[Cite as *State v. Diaz*, 2016-Ohio-5523.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103878

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

PEDRO DIAZ

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-596335-A

BEFORE: McCormack, P.J., Laster Mays, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: August 25, 2016

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TIM McCORMACK, J.:

{¶1} Defendant-appellant Pedro Diaz appeals from his convictions for rape, gross sexual imposition ("GSI"), importuning, compelling prostitution, and kidnapping. For the reasons that follow, we affirm.

I. Procedural History

{¶2} Diaz was charged under a multiple-count indictment pertaining to acts allegedly committed against three separate victims: Count 1, rape of A.S.; Count 2, kidnapping of A.S.; Count 3, gross sexual imposition ("GSI"), involving I.O.; Count 4, importuning, involving I.O.; Counts 6, 9, and 12, rape of I.O.; Counts 5, 8, 11, and 14, kidnapping of I.O.; Counts 7, 10, and 13, compelling prostitution, involving I.O.; Count 15, gross sexual imposition, involving K.R.; and Count 16, kidnapping of K.R. The indictment alleged that Diaz committed the acts against I.O. between April 2014 and October 2014 and the acts against A.S. and K.R. in March 2015.

{¶3} Prior to trial, the court conducted voir dire of K.R., who was 3 years old at the time of the incident. The court determined that K.R. was not competent to testify at trial. The court also conducted voir dire of Laura Evans, a forensic DNA analyst with the Cuyahoga County Medical Examiner's Office. The court determined that Evans was qualified as an expert witness. The matter proceeded to a jury trial in November 2015.

{¶4} At the close of the state's case, defense counsel moved for Crim.R. 29 acquittal. The trial court granted the defense motion as it related to Counts 2, 3, 5, 10, and 12 -14, and it dismissed those charges. The state conceded the dismissals of Counts 10 and 13.

{¶5} The jury found Diaz guilty of the following counts pertaining to the acts committed against I.O.: Count 4, importuning; Count 6, rape; Count 7, compelling prostitution;

and Count 8, kidnapping. The jury also found Diaz guilty of Counts 15 (GSI) and 16 (kidnapping), which involved K.R. Finally, the jury acquitted Diaz of the alleged rape of A.S. in Count 1, the rape of I.O. in Count 9, and the kidnapping of I.O. in Count 11.

{¶6} The court sentenced Diaz to five years imprisonment on Count 4, five years on Count 7, ten years to life on Count 6, and fifteen years to life on Count 8. The state conceded that Counts 15 and 16 merge for sentencing and it elected to sentence on Count 16. The court sentenced Diaz to fifteen years to life on Count 16. The court ordered the sentences of Counts 4, 7, and 8, to run concurrently and the sentences in Counts 6 and 16 (merged with Count 15) to run consecutively.

{¶7} Diaz now appeals his convictions, assigning the following errors for our review:

> I. The trial court erred in admitting hearsay testimony, which does not fall under the hearsay exception of Evid.R. 803(4), thereby depriving defendant-appellant of a fair trial.
>
> II. The trial court erred when it admitted other acts evidence over the objection of counsel, thereby depriving defendant-appellant of a fair trial.
>
> III. Defendant-appellant was denied effective assistance of counsel when counsel failed to file a motion for relief from prejudicial joinder.
>
> IV. Defendant-appellant's convictions were not supported by sufficient evidence.
>
> V. Defendant-appellant's convictions are against the manifest weight of the evidence.

II. Evidence at Trial

{¶8} At trial, the state presented the following witnesses: A.S.; A.S.'s mother; I.O.; I.O.'s mother; Sexual Assault Nurse Examiners ("SANE"), Julie Longo and Christina Raymond; and social workers, Tina Funfgeld and Stephanie Moore.

{¶9} A.S., who was 12 years old on the date in question, and her family met Diaz at church, and they became friends. Diaz invited A.S. and her family to stay with him after her family had been evicted from their home. A.S. shared a small bedroom with her mother and her two younger siblings, a 2-year-old brother and her 3-year-old sister, K.R. On occasion, A.S. and her mother took turns sleeping on the couch. At the time of the alleged incident, A.S. and her family had been staying with Diaz in his home in Cleveland for approximately one year.

{¶10} A.S. testified that in the early morning of March 20, 2015, Diaz entered the room where she was "half sleeping and half awake," removed the blanket that was covering her, opened her pants, and placed two fingers in her vagina. She then awakened. A.S. stated that she did not like it and she pushed Diaz away and told him to "get off" of her. At this point, her friend, I.O., came into the room, and Diaz left. A.S. did not tell I.O. what happened because she was scared. That afternoon, however, A.S. told I.O. what happened with Diaz in the morning. I.O. told A.S. that the same thing happened to her previously. After speaking with I.O., A.S. told her mother what happened.

{¶11} A.S.'s mother testified that A.S. was behaving "really cold" with her siblings after school, acting "weird," so she asked A.S. if anything was wrong. At this point, A.S. explained what had happened with Diaz in the morning and she began to cry. A.S.'s mother became angry and grabbed a large kitchen knife because she felt the need to protect A.S. She told A.S. to pack her things, and she proceeded to phone her estranged husband, asking him to come to the home. A.S. confronted Diaz in the presence of other family members and friends. While A.S. phoned 911, Diaz ran off. A group of people chased after him. Diaz was later apprehended.

{¶12} A.S. testified that the ambulance arrived while she was standing outside with her friends and family, including I.O. and her little sister, K.R. After speaking with the police

officer, A.S., K.R., and I.O. were transported to the hospital for evaluation. A.S.'s mother testified that someone on the scene suggested K.R. have a medical evaluation as well.

{¶13} I.O., who was between 11 and 12 years old at the time of the alleged incidents, testified that Diaz had been her neighbor and she had known Diaz for six or seven years. She testified that Diaz began touching her and offering her money when she was 11 years old. She stated that in April 2014, Diaz offered her $100 to have sexual intercourse with him. She said "no." He then grabbed her and forced her to have sex with him. She explained that while they were seated on the living room couch, Diaz removed her pants and placed his penis in her vagina. I.O. stated that "he kept forcing me until * * * he actually did it and he then gave me the money." She did not report the incident.

{¶14} I.O. further testified that on another occasion, in May 2014, a couple of days before her 12th birthday, she entered Diaz's room upon her father's request. I.O.'s father asked I.O. to get something her father needed for cooking from Diaz. I.O. stated that upon entering Diaz's room, Diaz asked if she wanted to have sex with him, to which she replied that she did not. Despite her answer, Diaz grabbed her, forced I.O. onto the bed, removed her pants, and proceeded to have sex with her. She became upset and depressed and returned home. Once again, she did not report the incident to the authorities or her parents. She was afraid to tell her father. She did, however, tell her boyfriend. I.O.'s boyfriend met with I.O.'s parents and told them what Diaz had done. I.O. stated that her parents told her to stay away from Diaz. She explained that it was difficult to avoid Diaz because he "kept on following [us] every time we moved." Nonetheless, she did stop visiting Diaz.

{¶15} I.O. testified that on the morning of March 20, 2015, she went to visit A.S., who was staying with Diaz, in order to retrieve some of her clothing. I.O. explained that she felt

more comfortable going to Diaz's house now that A.S. was staying there. Upon entering the home, she observed Diaz running from the living room to the kitchen. She also observed A.S. looking scared.

{¶16} Later that day, after school, I.O. returned to visit A.S. She stated that A.S. appeared worried and "wasn't looking the same [and] she wasn't playing much." Eventually, A.S. opened up and told I.O. what happened with Diaz. After seeing A.S., I.O. went to Diaz and asked to use his telephone, as she often did. I.O. testified that upon returning his phone, Diaz grabbed her by the hand and asked if she wanted to have sex for $20. I.O. stated that she pushed him away and said "no." I.O. convinced A.S. to tell her mother what happened that morning with Diaz.

{¶17} I.O.'s mother testified that she has known Diaz for seven years. He was their neighbor many times in multiple locations. Every time her family would move, Diaz would follow. At one point in time, she and I.O.'s father learned of the allegations against Diaz. I.O.'s parents met to discuss I.O.'s allegations against Diaz. I.O.'s mother testified that they did not believe I.O. because they could not believe that someone they had known for so long "would do something like that to her." Neither parent reported Diaz to the authorities. I.O.'s mother testified that she feels badly about that now.

{¶18} The girls were transported to the emergency room at Fairview Hospital. A.S. and K.R. were examined by SANE nurse, Julie Longo. Longo explained that the duties of a SANE nurse include the following: conduct a detailed history; ensure that the patient is medically stable; perform a "hands-on" physical assessment, including a detailed genital exam, "looking for any injuries"; collect evidence for a sexual assault kit "as a courtesy" to the patient; provide safety planning; provide resources for their well-being after the alleged assault, including referring the

patient to counseling, as needed; and contact police or social services. Longo stated that the SANE nurse primarily ensures the patient's safety.

{¶19} As the primary forensic, or SANE nurse, on call at the time, Longo conducted an interview, obtaining the patients' history, and performed a medical examination of both girls. Longo stated that during the interview process, in obtaining the patient's history, she asked A.S. what happened on the morning in question. A.S. told Longo that while she was sleeping, Diaz reached into her pants and put his finger in her vagina. A.S. told Longo that he stopped when she awakened and pushed Diaz away. After speaking with A.S., Longo conducted a physical examination of A.S. and obtained consent to perform a sexual assault kit. As part of the examination, Longo obtained DNA swabs and she collected A.S.'s underwear.

{¶20} Longo also interviewed and conducted an examination of A.S.'s little sister, K.R. Upon reviewing her notes from the interview (history), Longo testified concerning her interview of K.R. as follows:

Nurse:	Does anything hurt you right now?
Patient:	Yes.
Nurse:	Can you tell me what hurts?
Patient:	My tootie. [Patient refers to genitalia area as * * * tootie.]
Nurse:	Tell me why your tootie hurts. (Patient coloring.) Did something or somebody hurt your tootie?
Patient:	Uh huh. Pedro [Diaz]. Pedro says I'm his best friend. (Patient took left hand and was rubbing hand back and forth on genital area.)
Nurse:	And what else? (Patient drops stickers on floor.)
Patient:	I say, no. No. You don't do that to me. Hey. Hey. No. No.

Longo testified that, at this point, K.R. became fidgety and was no longer able to engage in further conversation.

{¶21} Longo also testified regarding the collection of evidence contained in the sexual assault kit that resulted from her examination of K.R. The items included K.R.'s underwear and various DNA swabs.

{¶22} SANE nurse, Christina Raymond, testified that her role as a SANE nurse is to tend to the care and well-being of the patient. In this role, Raymond conducted the examination of I.O. Raymond testified that she took the patient's history and performed a physical examination. Raymond explained that there was no sexual assault kit performed in this case because it was past the 96-hour time frame required for collection. Raymond did, however, collect I.O.'s underwear and pants that were worn during that day's alleged assault. During the physical examination, Raymond noted no physical injuries. Raymond testified that I.O. covered her face with her hands while Raymond took the patient's history.

{¶23} Tina Funfgeld, a sex abuse investigative social worker with the Cuyahoga County Department of Children and Family Services, testified regarding her interactions with A.S. and K.R. Funfgeld testified that in her capacity as a social worker in the sex abuse unit, she responds to cases called into the department's hotline. Her duties include meeting with families, assessing safety, and providing medical and psychological referrals to children in need during the course of an investigation.

{¶24} As a result of a call that came into the hotline, Funfgeld met with A.S. and K.R., as well as their mother. The purpose of their meeting was to forensically interview the children regarding the allegations of sex abuse, which included learning about what happened, assessing

the children's safety, and making any necessary referrals for cognitive behavioral therapy ("CBT") that may have been necessitated by the trauma the children suffered.

{¶25} Funfgeld testified that A.S. reported the details of the alleged assault by Diaz, explaining that she awakened to Diaz inserting his finger into her vagina. She also stated that A.S. told her it was not the first time Diaz "had tried." Regarding her interaction with K.R., Funfgeld testified that she used an anatomically correct drawing of a child of the same age and asked K.R. questions. She explained that she pointed to all of the body parts and K.R. would identify each part of the body. When Funfgeld pointed to the vagina, K.R. referred to it as a "toto" and told her that Diaz touches her there with his hand, under her clothes. Funfgeld stated that she referred A.S. and K.R. for CBT because there were concerns regarding how the children were "dealing with things."

{¶26} Stephanie Moore, also a sex abuse investigative social worker with the county, testified that her duties include assessing the children's safety and making any necessary medical and psychological referrals. In response to a report of sexual abuse, Moore met with I.O. Moore testified that I.O. provided details regarding incidents involving Diaz. I.O. told her that Diaz had sex with her three times: in or around April 2014, on the living room couch; in July 2014, in his bedroom; and in or around October 2014, again on the living room couch. She also reported that in March 2015, Diaz offered her $100 for sex with her, while touching her thigh and vagina. Moore stated that I.O. had been nervous and afraid during her evaluation. Following her meeting with I.O., Moore referred I.O. for psychological services at Guidestone Project, which is a counseling service that further evaluates the referred children to determine the specific services required.

III. Hearsay Testimony

{¶27} In his first assignment of error, Diaz claims that the trial court erred in admitting hearsay testimony. More specifically, he contends that the court erred when it allowed the admission of statements that K.R. made to the SANE nurse and statements that K.R. and I.O. made to the social workers. Diaz argues that the statements identifying him as the perpetrator of the assaults were inadmissible hearsay and a violation of his constitutional right to confrontation.

{¶28} The Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." *See State v. Issa*, 93 Ohio St.3d 49, 752 N.E.2d 904 (2001). Further, Section 10, Article I of the Ohio Constitution provides that "[i]n any trial, in any court, the party accused shall be allowed * * * to meet the witnesses face to face * * *." *Id.*

{¶29} The Confrontation Clause prohibits the admission of an out-of-court statement of a witness who does not appear at trial if the statement is testimonial, unless the defendant has had an opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). "Testimonial" statements generally include hearsay statements "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id.* at 52, quoting the amicus brief of the National Association of Criminal Defense Lawyers. In determining whether a statement is testimonial for purposes of the Confrontation Clause, "'courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant's expectations.'" *State v. Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415, ¶ 21, quoting *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, paragraph two of the syllabus.

{¶30} In attempting to determine whether a statement is testimonial, the United States Supreme Court has employed the "primary purpose" test, from which it seeks to quantify the primary objective of the questioning:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). More recently, the Supreme Court explained that in making a "primary purpose" determination, the courts must consider all relevant circumstances, and "'[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Ohio v. Clark*, 576 U.S.___, 135 S.Ct. 2173, 2176, 192 L.Ed.2d 306 (2015), quoting *Michigan v. Bryant*, 562 U.S. 344, 359, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011). Moreover, "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause." *Clark* at 2182.

{¶31} Hearsay is an out-of-court statement offered for the truth of the matter asserted. Evid.R. 801(C). Hearsay is inadmissible unless it falls within a specific exception outlined in the rules of evidence. Evid.R. 802. Where the issue concerns the introduction of hearsay evidence in a criminal matter, the reviewing court must determine "not only whether the evidence fits within an exception to the hearsay rule, but also whether the introduction of such evidence offends an accused's right to confront witnesses against him." *Thomas* at ¶ 18, citing *State v. Kilbane*, 8th Dist. Cuyahoga No. 99485, 2014-Ohio-1228, ¶ 29.

{¶32} This court has repeatedly held that statements elicited during questioning by medical personnel for the purposes of medical diagnoses and treatment are not testimonial, and therefore, are not barred by the Confrontation Clause. *State v. Echols*, 8th Dist. Cuyahoga No. 102504, 2015-Ohio-5138 (the introduction of medical records containing the child victim's statements and the testimony of her treating physician was not a violation of the Confrontation Clause because the statements included a description of the attack reasonably related to medical diagnosis and treatment and were admissible under Evid.R. 803(4)); *Thomas*, 8th Dist. Cuyahoga No. 101202, 2015-Ohio-415 (no violation where victim's primary reason for providing a narrative account of rape to medical professionals was for medical treatment rather than investigation); *State v. Bowleg*, 8th Dist. Cuyahoga Nos. 100263 and 100264, 2014-Ohio-1433 (the victim's denial of any physical injury was not dispositive of her need for medical treatment and she would have no reason to believe her statements about the rape made to medical personnel would be used for anything other than medical treatment).

{¶33} "Statements made for the purposes of medical diagnosis and treatment are a clearly defined, long-standing exception to the rules of hearsay." *Echols* at ¶ 27. Evid.R. 803(4) allows for the admission of "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Additionally, "'courts have consistently found that a description of the encounter and identification of the perpetrator are within [the] scope of statements for medical treatment and diagnosis.'" *Echols*, quoting *In re D.L.*, 8th Dist. Cuyahoga No. 84643, 2005-Ohio-2320, ¶ 21, citing *State v. Stahl*, 9th Dist. Summit No. 22261, 2005-Ohio-1137, at ¶ 15; *State v. Richardson*, 12th Dist. Clermont Nos. CA2014-03-023, CA2014-06-044 and

CA2014-06-045, 2015-Ohio-824, ¶ 36 (child-victim's statements to child advocacy social worker and forensic examiner regarding the identity of the perpetrator, the type of abuse alleged, the time frame of the alleged abuse and identification of the areas where the child had been touched were made for purpose of medical diagnosis and treatment and were, therefore, admissible under Evid.R. 803(4)).

{¶34} In explaining how a victim's statement that she had been raped and the facts associated with the rape are relevant for medical diagnosis and treatment, this court stated as follows:

> "A victim's statement that she had been raped is relevant for medical diagnosis and treatment because it directs medical providers to examine the genital areas for physical injury, administer a pregnancy test, and prescribe medications for the prevention of sexually transmitted diseases * * *. A patient's statements concerning how the alleged rape occurred can be relevant to show the 'general cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.' Evid.R. 803(4). For example, the victim's statements may guide medical personnel to the particular area(s) of the victim's body to be examined for injury, as well as indicate which areas may need more immediate treatment than others. *State v. Menton*, 7th Dist. [Mahoning] No. 07 MA 70, 2009-Ohio-4640, ¶ 51 ('* * * the description of how the [sexual] assault took place, over how long of a period, how many times a person was hit, choked or penetrated, and what types of objects were inserted are all specifically relevant to medical treatment. They are part of the medical history. They are the reason for the symptoms. They let the examiner know where to examine and what types of injuries could be latent.')"

Bowleg at ¶ 19, quoting *State v. Wallace*, 3d Dist. Union No. 14-10-20, 2011-Ohio-1728, ¶ 18.

{¶35} In *Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, the Ohio Supreme Court considered whether hearsay statements by an adult rape victim to a nurse working in a specialized medical facility for sexual assault victims were admissible when the victim was not available to testify at trial. In focusing on the expectation of the victim when making the statement, the court found that the victim's statements were made to a medical professional at a

medical facility for the primary purpose of receiving medical treatment and not investigating past events related to criminal prosecution. *Id.* at ¶ 25. The court held that the statements made by the rape victim to the nurse were nontestimonial because the victim "could have reasonably believed that although the examination conducted at the [sexual assault] unit would result in scientific evidence being extracted for prosecution purposes, the statement would be used primarily for health-care purposes." *Id.* at ¶ 47.

{¶36} In *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, the Ohio Supreme Court held that the statements of a child victim of sexual assault made to doctors and counselors about how her father had sexually abused her were not testimonial and were admissible because they had been made to medical personnel in the course of medical diagnosis and treatment. The court held that "[s]tatements made to medical personnel for purposes of diagnosis or treatment are not inadmissible under Crawford, because they are not even remotely related to the evils that the Confrontation Clause was designed to avoid." *Id.* at ¶ 63. The court noted that "[t]he fact that the information gathered by the medical personnel in this case was subsequently used by the state does not change the fact that the statements were not made for the state's use." *Id.* at ¶ 62.

{¶37} In sexual assault cases involving young victims, there is often testimony from a SANE nurse and a social worker. Courts have acknowledged the "dual role" — medical diagnosis/treatment and investigation/gathering of evidence — of both the nurses and the social workers who interview a child who may be the victim of sexual abuse. *See State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, ¶ 33. Only those statements made for the purpose of diagnosis and treatment are admissible under Evid.R. 803(4). *Muttart* at ¶ 47 (regardless of whether a child less than ten years old has been determined to be competent to

testify, the child's statements may be admitted at trial as an exception to the hearsay rule if they were made for purposes of medical diagnosis or treatment). "'To the extent that a victim's statement to a nurse is for investigative purposes in furtherance of such criminal prosecution, the statements will not fall within the hearsay exception under Evid.R. 803(4).'" *State v. Ceron*, 8th Dist. Cuyahoga No. 99388, 2013-Ohio-5241, ¶ 57, quoting *State v. Rose*, 12th Dist. Butler No. CA2011-11-214, 2012-Ohio-5607, ¶ 42. The same analysis applies to young children's statements to social workers. *State v. Goza*, 8th Dist. Cuyahoga No. 89032, 2007-Ohio-6837, ¶ 39. Trial courts are entrusted with recognizing the point in which nontestimonial statements become testimonial. *See Davis*, 547 U.S. at 828, 126 S.Ct. 2266, 165 L.Ed.2d 224.

{¶38} The courts consider several factors when determining the purpose of the child's statements made to either a nurse or a social worker regarding sexual abuse. Such factors will depend on the particular facts and circumstances of a case and may include the following:

> (1) whether the child was questioned in a leading or suggestive manner; (2) whether there is a motive to fabricate, such as a pending legal proceeding or "bitter custody battle"; (3) whether the child understood the need to tell the physician the truth; [(4) whether the age of the particular child making the statements suggests] the absence or presence of an ability to fabricate; [(5) whether the child was consistent in her declarations]; and [(6)] the manner in which a physician or other medical provider elicited or pursued a disclosure of abuse by a child victim, as shown by evidence of the proper protocol for interviewing children alleging sexual abuse. (Citations omitted.)

Muttart at ¶ 49.

{¶39} A trial court has broad discretion in admitting or excluding evidence, and a trial court's ruling on the admissibility of evidence will be upheld absent an abuse of that discretion. *In re C.A.*, 8th Dist. Cuyahoga No. 102675, 2015-Ohio-4768, ¶ 59. An abuse of discretion implies that the court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶40} Here, nurse Longo testified that a sexual assault nurse examiner examines the victim, obtains a history and a physical, looks for any injuries, and refers the victim to well-being services and counseling, as needed. In addition, the SANE nurse provides safety planning, if necessary. Nurse Raymond also testified that a SANE nurse obtains a patient history and conducts a physical examination. Raymond further testified that a SANE nurse's role is to provide for the well-being and care of the patient. It was within this context that Longo met with and examined K.R.

{¶41} Longo testified that while obtaining 3-year-old K.R.'s history, she asked K.R. if anything hurt, to which K.R. replied "yes * * * [her] tootie." Longo then asked K.R. why her tootie hurts and if "something or someone hurt your tootie?" Longo testified that K.R. responded, "Uh huh. Pedro [Diaz]. Pedro says I'm his best friend." At that point, Longo noted that K.R. used her left hand and rubbed it back and forth on her genital area.

{¶42} Upon review, we find that this statement made by a 3-year-old child was for the purpose of medical diagnosis and treatment. The statement was made in the context of providing a medical history and was relevant to the type of treatment K.R. would receive. The nurse's duty to provide for the care and well-being of her patient necessarily included inquiring whether the child was in any pain, or was "hurt." Identifying the source of the pain provided a reason why the child was in pain and it helped the nurse know where to examine and what type of injuries to look for, whether apparent or latent.

{¶43} Furthermore, there is nothing in the record suggesting that the nurse was attempting to elicit statements as part of a police investigation. The fact that the nurse was required to ask for a patient history as part of a rape kit does not demonstrate that the statement was taken solely for the collection of evidence in anticipation of prosecution. *State v. Burgess*, 162 Ohio App.3d

291, 2005-Ohio-3747, 833 N.E.2d 352, ¶ 26 (2d Dist.). Nor does the fact that the statements were used later in trial change the fact that the initial purpose of the statement was not for the state's use. *Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, at ¶ 62.

{¶44} Additionally, it is unlikely that a 3-year-old child would believe that a nurse, in a medical setting such as a hospital, was examining her for any purpose other than for a medical evaluation. It is also unlikely that a young child would anticipate that her statements to a nurse during a physical examination would ultimately become available for later use in a prosecution. It is more likely that a 3-year-old child possessed very little knowledge of prosecutions and trials and, rather, she would believe that a nurse is there to help her.

{¶45} Finally, there is no evidence that K.R. was being untruthful or inconsistent, or that she was unable to appreciate the truth. The fact that K.R. was deemed incompetent to testify at trial does not automatically mean that the child's statements to a nurse or social worker are unreliable. *In re D.L.*, 8th Dist. Cuyahoga No. 84643, 2005-Ohio-2320, at ¶ 28. "Where the totality of the circumstances fail to demonstrate a lack of reliability or trustworthiness, the statements should be admitted if they fall within the hearsay exception, [and] the credibility of the statements may then be evaluated by the trier of fact." *Id.* Although defense counsel contends that there was a motive to fabricate the allegations against Diaz, in that K.R.'s family was being forced out of Diaz's apartment, there is nothing in the record suggesting that K.R. had any knowledge of this fact or that such knowledge, if any, influenced her statement to the SANE nurse in the course of her examination.

{¶46} The social workers, Funfgeld and Moore, also testified regarding statements made to them by K.R. and I.O., respectively. Funfgeld testified that during her meeting with K.R., K.R. told her that Diaz touches her "toto" under her clothes with his hands. Moore testified that

I.O. told her that Diaz had sex with her three times and she provided details, such as dates and locations.

{¶47} We find that the above statements were made for the purpose of medical diagnosis and treatment. Both social workers testified that their duties as sex abuse social workers included assessing for the children's safety and determining whether any medical or psychological care is needed. The record demonstrates that the children's statements were made to the social workers in the context of this evaluation and in a neutral setting. We note that K.R.'s statement to Funfgeld was consistent with her prior statement to nurse Longo during her sexual assault examination, and there is no indication that K.R. might be untruthful. Also, there is nothing in the record indicating any police presence during the children's meeting with the social workers or suggesting that the children's statements would be used in a prosecution.

{¶48} Furthermore, after meeting with the children, Funfgeld and Moore did, in fact, refer K.R. and I.O. for psychological services. Funfgeld referred K.R. for CBT because of her concerns regarding how K.R. was coping after the assault, and Moore referred I.O. to Guidestone Project for counseling services, where I.O. would be further evaluated to determine other needs.

{¶49} In light of the foregoing, we find that the out-of-court statements made to the SANE nurse and the social workers were not elicited as part of a police investigation or in anticipation of prosecution, but rather, they were made primarily for the purpose of medical diagnosis and treatment. The statements are therefore admissible under the hearsay exception outlined in Evid.R. 803(4). Because the statements were elicited for purposes of medical diagnosis and treatment, and are nontestimonial, they are not barred from trial by the Confrontation Clause. Moreover, I.O. testified at trial and Diaz was afforded the right to

cross-examine her regarding her statements; therefore, there was no violation of Diaz's confrontation rights concerning I.O.'s statements.

{¶50} The trial court did not abuse its discretion in allowing the admission of K.R.'s and I.O.'s statements to the nurse and social workers under the hearsay exception of Evid.R. 803(4). Diaz's first assignment of error is overruled.

IV. Other Acts Evidence

{¶51} In his second assignment of error, Diaz contends that he was denied due process of the law and a fair trial because the trial court improperly admitted "other acts" evidence under Evid.R. 404(B). Specifically, Diaz objects to the SANE nurse's testimony that A.S. told her that Diaz had offered her money for sex previously and the social worker's testimony that A.S. also told her that Diaz had attempted other acts in the past.

{¶52} Under Evid.R. 402, only relevant evidence is admissible. Evid.R. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Although 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." Evid.R. 403. Unfair prejudice is "that quality of evidence which might result in an improper basis for a jury decision." *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 24.

{¶53} Generally, "evidence that an accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime or that he acted in conformity with bad character." *State v.*

Williams, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 15, citing *State v. Curry*, 43 Ohio St.2d 66, 68, 330 N.E.2d 720 (1975).

{¶54} Evid.R. 404(B), "other acts," provides that evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Such evidence may, however, be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

{¶55} Similarly, R.C. 2945.59, which provides certain exceptions to the common law regarding the admission of evidence of other acts of wrongdoing, provides that

> [i]n any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

State v. Terry, 2014-Ohio-4804, 23 N.E.3d 188, ¶ 64 (8th Dist.).

{¶56} In determining whether other-acts evidence is to be admitted, trial courts conduct a three-step analysis: (1) determine if the other-acts evidence is relevant under Evid.R. 401; (2) consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith, or whether the other-acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B); and (3)

consider whether the probative value of the other-acts evidence is substantially outweighed by the danger of unfair prejudice. *State v. Jamie*, 8th Dist. Cuyahoga No. 102103, 2015-Ohio-3583, ¶ 32, citing *Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, at ¶ 20.

{¶57} The admission of other acts evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb such evidentiary decisions in the absence of an abuse of discretion that created material prejudice. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 66.

{¶58} Here, Diaz objects to two statements that were admitted at trial. First, nurse Longo testified that A.S. told her during her examination that Diaz "offered [her] $100 to — ." The testimony was immediately prevented by defense counsel's objection. At which point, counsel engaged in a sidebar with the court, and this testimony did not continue. Additionally, defense counsel alleged that A.S.'s statement had not been redacted from the medical records. Finally, Diaz objects to Funfgeld's testimony that A.S. had made allegations that it was not the first time he "had tried." Diaz claims that the foregoing other acts evidence was a "piling on" of evidence that attempted to demonstrate his bad character and that he was likely to commit such acts, and therefore, the testimony prejudiced him.

{¶59} First, we note that Longo's testimony was cut short by defense counsel's objection. The jury, therefore, did not hear why Diaz allegedly offered A.S. money or whether that offer somehow constituted other bad acts. More importantly, however, to the extent that any of the alleged other acts evidence was admitted and was improper, the statements all concerned allegations made by A.S. Diaz cannot demonstrate he was prejudiced by A.S.'s statements because Diaz was found not guilty on all charges that related to A.S. In fact, of the 16 charges

filed, Diaz was convicted of six, all of which concerned K.R. or I.O. Diaz cannot demonstrate that the allegedly unfairly prejudicial evidence resulted in an improper basis for the jury's verdict.

{¶60} Diaz's second assignment of error is overruled.

V. Ineffective Assistance of Counsel

{¶61} In his third assignment of error, Diaz claims that he received ineffective assistance of counsel when his trial counsel failed to move the court to sever the counts of each of the three children. Diaz argues that the joinder of offenses involving the three children was prejudicial, and it improperly influenced the jury.

{¶62} Under Crim.R. 8(A), which governs the joinder of offenses, two or more offenses may be charged together if the offenses "are of the same or similar character, * * * or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." Similarly, Crim.R. 13 provides that a trial court may order two or more indictments or informations, or both, to be tried together, "if the offenses or the defendants could have been joined in a single indictment or information."

{¶63} The law favors joining multiple offenses in a single trial if the requirements of Crim.R. 8(A) are satisfied. *State v. Ferrell*, 8th Dist. Cuyahoga No. 100659, 2014-Ohio-4377, ¶ 38. If it appears, however, that the defendant would be prejudiced by the joinder, a trial court may grant a severance. Crim.R. 14; *Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, at ¶ 95. The defendant bears the burden of proving prejudice. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 29.

{¶64} The state may rebut a defendant's claim of prejudicial joinder in two ways: (1) by showing that, if in separate trials, the state could introduce evidence of the joined offenses as

"other acts" under Evid.R. 404(B), which is known as the "other acts" test; or (2) by showing that the evidence of each crime joined at trial is simple and direct, which is known as the "joinder test." *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990). "A trier of fact is believed capable of segregating the proof on multiple charges when the evidence as to each of the charges is uncomplicated." *State v. Lunder*, 8th Dist. Cuyahoga No. 101223, 2014-Ohio-5341, ¶ 33, citing *State v. Torres*, 66 Ohio St.2d 340, 343-344, 421 N.E.2d 1288 (1981). Joinder is therefore not prejudicial when the evidence is direct and uncomplicated and can reasonably be separated as to each offense. *Id.*

{¶65} If the state can meet the requirements of the "joinder test," it need not meet the requirements of the stricter "other acts" test. *State v. Franklin*, 62 Ohio St.3d 118, 122, 580 N.E.2d 1 (1991). A defendant is therefore not prejudiced by joinder when simple and direct evidence exists, regardless of the admissibility of evidence of other crimes under Evid.R. 404(B). *Id.*

{¶66} In order to establish a claim of ineffective assistance of counsel, the defendant must show that his trial counsel's performance was deficient in some aspect of his representation and that deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Counsel's performance will be considered deficient only when that performance falls below an objective standard of reasonableness. *Strickland* at 688.

{¶67} Under *Strickland*, our scrutiny of an attorney's representation must be highly deferential and we must indulge "a strong presumption that counsel's conduct falls within the range of reasonable professional assistance." *Id.* at 689. The defendant must therefore overcome the presumption that the challenged action is sound trial strategy. *Id.* Trial strategy

does not constitute ineffective assistance of counsel. *State v. Benitez*, 8th Dist. Cuyahoga No. 98930, 2013-Ohio-2334, ¶ 31, citing *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 111. And the decision to file a motion for separate trials or to proceed with the joinder of the offenses may, in fact, be a matter of counsel's trial strategy. *Ferrell*, 8th Dist. Cuyahoga No. 100659, 2014-Ohio-4377, at ¶ 40.

{¶68} In order to show prejudice, a defendant must demonstrate that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *State v. Geraci*, 8th Dist. Cuyahoga Nos. 101946 and 101947, 2015-Ohio-2699, ¶ 12. "Reasonable probability" is "probability sufficient to undermine confidence in the outcome" of the proceeding. *Strickland* at 694.

{¶69} Here, we find that it is reasonable to presume that trial counsel's decision not to file a motion to sever the offenses in this case was sound trial strategy. Counsel may have reasonably believed that one trial would be the best strategy to attempt to persuade the jury to return a verdict of not guilty on all counts of the indictment at the same time. In fact, in closing argument, defense counsel emphasized the relationship between A.S. and I.O. as "best friends" and implied that the girls, whose stories were equally incredible, fabricated their stories. Counsel questioned why I.O. had not disclosed to her best friend, A.S., that Diaz had raped her, until "[a]ll of a sudden on March 20, 2015, everyone is accusing Pedro Diaz. Everyone."

{¶70} Moreover, the evidence presented by the state was simple and direct, and there was no evidence in the record that the jury confused the evidence as to the different counts or that the jury was influenced by the cumulative effect of the joinder. In fact, the jury's not guilty verdicts on several of the charges demonstrated the jury's ability to apply the evidence separately to each

offense. Joinder was therefore not prejudicial. Accordingly, we find no merit to Diaz's claim of ineffective assistance of counsel.

{¶71} The third assignment of error is overruled.

VI. Sufficiency of the Evidence and Manifest Weight of the Evidence

{¶72} In his fourth and fifth assignments of error, Diaz contends that his convictions were not supported by sufficient evidence and his convictions were against the manifest weight of the evidence.

{¶73} When assessing a challenge of sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "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." *Id.* A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).

{¶74} While the test for sufficiency of the evidence requires a determination whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins* at 390. Also unlike a challenge to the sufficiency of the evidence, a manifest weight challenge raises a factual issue.

> "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a

> manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction."

Id. at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). A finding that a conviction was supported by the manifest weight of the evidence, however, necessarily includes a finding of sufficiency. *State v. Howard*, 8th Dist. Cuyahoga No. 97695, 2012-Ohio-3459, ¶ 14, citing *Thompkins* at 388.

{¶75} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. A factfinder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Ellis*, 8th Dist. Cuyahoga No. 98538, 2013-Ohio-1184, ¶ 18. Although the reviewing court considers the credibility of witnesses in a challenge to the manifest weight of the evidence, it does so "with the caveat that the trier of fact is in the best position to determine a witness' credibility through its observation of his or her demeanor, gestures, and voice inflections." *State v. Campbell*, 8th Dist. Cuyahoga Nos. 100246 and 100247, 2014-Ohio-2181, ¶ 39.

{¶76} Diaz was convicted of kidnapping in violation of R.C. 2905.01(A)(4) in Count 16, with a sexual motivation specification under R.C. 2941.147. Diaz contends that the state failed to present sufficient evidence of kidnapping as it related to K.R. He claims that the state failed to present any evidence that K.R. was restrained or moved from any place.

{¶77} R.C. 2905.01(A)(4) provides that "[n]o person, by force, threat, or deception, or, in the case of a victim under the age of thirteen * * *, by any means, shall remove another from the

place where the other person is found or restrain the liberty of the other person, * * * [t]o engage in sexual activity * * * with the victim against the victim's will." For purposes of this statute, it is not necessary for the state to demonstrate that the defendant used "force" to remove or otherwise restrain the liberty of a child under the age of 13. *State v. Weems*, 8th Dist. Cuyahoga No. 102954, 2016-Ohio-701, ¶ 25. Rather, "the state need only show that the child's liberty was restrained by 'any means.'" *Id.* The "restraint of liberty" means to "limit one's freedom of movement in any fashion for any period of time." *State v. Wingfield*, 8th Dist. Cuyahoga No. 69229, 1996 Ohio App. LEXIS 867, 6 (Mar. 7, 1996); *State v. Mohamed*, 8th Dist. Cuyahoga Nos. 102398 and 103602, 2016-Ohio-1116, ¶ 20.

{¶78} Here, the SANE nurse provided detailed testimony regarding her interactions with 3-year-old K.R. The nurse testified that K.R. told her that Diaz hurt her genital area, and while rubbing her genital area back and forth with her hand, K.R. told the nurse that Diaz "says I'm his best friend." K.R. then tells her, "I say, no. No. You don't do that to me. Hey. Hey. No. No." The social worker also testified that K.R. reported to her that Diaz touches her vagina with his hands under her clothes.

{¶79} Viewing this evidence in a light most favorable to the prosecution, we find that a rational trier of fact could find that Diaz restrained K.R. Diaz, an adult male with whom K.R. shared a home, convinced his 3-year-old victim that she was his best friend in order to place his hand under her clothing and touch her vagina, against her will and causing her pain. Diaz's conviction of kidnapping in Count 16 is therefore supported by sufficient evidence.

{¶80} Diaz's fourth assignment of error is overruled.

{¶81} Diaz also maintains that his convictions were against the manifest weight of the evidence. As the charges relate to K.R., Diaz was convicted of gross sexual imposition in violation of R.C. 2907.05(A)(4) and kidnapping in violation of R.C. 2905.01(A)(4).

{¶82} R.C. 2907.05(A)(4) provides that no person shall have sexual contact with a child less than 13 years of age. "Sexual contact" is defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B). As we previously noted, R.C. 2905.01(A)(4) prohibits restraining the liberty of a child under the age of 13 for the purpose of engaging in sexual activity with the victim against the victim's will. *State v. Singleton*, 8th Dist. Cuyahoga No. 103478, 2016-Ohio-4696, ¶ 38.

{¶83} Here, there is no dispute that K.R. was 3 years old at the time of the alleged incident. Further, as discussed previously, nurse Longo testified that K.R. told her that Diaz hurt her genital area. Longo stated that she observed K.R. rubbing her genital area back and forth with her hand while telling Longo that Diaz "says I'm his best friend." Longo also testified that K.R. told her, "I say, no. No. You don't do that to me. Hey. Hey. No. No." Additionally, the social worker testified to K.R.'s report that Diaz touches her vagina with his hands under her clothes. As a result of their meeting, the social worker referred K.R. to counseling services.

{¶84} Based upon the foregoing, we find that Diaz's convictions as they relate to K.R. were not against the manifest weight of the evidence.

{¶85} As the charges relate to I.O., Diaz was convicted of importuning in violation of R.C. 2907.07(A), rape in violation of R.C. 2907.02(A)(1)(b), compelling prostitution in violation of R.C. 2907.21(A)(3)(a), and kidnapping in violation of R.C. 2905.01(A)(4), as defined above.

{¶86} "Importuning," under R.C. 2907.07 (A), provides that "[n]o person shall solicit a person who is less than thirteen years of age to engage in sexual activity with the offender, whether or not the offender knows the age of such person." "Sexual activity" is defined as sexual conduct or sexual contact, or both. R.C. 2907.01(C). "Sexual conduct" includes vaginal intercourse between a male and female. R.C. 2907.01(A). Within the meaning of the importuning statute, "solicit" means "to seek, to ask, to influence, to invite, to tempt, to lead on, to bring pressure to bear." *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 68; *State v. Marquand*, 8th Dist. Cuyahoga No. 99869, 2014-Ohio-698, ¶ 40.

{¶87} R.C. 2907.02(A)(1)(b), rape, prohibits sexual conduct with a child less than 13 years of age.

{¶88} Under R.C. 2907.21(A)(3)(a), compelling prostitution, no person shall "[p]ay or agree to pay a minor, either directly or through the minor's agent, so that the minor will engage in sexual activity, whether or not the offender knows the age of the minor."

{¶89} Here, the record shows that I.O. was between 11 and 12 years old at the time of the alleged incidents. I.O. testified that Diaz began touching her and offering her money when she was 11 years old. She stated that on one occasion, Diaz offered her money to have sexual intercourse with him and she said "no." She stated that Diaz then grabbed her, removed her pants, and forced her to have sex with him by placing his penis in her vagina. She testified that afterwards, he gave I.O. some money. I.O. also testified that on another occasion, Diaz asked her if she wanted to have sex with him, to which she replied that she did not. Despite her answer, Diaz grabbed her, forced I.O. onto the bed, removed her pants, and proceeded to have sex with her. Additionally, the social worker, Moore, testified that I.O. had reported that Diaz

had sex with her on three occasions, providing approximate dates, and that Diaz had offered her money for sex. As a result of their meeting, Moore referred I.O. to counseling services.

{¶90} Upon our review, we find that Diaz's convictions as they relate to I.O. are not against the manifest weight of the evidence.

{¶91} Diaz's fifth assignment of error is overruled.

{¶92} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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

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TIM McCORMACK, PRESIDING JUDGE

ANITA LASTER MAYS, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR