintains:

{¶111} "Appellant Thomas Rossbach was denied effective assistance of counsel."

{¶112} Appellant claims that trial counsel was ineffective in challenging V.R.'s competency; failing to object to the prosecutor's reference to V.R. as a "victim;" failing to

move for dismissal following the state's case-in-chief; and failing to object to inadmissible evidence.

{¶113} We disagree.

{¶114} A reviewing court may not reverse a conviction for ineffective assistance of counsel unless the defendant shows first that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. See *Strickland v. Washington* (1984), 466 U.S. 668, 687. "To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's error, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. A "reasonable probability" in this context is one that undermines confidence in the outcome. See *State v. Sanders* (2001), 92 Ohio St.3d 245, 274.

{¶115} When conducting its inquiry, "[a] reviewing court must strongly presume that 'counsel's conduct falls within the wide range of reasonable professional assistance,' and must 'eliminate the distorting effects of hindsight, * * * and * * * evaluate [counsel's] conduct from counsel's perspective at the time.'" Id. at 273, quoting *Strickland*, 466 U.S. at 689. In Ohio, a properly licensed attorney is presumed competent and the burden of proving ineffectiveness is the defendant's. *State v. Smith* (1985), 17 Ohio St.3d 98, 100.

A. Competency of Child Witness

{¶116} Appellant argues that trial counsel was ineffective in pursuing the argument that V.R. was not competent. Although counsel filed a motion challenging V.R.'s competency, appellant asserts that counsel should have made an additional statement following the examination in support of his claim that V.R. was not competent.

{¶117} Given, however, the "strong presumption" that counsel's performance constituted reasonable assistance, counsel's actions must be viewed as tactical decisions and do not rise to the level of ineffective assistance. *Strickland*, supra. Appellant does not show that there is a "reasonable probability" that but for counsel's actions, the result of the case would have been different. *Bradley*, supra.

{¶118} We have already concluded that the trial judge did not err in concluding that V.R. was competent. As such, appellant cannot demonstrate that counsel's failure to make a statement was prejudicial.

B. Failure to Object

{¶119} Appellant contends that trial counsel was ineffective for failing to object to the prosecutor's characterization of V.R. as a "victim" during opening and closing argument.

{¶120} In this case, we concluded that although a pretrial order was in place prohibiting reference to V.R. as a "victim," appellant could not show that he was prejudiced by the statements.

{¶121} We further note that a failure to object to prosecutorial misconduct "does not constitute ineffective assistance of counsel per se, as that failure may be justified as a tactical decision." *State v. Gumm* (1995), 73 Ohio St.3d 413, 428.

C. Failure to make Crim.R. 29 Motion

{¶122} Appellant contends that trial counsel was ineffective when he failed to make a Crim.R. 29 motion for acquittal at the close of the state's case and to renew that motion at the close of all evidence.

{¶123} A Crim.R. 29 motion is asserted to test the sufficiency of the evidence. *State v. Shaffer*, 11th Dist. No. 2002-P-0133, 2004-Ohio-336, ¶ 17. "A motion for acquittal may be granted by the trial court only where, construing the evidence most strongly in favor of the State, the evidence is insufficient to sustain a conviction." (Citations omitted.) *State v. McCroskey* (Apr. 2, 1997), 9th Dist. No. 96CA0026. See *State v. Vaughn* (Mar. 28, 2002), 8th Dist. No. 79948; *State v. Small* (May 1, 2001), 10th Dist. No. 00AP-1149; *State v. Douglas* (Mar. 16, 1999), 10th Dist. No. 94 CA 214.

{¶124} Thus, trial counsel's failure to assert a Crim.R. 29 motion is not ineffective assistance of counsel, particularly where such a motion would have been futile. *State v. Beesler*, 11th Dist. No. 2002-A-0001, 2003-Ohio-2815, ¶ 9. See *Defiance v. Cannon* (1990), 70 Ohio App.3d 821, 826-27; *Thomas v. United States* (C.A.8, 1991), 951 F.2d 902, 905 (holding that a failure of defense counsel to raise a meritless claim does not constitute ineffective assistance). See, also, *State v. Fields* (1995), 102 Ohio App.3d 284, 288-89; *State v. Turner* (Feb. 27, 1997), 3d Dist. No. 1-96-27.

{¶125} In *State v. Scott*, 6th Dist. No. S-02-026, 2003-Ohio-2797, ¶ 21, this court held, "'[w]hile it is customary for defense counsel to make a motion for acquittal as a matter of course to test the sufficiency of the state's evidence, the failure to follow that course of action did not mean the performance of appellant's trial counsel fell below a reasonable standard of representation.'" (Citation omitted.)

{¶126} In this case, we concluded that there was sufficient evidence to sustain the conviction. A Crim.R. 29 motion would not have affected the ultimate outcome of the trial. As such, appellant cannot show that he was prejudiced.

D. Failure to Object to Inadmissible Evidence

{¶127} Appellant complains that trial counsel was ineffective for failing to object to: (1) statements V.R. made to her mother as being hearsay; (2) statement by V.R.'s mother vouching for the credibility of V.R.; (3) leading questions; and (4) speculation about appellant's state of mind during taped interview.

(1) Hearsay statements

{¶128} Appellant contends that trial counsel was ineffective when he failed to object to mother's hearsay statements about what V.R. told her about appellant touching her and what her husband told her about his conversation with appellant. Appellant asserts that the statements were hearsay and inadmissible.

{¶129} In the present case, the testimony elicited from the mother concerning what she heard from her daughter and her husband was part of a line of questioning relating why she called the police to report that V.R. had been molested. The answers

given in this type of questioning are not hearsay because the mother did not give this information for the truth of the matter asserted, that is, to show that gross sexual imposition occurred.

{¶130} Testimony which explains the actions of a witness to whom a statement is directed is not hearsay. *State v. Thomas* (1980), 61 Ohio St.2d 223, 232. Accordingly, we find that the mother's statements about V.R. being molested did not constitute impermissible hearsay. Furthermore, V.R. and her father testified to the same matters which were the subject of the out-of-court statements they made. Neither of them were present when the mother testified. *State v. Griffin*, 8th Dist. No. 80499, 2002-Ohio-4288, ¶ 97.

{¶131} We conclude that appellant's trial counsel was not ineffective merely because he did not object to the mother's admissible testimony.

(2) Vouching for Credibility of V.R.

{¶132} Appellant also contends that his trial counsel was ineffective in failing to object to the mother's statement that she "believed" V.R.'s claim that appellant had molested her. The prosecutor had asked the mother:

{¶133} "Q. What did you do after [appellant] left?

{¶134} "A. We were just completely devastated, we didn't even know how to absorb everything and we -- you know, here your brother -- you know, I mean, but here's your daughter, and just the way that she described things, her behavior, I knew. I knew it was true just from the way she presented it and all of the things that had led up to that and

all of the things I thought back on where she didn't want me to go, the nightmares, you know, the tongue incident, and just the way that she looked at him and straight out told him, *you're a liar*. I had to believe -- I had to believe my daughter, I had to do the right thing and get the law involved."

{¶135} Generally, a failure to object is viewed as trial strategy and alone will not establish an ineffective assistance claim. See *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 103.

{¶136} In this case, V.R. testified and was subject to cross-examination. The jury was able to witness her demeanor and judge her credibility independent of her mother's testimony. See *State v. Amankwah*, 8th Dist. No. 89937, 2008-Ohio-2191, ¶ 44; *State v. Cappadonia*, 12th Dist. No. CA2008-11-138, 2010-Ohio-494, ¶ 36.

{¶137} In addition, in appellant's videotaped admission to the police, he admitted that V.R. had touched his penis twice. Dr. Schlievert also testified generally concerning her behavior and the behavior of abused children. Finally, there was testimony from V.R.'s parents that corroborated her testimony and provided independent evidence of her behavior during the time period in question.

{¶138} The record in this case leads us to conclude that trial counsel's failure to object to the mother's statement that she believed her child is harmless error. In light of the context in which the statement was made and all of the evidence presented at trial, we cannot conclude that the admission of the mother's statement prejudicially affected the fairness or result of appellant's trial.

(3) Leading Questions

{¶139} Appellant contends that trial counsel was ineffective for failing to object to the prosecutor's leading questions of V.R.'s mother. Specifically, he complains that the question posed to her about whether she recalled writing in her report that appellant had been caught masturbating in the bathroom by V.R. was prejudicial.

{¶140} A leading question is "one that suggests to the witness the answer desired by the examiner." *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶ 149, quoting 1 McCormick, Evidence (5th Ed.1999) 19, Section 6. Under Evid.R. 611(C), "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony."

{¶141} The Supreme Court of Ohio has held that the failure to object to leading questions does not constitute ineffective assistance of counsel. *State v. Jackson* (2001), 92 Ohio St.3d 436, 449; *State v. Coy* (March 22, 1995), 2d Dist. No. 14415; *State v. Campbell* (1994), 69 Ohio St.3d 38, 52-53. The failure of counsel to object may be the result of trial strategy, and "will almost never rise to the level of ineffective assistance of trial counsel." *State v. Jones*, 2d Dist. No. 20349, 2005-Ohio-1208, ¶ 28.

{¶142} Even if the prosecutor's questions to V.R.'s mother were objectionable because they were leading, appellant fails to demonstrate that he was prejudiced as a result; that is, that the outcome of the trial likely would have been different had defense counsel objected. *Strickland*, 466 U.S. at 689.

{¶143} Other evidence was presented at trial that established appellant's guilt, and there is no reason to believe that the outcome of the trial was affected by the prosecutor's improper questioning or trial counsel's failure to object. *Diar*, supra.

(4) Speculation about Appellant's State of Mind

{¶144} Appellant complains that trial counsel was ineffective for failing to object to the leading question the prosecutor asked of Detective Stooksbury concerning appellant's apparent belief that V.R. was at fault for the sexual contact that had occurred. Appellant complains that trial counsel did not object to the speculation about appellant's state of mind. The colloquy appellant complains of:

{¶145} "Q. On the tape that we just saw, did the Defendant ever admit to doing anything improper as far as any improper touching or any improper actions towards [V.R.]?

{¶146} "A. No.

{¶147} "Q. And during the interview, basically, it would appear as though the little girl was pursuing him, correct?

{¶148} "A. That's what it appears to be."

{¶149} In *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶ 174, the Supreme Court of Ohio concluded that the prosecutor's improper leading question to detective after the jury heard detective's audiotaped interview of the murder defendant, asking "during the course of this, approximately, half-hour interview, she appears to be

somewhat emotional; is that correct," was not plain error, as the jury could hear that defendant was emotional while listening to her interview. Evid.R. 611(C).

{¶150} As in *Diar*, the jury in this case heard the detective's videotaped interview of appellant and could draw their own conclusion of appellant's justification of what occurred. Trial counsel's failure to object to these questions of Detective Stooksbury concerning appellant's state of mind does not constitute ineffective assistance.

{¶151} Thus, we conclude there was no plain error resulting from the leading question. Trial counsel was not ineffective for failing to object. Appellant was not prejudiced.

(5) Testimony of Non-Witness

{¶152} Appellant complains that trial counsel was ineffective because he failed to object to a leading question posed to appellant's son that included inadmissible hearsay:

{¶153} "Q. And when Mr. Wegnan, Jason, asked you about any sexual abuse that you may have witnessed, you said that you denied any sexual abuse, either witnessing or being touched yourself. Do you remember telling Mr. Wegnan that?

{¶154} "A. No. It was a while ago."

{¶155} As stated earlier, Evid.R. 611(C) does not forbid the use of leading questions in direct examination, provided they are being used to develop or elicit testimony. Furthermore, the failure to object to leading questions in direct examination "will almost never rise to the level of ineffective assistance of counsel." *State v. Howard*,

2d Dist. No. 20575, 2005-Ohio-3702, ¶ 48. The trial court has broad discretion to allow the use of leading questions. *State v. Lewis* (1982), 4 Ohio App.3d 275, 278.

{¶156} Although the question could have been posed more generally, the state was properly eliciting routine facts from a young witness. It was not an abuse of discretion to permit the prosecutor to ask leading questions of a young witness. *State v. Madden* (1984), 15 Ohio App.3d 130, 133.

{¶157} We agree with appellant that the prosecutor's statement relating what Mr. Wegnan said was hearsay. Evid.R. 801 provides a general prohibition against the admission of out-of-court statements since the defendant loses his right of confrontation. However, there is no evidence that the error was materially prejudicial to appellant. It would have been expected of a caseworker conducting an investigation into a claim that a child had been molested to ask any other young children in the house if they had either been molested or witnessed another being molested. The witness's response that he was not molested and did not witness anyone else being molested negates the potential prejudice from the leading question that contained inadmissible hearsay.

{¶158} After a thorough review of the record, we conclude that properly introduced evidence overwhelmingly establishes appellant's guilt. See *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 681; *State v. Williams* (1983), 6 Ohio St.3d 281, 290. Trial counsel was not ineffective for failing to object to the leading questions to a young witness that also contained hearsay.

{¶159} Accordingly, appellant's seventh assignment of error is not well-taken.

IX. CONCLUSION

{¶160} The trial court did not abuse its discretion in determining that the child, V.R., was competent to testify. Nor was appellant prejudiced by the prosecutor's reference to V.R. as a "victim" six times during opening and closing argument. While improper, appellant did not demonstrate that but for the prosecutor's misconduct, the result of the proceeding would have been different. A mistrial was not warranted as a result of the prosecutor's disregard of the pretrial order.

{¶161} We cannot say that appellant's conviction was against the manifest weight of the evidence or against the sufficiency of the evidence. The trial court did not abuse its discretion in imposing maximum, consecutive sentences. The sentencing entry provided sufficient notice to appellant that he was subject to a mandatory term of postrelease control. Finally, trial counsel was not ineffective.

{¶162} On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial. Accordingly, the judgment of the Lucas County Common Pleas Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE