

[Cite as *State v. Clark*, 2015-Ohio-3027.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101863

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**GAYLON E. CLARK**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-13-573724-A

**BEFORE:** Kilbane, P.J., Stewart, J., and Laster Mays, J.

**RELEASED AND JOURNALIZED:** July 30, 2015

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MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Gaylon Clark (“Clark”), appeals from his convictions for rape, sexual battery, kidnapping, and other offenses. Having reviewed the record and the controlling case law, we affirm.

{¶2} On August 20, 2013, Clark was indicted pursuant to a 19-count indictment in connection with the alleged sexual abuse of J.W., the daughter of his live-in girlfriend.

The state of Ohio (“state”) maintained that the offenses occurred in five separate incidents from October 2011 to January 2013.<sup>1</sup> After a mistrial in April 2014, the following 15 counts remained in the indictment: two counts of rape, one count of attempted rape, six counts of gross sexual imposition, four counts of kidnapping with sexual motivation specifications, and two counts of sexual battery.

{¶3} A second jury trial commenced on June 25, 2014. The state presented testimony from J.W.’s mother (“mother”) who stated that J.W. was born in March 1996 and placed in the legal custody of her paternal grandmother when she was three years old.

During the weekends and holidays, J.W. would visit at the home her mother shared with her other two children and Clark. Mother stated that Clark treated J.W. as one of his own children. In 2011, the family lived in an apartment in Cleveland. During the

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<sup>1</sup>These incidents were alleged to have occurred at the following times: a night in 2011, when J.W.’s mother was at a Halloween party; a night approximately one week after the first incident; a night in 2012, in the bedroom J.W. shared with her sisters; a night in the latter part of 2012, after the family had moved to Cleveland Heights; and a night in late 2012, when the family was driving to attend a family funeral.

weekends, J.W. and the other girls all shared a bedroom. There were bunk beds in the room, so during the visits the girls would share their beds. J.W. generally slept in the bottom bed, which was a larger trundle bed. In 2012, the family moved to Cleveland Heights, and J.W. then had her own bedroom during her weekend visits.

{¶4} Mother next testified that after the family moved to Cleveland Heights, J.W. started skipping school and her grades began to fall. J.W. skipped school one day in January 2013, and mother contacted J.W.’s friend, Tyrone, in order to try to find her. Tyrone told mother that Clark had been abusing J.W. Following that discussion, she located J.W. and asked her whether Clark had ever raped her. J.W. started shaking and crying. Mother then spoke with Clark about the allegations. The next day, mother contacted the Cuyahoga County Division of Children and Family Services (“CCDCFS”), which in turn instructed her to call the police. Mother and her girls later moved out of the home.

{¶5} On cross-examination, mother admitted that she was initially uncertain as to whether J.W. was simply making up a story to cover for cutting school because she had seen “zero” signs of anything inappropriate.

{¶6} J.W., who was 18 years old at the time of the second trial, testified that she has lived with her grandmother since she was very young. She saw her biological father daily and did not see her mother very much until she turned 13 or 14 years old. By this time, her mother was living with Clark. According to J.W., Clark “played the father role” in her life, and she thought of him as a father.

{¶7} In October 2011, she was visiting her mother and Clark. It was Halloween weekend, and her mother went to a Halloween party and Clark went to a restaurant. When Clark returned, the younger children were asleep, and mother was still not home. According to J.W.'s testimony, Clark asked her to watch a movie with him. She sat next to him on the couch, and Clark began rubbing her back under her shirt. He caressed her "underneath [her] bra," and fondled her breasts. He knelt down between her knees and removed her shorts and underwear. Clark, who was wearing shorts and a T-shirt, pulled his penis out and penetrated her. J.W. stated that she cried during the incident, but she did not say anything because he was "suppose to be my stepdad." J.W. testified that after this incident, Clark kept apologizing.

{¶8} J.W. further testified that approximately one week after the first incident, while the three younger girls were asleep in their beds, Clark came into the room and began to fondle J.W.'s thighs. He fondled her breasts, then pulled down her pants and digitally penetrated her.

{¶9} Later, in a separate incident in the bedroom, Clark again came into J.W.'s room. While the other children were sleeping nearby, Clark pulled down J.W.'s pants, then pulled down his pants. As he attempted to penetrate her, one of the children in the other bed began moving, so he left without penetrating her. Shortly after that, J.W. received a private post from Clark on her Facebook account. This message stated:

I hope you're not upset with me. We're not finish [sic]. I hate doing that in there with them, but I was worried on the couch. I think someone is going out tonight, I won't be as nervous next time. Plus I want to like the first time.

{¶10} J.W. next testified that after these incidents the family moved to Cleveland Heights. J.W. stated that in the Cleveland Heights home she did not share a room with her sisters and had her own bedroom. After this move, Clark came into her bedroom during the night. He got on top of her and began to rub her thighs. He attempted to put his hands in her pants, but could not do so because she was on her stomach. She then nudged him to move, and that is when he got up and left her room.

{¶11} J.W. also testified to another incident that occurred around December 2012, at night, while the family was driving to Clark's aunt's house in preparation for attending a funeral. According to J.W., Clark's cousin Steve was driving, and her mother was in the front seat. J.W., Clark, and the younger girls were in the backseat. During the drive, Clark stretched his arm over the younger girls and grabbed and fondled her chest underneath her bra. On another occasion, J.W. testified that Clark asked J.W. to watch a movie with him. J.W. stated that she reluctantly agreed to do so. She began to doze off, and when she awoke, Clark was rubbing her lower back.

{¶12} After these events, J.W. skipped school and confided in Tyrone that Clark had abused her. Later that day, mother called Tyrone looking for J.W. Mother subsequently informed Clark that J.W. had spent the day with Tyrone, and Clark threatened to call the police. In response, Tyrone told mother that Clark had been abusing J.W. In her initial discussion of the matter with mother, J.W. stated that Clark did not rape her. However, later in the discussion, she stated that he had done so. After that disclosure, J.W. told Nicole Ratti ("Ratti"), a licensed professional clinical

counselor with Bellfaire JCB, that she felt overwhelmed, confused, and scared of the outcome. She also met with Cleveland Police Detective Sharon Johnson (“Detective Johnson”) and CCDCFS Social Worker Nakita Heard (“Heard”).

{¶13} The paternal grandmother testified that when J.W. was 14 years old, she wanted to spend more time with her mother and began going to her home every weekend.

The paternal grandmother believed that Clark was “too affectionate” with J.W. during these visits.

{¶14} The biological father of J.W. testified that he observed that Clark and J.W. had a “touchy-feely relationship,” that “looked weird.” On cross-examination, he acknowledged that he lived at his mother’s home with J.W., and that he was her “father figure.”

{¶15} Ratti testified that the Cleveland School system referred J.W. for an assessment in January 2013. Ratti began counseling her in February 2013, and determined that J.W. has ADHD. In addition, at the initial counseling session, J.W. stated that she had been raped. They then began to “focus on the trauma” and engaged in trauma-based cognitive behavioral therapy. According to Ratti, they “made general correlations with behaviors[,] such as[,] \* \* \* not wanting to become intimate with a young man that might have been her boyfriend.” (Tr. 791.) Ratti made the “correlation” that intimacy avoidance was from the trauma she sustained. (Tr. 791.) Ratti also testified that some individuals may not promptly disclose a traumatic event because of guilt, shame, and fear of not being believed.

{¶16} Detective Johnson testified that she conducted an investigation in this matter. She interviewed family members and learned of a private message posted on J.W.'s Facebook account. She subpoenaed the account information from Facebook and preserved the posting, a hard copy of which was admitted into evidence. According to Detective Johnson, the private message was sent to J.W. from Clark's cell phone on February 11, 2012.

{¶17} During Detective Johnson's interview with Clark and his counsel, Clark denied the allegations made against him. Clark reportedly told Detective Johnson, however, that he was "more of a father to [J.W.] than her own father." Clark also denied sending the private message to J.W., and he theorized that someone else may have sent it from his cell phone while the phone was left unattended.

{¶18} Heard testified that she conducts intake interviews in sex abuse cases. She was assigned to J.W.'s case in February 2013, and it was a "priority 2," or a case that requires contact with the complainant within 24 hours. Heard spoke with J.W. after the family finished meeting with Detective Johnson. According to Heard, J.W. was upset and cried throughout the entire interview. J.W. discussed three separate incidents with Heard. Heard learned that there was no medical evidence in this matter. Ultimately, however, after learning of the Facebook private posting, Heard concluded that the allegations were substantiated, meaning that there is "some form of evidence that can corroborate what the victim is telling us." This is a completely different standard than evidence beyond a reasonable doubt, she acknowledged. Heard additionally testified



that typically there is a delay in reporting following an alleged incident of abuse, and that such allegations often involve “ongoing” or recurring incidents of abuse. (Tr. 856.) Heard admitted, however, that there is “always room for mistakes” in what she does.

{¶19} Clark elected to present evidence and testified on his own behalf. He also presented testimony from Reverend Able Dixon and Steve Doatie (“Doatie”).

{¶20} Clark testified that after graduating from high school, he attended the University of Cincinnati for one year. He has worked steadily since that time, and he is currently an IT business specialist with Forest City Enterprises.

{¶21} Clark testified that he met J.W.’s mother in 2006. They have been together since that time, and lived together except for brief break-ups in 2010 and 2012. Clark testified that he did not abuse J.W., and that none of her allegations are true. With regard to the Facebook post entered into evidence in this matter, Clark testified that he did not send this message, and he had no explanation for how it came to be posted on J.W.’s Facebook account.

{¶22} Doatie testified that he is Clark’s cousin. He was adamant that he has never driven Clark and the girls together at any time, and that J.W. has never been in his car. He admitted, however, that Clark does not have a car and had to be driven to various family events.

{¶23} Clark was subsequently convicted of two counts of rape, in violation of R.C. 2907.02(A)(2); four counts of gross sexual imposition, in violation of R.C. 2907.05(A)(1); four counts of kidnapping, in violation of R.C. 2905.01(A)(4), with

sexual motivation specifications; one count of attempted rape, in violation of R.C. 2923.02 and 2907.02; one count of sexual battery, in violation of R.C. 2907.03; and one count of attempted sexual battery, in violation of R.C. 2923.02 and 2907.03(A)(5). He was acquitted of two charges of gross sexual imposition, one charge arising from the events that were alleged to have occurred during the car drive, and the other charge arising in connection with the events that were alleged to have occurred after the family moved to Cleveland Heights. He was sentenced to a total of eight years of imprisonment.

{¶24} Clark now appeals, assigning the following four errors for our review:

#### Assignment of Error One

The trial court erred by denying appellant's motion for acquittal pursuant to Crim.R. 29 when the state failed to submit sufficient evidence for the essential elements of the crimes charged denying the appellant of due process.

#### Assignment of Error Two

Appellant's convictions are against the manifest weight of the evidence.

#### Assignment of Error Three

The appellant was denied a fair trial by the admission of expert opinions in areas in which the witness was not qualified as an expert nor permitted by law to testify and which amounted to credibility testimony.

#### Assignment of Error Four

The trial court committed prejudicial error and/or plain error in violation of the double jeopardy clause of the United States Constitution and Section 10,

Article I, of the Ohio Constitution when it failed to merge the sentences for crimes committed at the same time with the same animus.

### Sufficiency of the Evidence

{¶25} In his first assignment of error, Clark asserts that the trial court erred in denying his motion for acquittal on the rape charges because the essential element of force was not established. He maintains that the trial court did not follow the definition of “force” set forth in R.C. 2901.01(A), and instead, erroneously applied an inapplicable definition of force pertaining to younger victims as set forth in *State v. Eskridge*, 38 Ohio St.3d 56, 526 N.E.2d 304 (1988), and *State v. Dye*, 82 Ohio St.3d 323, 695 N.E.2d 763 (1998).

{¶26} Crim.R. 29(A) provides for a judgment of acquittal if the evidence is insufficient to sustain the conviction. 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 and 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. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. *See also State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

{¶27} Force is an essential element of rape pursuant to R.C. 2907.02(A)(2), as well as gross sexual imposition pursuant to R.C. 2907.05(A)(1). In certain instances, force is also an essential element of kidnapping under R.C. 2905.01(A). Pursuant to R.C. 2901.01(A), “force” is defined as “any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.”

{¶28} This court has held that the manipulation of a sleeping victim’s clothing in order to facilitate sexual conduct constitutes force under R.C. 2901.01(A)(1), even though such force requires only minimal physical exertion. *State v. Walker*, 8th Dist. Cuyahoga No. 96662, 2011-Ohio-6645, ¶ 20; *State v. Clarke*, 8th Dist. Cuyahoga No. 94207, 2010-Ohio-5010, ¶ 23; *State v. Clark*, 8th Dist. Cuyahoga No. 90148, 2008-Ohio-3358, ¶ 18.

{¶29} In *Eskridge*, the defendant was convicted of raping his four-year-old daughter. The Ohio Supreme Court noted that the “force and violence necessary in rape is naturally a relative term, depending upon the age, size and strength of the parties and their relation to each other; as the relation between father and daughter under twelve years of age.” *Eskridge*, 38 Ohio St.3d 56, 58, 526 N.E.2d 304. The court additionally recognized that

[f]orce need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim’s will was overcome by fear or duress, the forcible element of rape can be established.

*Id.* at 58-59, citing *State v. Fowler*, 27 Ohio App.3d 149, 500 N.E.2d 390 (8th Dist.1985).

In *Fowler*, this court considered a stepfather charged with four counts of raping his

stepdaughter when she was under the age of 13, and two counts of raping his stepdaughter when she was over the age of 13. This court found sufficient force to establish all six offenses and stated:

In the within case, we are confronted with a child being told to do something by an important figure of authority, and commanded not to tell anyone about it. In such a case, we find nothing unreasonable about a finding that the child's will was overcome. Consequently, the forcible element of rape was properly established.

{¶30} In *State v. Milam*, 8th Dist. Cuyahoga No. 86268, 2006-Ohio-4742, ¶ 12, and *State v. Szorady*, 8th Dist. Cuyahoga No. 95045, 2011-Ohio-1800, ¶ 34, this court considered offenses against 13-year-old victims and concluded that

if the alleged victim is a minor child, evidence of subtle and/or psychological force may be sufficient to support conviction of an accused who is an authority figure to that child, even in the absence of any express threat of harm or significant physical restraint.

In *State v. Robinson*, 8th Dist. Cuyahoga No. 91320, 2009-Ohio-1879, ¶ 17, this court found sufficient evidence of force in a matter involving a 14-year-old victim who was abused by her uncle, and the evidence indicated that he told her not to tell anyone, and that she was scared. In *State v. Scott*, 8th Dist. Cuyahoga No. 88084, 2007-Ohio-2111, ¶ 21, this court found sufficient evidence of force in a matter involving a 14-year-old victim who was abused by her uncle, and the evidence indicated that he told the victim “not to tell anyone because it would break up the family, and that he would go away for a long time and not be with the family.”

{¶31} In this matter, the trial court instructed the jury on the definition of force as set forth in R.C. 2901.01(A). The trial court also provided the jury with this additional instruction, which is supported from *Eskridge*, 38 Ohio St.3d 56, 58-59, 526 N.E.2d 304:

[W]hen the relationship between the victim and the defendant is one of child and parent or other authority figure, the element of force need not be openly displayed or physically brutal. It can be subtle, slight and psychological or emotionally powerful.

(Tr. 1044.)

{¶32} Insofar as the evidence in this matter concerned Clark's conduct upon J.W. while she was in her bed and that he manipulated her clothing, we note that this is sufficient evidence of force under R.C. 2901.01(A)(1).

{¶33} Insofar as the evidence of this matter concerned Clark's conduct while the victim was awake and watching television in the living room, we note that the state presented considerable evidence that Clark was a father figure to J.W., or at the very least, an important figure of authority. In addition, J.W. would be disciplined by her mother upon his word. J.W. also testified that she did not feel that she could say anything to stop him because he was "supposed to be my stepdad," and that she cried during the attack, yet it did not stop. She also feared saying anything to disturb the family's situation, which improved financially while Clark lived with them. We conclude that this evidence, though subtle and psychological, was sufficient to establish that her will was overcome, therefore, the force element was established.

{¶34} The first assignment of error is without merit.

#### Manifest Weight of the Evidence

{¶35} In his second assignment of error, Clark maintains that the convictions are against the manifest weight of the evidence.

{¶36} In considering a claim challenging the manifest weight of the evidence, the court, reviewing the entire record, must weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the exceptional case in which the evidence weighs heavily against the conviction. *Id.*

{¶37} In this matter, the evidence presented by the state demonstrated that while mother was at a Halloween party in October 2011, Clark asked J.W. to watch a movie with him, then engaged in sexual conduct with her as she cried. The state's evidence also indicated that about a week after that incident, while the three younger girls were asleep in their beds, Clark came into the room and began to fondle J.W.'s thighs. He began fondling her breasts, and then pulled down her pants and digitally penetrated her. J.W. further testified that in a separate incident in the bedroom, Clark again came into her room. While the other children were sleeping nearby, he pulled down her pants and his own pants and attempted to penetrate her, but he left when one of the children in the other bed began moving. The state presented evidence that, following that incident, J.W. received a private message from Clark on her Facebook page that alluded to an inappropriate private encounter. J.W. testified that after these incidents the family moved to Cleveland Heights. J.W. stated that she did not share a room with her sisters in the Cleveland Heights home and had her own bedroom. Soon after this move, Clark came into her bedroom during the night, got on top of her, and began to rub her thighs.

He attempted to put his hands in her pants, but could not do so because she was on her stomach. The evidence also indicated that following these incidents, J.W. had issues with truancy and her grades suffered.

{¶38} From all of the foregoing, we cannot conclude that, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice in convicting Clark of the offenses. The convictions are not against the manifest weight of the evidence.

{¶39} The second assignment of error is without merit.

#### Testimony of Heard and Ratti

{¶40} In the third assignment of error, Clark complains that the trial court erred in permitting the state to introduce the testimony of Heard as to CCDCFS concluding that the disclosure was “substantiated.” He also complains that the trial court erred in permitting the state to introduce Ratti’s testimony concerning J.W.’s disclosure to her and J.W.’s counseling for trauma. He argues that these witnesses essentially provided impermissible testimony as to J.W.’s credibility.

{¶41} In *State v. Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989), syllabus, the Ohio Supreme Court held that “[a]n expert may not testify as to the expert’s opinion of the veracity of the statements of a child declarant.” Later, in *State v. Stowers*, 81 Ohio St.3d 260, 1998-Ohio-632, 690 N.E.2d 881, the Ohio Supreme Court held that an expert witness’s testimony that the behavior of an alleged child victim of sexual abuse is consistent with behavior observed in sexually abused children is admissible under the



Ohio Rules of Evidence. The court explained that “*Boston*’s syllabus excludes expert testimony offering an opinion as to the truth of a child’s statements (e.g., the child does or does not appear to be fantasizing or to have been programmed, or is or is not truthful in accusing a particular person),” and “does not proscribe testimony which is additional support for the truth of the facts testified to by the child, or which assists the factfinder in assessing the child’s veracity.” *Stowers* at 262-263.

### Admissibility of Heard’s Testimony

{¶42} In *State v. Ferrell*, 8th Dist. Cuyahoga No. 100659, 2015-Ohio-1446, this court considered the admissibility of a social worker’s testimony that the CCDCFS had determined that the victim’s claim of abuse was substantiated. This court held:

This court has repeatedly recognized “that a social worker’s interdepartmental determination of an allegation of abuse — such as, unsubstantiated, substantiated, or indicated — is acceptable, provided the social worker does not testify as to the truthfulness or credibility of the alleged victim.” *State v. Jackson*, 8th Dist. Cuyahoga No. 92531, 2010-Ohio-3080, ¶ 17, citing *State v. Smelcer*, 89 Ohio App.3d 115, 623 N.E.2d 1219 (8th Dist.1993); *State v. Sopko*, 8th Dist. Cuyahoga No. 90743, 2009-Ohio-140; *State v. Whitfield*, 8th Dist. Cuyahoga No. 89570, 2008-Ohio-1090; *State v. Simpson*, 8th Dist. Cuyahoga No. 88301, 2007-Ohio-4301. In *Smelcer*, this court noted that “the *Boston* decision did not prohibit an expert from giving his or her opinion on whether sexual abuse occurred.” [*Smelcer*] at 121, citing *State v. Cornell*, 8th Dist. Cuyahoga No. 59365, 1991 Ohio App. LEXIS 5664 (Nov. 27, 1991).

While the social worker’s testimony reports the agency’s finding that sexual abuse of the victim was indicated, it does not offer any opinions on who committed the abuse. At no point during the social worker’s testimony did she testify that she believed Ferrell was the perpetrator or was the person who committed the abuse. The social worker testified repeatedly that her purpose in interviewing the victim was to assess his or her safety. In doing so, the social worker referred to the accused as the “alleged perpetrator.”

The social worker did not testify as to the veracity of the victim's accusations against Ferrell.

*Id.* at ¶ 15-17.

{¶43} In accordance with the foregoing, the trial court did not err in permitting the state to introduce Heard's testimony that the victim's abuse claim was substantiated.

#### Admissibility of Ratti's Testimony

{¶44} In *State v. Davis*, 64 Ohio App.3d 334, 339, 581 N.E.2d 604 (12th Dist.1989), the court held that the trial court erred in permitting a psychologist to testify that a 14-year-old child suffered from "sexually abused child syndrome," and to testify regarding whether the abuse allegation was fabricated.

{¶45} In *State v. Eisermann*, 8th Dist. Cuyahoga No. 100967, 2015-Ohio-591, this court questioned the trial court's decision permitting a child psychiatrist who treated the victim to testify that she diagnosed the victim with post-traumatic stress syndrome as a result of sexual molestation, that certain behaviors were "red flags" for abuse, and that the victim consistently identified a single perpetrator.

{¶46} This court found that the "testimony that \* \* \* 'there was certainly a history of sexual abuse and sexual trauma,' would appear to be an assessment of [the victim's] credibility and serve to tip the proverbial scale in favor of conviction." This court held, however, that there was also a proper basis for the doctor's opinion because it was derived from the report of the victim's bizarre reaction when a picture of a man was shown to her.

{¶47} However, in *State v. Ullis*, 6th Dist. Lucas No. L-95-141, 1997 Ohio App. LEXIS 3362 (Aug. 1, 1997), the court held that a doctor's testimony stating that the victim suffered from post-traumatic stress syndrome did not impermissibly assess the victim's credibility where "no attempt was made to elaborate on the ramifications of that diagnosis and, in fact, both the witness and the prosecutor assiduously avoided any testimony which might be remotely construed as expert testimony on the victim's truthfulness." *Id.* at \*9.

{¶48} In this matter, Ratti testified that the victim has ADHD, and during their initial counseling session, J.W. stated that she had been raped. They then began to "focus on the trauma," and engaged in trauma-based cognitive behavioral therapy. According to Ratti, they "made general correlations with behaviors, such as, she discussed not wanting to become intimate with a young man that might have been her boyfriend." (Tr. 791.) Ratti made the "correlation" that intimacy avoidance was from the trauma she sustained. (Tr. 791.)

{¶49} While we find this testimony troubling in light of *Boston*, *Davis*, and *Eisermann*, we note that no perpetrator was identified, and on balance, the testimony focused upon is consistent with behavior observed in individuals who are abused and serves as additional support for the state's case. Therefore, the admission of this testimony was not prejudicially erroneous under *Stowers*, 81 Ohio St.3d 260, 1998-Ohio-632, 690 N.E.2d 881, at 262-263.

{¶50} The third assignment of error is without merit.

### Allied Offenses

{¶51} In the fourth assignment of error, Clark complains that the trial court erred in failing to merge his convictions for the counts arising on the same date. He maintains that the rape conviction in Count 1 and the gross sexual imposition in Count 2 from the night of the Halloween party should merge. He also argues that the rape conviction in Count 4 and the gross sexual imposition in Count 7 from the incident a week later should also merge, and that the rape conviction in Count 9, the gross sexual imposition in Count 11, and the kidnapping conviction in Count 12 should merge.

{¶52} Pursuant to R.C. 2941.25(A), where a defendant's conduct results in the commission of two or more "allied" offenses of similar import, that conduct can be charged separately, but the defendant can be convicted and sentenced for only one offense.

{¶53} In *State v. Ferrell*, 8th Dist. Cuyahoga No. 100659, 2014-Ohio-4377, ¶ 33, this court rejected the same transactional-merger argument raised herein, and stated:

Focusing on the fact that these offenses occurred during the out-of-state trip, Ferrell contends that the offenses were committed as part of the same transaction with a single state of mind, namely, "to assault [daughter] throughout the out-of-state trip." We find Ferrell's argument misplaced. The three separate counts of rape pertained to Ferrell's placing (1) his tongue inside daughter's vagina, (2) his finger inside daughter's vagina, and (3) his penis inside [his] daughter's vagina. The count of gross sexual imposition related to Ferrell's touching daughter's breasts. While these offenses all occurred close in time to one another, each offense involved different conduct. Accordingly, we find that these offenses do not merge as allied offenses.

*Accord State v. Webb*, 8th Dist. Cuyahoga No. 98628, 2013-Ohio-699, ¶ 10-12 (acts were not simultaneous and were committed with separate conduct so they do not merge.).

{¶54} In accordance with the foregoing, this assignment of error is without merit.

{¶55} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated.

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

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MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., and  
ANITA LASTER MAYS, J., CONCUR