[Cite as *State v. Eisermann*, 2015-Ohio-591.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100967

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HEINZ EISERMANN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-563728-A

BEFORE: Blackmon, J., E.A. Gallagher, J., and Kilbane, J.

RELEASED AND JOURNALIZED: February 19, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Heinz Eisermann appeals his conviction and assigns 11 errors for our review.[1] Having reviewed the record and pertinent law, we affirm Eisermann's convictions. The apposite facts follow.

{¶2} On June 18, 2012, the Cuyahoga County Grand Jury indicted Eisermann on four counts of rape with a furthermore clause that the victim was less than ten years old. The grand jury also indicted Eisermann on four counts of kidnapping with a sexual motivation specification attached to each count. On June 26, 2012, Eisermann pleaded not guilty at his arraignment. On January 6, 2014, after numerous pretrials had been conducted in the matter, a jury trial commenced.

Jury Trial

{¶3} At trial, the state presented the testimony of 12 witnesses including S.P.,[2] the mother of two girls, who were ages five and seven at the time of trial. S.P. testified that she met Eisermann sometime around 2003 or 2004 while she was working as a bartender at Ace's Grill in Brooklyn, Ohio. S.P. testified that Eisermann was a regular patron, who worked in Ohio, but whose family lived in New York state.

{¶4} S.P. testified that in August 2010, Eisermann indicated that he was looking for a new place to live. S.P., was living in Parma, Ohio at the time in a house with a full basement, equipped with its own bathroom and kitchen. S.P. offered to rent that space to Eisermann and he accepted. S.P. testified that in October 2011, she and her fiancé purchased a home in Olmsted Township and again Eisermann accepted her offer of a space to rent in the new home.

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[1]See appendix.

[2]To protect the identity of the minor victims in sexual assault cases, we refer to the parents by their initials.

{¶5} S.P. testified that in the latter part of 2011, her older daughter, S.P.1.,[3] then five years old, began to purposely urinate and defecate in her pants. S.P. took S.P.1. to see a pediatrician in 2012 because S.P.1.'s behavior had worsened to include defiance, anger, screaming fits, and being increasingly mean towards her then three-year-old sister. S.P. testified that during this period, Eisermann, whom she had grown to regard as a father figure, would babysit her daughters for about two hours until she and her fiancé came home from work. The record reveals that Eisermann was 64 years old at the time of the trial.

{¶6} S.P. testified that on June 10 or 11, 2012, while she was changing the diaper of her three-year-old daughter, S.P.1. reached out and placed her finger on her sister's genital. S.P. testified that she admonished S.P.1. by stating: "Oh, don't, we don't touch other people's private areas. That's not nice." Tr. 580. In response, S.P.1. stated: "Well, Heinz does." Tr. 581. S.P. testified that S.P.1. also indicated that Eisermann tickles her genital, that Eisermann's penis gets hard, and "white stuff" comes out of Eisermann's penis. S.P. testified that S.P.1. further indicated that Eisermann bit her "down there" and scratched her with his facial hair. S.P. testified that S.P.1 stated that: "when I lick his pee pee, it gets bigger."

{¶7} S.P. testified that she had to wait until the following day to confront Eisermann about S.P.1.'s revelation, because he was in Rochester, New York visiting his family. S.P. testified that upon confronting Eisermann, he stated: "Well, what'd you expect when she's dry humping me?" S.P. testified that she became irate and ordered Eisermann to leave the house. S.P. testified that Eisermann then calmly walked out to the garage, opened a can of beer, and

[3]The minor is referred to herein by her initials in accordance with this court's established policy regarding non-disclosure of identities in all juvenile cases. This minor will be referred to as S.P.1. because she shares similar initials with her mother, who is being referred to as S.P.

began drinking, but never denied the accusation. The following day, S.P. reported S.P.1.'s revelation to the police.

{¶8} Officer Jacqueline Ketterer of the Olmsted Township Police Department, who initially received the report of the sexual abuse allegation, testified that she interviewed S.P. and then met with S.P.1. at the police station. Officer Ketterer testified she showed S.P.1. an anatomical drawing of a little girl and S.P.1. was able to identify the various parts of the body including the vagina that she called "pee pee."

{¶9} Officer Ketterer testified that she also showed S.P.1. a drawing of a little boy and she was able to identify the various parts including the penis that she also called "pee pee." Officer Ketterer testified that as the anatomical drawing of the little boy was laying on the desk, S.P.1. picked it up and pressed it against her face. Officer Ketterer testified about the ensuing, as follows:

Q. And what part of the diagram did she press up against her face?

A. She did the boy's pee pee, the penis.

Q. And what part of her face did she press it up against?

A. To her mouth.

Q. To her mouth, okay. Did you ask her a question when she did that?

A. I did.

Q. What did you ask her?

A. I asked her if she kissed the boy's pee pee?

Q. What did she say?

A. She said: No, I didn't kiss it, I licked it.

Q. Based on that disclosure, did you ask her a follow-up question?

* * *

A. I asked her if she really did lick someone's pee pee. And she said: Yes, Heinz.

Q. So, you asked her an open-ended question?

A. Yes.

Q. And she volunteered the name Heinz?

A. Yes.

Q. Did she volunteer anyone else's name?

A. No.

Q. After she volunteered that answer, what happened next * * *?

A. I asked her if Heinz had touched her pee pee.

Q. And what did she say?

* * *

A. She took her finger, she touched her vaginal area, she took her finger up, she put it in her mouth, she pulled her finger out and she said: Heinz did that.

Q. You may refresh your recollection, refer to your report.

A. She — after she pulled her finger out, she stated that: Heinz did it, did it and — did that, and it's gross.

Q. Following that demonstration by [S.P.1.], what question did you ask her next?

A. I asked her if she had her clothes on when Heinz did that.

Q. And did she — did she give you a response to that question?

A. * * * She said she had — she said both, she had her Blues Clues nightgown on, but — and that's what she said. She had her Blues Clues nightgown on.

Tr. 1013-1019.

{¶10} Later that day, after Officer Ketterer had met with S.P.1., fellow police officers of Olmsted Township arrested Eisermann when he returned to retrieve his personal belongings from S.P.'s house.

{¶11} At trial, S.P.1., then seven years old, testified that Eisermann lived upstairs in a bedroom in her house. S.P.1. testified that sometimes she went into Eisermann's bedroom where they would "touch each other's pee pees." S.P.1. testified that Eisermann touched the front part of her "pee pee" while her underwear was off and that she touched Eisermann's "pee pee" and it was hard. S.P.1. testified that Eisermann touched her on the butt "where the poop comes out" and that Eiserman put strawberry syrup on his "pee pee" and she licked it off. Tr. 728.

{¶12} Tina Funfgeld, a sex abuse intake social worker with Cuyahoga County Department of Children and Family Services testified that she conducted a forensic interview of S.P.1. shortly after receiving the reported allegations. Funfgeld testified that as part of the interview, she showed S.P.1. a pre-school anatomical drawing of a girl and an adult male anatomical drawing. Funfgeld testified as follows regarding S.P.1. respective response to the drawings:

Q. When you showed [S.P.1.] the SAC drawing drawings, did she do anything?

* * *

A. Grabbed the male SAC drawing.

Q. Where did she grab the male SAC drawing at?

A. She grabbed the whole paper and brought it up to her face.

Q. And what did she do when she brought the male SAC drawing to her face?

A. She acted like she was kissing it.

Q. What part of the male body was she acting like she was kissing?

A. The penis.

Q. Did she do anything else to the male SAC drawing?

A. Not that I remember exactly. She was very enthralled with it.

Q. What do you mean she was enthralled with it? Once again, you can't say what [S.P.1.] told you.

A. Her eyes got very big, she very much directed all of her attention to that.

Q. What about when you showed her the female SAC drawing?

A. She answered the questions like any other normal child would, or any other child would. She explained things and told me what had gone on, in her wording.

Q. How did you take her reactions to the male SAC drawing?

A. She was very enthusiastic about the male SAC drawing, so I personally and professionally noticed there was something going on. She very much focused on the male anatomy, which again is for a child to be able to tell me what she did tell me, and focus on that aspect, was very much a red flag in my eyes.

Q. Why was that a red flag?

A. She was describing X, she was describing body functions, that normal children of her age do not know of.

Q. Did [S.P.1.] make disclosures — did [S.P.1.] tell you who committed the sexual abuse against her?

A. She did.

Q. Did she confirm the identity of the alleged perpetrator?

A. Yes, she did.

Q. And who did she identify as the alleged perpetrator?

[Counselor] Objection.

The Court: Sustained.

Q. Besides the alleged perpetrator, did [S.P.1.] disclose anyone else as committing sexual abuse against her?

A. No, she did not.

Q. How many people did she disclose as committing sexual abuse against her?

A. One.

Tr. 960-963.

{¶13} Funfgeld testified that after conducting the forensic interview, she prepared a report indicating that the allegation of sexual abuse was substantiated. Funfgeld testified that her determination was based on S.P.1.'s descriptive disclosure, and consistency between the police department's interview and her forensic interview.

{¶14} At the close of the state's case in chief, the trial court granted Eisermann's Crim.R. 29 motion for acquittal and dismissed one count of rape, as well as one count of kidnapping. On January 15, 2014, the jury returned not guilty verdicts on the remaining three counts of rape and the three counts of kidnapping. The jury also returned a not guilty verdict as to one lesser included count of gross sexual imposition. The jury returned guilty verdicts on two lesser included counts of gross sexual imposition. On February 4, 2014, the trial court classified Eisermann as a Tier III sex offender and sentenced him to a prison term of ten years.

Motion for Acquittal and Sufficiency of the Evidence

{¶15} We will address the assigned errors out of sequence and together, when appropriate.

{¶16} In the fifth and ninth assigned error, Eisermann argues his motion for acquittal should have been granted as to all counts, because the state failed to present sufficient evidence that he was guilty of gross sexual imposition.

{¶17} Crim.R. 29 mandates that the trial court issue a judgment of acquittal where the prosecution's evidence is insufficient to sustain a conviction for the offense. Crim.R. 29(A) and sufficiency of evidence review require the same analysis. *State v. Taylor*, 8th Dist. Cuyahoga No. 100315, 2014-Ohio-3134, citing *Cleveland v. Pate*, 8th Dist. Cuyahoga No. 99321, 2013-Ohio-5571, citing *State v. Mitchell*, 8th Dist. Cuyahoga No. 95095, 2011-Ohio-1241.

{¶18} A challenge to the sufficiency of the evidence supporting a conviction requires the court to determine whether the prosecution has met its burden of production at trial. *State v. Givan*, 8th Dist. Cuyahoga No. 94609, 2011-Ohio-100, citing *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. On review for sufficiency, courts are to assess not whether the prosecution's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id*.

{¶19} At trial, S.P.1. testified that sometimes she went into Eisermann's bedroom where they would "touch each other's pee pees," that Eisermann touched the front part of her "pee pee" while her underwear was off and that she touched Eisermann's "pee pee" and it was hard. S.P.1. also testified that Eisermann touched her on the butt "where the poop comes out" and that Eiserman put strawberry syrup on his "pee pee" and she licked it off.

{¶20} S.P.1.'s mother, S.P., testified about the revelation that led to the charges that are the subject of the instant appeal. S.P. testified about the detailed manner in which S.P.1. recounted the sexual abuse, such as touching each others genitals, that Eisermann's penis would get hard, and that "white stuff" would come out.

{¶21} At trial, Officer Ketterer, who conducted the initial interview with S.P.1. and Tina Funfgeld, who conducted a forensic interview with S.P.1. after Eisermann had been arrested, testified to S.P.1.'s unusual reaction to a male anatomical drawing. Both Keterer and Funfgeld

testified that S.P.1. picked up the drawing, brought it to her face and kissed the penis. Funfgeld testified that S.P.1. seemed enthralled by the adult male anatomical drawing. Funfgeld testified that when showed an anatomical drawing of a girl, S.P.1. had no unusual reaction, but acted like the average child of that age, who is shown that picture.

{¶22} After viewing the evidence in a light most favorable to the prosecution, especially S.P.1.'s graphic description of activities that arguably is not within the knowledge of an ordinary five-year-old child, the above evidence, if believed, would support the conclusion that Eisermann committed the actions alleged. As such, any rational trier of fact would have found the essential elements of the charges that led to his convictions for gross sexual imposition proven beyond a reasonable doubt. Consequently, the trial court did not err when it denied Eisermann's motion for acquittal. Accordingly, we overrule the fifth and ninth assigned errors.

Manifest Weight of the Evidence

{¶23} In the tenth assigned error, Eisermann argues his convictions were against the manifest weight of the evidence.

{¶24} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 1997 Ohio 52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. *Id*. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. *Id*. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be

> against the manifest weight of the evidence. *Id*. at 387, 678 N.E.2d 541. "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Id*. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

Id. at ¶ 25.

{¶25} An appellate court may not merely substitute its view for that of the factfinder, but must find that "in resolving conflicts in the evidence, the factfinder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Walker*, 8th Dist. Cuyahoga No. 99239, 2013-Ohio-3522, quoting *Thompkins* at 387. Consequently, reversal on manifest weight grounds is reserved for "the exceptional case that the evidence weighs heavily against the conviction." *Id*.

{¶26} Based on our resolution above of the fifth and ninth assigned errors, where we found that Eisermann's convictions for gross sexual imposition were supported by sufficient evidence, we conclude that this is not the exceptional case where the evidence weighs heavily against the convictions. Much to the contrary, Eisermann's convictions are not against the manifest weight of the evidence.

{¶27} Nonetheless, Eisermann argues he was convicted solely on S.P.1.'s inconsistent testimony. We are not persuaded.

{¶28} Although we review credibility when considering the manifest weight of the evidence, we are cognizant that determinations regarding the credibility of witnesses and the weight of the testimony are primarily for the trier of fact. The trier of fact is best able "to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *State v. Kurtz*, 8th Dist.

Cuyahoga No. 99103, 2013-Ohio-2999, ¶ 26, quoting *Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24.

{¶29} Here, despite Eisermann's suggestion otherwise, the record reveals that S.P.1. gave very consistent versions to all the adults who interviewed her concerning the reported activities. Thus, after independently reviewing the entire record and weighing the aforementioned evidence and all reasonable inferences, including the credibility of the witnesses including S.P.1., we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Accordingly, we overrule the tenth assigned error.

Psychological Evaluation of Victim

{¶30} In the fourth assigned error, Eisermann argues the trial court erred by denying his request to have S.P.1. psychologically evaluated.

{¶31} It is within the court's discretion to order a psychiatric or psychological examination. *State v. Coffey*, 6th Dist. Lucas No. L-12-1047, 2013-Ohio-3555, citing *State v. Murrell*, 72 Ohio App.3d 668, 673, 595 N.E.2d 982 (12th Dist. 1991). Courts are cautioned, however, that a defendant has no right to compel such an examination of an alleged child rape victim. *State v. Ross*, 2d Dist. Montgomery No. 22958, 2010-Ohio-843, ¶ 47.

{¶32} Further, a psychological examination of a child alleged to be the victim of sexual abuse is intrinsically dangerous and therefore permission to conduct the examination should not be granted lightly. *State v. Lacy*, 12th Dist. Butler No. CA95-12-221, 1996 Ohio App. LEXIS 5362 (Dec. 2, 1996), citing *State v. Shoop*, 87 Ohio App.3d 462, 622 N.E.2d 665 (3d Dist.1993).

Such examinations are appropriate only in exceptional circumstances and when necessary to further the ends of justice. *Ross, supra*.

{¶33} Nonetheless, Eisermann cites *State v. Madison*, Cuyahoga C.P. No. CR-13-579539, in support of the notion that a psychological evaluation of S.P. was necessary. In *Madison*, defendant's mental state was at issue and it was anticipated that multiple psychological experts would testify about the defendant's mental state before, during, and after the homicides he was alleged to have committed.

{¶34} In the instant matter, unlike *Madison*, S.P.1.'s mental state is not at issue. Our review indicates that the trial court conducted a full hearing to determine whether S.P.1. was competent to testify. Our review further reveals that defense counsel subjected S.P.1. to a very rigorous cross-examination, despite her fragile psychological state. Based on our review, we cannot conclude that the trial court erred in denying Eisermann's motion to have S.P.1. psychologically evaluated. Accordingly, we overrule the fourth assigned error.

Victim Impact Testimony

{¶35} In the second assigned error, Eisermann argues the trial court improperly allowed prejudicial victim-impact testimony.

{¶36} Victim impact evidence is excluded because it is irrelevant and immaterial to the guilt or innocence of the accused; it principally serves to inflame the passion of the jury. *See State v. Wilson*, 8th Dist. Cuyahoga No. 91971, 2010-Ohio-1196, citing *State v. White*, 15 Ohio St.2d 146, 239 N.E.2d 65 (1968). Nevertheless, the state is not wholly precluded from eliciting testimony from victims that touches on the impact the crime had on the victims: "circumstances of the victims are relevant to the crime as a whole. The victims cannot be separated from the

crime." *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, ¶43, quoting *State v. Lorraine*, 66 Ohio St.3d 414, 420, 613 N.E.2d 212 (1993).

{¶37} In *State v. Fautenberry*, 72 Ohio St.3d 435, 439-440, 1995-Ohio-209, 650 N.E.2d 878, the Ohio Supreme Court went on to say that although "true victim-impact evidence" should not be admitted during the guilt phase of the proceeding, "evidence which depicts both the circumstances surrounding the commission of the [offense] and also the impact of the [offense] on the victim's family may be admissible during both the guilt and the sentencing phases." *Id*.

{¶38} In *State v. Halder*, 8th Dist. Cuyahoga No. 87974, 2007-Ohio-5940, this court upheld the trial court admitting similar victim-impact evidence. *Id*. at ¶ 68, 70. In *Halder*, the defendant walked into a building at Case Western Reserve University, shot and killed the first person he encountered, and continued to fire at other people in the building and at the police when they arrived. He then held numerous people hostage for approximately eight hours before surrendering.

{¶39} Halder argued that the trial court improperly admitted testimony of the slain victim's brother, as well as twenty-eight other witnesses. The victim's brother testified about learning of the hostage situation, watching the news, and seeing the body of his brother being taken from the building, and how the death of his brother had affected the entire family. We disagreed that the trial court erred, holding that this "testimony comports with the law espoused in *Fautenberry*, because it describes the surrounding circumstances of the murder and the impact it has had on the victim's family." *Id*. at ¶ 68.

{¶40} With respect to the testimonies of the twenty-eight other witnesses who Halder held hostage for approximately eight hours, they testified about their ordeal, that they were forced by fear of death to remain in the building, that many had received counseling since the incident,

and some testified about the fear of loud noises, and many of the victims testified that they now had to plan exit strategies whenever they entered a building. We held that "the testimony sheds light on the surrounding circumstances of the hostage situation and how the experience has impacted the lives of each victim." *Id*. at ¶ 70.

{¶41} We find that the testimony admitted here was similar to the testimony that was admitted in *Halder* and thus, comports with the law espoused in *Fautenberry* and did not deny Eisermann a fair trial. Thus, the trial court did not err when it allowed this testimony. Accordingly, we overrule the second assigned error.

Prosecutorial Misconduct

{¶42} In the first assigned error, Eisermann argues that he was materially prejudiced by prosecutorial misconduct. Specifically, Eisermann contends that the prosecutors committed numerous instances of misconduct that, taken either separately or especially together, compromised his right to a fair trial.

{¶43} The test for prosecutorial misconduct is whether the prosecutor's remarks were improper and, if so, whether they prejudicially affected the substantial rights of the accused. *State v. Hostacky*, 8th Dist. Cuyahoga No. 100003, 2014-Ohio-2975, citing *State v. Bey*, 85 Ohio St.3d 487, 493, 1999-Ohio-283, 709 N.E.2d 484 (1999). The touchstone of analysis is the fairness of the trial, not the culpability of the prosecutor. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 92, citing *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

{¶44} In addition, the Supreme Court of Ohio has cautioned that prosecutorial misconduct constitutes reversible error only in rare instances. *State v. Ball*, 8th Dist. Cuyahoga

No. 99990, 2014-Ohio-1060, citing *State v. Keenan*, 66 Ohio St.3d 402, 405, 613 N.E.2d 203 (1993).

{¶45} At the outset, we note that Eisermann's defense counsel at trial continues to represent him in the instant appeal. We also note that the same attorney, in the instant appeal, invokes the doctrine of "plain error," thus implicitly acknowledging that during trial he did not lodge objections to the myriad instances of alleged prosecutorial misconduct. The plain error rule is to be invoked only under exceptional circumstances in order to avoid a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 95, 372 N.E.2d 804 (1978). Plain error does not occur unless, but for the error, the outcome of the trial clearly would have been different. *Id*. at 97; Crim.R. 52(B).

{¶46} Our review of the record reveals that Eisermann's argument, albeit passionate, lacks support. This lack of support in the record explains Eisermann's failure to object to most of the instances that he now employs emotionally charged adjectives to characterize as prosecutorial misconduct. Further, many of things Eisermann claims constituted error came in response to his own questions, thus implicating the invited error doctrine.

{¶47} Pursuant to the invited error doctrine, a party may not take advantage of an error that the party invited or induced. *State v. Robinson*, 8th Dist. Cuyahoga No. 99917, 2014-Ohio-2973, citing *State v. Bey*, 85 Ohio St.3d 487, 492-493, 1999-Ohio-283, 709 N.E.2d 484. Therefore, since the complained of testimony flowed from Eisermann's own questions, he may not now seek to use those responses to his advantage on appeal.

{¶48} At trial, S.P.'s close friend, Karen O'Neil, whom S.P. told first about S.P.1.'s revelation, was present when S.P. ordered Eisermann out of her home. O'Neil testified that she followed Eisermann into the bedroom as he was gathering his belongings. O'Neil testified that

she observed a bottle of KY Jelly on Eisermann's night table and thought it odd that he would have a sexual lubricant in his room since Eisermann's wife lived in New York. Eisermann now argues this testimony was prejudicial.

{¶49} However, this testimony from O'Neil was relevant because the presence of a sexual lubricant in Eisermann's bedroom suggests that he engaged in sexual activity in his bedroom. It becomes more relevant and collaborative because S.P.1. testified that the activity took place in Eisermann's bedroom. Despite the relevance and collaborative nature of the testimony, it was a very brief reference, given the length of the trial, and in light of the fact that Eisermann was acquitted of the rape counts, suggests that the brevity of the reference to the KY Jelly might not have had any great impact on the minds of the jurors.

{¶50} Eisermann also complains that the prosecutor argued that the evidence proved his guilt. However, prosecutors are given considerable latitude in closing argument. *State v. Dillon*, 10th Dist. Franklin No. 04AP-1211, 2005-Ohio-4124, ¶ 50. Further, the prosecutor is entitled to comment on "what the evidence has shown and what reasonable inferences may be drawn therefrom." *State v. Butler*, 10th Dist. Franklin No. 03AP-800, 2005-Ohio-579, ¶ 11.

{¶51} In addition, Eisermann complains that the prosecutor improperly appealed to the sympathies of the jury and denigrated defense counsel in the eyes of the jury. After scouring the voluminous record, we have uncovered no support for this, nor any of Eisermann's other assertions. Thus, we underscore that we review closing arguments in its entirety to determine whether prejudicial error exists. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 94. A prosecutor's statements are not be taken out of context and given their most damaging meaning. *Id*.

{¶52} We conclude, Eisermann's complained of errors lack any real substance. Accordingly, we overrule the first assigned error.

Opinion Testimony

{¶53} In the third assigned error, Eisermann argues the trial court improperly admitted opinion testimony that S.P.1. was sexually abused. Specifically, Eisermann argues that the trial court allowed a doctor and a social worker to testify that S.P.1. was a victim of sexual abuse. Eisermann contends this was improper because the statements upon which these two witnesses based their opinions were received either from S.P.1. or her mother and, as such, allowed them to vouch for S.P.1.'s credibility.

{¶54} In *State v. Boston*, 46 Ohio St.3d 108, 128, 545 N.E.2d 1220 (1989), a jury found a father guilty of gross sexual imposition against his two-year-old daughter. During trial, the court allowed a pediatrician who had examined the child to testify that the child had neither fantasized her abuse nor been programmed to make the accusations of abuse. The court also allowed a counselor who had examined the child to testify that the child had been telling the truth.

{¶55} In *Boston*, the Supreme Court of Ohio held that "[a]n expert's opinion testimony on whether there was sexual abuse would aid jurors in making their decision and is, therefore, admissible pursuant to Evid.R. 702 and 704." *Id*. at 129. However, despite the admissibility of such evidence, "an expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." *Id*.

{¶56} When a trial court permits an expert to render an opinion as the victim's veracity, "the admission of this testimony [is] not only improper — it [is] egregious, prejudicial and constitutes reversible error." *Id*. at 128. The court reasoned that such an opinion constitutes a

litmus test of the victim's credibility, which infringes upon the factfinder's responsibility to make their own assessment of the veracity of witnesses. *Id*. at 129, relying upon *State v. Eastham*, 29 Ohio St. 3d 307, 312, 530 N.E.2d 409 (1988)(Brown, J., concurring).

{¶57} We first turn our attention to the testimony of Funfgeld, the social worker, whose testimony is quoted, at length, above. As previously stated, after conducting a forensic interview of S.P.1., Funfgeld prepared a report indicating that the allegation of sexual abuse was substantiated.

{¶58} Initially, we note, social workers are permitted to testify to their disposition in an alleged sexual abuse case. *See State v. Winterich*, 8th Dist. Cuyahoga No. 89581, 2008-Ohio-1813, citing *State v. Smelcer*, 89 Ohio App.3d 115, 623 N.E.2d 1219 (8th Dist.1993). Thus, Funfgeld's statement that sexual abuse was substantiated merely reflected her agency's policy of classification of child abuse cases and not an assessment of S.P.1.'s credibility. *See State v. Whitfield*, 8th Dist. Cuyahoga No. 89570, 2008-Ohio-1090.

{¶59} Nonetheless, Eisermann takes issue with the following exchange:

Q. And why did you make those findings?

A. The findings I made were based upon the child's descriptive disclosure, and consistency between the police department, the Care Clinic and myself.

Tr. 969.

{¶60} However, in explaining how she arrived at her disposition of the matter, Funfgeld did not say that she thought S.P.1.'s statements were credible, consistent, or truthful, thus, she did not cross the bright line of *Boston* and testify to S.P.1.'s veracity. Because Funfgeld did not testify to S.P.1.'s veracity, the complained of statements in the above exchange still falls within the ambit of the agency's policy of classification of child abuse cases. Therefore, we find that the social worker did not testify as to S.P.1.'s veracity and her testimony was properly admitted.

{¶61} We now address the testimony of Dr. Jennifer Tucker Rosenburg, a medical doctor employed as a child and adult psychiatrist, who began treating S.P.1. in May 2013. Dr. Rosenburg testified that she diagnosed S.P.1. with Post Traumatic Stress Disorder as a result of sexual molestation. Dr. Rosenburg elaborated on her diagnosis in the following exchange:

> Q. Have you had an opportunity to ask [S.P.1.] herself about the sexual abuse?
>
> A. I have had the opportunity to attempt to ask her. When I do bring up the name of the person that was reportedly involved, she will say, I don't remember or she'll shut down or she'll start acting up in the office. * * * She'll say, I have to go to the bathroom now, and she'll leave my office. She avoids talking about it with me.
>
> Q. Is that behavior typical of somebody who has experienced sexual trauma?
>
> A. Yes.

Tr. 825-825.

> * * *
>
> Q. Did there come a time when you diagnosed [S.P.1.] with any disorder?
>
> A. I did.
>
> Q. What diagnosis was that?
>
> A. I diagnosed posttraumatic stress disorder.
>
> Q. Why?
>
> A. Because she exhibited the symptoms of posttraumatic stress disorder. Do you want me to say what they are?
>
> Q. What did she exhibit that led to your diagnosis?
>
> A. Okay. So first of all, to make the diagnosis of posttraumatic stress disorder, you have to have a trauma. First of all through — from the history that was provided to me, there was certainly a history of sexual abuse and sexual trauma.

Tr. 829.

{¶62} Eisermann argues that Dr. Rosenburg's testimony was in direct violation of *Boston* because she offered her opinion as to the truth of the S.P.1.'s accusations.

{¶63} A *Boston* violation may be harmless error beyond a reasonable doubt when considering certain factors. Those factors include "(1) if the victim testifies and is subject to cross-examination, (2) the state introduces substantial medical evidence of sexual abuse, and (3) the expert or lay person's opinion testimony is cumulative to other evidence." *State v. Palmer*, 9th Dist. Medina No. 2323-M, 1995 Ohio App. LEXIS 514 (Feb. 8, 1995); *State v. Lewis*, 9th Dist. Summit No. 14632, 1991 Ohio App. LEXIS 3880 (Aug. 14, 1991); *State v. Djuric*, 8th Dist. Cuyahoga No. 87745, 2007-Ohio-413, ¶ 44.

{¶64} However, a finding of harmless error is not justified if the case is a "credibility contest" between the victim and the defendant. *State v. Burrell*, 89 Ohio App.3d 737, 746, 627 N.E.2d 605 (9th Dist.1993). Thus, in order to find a *Boston* violation harmless, some independent evidence must exist when it is a credibility contest between the defendant and the victim. *State v. West*, 8th Dist. Cuyahoga No. 90198, 2008-Ohio-5249; *Winterich*, 8th Dist. Cuyahoga No. 89581, 2008-Ohio-1813; *State v. Knight*, 8th Dist. Cuyahoga No. 87737, 2006-Ohio-6437.

{¶65} In the instant case, S.P.1. testified at trial that she was sexually abused by Eisermann and our review indicates that she was subject to rigorous cross-examination. Nonetheless, Eisermann contends that case against him mirrors several of the cases that we have addressed involving similar circumstances; specifically where no physical evidence or eyewitness was presented. *See In re R.E.A.*, 8th Dist. Cuyahoga No. 99652, 2014-Ohio-110; *West*; *Winterich*; *Knight*. Eisermann argues that because no eyewitness or physical evidence was presented, the state's case ultimately hinged on S.P.1.'s credibility.

{¶66} We acknowledge that like the other cases we have addressed, the instant case had no eyewitnesses or physical evidence to support the allegations. Thus, Dr. Rosenburg's statement that "from the history that was provided to me, there was certainly a history of sexual abuse and sexual trauma," would appear to be an assessment of S.P.1.'s credibility and serve to tip the proverbial scale in favor of conviction.

{¶67} However, unlike the other cases, Dr. Rosenburg's diagnosis did not flow only from S.P.1.'s statements to her mother, to Officer Ketterer, and to Funfgeld, but also flowed from the report of S.P.1.'s bizarre reaction to the adult male SAC drawing. As previously discussed, at trial, both Officer Ketterer and Funfgeld testified in detail about S.P.1.'s bizarre reaction when shown the male SAC drawing. We find S.P.1.'s reaction of immediately bringing the adult male SAC drawing to her face and kissing the penis would so shock the sensibilities of the average observer, that they would conclude, given S.P.1.'s tender age, that she had been sexually abused. We also find that the average juror hearing the testimony of S.P.1.'s bizarre reaction to the male SAC drawing would not be surprised that Dr. Rosenburg had concluded that S.P.1. had been sexually abused.

{¶68} Consequently, we are constrained under the peculiar circumstances of the instant case, having not previously addressed any matter involving this bizarre component, to find that the admission of the complained of portion Dr. Rosenburg's testimony was harmless error. Accordingly, we overrule the third assigned error.

Jury Instructions

{¶69} In the sixth assigned error, Eisermann argues the trial court erred by repeatedly using the term "victim" to refer to S.P.1. in the jury instruction.

{¶70} Initially, we note Eisermann did not enter an objection when the trial court used the term "victim" in reference to S.P.1. We also note that the term "victim" is used to refer to S.P.1. in the indictment and Eisermann never objected to the language in the indictment.

{¶71} A failure to object requires that we review any error under the stringent plain error standard. *State v. Ball*, 8th Dist. Cuyahoga No. 99990, 2014-Ohio-1060, citing *State v. Evans*, 63 Ohio St.3d 231, 240, 586 N.E.2d 1042 (1992); Crim.R. 52(B). An error rises to the level of plain error only if, but for the error, the outcome of the proceedings would have been different. *State v. Becker*, 8th Dist. Cuyahoga No. 100524, 2014-Ohio-4565, citing *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, 912 N.E.2d 1106, ¶ 61; *State v. Long*, 53 Ohio St.2d 91, 97, 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.*

{¶72} Here, we see nothing in the record to support a finding that the outcome of the trial would have been different, but for the trial court's use of the term "victim" to refer to S.P. when giving the jury instructions. For example, the jury acquitted Eisermann of the rape and kidnapping charges despite the trial court's use of the term "victim." Accordingly, we overrule the sixth assigned error.

Limiting Cross-Examination

{¶73} In the seventh assigned error, Eisermann argues the trial court deprived him of his right to present a defense by limiting his cross-examinations of Officer Ketterer and S.P.

{¶74} The right to cross-examination, protected by the Confrontation Clause, is essentially a "functional" right designed to promote reliability in the truth-finding functions of a criminal trial. *Kentucky v. Stincer*, 482 U.S. 730, 737, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). A defendant is entitled to "an opportunity for effective cross-examination, not cross-examination

that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985). Thus, the trial court has "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 474 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

{¶75} To establish a Confrontation Clause violation, the defendant must show that he was "prohibited from engaging in otherwise appropriate cross-examination" and "[a] reasonable jury might have received significantly different impression of [the witness's] credibility had [the defendant's] counsel been permitted to pursue his proposed line of cross-examination." *Id.* at 680.

{¶76} First, Eisermann claims that the trial court refused to allow him to impeach Officer Ketterer by introducing evidence that she had been fired from the Cleveland Police Department for lying on an affidavit.

{¶77} We cannot say that the court acted unreasonably by refusing to allow this extraneous evidence that had no bearing on whether Eisermann was guilty of the charges. In addition, the court could rationally have found that allowing cross-examination on that issue would have caused the jury unnecessary confusion over the legal issues because it would effectively be putting Officer Ketterer on trial.

{¶78} Further, we have found no abuse of discretion when a trial judge refused to allow the defendant to use an official reprimand from a police officer's personnel file to impeach the officer or otherwise test his credibility under Evid.R. 608(B). *See, e.g., State v. Hairston*, 8th

Dist. Cuyahoga No. 69821, 1996 Ohio App. LEXIS 3557 (Aug. 22, 1996); *State v. Benjamin*, 8th Dist. Cuyahoga No. 87872, 2007-Ohio-84, ¶ 19. Evid.R. 608(B) states:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of a crime as provided in Evid.R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness * * *.

{¶79} The evidence contained in Ketterer's personnel file would be extrinsic evidence and not allowed. Thus, it follows that Eisermann did not assert a viable basis to cross-examine Officer Ketterer on the information in her Cleveland Police Department personnel file. As such, the trial court properly disallowed this evidence.

{¶80} Second, Eisermann complains that the trial court limited his cross-examination of Ketterer on her decision not to investigate other suspects. The trial court properly limited that line of questioning because it already had been established that S.P. specifically stated that Eisermann was the perpetrator.

{¶81} Third, Eisermann claims the trial court limited his ability to inquire into S.P.'s claim that someone at the biological father's home was "messing with" her daughter.

{¶82} Relevant to the above assertion, the following exchange took place during S.P.'s cross-examination:

> Q. And you made the statement you read out loud, that someone is messing with her daughter at father's house. That's what that statement says, correct?
>
> A. Right.
>
> Q. You said that to the doctor?
>
> A. Yes.

Q. Her pediatrician?

A. Yes.

Q. What information did you have that made you report that to her doctor?

A. Just her not wanting to go.

Q. So the fact that she did not want to go to her father's house, that was enough information for you to conclude that somebody is messing with her sexually?

[Prosecutor]: Objection.

The Court: Sustained.

Q. You reported to the doctor that — again, you had read this out loud, that you believed she's being sexually assaulted? That's what you believed?

A. Messing with is not — in that one, could be. I'm confused, I'm sorry, with the question.

Q. Confused. Did you believe on January 19, 2012, that your daughter was being sexually abused?

A. Yes.

Q. Why?

A. Because of her pooping in her pants and peeing, on purpose, and after speaking to my grandmother and my aunt.

Q. What did you learn when you spoke to your grandmother and your aunt?

A. That those are triggers for possible sexual abuse.

Tr. 634-635.

{¶83} A review of the excerpt above, reveals that Eisermann cross-examined S.P. on the very issue that he now claims he was prevented from doing. As such, we see no merit in his assertion.

{¶84} Fourth, Eisermann complains that the trial court limited his ability to inquire into custody conflicts between S.P. and S.P.1.'s biological father. The record reveals that the trial court refused to allow any inquiry into custody conflicts because of lack of relevance.

{¶85} Here, even assuming that the evidence at issue was admissible, its admissibility is still subject to Evid.R. 403, which states that relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. *See, e.g., State v. Buchanan*, 12th Dist. Brown No. CA2008-04-001, 2009-Ohio-6042, ¶ 57 ("even if evidence was deemed admissible pursuant to Evid.R. 608[B], it would still have been excluded under Evid.R. 403[A].").

{¶86} Based on the foregoing, we can find no abuse of discretion in the trial court's decision regarding the complained of issues. Accordingly, we overrule the seventh assigned error.

Maximum and Consecutive Sentences

{¶87} In the eighth assigned error, Eisermann argues the trial court erred by imposing maximum and consecutive sentences without ordering a presentence report.

{¶88} R.C. 2953.08(G)(2) provides, in part, that when reviewing felony sentences, the appellate court's standard for review is not whether the sentencing court abused its discretion; rather, if this court "clearly and convincingly" finds that (1) "the record does not support the sentencing court's findings under R.C. 2929.14(C)(4)," or that (2) "the sentence is otherwise contrary to law," then we "may increase, reduce, or otherwise modify a sentence * * * or [a reviewing court] may vacate the sentence and remand the matter to the sentencing court for re-sentencing."

{¶89} A sentence is not clearly and convincingly contrary to law "where the trial court considers the purposes and principles of sentencing under R.C. 2929.11 as well as the seriousness and recidivism factors listed in R.C. 2929.12, properly applies postrelease control, and sentences a defendant within the permissible statutory range." *State v. A.H.*, 8th Dist. Cuyahoga No. 98622, 2013-Ohio-2525, ¶ 10, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 18.

{¶90} R.C. 2929.11(A) provides that "[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." Under R.C. 2929.12(A), trial courts must consider a nonexhaustive list of factors, including the seriousness of the defendant's conduct, the likelihood of recidivism, and "any other factors that are relevant to achieving those purposes and principles of sentencing."

{¶91} Pursuant to R.C. 2929.14(C)(4), when imposing consecutive sentences, the trial court must first find the sentence is "necessary to protect the public from future crime or to punish the offender." Next, the trial court must find that consecutive sentences are "not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." Finally, the trial court must find the existence of one of the three statutory factors set forth in R.C. 2929.14(C)(4)(a)-(c):

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶92} Our review of the record reveals that the trial court listened to the evidence presented at trial, conducted a full sentencing hearing, and determined that Eisermann deserved maximum and consecutive sentences. At the sentencing hearing, the trial court stated in pertinent part as follows:

> Well, just a few things I think for purposes of the record. If this is reviewed, then the Court of Appeals can then understand what my thought process is.
>
> * * *
>
> Having said all that, after reviewing the purposes and principles set forth in felony sentencing, I do find that a sentence of incarceration is appropriate.
>
> * * *
>
> And I do agree with [Prosecutor], that I believe a consecutive sentence are necessary to protect the public from future crimes, or to punish you, and that consecutive sentences are not at all disproportionate to the seriousness of your conduct in this case.
>
> Specifically we're talking about two separate actions here involving a very young child that is difficult to imagine how someone would do that. Particularly in your position as a trusted family member, and to these girls, to this girl, anyway,

> [S.P.1.], and perhaps anyone else — we don't know what may have happened with [S.P.1.'s] sister. In any event, though, I do also find, as I've indicated, that — if I'm being repetitive, I apologize, that they're not disproportionate to the seriousness of your conduct and to the danger that you pose to the public.
>
> And I've indicated, I do find that there were multiple offenses that were committed, and that can only be construed to be part of a course of conduct, and the harm caused by these multiple offenses is so great or unusual that no single prison term for any of the offense or offenses committed is a part of the course of conduct, would again reflect the seriousness of your conduct.

Tr. 1451-1454.

{¶93} The above excerpt reflects a textbook rendition of the findings necessary to impose consecutive sentences. In addition, a prison term of five years is within the statutory range of punishment for a third-degree felony. R.C. 2929.14(A)(3)(a). Further, despite Eisermann's protestations to the contrary, a trial court is not required to order a presentence report if it determines that a prison sentence is appropriate. *State v. Cyrus*, 63 Ohio St.3d 164, 586 N.E.2d 94 (1992); Crim.R. 32.2. As such, we find no abuse of discretion in the trial court's imposition of maximum and consecutive sentences. Accordingly, we overrule the eighth assigned error.

Judicial Bias

{¶94} In the eleventh assigned error, Eisermann claims the trial court exhibited judicial bias.

{¶95} Due process requires that a criminal defendant be tried before an impartial judge. *State v. Hough*, 8th Dist. Cuyahoga Nos. 98480 and 98482, 2013-Ohio-1543, citing *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 34. If the record evidence indicates that the trial was infected by judicial bias, the remedy is a new trial. *State v. Dean*, 127 Ohio St.3d 140, 2010-Ohio-5070, 937 N.E.2d 97, ¶ 2. Judicial bias is defined as "'a hostile

feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge * * * .'" *Id.* at ¶ 48, quoting *Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956), paragraph four of the syllabus. Judicial bias is "'contradistinguished from an open state of mind which will be governed by the law and the facts.'" *Id.*, quoting *Pratt* at paragraph four of the syllabus.

{¶96} Despite Eisermann's sweeping assertion, our review of the entire record demonstrates that the trial court exhibited a fair and impartial demeanor throughout the lengthy proceedings. As such, we find no merit in Eisermann's claim of judicial bias. Accordingly, we overrule the eleventh assigned error.

{¶97} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction 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.

PATRICIA ANN BLACKMON, JUDGE

EILEEN A. GALLAGHER, P.J., and
MARY EILEEN KILBANE, J., CONCUR

APPENDIX

Assignments of Error

I. Multiple instances of prosecutorial misconduct materially prejudiced appellant's constitutional rights constituting plain error.

II. The trial court improperly allowed the state to present prejudicial victim-impact testimony.

III. The trial court improperly admitted opinion testimony that S.P. was sexually abused.

IV. The trial court erred by denying appellant's request for a psychological evaluation of the alleged victim.

V. The trial court erred by denying appellant's motion for judgment of acquittal pursuant to Crim.R. 29.

VI. The trial court erred by providing the jury with improper jury instructions.

VII. The trial court erred by denying appellant his constitutionally protected right to present a defense.

VIII. The trial court erred by imposing the maximum, consecutive term of imprisonment after denying appellant a presentence investigation report.

IX. Appellant's conviction was not supported by legally sufficient evidence.

X. Appellant's conviction was against the manifest weight of the evidence.

XI. The trial court committed judicial misconduct, which materially prejudiced appellant.