[Cite as *State v. Garner*, 2016-Ohio-2623.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102816

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GARY L. GARNER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-575481-A

BEFORE: E.T. Gallagher, J., Kilbane, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: April 21, 2016

ATTORNEY FOR APPELLANT

Thomas G. Haren
Seeley, Savidge, Ebert & Gourash Co., L.P.A.
26600 Detroit Road, Suite 300
Westlake, Ohio 44145

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

BY: Gregory J. Ochocki
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Gary Garner ("Garner"), appeals from his convictions and sentence following a jury trial. He raises four assignments of error for review:

> 1. The trial court erred when it allowed Garner's case to proceed to trial in violation of Garner's right to speedy trial under R.C. 2945.71.
>
> 2. Garner was deprived of effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution.
>
> 3. Garner was denied due process of law because his conviction was based on insufficient evidence and was against the manifest weight of the evidence.
>
> 4. The trial court improperly sentenced Garner contrary to law.

{¶2} After careful review of the record and relevant case law, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Procedural and Factual History

{¶3} Garner was named in a 24-count indictment in Cuyahoga C.P. No. CR-13-575481-A.[1] Garner was charged with eight counts of rape, in violation of R.C.

[1] On December 19, 2012, Garner was originally indicted in Cuyahoga C.P. No. CR-12-569811-A. On April 17, 2013, Garner was indicted with additional counts of rape, kidnapping, and GSI in Cuyahoga C.P. No. CR-13-572491-A. On August 28, 2013, Garner was indicted with additional counts of rape, kidnapping, and GSI in Cuyahoga C.P. No. CR-13-575481-A. Following his indictment in CR-13-575481-A, case numbers CR-12-569811-A and CR-13-572491-A were dismissed and consolidated into this case on October 21, 2013.

2907.02(A)(1)(b) (Counts 1, 2, 5, 6, 13, 16, 19, and 22); nine counts of gross sexual imposition ("GSI"), in violation of R.C. 2907.05(A)(4) (Counts 3, 7, 9, 10, 11, 14, 17, 20, and 23); six counts of kidnapping in violation of R.C. 2905.01(A)(4) (Counts 4, 8, 15, 18, 21, and 24); and one count of intimidation of a victim of a crime, in violation of R.C. 2921.04(B)(1) (Count 12). With the exception of the intimidation of a victim charge, each count of the indictment carried a sexually violent predator specification. In addition, Counts 4, 5, 6, 8, 15, 18, 21, and 24 contained a sexual motivation specification. Garner's indictment stemmed from allegations that he engaged in inappropriate sexual conduct with three minor children: A.C., D.T., and D.G.[2]

{¶4} In January 2014, the matter proceeded to a jury trial where the following relevant facts were adduced.

{¶5} During the time periods pertinent to this case, Garner lived with his girlfriend, Linda Harvey ("Harvey"), who is the paternal grandmother of D.T. and the mother of A.C.'s stepfather, Tyrone Harvey.

{¶6} D.T.'s mother, Khaesha Brown, testified that D.T. had a good relationship with her grandmother and spent the night at Harvey's home on numerous weekends while Brown worked. Brown testified that in July 2012, she learned that D.T. confessed to Felicia Coles ("Coles"), D.T.'s maternal grandmother, that Garner had inappropriately "touched" her on multiple occasions. Brown stated that when she asked D.T. about the "touchings," D.T. was scared and nervous, but eventually stated that Garner would come

---

[2] D.G. did not testify at trial.

to her bedroom in Harvey's home and "take the covers off of her and touch her." D.T. also told Brown that she once woke up on the couch with "her panties down to her ankles." According to Brown, D.T. estimates that "basically every time that she was over there, * * * he was touching her." Following this conversation, Brown prevented D.T. from visiting Harvey's home and took D.T. to the hospital for examination. Brown testified that the medical examinations did not reveal any signs of abuse.

{¶7} D.T. (DOB 7-14-2002), was 11 years old at the time of trial. She testified that Garner "touched" her when she was in the third and fourth grades, which encompassed the school years 2011-2012 and 2012-2013. These "touchings" took place when D.T.'s mother would drop her off at Harvey's home. D.T. testified that Garner touched her "chest" and her "private area in front" under her clothes with his fingers. D.T. clarified that Garner inserted his fingers inside her vagina on approximately one to five occasions. She further stated that Garner "touched [her] vaginal area without putting his fingers inside of [her]" more than five times but less than ten times. D.T. testified that the "touchings" usually took place in her bedroom but that on one occasion Garner touched her in the living room. D.T. stated that the sexual abuse stopped after she told Coles about what Garner had been doing to her.

{¶8} A.C.'s mother, Shannon Farrow ("Farrow"), testified that Harvey is the paternal grandmother of A.C.'s youngest sister. Farrow testified that A.C. spent time at Harvey's home while Farrow was working or for sleepovers with Harvey's other grandchildren. In August 2012, Farrow received a phone call from Brown. According

to Farrow, Brown warned her that Garner had inappropriately touched D.T. while she was sleeping over at his home. Thereafter, Farrow asked each of her children if "they have ever been touched by anybody?" She clarified that she intentionally did not mention Garner's name when she questioned her children. Farrow testified that her children stated that they had never been touched inappropriately. Several weeks later, however, A.C. asked Farrow, "[i]f I tell you something, are you going to be mad?" When Farrow assured her that she would not be upset, A.C. stated that Garner "had been performing sexual acts on her and had her performing sexual acts on him." A.C. further told Farrow that Garner made her watch pornographic videos on his cell phone. Based on this information, Farrow went the police the following morning to fill out a report.

{¶9} A.C. (DOB 4-7-2003) was ten years old at the time of trial. She testified that Garner touched her when she was nine years old, in the summer of 2012. A.C. testified that on one occasion, Garner woke her up while she was sleeping and took her into the living room. Garner told A.C. to lay down on two couch cushions. Garner then pulled down A.C.'s underwear and touched her vagina with his tongue and fingers. In addition, A.C. testified that Garner made her touch and lick his "private areas." When asked how often this occurred, A.C. stated, "a lot." A.C. also testified that Garner "rubbed her bottom," and she also recalled an incident where Garner "rubbed [her] vagina" with his "private part." According to A.C., "yellow stuff" came out of Garner's penis. A.C. testified that she did not tell her mother about Garner's conduct because he threatened to "chop her head off" if she told anyone.

{¶10} Harvey testified that she had no knowledge of the accusations made by D.T. and A.C. prior to Garner's arrest. Harvey stated that she did not believe Garner was capable of committing the offenses and that she would have noticed the sexual abuse had it occurred in her home. On cross-examination, Harvey testified that Garner was unable to perform sexually due to the side effects of his prescription medications.

{¶11} After resting its case, the state dismissed Counts 10, 22, 23, and 24.

{¶12} Garner testified on his own behalf and denied the allegations of sexual abuse made by D.T. and A.C. Garner testified that he never threatened, restrained, or inappropriately touched D.T. or A.C. Further, Garner maintained that many of the allegations raised against him were physically impossible given his medical conditions. Specifically, Garner testified that the side effects of his numerous medications prevent him from having an erection and that he has been unable to ejaculate since 2005.

{¶13} At the conclusion of trial, the jury found Garner guilty of all remaining counts and specifications. Subsequently, the trial court sentenced Garner to life without parole on the rape counts (Counts 1, 2, 5, 6, 13, 16, and 19); 25 years on the GSI counts (Counts 3, 7, 9, 11, 14, 17, and 20); life with the possibility of parole after 25 years on the kidnapping counts (Counts 4, 8, 15, 18, and 21); and 3 years for the intimidation count (Count 12). Counts 1 through 9 and 11-12, which related to A.C., were ordered to run concurrently to each other, as were Counts 13-21, which related to D.T. However, the court ordered Counts 1-9 and 11-12 to run consecutively to Counts 13-21, "for an aggregate prison term of two life sentences (served consecutively) without parole."

II. Law and Analysis

A. Statutory Speedy Trial Rights

{¶14} In his first assignment of error, Garner argues the trial court violated his statutory right to a speedy trial[3] pursuant to R.C. 2945.71

{¶15} A defendant is guaranteed the constitutional right to a speedy trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10, of the Ohio Constitution. *State v. Williams*, 8th Dist. Cuyahoga No. 100898, 2014-Ohio-4475, ¶ 51, citing *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72, ¶ 32. Pursuant to its authority to prescribe reasonable periods in which a trial must be held that are consistent with these constitutional requirements, Ohio enacted R.C. 2945.71 that sets forth the specific time requirements within which the state must bring a defendant to trial. *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, 971 N.E.2d 937, ¶ 14.

{¶16} Pursuant to R.C. 2945.71(C)(2), the state is required to bring a defendant to trial on felony charges within 270 days of arrest. Under the "triple count provision" contained in R.C. 2945.71(E), each day a defendant is held in jail in lieu of bail counts as three days in the speedy trial time calculation. Thus, a defendant held in jail without bail pending a felony charge must be tried within 90 days. However, the triple-count rule "is applicable only to those defendants held in jail in lieu of bail solely on the pending

---

[3] Garner does not address his constitutional right to speedy trial.

charge." *State v. MacDonald*, 48 Ohio St.2d 66, 357 N.E.2d 40 (1976), paragraph one of the syllabus.

{¶17} In addition, speedy trial time may be tolled by certain events delineated in R.C. 2945.72. Permissible reasons for extending the trial date include "[a]ny period of delay occasioned by the neglect or improper act of the accused," R.C. 2945.72(D), "[a]ny period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused," R.C. 2945.72(E), and "[t]he period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion," R.C. 2945.72(H).

{¶18} Once the statutory time limit has expired, the defendant has established a prima facie case for dismissal. *State v. Steele*, 8th Dist. Cuyahoga Nos. 101139 and 101140, 2014-Ohio-5431, ¶ 18, citing *State v. Howard*, 79 Ohio App.3d 705, 607 N.E.2d 1121 (8th Dist.1992). The burden then shifts to the state to demonstrate that sufficient time was tolled pursuant to R.C. 2945.72. *Steele* at ¶ 18, citing *State v. Geraldo*, 13 Ohio App.3d 27, 468 N.E.2d 328 (6th Dist.1983).

{¶19} When reviewing a speedy trial issue, the appellate court counts the days and determines whether the number of days not tolled exceeds the time limits for bringing the defendant to trial as set forth in R.C. 2945.71. *State v. Gibson*, 8th Dist. Cuyahoga No. 100727, 2014-Ohio-3421, ¶ 15; *State v. Shepherd*, 8th Dist. Cuyahoga No. 97962, 2012-Ohio-5415, ¶14-16, citing *State v. Barnett*, 12th Dist. Fayette No. CA2002-06-011, 2003-Ohio-2014, ¶ 7. If the state has violated a defendant's right to a speedy trial, then

upon motion made at or prior to trial, the defendant "shall be discharged," and further criminal proceedings based on the same conduct are barred. R.C. 2945.73(B); *State v. Torres*, 7th Dist. Jefferson Nos. 12 JE 30 and 12 JE 31, 2014-Ohio-3683, ¶ 18.

{¶20} In this case, Garner was arrested on December 11, 2012. At that time, Garner was only being held in jail on the "pending charge" of his original indictment and was subject to the "triple count provision" of R.C. 2945.71(E). "The statutory speedy trial period begins to run on the date the defendant is arrested; however, the date of arrest is not counted when calculating speedy trial time." *State v. Geraci*, 8th Dist. Cuyahoga Nos. 101946 and 101947, 2015-Ohio-2699, ¶ 21, citing *State v. Wells*, 8th Dist. Cuyahoga No. 98388, 2013-Ohio-3722, ¶ 44. Thus, the speedy trial countdown began on December 12, 2012, the day following Garner's arrest, and would have expired, if not extended, on March 11, 2013. Garner was not brought to trial until January 27, 2014. Accordingly, Garner has established a prima facie case for dismissal, and we must review the record to determine whether sufficient time was tolled pursuant to R.C. 2945.72.

{¶21} From December 12, 2012, until December 26, 2012, 15 days, or 45 three-for-one speedy trial days ran. On December 26, 2012, Garner filed a motion for a bill of particulars, a request for evidence, and a demand for discovery. A defendant's demand for discovery tolls the speedy trial time until the state responds to the discovery or for a reasonable time, whichever is sooner. *State v. Shabazz*, 8th Dist. Cuyahoga No. 95021, 2011-Ohio-2260, ¶ 26, 31; R.C. 2945.72(E).

{¶22} Ordinarily, this court has found 30 days to be a "reasonable" amount of time for the state to complete its discovery responses. *See State v. Byrd*, 8th Dist. Cuyahoga No. 91433, 2009-Ohio-3283; *State v. Barb*, 8th Dist. Cuyahoga No. 90768, 2008-Ohio-5877. In this case, however, the state was unable to complete its responses within 30 days of Garner's discovery demand because it was awaiting subpoenaed documents from the Cuyahoga County Division of Child and Family Services ("CCDCFS") and the trial court's resolution of a motion for protective order filed by CCDCFS.

{¶23} Under these circumstances, we find that Garner's speedy trial time was tolled beyond the 30-day period following his demand for discovery. At the very earliest, Garner's statutory speedy trial time was tolled until February 15, 2013, when the trial court issued a journal entry finding that the documents requested from CCDCFS were not discoverable. Therefore, 13 days, or 39 three-for-one speedy trial days, ran from February 15, 2013, to February 27, 2013. On February 27, 2013, Garner requested a continuance, which tolled the trial days until the next pretrial was held on March 12, 2013.

{¶24} From March 12, 2013 until April 4, 2013, there were an additional 24 days, or 72 three-for-one speedy trial days, for a total number of 156 speedy-trial days. On April 4, 2013, the trial court granted Garner's request to continue the matter until April 24, 2013, which tolled his speedy-trial time. R.C. 2945.72(H).

{¶25} However, before the April 24, 2013 hearing was held, Garner was indicted on April 17, 2013, in Case No. CR-13-572491-A, based on the separate allegations of rape, GSI, and kidnapping brought against him by A.C.[4] Accordingly, as of April 17, 2013, Garner was no longer being "held in jail in lieu of bail solely on the pending charge" in Case No. CR-12-569811-A, and therefore, was no longer entitled to the "triple count provision" of R.C. 2945.71(E). *See State v. Hyde*, 2d Dist. Clark No. 2013 CA 41, 2014-Ohio-1278; *State v. Freeman*, 6th Dist. Lucas No. L-09-1086, 2010-Ohio-1357.[5]

{¶26} From April 24, 2013 until May 21, 2013, the date of the next tolling event, there were 28 speedy trial days, for a total number of 184 speedy trial days. On May 21, 2013, the state responded to Garner's discovery requests and simultaneously served its own demand for discovery pursuant to Crim.R. 16. Significantly, Garner never responded to the state's reciprocal discovery requests.

{¶27} In *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, 860 N.E.2d 1011, the Ohio Supreme Court held that "[t]he failure of a criminal defendant to respond within

---

[4] We note that the additional charges brought against Garner following his original indictment were not subject to the speedy trial limits of the original indictment, since the subsequent charges were based on new and additional facts that the state had no knowledge of at the time of the original indictment. *See State v. Baker*, 78 Ohio St.3d 108, 110, 1997-Ohio-229, 676 N.E.2d 883 (1997).

[5] Although not dispositive of this case, several appellate districts have suggested that Garner may have been re-entitled to the triple-count provision of R.C. 2945.71(E) once the separate indictments were consolidated into one indictment on October 21, 2013. *See State v. Dankworth*, 172 Ohio App.3d 159, 2007-Ohio-2588, 873 N.E.2d 902, ¶ 37 (2d Dist.), citing *State v. Collins*, 91 Ohio App.3d 10, 14-15, 631 N.E.2d 666 (6th Dist.1993); *State v. Armstrong*, 10th Dist. Franklin No. 87AP-1166, 1989 Ohio App. LEXIS 1935 (May 25, 1989); *State v. Bowman*, 41 Ohio App.3d 318, 535 N.E.2d 730 (12th Dist.1987).

a reasonable time to a prosecution request for reciprocal discovery constitutes neglect that tolls the running of speedy-trial time pursuant to R.C. 2945.72(D)." *Id.* at paragraph one of the syllabus; *see also Gibson*, 8th Dist. Cuyahoga No. 100727, 2014-Ohio-3421, at ¶ 23. The tolling of statutory speedy-trial time based on a defendant's failure to respond to the state's reciprocal discovery requests within a reasonable time is not dependent upon the filing of a motion to compel by the state. *Palmer* at paragraph two of the syllabus. What constitutes a reasonable amount of time by which a defendant should have responded to a reciprocal discovery request is for the trial court to determine "based on the totality of facts and circumstances in the case." *Id.* at paragraph three of the syllabus. Garner does not address this tolling event in his brief. Further, there is nothing in the record that indicates why Garner failed to respond to the state's demand for reciprocal discovery.

{¶28} In addressing the tolling period under similar circumstances, this court has recently held:

> Under *Palmer*, it is the period of time that constitutes neglect by the defendant, i.e., the period of time after the reasonable response time, not the period of time that constitutes the reasonable response time itself, that is properly tolled. *Palmer* at ¶ 23. * * * This is consistent with R.C. 2945.72(D), which provides that "[t]he time within which an accused must be brought * * * in the case of felony, to preliminary hearing and trial, may be extended [by] * * * [a]ny period of delay occasioned by the neglect or improper act of the accused." Thus, where a defendant fails to respond to the state's request for reciprocal discovery, speedy trial time is tolled *after a "reasonable time" for the defendant's responses has passed.* * * *
>
> Under most circumstances, this court has generally considered 30 days to be a "reasonable" response time when applying R.C. 2945.72.

(Citations omitted and emphasis added.) *State v. Geraci*, 8th Dist. Cuyahoga Nos. 101946 and 101947, 2015-Ohio-2699, ¶ 25-26.

{¶29} Applying the forgoing to this case, we find, using 30 days as a "reasonable" response time, that Garner's speedy-trial time was indefinitely tolled beginning on June 21, 2013, based on his negligent failure to respond to the state's discovery request. Thus, even if this court were to disregard the multiple motions filed by Garner during the 30-day period between May 21, 2013, and June 21, 2013,[6] at most, 214 speedy trial days elapsed between the date of Garner's arrest and his trial. Accordingly, we find that Garner's statutory speedy trial rights were not violated.

{¶30} Garner's first assignment of error is overruled.

B. Ineffective Assistance of Counsel

{¶31} In his second assignment of error, Garner argues he was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the U.S. Constitution and Article I, Section 10, of the Ohio Constitution.

{¶32} 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,

---

[6] There were additional periods of delay initiated by Garner that tolled the speedy trial time after the state served its discovery request. On May 23, 2013, Garner's counsel moved for leave to withdraw. On May 29, 2013, Garner moved for a continuance. On June 12, 2013, Garner requested an additional pretrial. On July 2, 2013, Garner filed a demand for discovery. On August 8, 2013, Garner moved for continuance. On October 16, 2013, Garner moved for continuance. On October 21, 2013, Garner's counsel withdrew and trial was continued. On November 6, 2013, Garner filed a demand for discovery and bill of particulars. On November 19, 2013, Garner moved for continuance. On December 10, 2013, Garner filed a motion to suppress evidence.

second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). "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*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. A "reasonable probability" in this context is one that undermines confidence in the outcome. *See State v. Sanders*, 92 Ohio St.3d 245, 274, 750 N.E.2d 90 (2001).

1. Prosecutor's Opening Statement

{¶33} Garner initially contends "trial counsel was ineffective for failing to object to the state's use of allegations from D.G. during its opening statement."

{¶34} "Generally, prosecutors are entitled to considerable latitude in opening and closing arguments." *State v. Whitfield*, 2d Dist. Montgomery No. 22432, 2009-Ohio-293, ¶ 12. Moreover, an opening statement is not evidence but is intended to advise the jury of what counsel expects the evidence to show. *State v. Turner*, 91 Ohio App.3d 153, 631 N.E.2d 1117 (1st Dist.1993). As such, the prosecutor and defense counsel may, in good faith, make statements as to what they expect the evidence will show. *Id*.

{¶35} In this case, the prosecutor stated during its opening statement that it intended to prove that Garner inappropriately touched the minor victim D.G. At the time

the statement was given, the prosecutor had a good faith belief that D.G. would be testifying at trial. Therefore, while the charges corresponding to D.G. were ultimately dismissed because she did not testify at trial, defense counsel did not have a legal basis to object to the prosecution's reference to D.G. during its opening statement. Accordingly, we find defense counsel was not deficient for failing to object to the challenged portion of the prosecutor's opening statement.

2. Detective's Use of the Term "Victim"

{¶36} Next, Garner contends trial counsel was "ineffective for failing to object to Detective Jack Lent's ('Det. Lent') characterization of the accusers as 'victims.'"

{¶37} At trial, Det. Lent was questioned at length about his investigation into the allegations raised against Garner. In the course of his testimony, Det. Lent often referred to D.T. and A.C. as "victims." Garner contends that referring to an accuser as a "victim" has the effect of instructing the jury that the crime did occur, "thereby depriving a defendant the presumption of innocence."

{¶38} While we recognize the concerns raised by Garner, we are unable to conclude that there is a reasonable probability the result of the trial would have been different had defense counsel objected to Det. Lent's reference to D.T. and A.C. as victims. Accordingly, Garner cannot establish the requisite level of prejudice necessary for his ineffective assistance of counsel claim.

3. Preservation of Evidence

{¶39} Garner further contends that counsel was ineffective for failing to subpoena his treating physician, Dr. Carrie Basset ("Dr. Basset"), to testify as a medical expert. Garner argues that Dr. Basset, "would have offered testimony rebutting the allegations against him; namely, that he could not have committed some of the offenses due to his medical conditions and treating medications."

{¶40} After careful review of the record, it is apparent that the trial court was not satisfied with defense counsel's repeated attempts to introduce certain medical records into evidence without producing Dr. Basset as a witness at trial. As referenced by the trial court, counsel's conduct did not comport with the most basic rules of criminal discovery, and her failure to request a continuance to produce Dr. Basset was "concerning."

{¶41} However, we are unable to conclude that Garner was prejudiced by defense counsel's failure to subpoena Dr. Basset. At trial, Garner and Harvey each testified about Garner's various medical conditions and his physical limitations that purportedly would have prevented him from engaging in the alleged sexual conduct. Thus, the jury, as the trier of fact, was presented with the relevant medical information supporting Garner's defense. Furthermore, we note that any testimony from Dr. Basset concerning Garner's erectile dysfunction would have been irrelevant to the majority of Garner's convictions which involved acts of cunnilingus, touching, rubbing, and digital penetration. For these reasons, we cannot say the outcome of the trial would have been different had Dr. Basset testified at trial.

4. Trial Preparation

{¶42} Finally, Garner claims that counsel failed to act with "reasonable diligence and promptness" when preparing for trial. Garner argues that defense counsel failed to meet with his prior counsel until the morning of trial and, therefore, did not have adequate time to prepare a sufficient defense.

{¶43} Despite Garner's position to the contrary, our review of the record reflects that defense counsel's preparations for trial began well before the morning of trial. Although defense counsel admitted that she was unable to meet with Garner's prior counsel until the day of trial, the parties' on-the-record discussion with the trial court demonstrates that defense counsel's inability to meet with prior counsel at an earlier time had no impact on her preparation of the case or her ability to proceed with the trial as scheduled. While Garner continues to challenge defense counsel's tactical decision to proceed with trial without subpoenaing Dr. Basset, we find nothing in the record to suggest counsel was ineffective for failing to meet with prior counsel before the morning of trial.

{¶44} Based on the foregoing, Garner's second assignment of error is overruled.

C. Sufficiency and Manifest Weight of the Evidence

{¶45} In his third assignment of error, Garner argues his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence.

{¶46} Although the terms "sufficiency" and "weight" of the evidence are "quantitatively and qualitatively different," we address these issues together because they

are closely related, while applying the distinct standards of review to Garner's arguments. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

{¶47} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. 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.

{¶48} In contrast to sufficiency, "weight of the evidence involves the inclination of the greater amount of credible evidence." *Thompkins* at 387. While "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, * * * weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *Thompkins* at 386-387. "In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's?" *Id*. The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses to determine "'whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983).

{¶49} We are mindful that the weight to be given the evidence and the credibility of the witnesses are matters primarily for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964). "The choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986).

{¶50} In challenging the sufficiency of the evidence supporting his convictions, Garner argues the state failed to prove he committed the offenses during the time frame specified in his indictment. Relevant to the arguments raised by Garner, Counts 1 through 12 of the indictment alleged that the sexual conduct or sexual contact with A.C. occurred between July 1, 2012, and August 31, 2012. Counts 13 through 21 of the indictment alleged that the sexual conduct or sexual contact with D.T. occurred between September 1, 2010, and June 30, 2012.

{¶51} This court has held that "specificity as to the time and date of an offense is not required in an indictment." *State v. Bogan*, 8th Dist. Cuyahoga No. 84468, 2005-Ohio-3412, ¶ 10, citing *State v. Shafer*, 8th Dist. Cuyahoga No. 79758, 2002-Ohio-6632.

{¶52} This is especially the case where the victim is a child victim of sexual assault, as were the victims in this case:

"[W]here such crimes constitute sexual offenses against children, indictments need not state with specificity the dates of alleged abuse, so long as the prosecution establishes that the offense was committed within the time frame alleged." *State v. Barnecut*, 44 Ohio App.3d 149, 152, 542 N.E.2d 353 (1988); *see also State v. Gus*, 8th Dist. Cuyahoga No. 85591, 2005-Ohio-6717. This is partly due to the fact that the specific date and time of the offense are not elements of the crimes charged. *Gus*, at ¶ 6. Moreover, many child victims are unable to remember exact dates and times, particularly where the crimes involved a repeated course of conduct over an extended period of time. *State v. Mundy*, 99 Ohio App.3d 275, 296, 650 N.E.2d 502 (1994). "The problem is compounded where the accused and the victim are related or reside in the same household, situations which often facilitate an extended period of abuse." *State v. Robinette*, 5th Dist. Morrow No. CA-652, 1987 Ohio App. LEXIS 5996, *8 (Feb. 27, 1987).

State v. Yaacov, 8th Dist. Cuyahoga No. 86674, 2006-Ohio-5321, ¶ 17. Thus, when dealing with the memory of a child, reasonable allowances for inexact dates and times must be made. *Id.* *See also State v. Ibrahim*, 8th Dist. Cuyahoga No. 102114, 2015-Ohio-3345, ¶ 32.

{¶53} In this case, D.T. and A.C. provided detailed accounts of the sexual abuse that occurred while they spent time at Garner's house. Specifically, D.T. testified that Garner touched her chest and vagina with his fingers and digitally penetrated her vagina with his fingers on approximately one to five occasions. D.T. testified that the sexual abuse took place when she slept over at Garner's home. Although D.T. could not remember when the sexual abuse started, she testified that Garner touched her while she was in the third and fourth grade, which covered the school years 2011-2012 and 2012-2013.

{¶54} Similarly, A.C. testified that when she was nine years old Garner rubbed her buttocks and touched her vagina with his tongue and fingers. Further, A.C. testified that Garner made her touch and lick his "private areas." She also recalled an incident where

Garner "rubbed [her] vagina" with his private part. Finally, A.C. testified that Garner threatened to "chop her head off" if she told someone. A.C. testified that these events took place during her summer break from school when she was nine years old, which encompassed the summer of 2012.

{¶55} Viewing the evidence in a light most favorable to the prosecution, we find a rational trier of fact could have found the essential elements of the crimes proven beyond a reasonable doubt. While the minor victims were unable to provide specific dates, the prosecution established that the offenses were committed within the time frame alleged in the indictment. The inexactness in time does not render the evidence insufficient to support Garner's convictions. Furthermore, the inexactness was not detrimental to Garner's defense because he maintained at trial that the sexual abuse never occurred.[7] *See State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E.2d 781 (1985). Accordingly, we find Garner's convictions were supported by sufficient evidence.

{¶56} Moreover, we are unable to conclude that Garner's convictions were against the manifest weight of the evidence. The jury, as the trier of fact, was in the best position to weigh the credibility of the witnesses and was free to give substantial weight to the testimony of D.T. and A.C. Deferring to the jury's assessment of credibility, as we must, we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered.

{¶57} Garner's third assignment of error is overruled.

---

[7] Garner's notice of alibi only related to the minor victim D.G.

D. Sentencing

{¶58} In his fourth assignment of error, Garner argues the trial court improperly imposed sentences on his GSI and kidnapping counts that are contrary to law.

{¶59} This court reviews sentences pursuant to R.C. 2953.08(G)(2), which states in pertinent part:

> The appellate courts' standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds * * * :
>
> * * *
>
> (b) That the sentence is * * * contrary to law.

{¶60} A sentence is contrary to law if (1) the sentence falls outside the statutory range for the particular degree of offense, or (2) the trial court failed to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12. *State v. Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, ¶ 13-14, citing *State v. Holmes*, 8th Dist. Cuyahoga No. 99783, 2014-Ohio-603, ¶ 10, and *State v. Hodges*, 8th Dist. Cuyahoga No. 99511, 2013-Ohio-5025, ¶ 7.

{¶61} In this case, the record reflects that the trial court considered all required factors of law including the principles and purposes of sentencing under R.C. 2929.11, as well as the seriousness and recidivism factors under R.C. 2929.12. The trial court relied extensively on Garner's exploitation of his position of trust over the minor victims and

their families and concluded that Garner committed the worst form of the offenses for which he was convicted.

{¶62} Furthermore, we find that Garner's life sentence with the possibility of parole after 25 years is within the statutory range for his kidnapping convictions. (Counts 4, 8, 15, 18, and 21.) Having been found guilty of kidnapping in violation of R.C. 2905.01(A)(4) with sexual motivation and sexually violent predator specifications, Garner was subject to an indefinite prison term "consisting of a minimum term of fifteen years and a maximum term of life imprisonment," pursuant to R.C. 2971.03(A)(3)(b)(i).[8] While not the minimum sentence the trial court could have imposed, the sentences imposed on Garner's kidnapping convictions fall within the statutory range and, therefore, are not contrary to law. *See State v. Brown*, 8th Dist. Cuyahoga No. 98540, 2013-Ohio-1982, ¶ 36 (Upholding a sentence of 12 years to life for rape with a sexually violent predator specification pursuant to R.C. 2971.03(A)(3)(d)(ii).).

{¶63} However, we find that the trial court's imposition of a 25-year sentence for Garner's GSI convictions was contrary to law. R.C. 2971.03(A)(3)(a) provides:

> Except as otherwise provided in division (A)(3)(b), (c), (d), or (e) or (A)(4) of this section, if the offense for which the sentence is being imposed is an offense other than aggravated murder, murder, or rape and other than an offense for which a term of life imprisonment may be imposed, it shall impose *an indefinite prison term consisting of a minimum term fixed by the court from among the range of terms available as a definite term for the offense, but not less than two years, and a maximum term of life imprisonment*.

---

[8] Garner does not contend he released the minor victims "in a safe place unharmed." *See* R.C. 2971.03(A)(3)(b)(i).

(Emphasis added.) *Id.*

{¶64} Pursuant to the express language of the statute, we find the trial court plainly erred by sentencing Garner to 25 years on each GSI charge. As mandated by R.C. 2971.03(A)(3)(a), the court was required to impose an indefinite term of imprisonment, consisting of a minimum term fixed by the court among the range of terms available as a definite term for the GSI offenses,[9] but not less than two years, and a maximum term of life. Accordingly, the trial court's imposition of a definite prison term was contrary to law.

{¶65} Based on the foregoing, we vacate the sentences imposed on the GSI offenses and remand for resentencing in accordance with R.C. 2971.03. *See* R.C. 2953.08(G)(2).

{¶66} Garner's fourth assignment of error is sustained.

III. Conclusion

{¶67} Garner's statutory right to a speedy trial was not violated. Further, Garner did not receive ineffective assistance of counsel during trial. Garner's convictions were supported by sufficient evidence and were not against the manifest weight of the

---

[9] The sentencing range available as a definite term for a violation of R.C. 2907.05(A)(4) is "twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months." R.C. 2929.14(A)(3)(a).

evidence. However, the trial court's imposition of a definite prison term on the GSI counts was contrary to law.

{¶68} Accordingly, Garner's convictions are affirmed. The sentences imposed on the GSI charges are vacated, and this case is remanded for resentencing on those charges, consistent with this opinion.

{¶69} Judgment affirmed in part, reversed in part, and case remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the 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.

EILEEN T. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., and
TIM McCORMACK, J., CONCUR