[Cite as *State v. Houser*, 2026-Ohio-3599.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 24AP-651 (C.P.C. No. 20CR-4371)
v.	:	(REGULAR CALENDAR)
Kenneth L. Houser, Jr.,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 15, 2026

Shayla D. Favor, Prosecuting Attorney, and *Benjamin A. Tracy*.

Kenneth L. Houser, Jr., pro se.

ON APPLICATION TO REOPEN

JAMISON, J.

{¶ 1} Defendant-appellant, Kenneth L. Houser, Jr., has timely filed an application to reopen his appeal on April 9, 2026, pursuant to App.R. 26(B). On May 11, 2026, plaintiff-appellee, State of Ohio, filed a response in opposition to appellant's application to reopen. For the following reasons, we deny the application.

{¶ 2} Procedurally, appellant filed a notice of appeal of his conviction by jury trial in the Franklin County Court of Common Pleas on October 24, 2024. On December 13, 2024, appellate counsel filed appellant's brief. On March 10, 2025, the state filed its brief. On May 16, 2025, appellant, pro se, filed a motion for leave to file instanter reply brief of appellant. The motion was granted and appellant filed a reply brief, pro se. On June 4, 2025, appellant filed a second motion for leave to proceed pro se for the limited purpose of filing a second reply brief instanter. On June 11, 2025, the motion was denied and the court struck appellant's reply brief of June 4, 2025. Appellant's conviction and sentence were affirmed on January 8, 2026. *State v. Houser*, 2026-Ohio-32 (10th Dist.). On February 23, 2026, appellant filed a notice of appeal in the Supreme Court of Ohio. On May 12, 2026, the Supreme Court declined to accept jurisdiction. *State v. Houser*, 2026-Ohio-1686.

{¶ 3} Appellant now has applied to reopen his appeal to challenge appellate counsel's representation. A claim of ineffective assistance of appellate counsel is judged using the test for ineffective assistance of trial counsel found in *Strickland v. Washington*, 466 U.S. 668 (1984). This is the appropriate standard to assess whether appellate counsel was ineffective under App.R. 26(B)(5). *State v. Reed*, 1996-Ohio-21. To initiate an appeal under App.R. 26(B), the applicant must apply to have his appeal reopened following the procedure set out in App.R. 26(B)(1) through (4). *State v. Simpson*, 2020-Ohio-6719, ¶ 12.

{¶ 4} A timely application for reopening must contain "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation[.]" App.R. 26(B)(2)(c). Additionally, the application must contain "[a] sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to (B)(2)(c) of [App. R. 26] and the way in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record[.]" App.R. 26(B)(2)(d). *State v. Walker*, 2025-Ohio-5191 (10th Dist.). The application must contain "[a]ny parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies." App.R. 26(B)(2)(e).

{¶ 5} "App.R. 26(B) establishes a two-stage procedure to adjudicate claims of ineffective assistance of appellate counsel." *State v. Leyh*, 2022-Ohio-292, ¶ 19. At the first stage, the applicant must seek the appellate court's permission to file appellate briefs. *Id.* At this stage, the applicant must show "that there is at least a genuine issue—that is, legitimate grounds—to support the claim that the applicant was deprived of the effective assistance of counsel on appeal." *Id.* at ¶ 25. "If that showing is made and the application is granted, the applicant must then establish at the second stage the merits of both the direct appeal and the claim of ineffective assistance of appellate counsel." *Id.* "If a court of appeals denies the application, then it must state its reasons for the denial in its judgment entry. App.R. 26(B)(6)." *Id.* at ¶ 21.

A. APPELLANT COUNSEL WAS INEFFECTIVE WHEN APPELLATE COUNSEL DID NOT RAISE AS ERROR AND OR GAVE AN INCOMPLETE ERROR WHEN HIS APPOINTED COUNSEL CONSTRUCTIVELY ABANDONED THE APPEAL RESULTING IN THE PROCEDURAL DEFAULT OF A MERITORIOUS CONSTITUTIONAL CLAIM(S) AS IT IS AGAINST THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION TEN AND SIXTEEN OF THE OHIO CONSTITUTION AND THE SENTENCE SHOULD BE VACATED.

<u>1. Appellate counsel failed to communicate</u>

<u>2. Appellate Counsel Failed to Show and attend mandated Oral Argument Without Notice</u>

<u>3. Appellate Counsel abandoned his Client at a critical stage of the appeal, Oral Argument</u>

{¶ 6} We take these assignments of error together as they are interrelated. Appellant raises the lack of communication from his appellate counsel. He cites to *Disciplinary Counsel v. Schnittke*, 2017-Ohio-9206. In *Schnittke*, appellate counsel received a disciplinary sanction for failure to file appellate briefs in three criminal cases in which he was appointed. Appellant has provided nothing in his affidavit or his application that shows that the lack of communication prevented counsel from performing his duties. He has further failed to describe any prejudice he suffered as a result of his alleged failure to have contact with counsel.

{¶ 7} Appellate counsel had access to the following: "[t]he original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases." App.R. 9(A)(1). Appellant does not allege that there is any newly discovered evidence that counsel failed to bring to this court's attention or that the trial record was incomplete. Further, his reliance upon *Schnittke* is misplaced. The case does not support appellant's claim of ineffective assistance of counsel as appellate counsel filed a brief in this matter.

{¶ 8} Appellant avers that his court-appointed counsel did not attend oral arguments on May 22, 2025. He equates his failure to attend with abandonment and forfeiture of a meritorious constitutional claim. He requests this court to remedy the "manifest injustice" by granting his application to reopen the appeal. (Apr. 9, 2026 App. to Reopen at 2.)

{¶ 9} Appellant cites to *State v. Skaggs*, 1990 Ohio App. LEXIS 1932 (8th Dist. May 17, 1990), "Cuyahoga App. No. 56714, unreported, reopening granted (Oct. 25, 1999) Motion No. 7505." (App. to Reopen at 8.) However, Skaggs' situation differed from appellant. The *Skaggs* case was remanded to the trial court where his conviction and sentence were vacated because neither defendant, nor his trial counsel, was present when the trial court corrected the verdict and sentence. Crim.R. 43(A)(1) requires that defendant be present at the return of the verdict and imposition of sentence. ("Except as provided in Crim.R. 10 and divisions (A)(2) and (A)(3) of this rule, the defendant must be physically present at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules."). *Id.* Reopening was granted "after the court of common pleas (Ohio) corrected a verdict and imposed sentence without defendant's presence" and "[d]efendant moved to reopen his appeal, due to abandonment by his counsel." *State v. Skaggs*, 2000 Ohio App. LEXIS 4947, *1 (8th Dist. Oct. 26, 2000).

{¶ 10} Appellant also cites "State of Ohio v. James Hammon (Dec. 2, 1997), Erie App. No. E-97-129, unreported, reopening granted, 1999 Ohio App. LEXIS 261 (Feb. 3, 1999)[.]" (App. to Reopen at 8.) In *Hammon*, appellate counsel failed to arrange for the timely preparation and transmission of the transcript and to file an appellate brief, which caused his original appeal to be dismissed. Hammon's counsel failed to make him aware of the dismissal, preventing him from filing a timely application for reopening. The Sixth District found that appellant had raised a genuine issue as to whether he was deprived of the effective assistance of appellate counsel, and his application to reopen was well-taken. *State v. Hammon*, 1999 Ohio App. LEXIS 261, *6 (6th Dist. Feb. 3, 1999). This case is distinguishable from Hammon's request to reopen, as appellate counsel timely filed his appellate brief but did not appear for oral argument.

{¶ 11} App.R. 21(F) governs the appearance of appellate counsel, which reads in pertinent part:

> If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on

> behalf of the appellee, if appellee's counsel is present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.

{¶ 12} In support of his argument that counsel abandoned his case, appellant cites to *Disciplinary Counsel v. Valenti*, 2021-Ohio-1373. In Valenti's first violation, the *Doak* matter, counsel failed to submit a brief by the deadline after securing an extension of time. The Eleventh District Court of Appeals removed her as counsel of record, sua sponte, finding that the brief that was submitted was "inadequate, incoherent and unintelligible" and the court noted that she was unprepared for oral argument. *Valenti* at ¶ 6.

{¶ 13} In her second violation, the *Evans* matter, Valenti failed to file a timely notice of appeal. Almost a month after the initial due date, she filed a motion for delayed appeal. The Eleventh District granted the motion, noting in its entry that Evans "should not be penalized for counsel's error in filing an untimely appeal." *Id.* at ¶ 8. But in the same entry, the court of appeals sua sponte removed Valenti as Evans's appellate counsel and appointed him a new attorney. *Id.* The Eleventh District granted the motion and sua sponte removed her appellate counsel, appointing a new attorney.

{¶ 14} In her third violation, the *Ellison* matter, Valenti failed to appear for a hearing in the Summit County Court of Common Pleas, Domestic Relations Division, to represent P.E. in a contempt proceeding regarding child support obligations. The hearing was scheduled for June 4, 2019. Around that same time, relator was investigating an unrelated grievance against Valenti, who agreed to reschedule a deposition with relator for June 4—the same day as Ellison's hearing. Valenti failed to appear for Ellison's hearing and failed to notify Ellison or the court that she had a conflict in her schedule. The court appointed a new attorney for Ellison and rescheduled the hearing in the contempt proceeding. *Id.* at ¶ 9.

{¶ 15} We find *Houser's* case to be easily distinguishable from *Valenti*. Appellant's counsel had filed his brief, and the plain language of the rule allows for a process when either appellant or appellee's counsel fail to appear for oral argument; we interpret the language of App.R. 21(F) to be optional, not mandatory. There is no order from this court in the record requiring the mandatory appearance of counsel. If counsel for a party is not present, the case is decided on the briefs. Oral argument generally gives counsel an opportunity to engage in oral advocacy of the position written in the brief. Based upon the distinction between *Houser* and *Valenti*, we cannot find that appellant's counsel abandoned appellant at any stage of the proceeding.

B. APPELLATE COUNSEL FAILED TO RAISE CONFLICT OF INTEREST OF THE TRIAL JUDGE

{¶ 16} In his affidavit, appellant argues that appellate counsel failed to identify and raise the "obvious and powerful judicial conflict-of-interest claim" in his initial appellate brief. (Houser Aff. at ¶ 18.) However, appellant does not raise this argument in his application to reopen as one of his assignments of error. We note that appellant raises this argument in his reply to appellee's response in opposition to the application for reopening, the same reason this issue was not reviewed in the direct appeal. But for the sake of judicial economy, we will address the judge's duty.

{¶ 17} "Jud.Cond.R. 2.11(A) provides: 'A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances . . . .' The rule then provides a nonexhaustive list of circumstances that require a judge's recusal. One of the enumerated circumstances is that '[t]he judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is . . . [l]ikely to be a material witness in the proceeding.' Jud.Cond.R. 2.11(A)(2)(d)." *Disciplinary Counsel v. Ickes*, 2026-Ohio-3173, ¶ 35.

{¶ 18} In this instance, the same trial judge presided over a sentencing hearing where appellant was a victim and/or witness for the State of Ohio in Franklin C.P. case No. 23CR-2641. Appellant argues that the trial attorney failed to raise a conflict of interest where the same trial judge now presides over his criminal trial. He did not raise this issue in his direct appeal until he filed his reply brief. As in this case, he has not raised the issue as an assignment of error but raises the issue in his affidavit filed in support of the application to reopen his direct appeal. Though not properly raised, we will address the issue as he has now proposed that the trial judge had a conflict of interest. We rely upon the Rules of Judicial Conduct to determine whether appellants are close enough in relationship as a material witness that the trial court judge should have recused. Appellant has raised no specific personal relationship with the trial court judge, but rather his status as a defendant in a criminal case and/or a witness/victim in a second criminal case. We conclude that the judge in the trial court was not within the third degree of relationship to appellant, who was the material witness in case No. 23CR-2641.

{¶ 19} Lastly, appellant failed to request the trial court judge to recuse herself, nor did he file an affidavit of disqualification to request her removal because of a conflict of interest or "dual role." In cases where there are allegations of judicial misconduct, "[i]t is the [S]upreme [C]ourt, not the Board of Professional Conduct and not the parties, that is the ultimate arbiter of the facts of the case, the law that applies to the facts, and the discipline that should be imposed." *Disciplinary Counsel v. Rudduck*, 2026-Ohio-1126. We conclude that this court does not have authority to adjudicate what appellant alleges is a violation of the Rules of Judicial Conduct.

C. APPELLANT COUNSEL WAS INEFFECTIVE WHEN FAILING TO ARGUE THE MANIFEST WEIGHT OF THE EVIDENCE AND IS BASED ON INSUFFICIENT EVIDENCE, AND IS IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUITION AND ARTICLE ONE, SECTION TEN AND SIXTEEN OF THE OHIO CONSTITUTION AND THE SENTENCE SHOULD BE VACATED.

{¶ 20} Appellant alleges that appellate counsel should have assigned an error to the sufficiency of the evidence and the manifest weight of the evidence in his direct appeal. Because neither of these assignments of error were addressed on direct appeal, we will consider both.

{¶ 21} Whether the evidence is sufficient as a matter of law to support a conviction involves a determination of whether the state met its burden of production at trial. *See, e.g.*, *State v. Smith*, 2004-Ohio-4786, ¶ 16 (10th Dist.); *State v. Frazier*, 2007-Ohio-11, ¶ 7 (10th Dist.); *State v. Thompkins*, 1997-Ohio-52. We do not weigh the evidence but instead determine " '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. Leonard*, 2004-Ohio-6235, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 22} In evaluating a sufficiency challenge, "[a]n appellate court 'essentially assume[s] the state's witnesses testified truthfully and determine[s] if that testimony and any other evidence presented at trial satisfies each element of the crime.' [*State v.*] *Harris*, [2023-Ohio-3994, ¶ 14 (10th Dist.)], citing *State v. Watkins*, 2016-Ohio-8272, ¶ 31 (10th Dist.), citing *State v. Hill*, 2008-Ohio-4257, ¶ 41 (10th Dist.). Legal sufficiency is a question of law that considers whether the state's evidence passes a ' "test of adequacy." ' *State v. Elkhabiry*, 2025-Ohio-1028, ¶ 45 (10th Dist.), quoting *Thompkins* at [¶ 23]. Thus, evidence is legally sufficient to support a conviction where, if believed, that evidence would allow any rational trier of fact to find that the state proved each element of the offense beyond a reasonable doubt. *State v. Jamii*, 2023-Ohio-4671, ¶ 43 (10th Dist.), citing *Harris* at ¶ 14." *State v. Frazier*, 2025-Ohio-2992, ¶ 21 (10th Dist.). "Thus, evidence is sufficient to support a conviction where, if believed, that evidence would allow any rational trier of fact to conclude that the state proved each element of the offense beyond a reasonable doubt. *Frazier* at ¶ 7, citing *Jenks* at paragraph two of the syllabus." *State v. Taylor*, 2026-Ohio-2497, ¶ 16 (10th Dist.).

{¶ 23} "Whether there is legally sufficient evidence to sustain a verdict is a question of law. [*Thompkins*, 1997-Ohio-52]. Sufficiency is a test of adequacy. *Id.* The relevant inquiry for an appellate court is whether the evidence presented, when viewed in a light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt. *State v. Mahone*, [2014-Ohio-1251, ¶ 38 (10th Dist.)], citing *State v. Tenace*, [2006-Ohio-2417, ¶ 37]." *State v. Messenger*, 2021-Ohio-2044, ¶ 34 (10th Dist.).

{¶ 24} Unlike sufficiency of the evidence, a challenge to manifest weight of the evidence attacks the credibility of the evidence presented and questions whether the state met its burden of persuasion. *See, e.g.*, *State v. Richey*, 2018-Ohio-3498, ¶ 50 (10th Dist.), citing *Eastley v. Volkman*, 2012-Ohio-2179, ¶ 11-13; *Thompkins* at ¶ 22-23. Because it is a broader review, a reviewing court may determine that a judgment of a trial court is sustained by sufficient evidence but nevertheless conclude that the judgment is against the weight of the evidence. *Thompkins* at ¶ 24, citing *State v. Robinson*, 162 Ohio St. 486, 487 (1955).

{¶ 25} " '[W]eight of the evidence' " concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other. *State v. Petty*, 2017-Ohio-1062, ¶ 60 (10th Dist.), quoting *State v. Boone*, 2015-Ohio-2648, ¶ 49 (10th Dist.), citing *Thompkins* at ¶ 24. When considering an appellant's claim that a conviction is against the manifest weight of the evidence, we sit as a "thirteenth juror" and may disagree "with the factfinder's resolution of the conflicting testimony."

Thompkins at ¶ 25, citing *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). *See also State v. Martin*, 2022-Ohio-4175, ¶ 26.

{¶ 26} In making this determination, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the witnesses' credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *See, e.g.*, *Sparre v. Ohio Dept. of Transp.*, 2013-Ohio-4153, ¶ 10 (10th Dist.); *Eastley* at ¶ 20; *Thompkins* at ¶ 24; *Martin* at ¶ 26.

{¶ 27} Although we review credibility when evaluating a challenge to the manifest weight of the evidence on appeal, we are cognizant that determinations regarding credibility of witnesses and the weight of testimony are primarily for the trier of fact. *See, e.g.*, *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus; *Morris v. Ohio Dept. of Rehab. & Corr.*, 2021-Ohio-3803, ¶ 64 (10th Dist.), citing *Watson v. Ohio Dept. of Rehab. & Corr.*, 2012-Ohio-1017, ¶ 31 (10th Dist.), citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). This is because the trier of fact " 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *State v. Cattledge*, 2010-Ohio-4953, ¶ 6 (10th Dist.), quoting *Seasons Coal Co.* at 80.

{¶ 28} To reverse a jury verdict as being against the manifest weight of the evidence, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required pursuant to Article IV, Section 3(B)(3) of the Ohio Constitution. *Bryan-Wollman v. Domonko*, 2007-Ohio-4918, ¶ 2-4, citing *Thompkins* at paragraph four of the syllabus. "Appellate courts should reverse a conviction as being against the manifest weight of the evidence only in the most ' "exceptional case in which the evidence weighs heavily against the conviction." ' *Thompkins* at [¶ 25], quoting *State v. Martin*, [20 Ohio App.3d 172, 175 (1st Dist. 1983)]." *State v. Miller*, 2025-Ohio-5192, ¶ 8 (10th Dist.).

{¶ 29} Rape is defined as "engag[ing] in sexual conduct with another when . . . [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person." R.C. 2907.01(A)(1)(b). Based upon testimony, the children in this case were under 13 at the time of the offenses. (Tr. at 72, 73, 96, 127-131, 140-141.) (State's

Memo at 15.) " 'Sexual conduct' means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." *State v. Jeffries*, 2020-Ohio-1539, ¶ 17, quoting R.C. 2907.01(A).

{¶ 30} Gross sexual imposition is defined in pertinent part in the Ohio Revised Code as follows:

> (A) No person shall have sexual contact with another . . . when any of the following applies:
>
> . . .
>
> (4) The other person . . . is less than thirteen years of age, whether or not the offender knows the age of that person.

R.C. 2907.05 (A)(4). " 'Sexual contact' " as defined in R.C. 2907.01(B) "means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." *Jeffries* at ¶ 17, quoting R.C. 2907.01(B).

{¶ 31} During trial, K.C., mother of the children, testified that she and her family lived in a home on Dimson Drive, in Franklin County, Ohio, where appellant also lived in 2016. She testified that she is the mother of D.A., who was born in June 2008 and P.B. (also known as R.B.), who was born in August 2009. She identified appellant, Houser, as "K.J." in the courtroom.

{¶ 32} D.B. testified that K.J. "had me on his leg and he was running his leg between mine and he was groping my chest." (Oct. 8, 2024 Tr. Vol. II at 80.) Next, the jury heard testimony from P.B., who testified that her birthday is August 20, 2009. P.B. testified that appellant took her into the backyard to play a game. "He pushed me down. . . . He held the back of my head so I couldn't move. . . . He was really close and inside my mouth. . . . His penis." *Id.* at 104-105. Further, she was questioned:

> Q. Did you feel anything come out of his penis?
>
> A. Yes.
>
> . . .
>
> Q. Did he eventually take his penis out of your mouth?

A. Yes.

Q. Do you recall why that happened?

A. Because he came.

Q. And what happened next?

A. He told me to swallow.

Id. at 105-106.

{¶ 33} She also testified that he took her into the garage, "[h]e turned me around and told me to be quiet and then he pulled down my pants. . . . I felt him push something inside of me. It was burning. . . . My anus. . . . Just felt like a finger." *Id.* at 107-109.

{¶ 34} The jury also heard the testimony of X.B.-B. who testified that his birthday is November 2. X.B.-B. testified that appellant "made me suck on his private area." *Id.* at 135. Further, testimony was elicited from X.B.-B. as follows:

Q. Okay. So his private area touched your mouth?

A. (Indicating.)

Q. On the outside or the inside of your mouth?

A. The inside of my mouth.

. . .

Q. Okay. Did this happen one time? Two times? Many times?

A. Many.

Id. at 137. X.B.-B. also testified that he was in counseling after making the disclosure to his father. J.B., father of X.B.-B. testified that X.B.-B.'s birth date is November 2, 2010. He identified appellant in the courtroom. He also testified that X.B.-B. had disclosed that appellant had touched him. He took him to Nationwide Children's Hospital.

{¶ 35} Appellant argues that the trial evidence included no physical or medical evidence. We remind the appellant that in determining sufficiency, corroborating evidence was not required for a conviction. The trier of fact is free to believe or disbelieve all or any of the testimony. The trier of fact is in the best position to consider inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Jackson*, 2008-Ohio-1277 (10th Dist.).

{¶ 36} In testing sufficiency, we assume that the victims testified truthfully. Accordingly, appellant's convictions were supported by sufficient evidence. Even if appellate counsel had raised the assignment of error alleging that the verdicts were based upon insufficient evidence, there is no reasonable probability that the result of the proceeding would be different in this case.

{¶ 37} The jury heard testimony from the victim's parents, victims, and appellant. We find that the jury believed the testimony of the victims on each element of the crimes as charged in the indictment. We find that the direct testimony of the witnesses would convince the average mind of the appellant's guilt beyond a reasonable doubt. The jury reached a verdict finding appellant guilty of three counts of rape of a child under the age of 13, in violation of R.C. 2907.02, felonies of the first degree, and gross sexual imposition, having sexual contact with a victim under the age of 13, in violation of R.C. 2907.05(B), a felony of the first degree.

{¶ 38} Appellant fails to point to anything in the transcript or to specific trial court errors to support his claim that the verdicts were against the sufficiency of the evidence. In appellant's application, he has not referred to any parts of the record upon which we could rely in our review that were not included in the record of his direct appeal. He has failed to show in his sworn statement that the alleged deficiency of appellate counsel's failure to make these arguments prejudiced the outcome of the direct appeal. Furthermore, he has failed to demonstrate that his lack of contact with appellate counsel prejudiced his direct appeal in any way.

{¶ 39} "Pursuant to *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, to determine whether a conviction is supported by sufficient evidence of guilt, '[t]he 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. following Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)." *Miller*, 2025-Ohio-5192, at ¶ 5 (10th Dist.). In determining manifest weight of the evidence, appellate courts do consider credibility of the witnesses. "Mere disagreement over the credibility of witnesses is not a sufficient reason to reverse a judgment on manifest weight grounds." *State v. Harris*, 2014-Ohio-2501, ¶ 25 (10th Dist.), *appeal not accepted for review*, 2014-Ohio-4414, citing *State v. G.G.*, 2012-Ohio-5902, ¶ 7 (10th Dist.).

{¶ 40} Based upon appellant's arguments and the record before us, we cannot say that appellant has demonstrated a genuine issue that the jury clearly lost its way and created a manifest miscarriage of justice. The jury heard direct evidence when the victims testified, finding the victims' testimony to be credible even after cross-examination. The jury was able to weigh the credibility of appellant's testimony and chose to disbelieve his testimony. The jury reached a unanimous verdict finding the state proved guilt beyond a reasonable doubt in all counts in the indictment. On this record, we cannot say that the jury lost its way and created a manifest injustice when it found appellant guilty of the offenses for which he was convicted.

D. APPELLANT COUNSEL WAS INEFFECTIVE WHEN APPELLATE COUNSEL FAILED TO RAISE AS ERROR THE TRIAL COUNSEL FAILED TO INVESTIGATE IN VIOLATION OF THE FIRST, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTIONS SEVEN, TEN AND SIXTEEN OF THE OHIO CONSTITUTION AND THE SENTENCE SHOULD BE VACATED.

{¶ 41} A person convicted of a crime may assert a civil, collateral attack of the conviction upon showing that "there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States." R.C. 2953.21(A)(1)(a)(i). A postconviction petition does not provide a petitioner with a second opportunity to litigate his or her conviction. *State v. Sidibeh*, 2013-Ohio-2309, ¶ 8 (10th Dist.). Pursuant to R.C. 2953.21(A)(2), a petition for postconviction relief must be filed no later than 365 days after the trial transcript is filed in the court of appeals in the direct appeal. If the petition for postconviction relief is filed after 365 days and is considered untimely, the petitioner must demonstrate either (1) he was unavoidably prevented from discovering the facts necessary for the claim for relief, or (2) the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation. R.C. 2953.23(A)(1)(a). If the petitioner demonstrates that one of these enumerated conditions applies, he must also demonstrate that but for the constitutional error at trial no reasonable finder of fact would have found him guilty. R.C. 2953.23(A)(1)(b). Pursuant to R.C. 2953.23(A)(2), a petitioner is also entitled to relief if a claim of actual innocence is presented based on DNA testing. Unfortunately for appellant, he previously filed an untimely petition for postconviction relief that was denied by the trial court. The judgment was affirmed by this court in *State v. Houser*, 2026-Ohio-3349 (10th Dist.).

{¶ 42} We find this additional attempt to collaterally attack the trial court's ruling denying his postconviction petition to be barred. According to the doctrine of res judicata, "a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." (Emphasis omitted.) *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus.

{¶ 43} As was explained in *State v. Saxon*, 2006-Ohio-1245, "the doctrine serves to preclude a defendant who has had his day in court from seeking a second on that same issue," and it "promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard." *Id.* at ¶ 18. *See also State v. Straley*, 2019-Ohio-5206, ¶ 35. "Stated differently, in criminal cases res judicata may preclude issues, arguments, or positions that could have been (even if they were not actually) litigated." *State v. Barber*, 2017-Ohio-9257, ¶ 19 (10th Dist.). We will decline to review the actions taken by trial counsel that could have been raised in a timely-filed petition for postconviction relief in this application to reopen direct appeal pursuant to App.R. 26(B).

E. CONCLUSION

{¶ 44} In this case, none of appellant's contentions present a genuine issue that appellate counsel was ineffective in his representation of appellant. Because appellant failed to show that the performance of his appellate counsel was deficient and that he was prejudiced by counsel's performance, we decline to reopen the instant appeal. Each assignment of error is overruled. Appellant's application to reopen the appeal, pursuant to App.R. 26(B), is denied.

Application to reopen denied.

BEATTY BLUNT and DINGUS, JJ., concur.