[Cite as *State v. Rowland*, 2024-Ohio-1660.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

STATE OF OHIO,	:	
	:	Case No. 21CA11
Plaintiff-Appellee,	:	
	:	
v.	:	DECISION AND JUDGMENT
	:	ENTRY
JASON ROWLAND,	:	
	:	**RELEASED: 04/23/2024**
Defendant-Appellant.	:	

APPEARANCES:

Tim Young, Ohio Public Defender, and Addison M. Spriggs and Kathleen Evans, Assistant Public Defenders, Columbus, Ohio for appellant.

Erik E. Spitzer and Andrea K. Boyd, Special Prosecuting Attorneys, Ohio Attorney General's Office, Columbus, Ohio, for appellee.

Wilkin, J.

{¶1} This is an appeal from a Jackson County Court of Common Pleas judgment entry that convicted appellant, Jason Rowland ("Rowland"), of rape and gross sexual imposition ("GSI"). The victim is Rowland's former minor step-daughter, R.C. On appeal Rowland asserts eight assignments of error.

{¶2} Rowland first argues that the trial court committed plain error by admitting unfairly prejudicial evidence. Rowland contends that testimony and exhibits from two of the state's witnesses regarding the juvenile court findings of sexual abuse confused and misled the jury into thinking Rowland had already been found guilty of sexually abusing R.C. However, the state's witness, Christina Carlisle, explained the differences between the juvenile court proceedings and the criminal case against Rowland. Furthermore, defense

counsel's comments during his closing argument and the trial court's instructions to the jury further emphasized that the jurors in this case would decide whether Rowland was guilty or not. Therefore, we find this testimony was not unfairly prejudicial to Rowland. Accordingly, because we find that the trial court did not commit plain error by admitting this testimony, we overrule Rowland's first assignment of error.

{¶3} In his second assignment of error, Rowland asserts that his counsel was ineffective for failing to object to the aforementioned testimony that compared the juvenile court proceedings to the criminal proceedings in this case. Because we found that the admission of this evidence was not plain error, Rowland's counsel's failure to object to that testimony was not deficient representation, which is necessary for a successful ineffective assistance of counsel claim. Therefore, we overrule Rowland's second assignment of error.

{¶4} In his third assignment of error, Rowland alleges that the trial court erred in admitting hearsay statements under Evid.R. 804(A)(3) and 804(B)(6) because R.C. was available to testify at trial, and, alternatively, even if she was unavailable, Rowland did not cause her unavailability. Because we find that the trial court did not err in determining that R.C. was unavailable and that Rowland caused her unavailability, we overrule Rowland's third assignment of error.

{¶5} In his fourth assignment of error, Rowland alleges that the trial court erred by admitting hearsay statements from R.C. under Evid.R. 801(D)(1)(c) because the identity of R.C.'s assailant was not at issue. We find that the trial court did not abuse its discretion in finding that the perpetrator's identity was at

issue or in admitting R.C.'s prior out-of-court statements that identified her assailant under Evid.R. 801(D)(1)(c). Therefore, we overrule Rowland's fourth assignment of error.

{¶6} In his fifth and sixth assignments of error, Rowland alleges that his conviction for rape is not supported by sufficient evidence and is against the manifest weight of the evidence. Because we find that there is sufficient evidence to support the rape conviction and also that it is not against the manifest weight of the evidence, we overrule his fifth and sixth assignments of error.

{¶7} In his seventh assignment of error, Rowland alleges that the trial court erred in sentencing him to both prison and a community control sanction (a no-contact order) because felony sentencing statutes permit community control sanctions or prison, but not both. We agree. Therefore, we sustain his seventh assignment of error and remand this case for the trial court to vacate the no-contact order.

{¶8} Finally, in his eighth assignment of error, Rowland alleges that the cumulative effect of the trial court's errors denied his right to a fair trial and due process. Having found only a single error in Rowland's sentencing, which will be remedied on remand, we overrule his eighth assignment of error.

{¶9} Accordingly, we affirm Rowland's convictions for rape and GSI but remand the matter to the trial court to vacate the no-contact order.

BACKGROUND

{¶10} Shoshana is R.C.'s mother. When R.C. was born, she resided with her mother and her mother's boyfriend at the time, Russell Allen. R.C. called Allen her dad, and Allen considered himself R.C.'s stepfather. However, when R.C. was between one and two years old, Shoshana began dating Rowland, which resulted in Allen moving out and Rowland moving in with Shoshana and R.C. Rowland and Shoshana eventually married and had a child, P.R.

{¶11} In 2012, when R.C. was five years old, the Jackson County Department of Job and Family Services ("JFS") opened an investigation to determine whether R.C. was an abused child. The Ross County Juvenile Court ("juvenile court") appointed attorney Dana Gilliland as guardian ad litem ("GAL") for R.C. Eventually, the juvenile court adjudicated R.C. as having been sexually abused. The case plan identified Rowland as R.C.'s abuser. Consequently, the juvenile court removed R.C. and P.R. from Shoshana and Rowland's home.

{¶12} The findings of the abuse adjudication were referred to the Jackson County Prosecutor's Office. The prosecutor's office sought assistance from the Ohio Attorney General's Office ("AG"). In turn, the AG requested assistance from the Bureau of Criminal Investigation ("BCI"). The BCI assigned special agent Kevin Cooper to investigate the case in 2014.

{¶13} Eventually agent Cooper tracked down Rowland in Seattle, Washington, where he had moved sometime between 2012 and 2013. Agent Cooper's investigation included interviews of Rowland, R.C., Teresa Hill (R.C.'s maternal grandmother), Nancy Haynes (R.C.'s paternal grandmother), and

Ashley Graham (girlfriend of Rowland's brother). Evidence from these witnesses and others was presented to a grand jury.

{¶14} On June 17, 2019, the grand jury charged Rowland with (1) rape in violation of R.C. 2907.02(A)(1)(b) for unlawfully engaging in sexual conduct with a minor who was less than 13 years old at the time, a felony of the first degree, and (2) GSI in violation of R.C. 2907.05(B) for knowingly touching the genitalia of a minor who was less than 12 years old at the time, a felony of the third degree.

{¶15} Two days prior to trial, the state filed a "Notice of Intention to Introduce Statements" that had previously been made by R.C. in accordance with Evid.R. 804(B)(6). The state argued that Rowland engaged in "wrongdoing" for the purpose of preventing R.C. from testifying (i.e., he caused her to be unavailable as a witness), which would allow R.C.'s prior statements to be admitted under Evid.R. 804(B)(6). The court reserved its ruling on the state's motion until after R.C. testified.

{¶16} The state's first witness was Ashley Graham. Graham had dated Rowland's brother, Devon. After they began dating, she and Devon moved in with Rowland's mother, Nancy Haynes. Rowland, Shoshana, P.R. and R.C. also moved into the Haynes' household. R.C. was five years old at that time.

{¶17} Sometime between 2011 and 2012 when Graham got pregnant, she and Devon moved out of Haynes' home to a trailer park. However, R.C. still often visited with Graham. The state asked Graham if R.C. had disclosed what Rowland did to her (R.C.), but defense counsel objected on hearsay grounds. The court eventually overruled the objection allowing Graham to answer the

question but only for the purpose of explaining Graham's actions subsequent to R.C.'s disclosure. The state then asked Graham what R.C. told her. Graham testified: "Um * * * [R.C.] just sat up and was watching the [T.V.] show and looked at me and she said 'daddy Jason' touched me' and then she pointed to her vagina and so I muted the t.v. and I said 'what' and she repeated herself[.]" Graham called her mother and told her what she had just heard from R.C. She also told Devon, who called the police.

{¶18} The state's next witness was Elizabeth Huscheck. At the time R.C. was abused, Huscheck was employed as a forensic interviewer with the Child Protection Center in Ross County ("CPC"), which is a nationally accredited center that offers forensic interviews and examinations of children. Huscheck described a forensic interview as a "non-leading, neutral fact finding way to * * * uh * * * get information about something or some event from a child and so it's developmentally appropriate for the child and * * * uh * * * done in a way that's * * * um * * * one time not repetitive to reduce the trauma on the child."

{¶19} Huscheck stated that in January of 2012 she interviewed R.C., which was reflected in her report that was admitted as evidence. Huscheck testified that R.C. "spontaneously disclosed that she was abused by Jason, her step-father, under [her] clothes[.]" Huscheck stated that R.C. consistently identified "daddy Jason" as her… abuser. Based on her training and experience, Huscheck believed that R.C.'s interview was reliable.

{¶20} The state's next witness was Dr. Brian Bethel. Dr. Bethel provides therapeutic counseling services that address the mental health of children and

families that have been impacted by trauma. In 2012, Dr. Bethel began treating R.C. for sexual abuse in 2012 for approximately 18 months.

{¶21} In a letter dated December 10, 2012, Dr. Bethel updated R.C.'s GAL, regarding R.C.'s condition. In part the letter stated:

> [R.C.] was initially referred to counseling after a disclosure of sexual abuse. At the time of the child's initial diagnostic assessment, [R.C,] was placed in the care of Nancy Haines [sic.]. Both Mrs. Haynes and the child participated in the diagnostic process. Results of the diagnostic assessment indicated some common traumatic reactions for [R.C.]. In particular there were disturbances noted in the child's sleeping patterns, behavioral difficulties, and traumatic triggers. While [R.C.] has made noted improvements initially in these areas the child has recently started exhibiting some more difficulties.
>
> As your aware, the court had ordered some unsupervised visitation with the child and her mother. Since the unsupervised visitation has occurred there has been an increase in the child's traumatic responses. Specifically, both [R.C.] and her current guardian have reported that the child is experiencing frequent nightmares after visitation. In addition, Ms. Haynes has also reported additional behavior issues with the child. Although some of these experiences are common for children during a change in visitation schedules, many children improve with consistency and time. Unfortunately, [R.C.'s] symptoms have been continuous and have intensified after each visitation.

{¶22} In a letter dated June 10, 2013, Dr. Bethel authored a letter to R.C.'s case worker at Jackson County Children's Services updating him on her condition. In part, it stated:

> As we discussed in our recent telephone conversation, [R.C.'s] mother (Shoshana) and maternal grandmother did schedule an appointment with me. I provided an overview of [R.C.'s] counseling and progress to both parties. [Shoshana] reported that "I am supposed to be part of [R.C.'s] counseling according to the case plan." I informed her that I was unaware of this requirement and would be opposed to incorporating her into the child's counseling at the present time. As I indicated to [R.C.'s] mother and grandmother on the date of our meeting, [R.C.'s]

> counseling has focused on [R.C.'s] issues and I am not comfortable (at this time) to include other parties.
>
> I also addressed the importance of maintaining [sic] a stable and calm environment for [R.C.]. As I have addressed all parties, there seems to be a great deal of conflict between family members. It is evident from my session with [R.C.] that she is subjected to this conflict. It is my professional opinion that the on-going conflict exacerbates the child's anxiety. I have encouraged all parties to focus on their time with the child and not on the happenings of the other parties to this case. It is difficult for the child to progress in counseling when the conflict only serves to sabotage our therapeutic goals. As previously discussed, [R.C.] continues to exhibit behavioral difficulties as all parties have reported. She has been consistent in counseling and has made some progress but the on-going tension and lack of permanency contributes greatly to her anxiety.
>
> * * *
>
> [A]s I have reiterated previously I am concerned regarding the lack of accountability related to the [R.C.'s] abuse. Evidence-based literature has clearly substantiated the need for support for child survivors of sexual abuse. To my knowledge [R.C.'s] offender has not participated in any type of offender treatment. Moreover, it is my understanding that the child's mother has also indicated that she does not believe the child and I am uncertain as to the type of counseling the mother is involved in at this time. These are obviously significant concerns along with the on-going conflict with the parties.

{¶23} Dr. Bethel asserted that for child sexual abuse victims the best type of support is a "loving, nurturing relationship with the non-offending parent." The state asked Dr. Bethel: "if a child had an unsupervised visit with a non-offending parent and they talked about the perpetrator or they suggested that maybe the child forget what happened, would that have a …a impact on the child?" He testified that "[t]here would be a substantial likelihood that it could have an impact on the child." Dr. Bethel testified that because there was some question of whether Shoshana was supportive of R.C.'s allegations, it was his decision not to incorporate her into R.C.'s therapy.

{¶24} Dr. Bethel confirmed that there were physical and emotional indicators that R.C. suffered trauma. He also testified that R.C. disclosed to him that she was sexually abused by "daddy Jason." He also stated that his treatment of R.C. ended after there was a "reunification[,]" and R.C.'s mother sought services "closer to home."

{¶25} The state's next witness was R.C., who at the time of trial was almost 15 years old. After taking the witness stand and without the state soliciting a question, R.C. stated:

> Uh * * * uh * * * um I lost my train of thought. (laughs) my social anxiety is getting to me * * * um * * * I honestly, *I don't think it was him*. I just * * * now that I'm looking back into the memory, I'm seeing a completely different silhouette. I * * * *I just can't remember who it is*. I don't believe it's him. *I think it could be somebody else*. Because I was so young that your minds easily * * * I was so young that my mind was easily manipulated. So I'm thinking that somebody who doesn't like him which is a lot of people because he's a tarus and tells the truth and no matter how blunt it is (laughs) * * * that somebody * * * that he made somebody upset and so they tried to mani * * * they manipulated me into thinking it was not him and so that kind of changed the memory at that young * * * (Emphasis added.)
>
> [Prosecutor]: * * * Okay, so do you * * *
> [R.C.]: * * * so now * * *
> [Prosecutor]: * * * you said you don't remember?
> [R.C.]: No. *I don't remember who it is*. All I know is that *I don't think it was him.* (Emphasis added.)
> * * *
> [Prosecutor]: Okay do you remember talking to * * * in the forensic interview?
> [R.C.]: Mmm * * * barely.
> [Prosecutor]: But do you remember talking? Did you actually watch that and see yourself in that?
> [R.C.]: No
> [Prosecutor]: Last month with me?
> [R.C.]: It kind of feels like it was just a manipulated version of me.
> * * *

[Prosecutor]: Okay. Um * * * what about * * * do you recall talking with children's services?
[R.C.]: Yeah barley. I just know that they were involved a few years ago.
[Prosecutor]: Okay do you remember talking to them about what 'Daddy Jason' did?
[R.C.]: No.

* * *

[Prosecutor]: You don't remember talking to Ashley?
[R.C.]: Like Carver or * * * Graham?
[Prosecutor]: Graham.
[R.C.]: Uh * * * I do remember like * * * like slightly telling her. I do remember staying the night at her house a lot though.

* * *

[Prosecutor]: We met in late 2018 early 2019, I came to your school, do you remember that?
[R.C.]: Kind of.
[Prosecutor]: Okay do remember telling me what Jason did?
[R.C.]: Yeah, I'm just now looking back I feel like my emotions are about to switch off. I don't like it. Mm (head twitching) ticks they'll subside.

* * *

[Prosecutor]: But you do remember talking to me then?
[R.C.]: Yeah.
[Prosecutor]: Okay.
[R.C.]: * * * (Yawns, her slapping sides of face) * * *
[Prosecutor]: So, since the * * * since towards the beginning of COVID * * *
[R.C.]: * * * yeah * * *
[Prosecutor]: * * * that's when things * * * your memories faded?
[R.C.]: * * * yeah, they're startin' * * * they're startin' to come back, not a lot though. It's just kind of bits and pieces, not a lot though. It's just kind of bits and pieces. I don't remember who still though.

* * *

[Prosecutor]: [R.C.], I know you said you can't remember who did it. Do you remember what happened?
[R.C]: yeah, I kind of remember what happened. I just * * *
[Prosecutor]: Can you tell me about it?

[R.C.]: I don't want to talk about it. Trauma is something I don't like talking about. I don't think any trauma someone ever likes talking about trauma.

* * *

[Prosecutor]: Do you remember [the abuse] happening in (2) two different locations?
[R.C.]: Yep.
[Prosecutor]: Do you remember it being at the apartment?
[R.C.]: Yep, old apartment at Jackson. I can't remember which one. All I know is I used to live by Mandy and my papa Frank.
[Prosecutor]: Okay. And do you remember the next time it being at Mamma Teresa's?
[R.C.]: Mmhmm * * *
[Prosecutor]: Okay do you remember that it in * * * involved someone touching * * *
[R.C.]: * * * mmhmm * * *
[Prosecutor]: * * * and they were rubbing * * *
[R.C.]: * * * yeah * * *
[Prosecutor]: * * * in your vagina?
[R.C.]: Yep.
[Prosecutor]: Okay. Okay. And do you remember someone taking your hand * * *
[R.C.]: * * * yeah * * *
[Prosecutor]: * * * and touching their penis?
[R.C.]: Yeah. Mmhmm * * *

* * *

[Prosecutor]: Do you remember when you first told someone?
[R.C.]: Yea, it was Ashley, I believe.
[Prosecutor]: Do you recall trying to tell your mom (Shoshana)?
[R.C.]: Mm * * * I don't know. It's kind of blurry in that part.

* * *

Counsel for Rowland then cross-examined R.C.

[Counsel]: Alright. Now you said you don't remember who did it?
[R.C.]: Nope *I don't*.
[Counsel]: It's okay if you do. You can tell.
[R.C.]: I honestly don't.
[Counsel]: Okay. Alright.
[R.C.]: It's just I just see like a silhouette.
[Counsel]: Mmhmm * * *
[R.C.]: It's hard to even describe what the silhouette looks like. It's * * * that's all I remember is a black silhouette.
[Counsel]: Okay, you don't recall if it was male or female?

[R.C.]: I do remember it was male.

* * *

[Counsel]: Okay. Uh * * * what she just asked you [in her interview] about somebody rubbing in your vagina, do you remember her asking you that question?

[R.C.]: Uh * * * I don't remember her asking that question.

[Counsel]: Okay. Well, did someone rub in your vagina or on your vagina?

[R.C.]: I don't remember. All I know is it was somewhere down there and I don't like it.

{¶26} The court then addressed the state's Notice of Intention to Introduce [R.C.'s] Statements in Accordance with Evid.R. 804(B)(6) that it had filed two days prior to trial. In the Notice, the state purported that R.C. was expected to be unavailable under Evid.R. 804(A)(3) due to her refusal to testify or her lack of memory of matters in this case, and that Rowland engaged in "wrongdoing" for the purpose of preventing R.C. from testifying. Therefore, R.C.'s prior statements should be admitted under Evid.R. 804(B)(6). The court permitted the state to voir dire testimony from Russell Allen, Teresa Hill, and agent Kevin Cooper in support of its argument that Rowland engaged in wrongdoing that caused R.C. to be unavailable.

{¶27} The court stated there are things "she said I can't remember. I think she's unavailable." The court further determined that the state also showed that Rowland caused R.C. to not be available, so her prior statements were admissible under Evid.R. 804(B)(6).

{¶28} The court then resumed witness testimony before the jury. The state's next witness was Teresa Hill, R.C.'s maternal grandmother. Hill indicated that R.C. occasionally stayed at her house. She testified that during one of those

visits she came home from work and found Rowland was also present. When Hill came home from work, R.C. came up to her and said "daddy Jason's here and she dropped her head." Hill said that R.C. sounded and appeared to be sad. Hill stated that she called the sheriff to get Rowland out of her house.

{¶29} Hill testified that she babysat R.C. and P.R. every weekend that she was off work. Hill maintained that when she returned the children to Rowland and Shoshana, R.C. would cry and ask Hill not to take her back to them.

{¶30} After Hill learned that R.C. had been sexually assaulted, she saw R.C. at "Children Services." Hill testified while there R.C. asked Hill "what the white stuff was that comes out[,]" of Rowland's penis. Hill testified that R.C. blamed herself for the whole family splitting up and that she was "having to stay at Nancy's and couldn't see everybody." R.C. told Hill that " 'it's all my fault Mamaw, I want my family back.' "

{¶31} The state's next witness was Russell Allen. Allen testified that he and Shoshana were in a relationship together in approximately 2006, which was prior to R.C.'s birth. Shortly thereafter both Shoshana and R.C. moved in with Allen. Although Allen was not R.C.'s biological father, he acted like her father and he loved her.

{¶32} However, Allen and Shoshana split up, and Rowland moved in with her and R.C. Subsequently, Rowland and Shoshana had a child, P.R. Nevertheless, Allen maintained his relationship with R.C. as her "defacto step-father." R.C. and P.R. would come over and visit with Allen over a weekend, or sometimes longer.

{¶33} Allen testified that in the fall of 2020 he received a text message from R.C. wanting to talk to him, face to face. Allen stated that normally R.C. would just wait until they were together, and tell him whatever news she had. When Allen arrived at Shoshana's home, R.C., P.R., Shoshana, and R.C's girlfriend were in the living room. R.C. and P.R. told Allen that they no longer wanted to have contact with him because his Christian values were incompatible with their beliefs, which Allen denied. P.R. said that she hated Allen because he was the reason that they could not see Rowland. P.R. accused Allen of sexually abusing R.C., not Rowland. Allen testified that during these statements Shoshana was nodding her head in agreement. Consequently, Allen no longer saw the girls.

{¶34} However, at Easter, Allen accompanied his mother in her van to drop items off at Shoshana's house. When the van pulled up, R.C. came out of Shoshana's trailer, she leaned in the window of the van, and hugged Allen's mom. Allen testified that when R.C. realized he was also in the van, she started to go around the van, stopped, looked back at the house, said "screw it," and ran to the passenger side and hugged him. Thereafter, they began visiting regularly again. During one of those visits, she told Allen that "she knew what was being said wasn't true but they made her say it and she never clarified who they were."

{¶35} The state's next witness was Christina Carlisle, who was employed by the Children's Services Division of JFS as an investigator. She investigates abuse and neglect allegations pertaining to children. Carlisle testified that on January 4, 2012, she received a call from law enforcement indicating that R.C.

had been sexually abused by her step-father, Rowland. Carlisle and another JFS employee spoke with Shoshana and Rowland and informed them of the allegations made against Rowland. They informed Carlisle that R.C. and P.R. were staying in Ross County with Nancy Haynes, Rowland's mother.

{¶36} Carlisle contacted Nancy Haynes, and pursuant to protocol Carlisle arranged a forensic interview at the Child Advocacy Center. Carlisle observed the interview by closed-circuit tv. She stated that R.C. was "very open and forthcoming" during the interview as "she immediately * * * um * * * as soon as they started going over body parts and that was brought up, [R.C.] immediately started telling about something that had happened to her with Jason her step-father and … um… she was consistent with that throughout."

{¶37} Carlisle had a follow-up meeting with Shoshana and Rowland and communicated that R.C. had specifically alleged that "[Rowland] touched her and that she had also had to touch [him.]" In response, they alleged that Hill had coached R.C. to say Rowland had abused her and that R.C. had been exposed to pornography at Ron and Becky Hargett's house (Becky Hargett is the mother of Russell Allen). However, after completing her investigation, Carlisle concluded that Rowland had sexually abused R.C., and Children's Services filed a complaint in juvenile court. During the pendency of the juvenile case, Children's Services had custody of both R.C. and P.R.

{¶38} Carlisle testified that the juvenile court made "an adjudication of sexual abuse on R.C." and identified Rowland as her abuser. A case plan from Children's Services, among other requirements, ordered that Rowland have no

contact with R.C. and P.R. and that he seek treatment for being a sexual offender. The ultimate goal of the case plan was to reunify the family. Rowland signed the case plan. At the dispositional hearing, the juvenile court granted Children's Services temporary custody of R.C. and P.R. and Children's Services placed the children with Rowland's mother, Nancy Haynes. Carlisle testified that in preparing for this case she found nothing that indicated that Rowland attended any sex offender treatment sessions.

{¶39} During her testimony, Carlisle agreed that the abuse cases that she investigates, including this one, are: "not criminal." It's a "civil matter" that involves a different standard. These cases are brought to address "abuse and neglect" of children and remove them from the custody of their parents. Carlisle also described the dispositional hearing in juvenile court as "kind of the equivalent of a sentencing in a criminal court kind of if you were found guilty or not guilty. Obviously not guilty or no abuse the case ends if the judge finds a child to be abused well this is what you have to do now so that we can work toward what our next plan is which in his case was reunification."

{¶40} Carlisle testified that Shoshana and Rowland divorced. She also testified that records showed that in 2014 Rowland left Ohio for Seattle, Washington. Shoshana had complied with her case plan obligations. Consequently, R.C. and P.R. were returned to Shoshana's custody.

{¶41} The state's final witness was agent Cooper. Agent Cooper testified that in 2014 Rowland's whereabouts were unknown. By the time that agent Cooper became involved in 2017, this was a "cold" case and R.C. was

approximately ten years old. Among others, agent Cooper interviewed R.C., Rowland, Graham, Hill, and Haynes for this investigation.

{¶42} After securing permission from Shoshana, agent Cooper interviewed R.C. At the beginning of the interview, P.R., Shoshana and Shoshana's boyfriend were also in the room. However, because R.C. was uncomfortable, she and agent Cooper went outside and R.C.'s whole demeanor changed. Agent Cooper stated that Shoshana told him that she only had limited contact with Rowland through Facebook after he left Ohio.

{¶43} The state asked agent Cooper if the persons he interviewed identified Rowland as R.C.'s abuser. Defense counsel objected on hearsay grounds. The court overruled the objection finding prior statements made by R.C. that identified Rowland as R.C.'s assailant were admissible because they were not hearsay as defined in Evid.R. 801(D)(1)(c). Agent Cooper then testified that the witnesses he interviewed consistently identified Rowland as R.C.'s assailant.

{¶44} Agent Cooper stated that his next step was to find Rowland. In 2018, agent Cooper found Rowland living in an apartment in Seattle, Washington. Agent Cooper stated that Rowland consented to be interviewed. Rowland told agent Cooper that he left Ohio for Washington between 2012 to 2013. He claimed that Rowland told him that he had limited contact with his mother and Shoshana, which occurred through Facebook/Facebook Messenger.

{¶45} Agent Cooper stated that Rowland denied that he sexually abused R.C. Agent Cooper testified that after Rowland was arrested and jailed pending

his trial for the rape and GSI charges herein, he made many phone calls to Shoshana, which agent Cooper monitored. Over a two-year period, Rowland and Shoshana spoke on the phone approximately 450 times. Agent Cooper testified that during these phone calls it was evident that R.C. and/or P.R. were present. During some of these calls, Shoshana would turn on the speaker so others in the room could hear the conversation. Rowland spoke to P.R. telling her that when he is out of jail he is going to take her on trips, like Disney World, Japan, etc. During another call, Rowland asks Shoshana to ask R.C. to talk to his lawyer and instructed Shoshana to put the call on the speaker. Agent Cooper testified that P.R. and R.C. were in the room at that time.

{¶46} The state introduced letters that Rowland and Shoshana sent to each other. In a letter from Shoshana she informed Rowland that R.C. was asking if they (Shoshana and Rowland) were back together Rowland responded "the only way we'll ever really be able to get back together is if [R.C.] would recant and tell the truth."

{¶47} The state then sought to play the audio from agent Cooper's interview of R.C. Defense counsel objected arguing it was hearsay and R.C. 's statements did not fall within the Evid.R. 804(B)(6) exception because she was available to testify. The court overruled the objection based on what the court "placed on the record yesterday[,]" i.e., it was admissible under Evid.R. 804(B)(6). The state then played an audio recording of agent Cooper's interview of R.C. During the interview, R.C. identified two locations where she had been

sexually abused. She also identified Rowland as her assailant maintaining that he inserted his finger inside her.

{¶48} The state then rested. Rowland did not call any witnesses but moved for acquittal, which the court denied. The jury convicted Rowland of both GSI and rape. The court sentenced Rowland to 36 months in prison for GSI, and life in prison without parole for the rape of a victim under the age of ten years old. The court also ordered that Rowland is not permitted to contact the victim, R.C. Rowland now appeals his convictions.

ASSIGNMENTS OF ERROR

I. MR. ROWLAND WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW BY THE ADMISSION OF HIGHLY PREJUDICIAL EVIDENCE AT TRIAL. FIFTH AND FOURTEENTH AMENDMENTS, U.S. CONSTITUTION; ARTICLE I, SECTION 16, OHIO CONSTITUTION. EVID.R. 104; EVID. 403.

II. JASON ROWLAND WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL. SIXTH AND FOURTEENTH AMENDMENTS, U.S. CONSTITUTION; ARTICLE I, SECTIONS 10 AND 16, OHIO CONSTITUTION.

III. THE TRIAL COURT ERRED WHEN IT ADMITTED HEARSAY STATEMENTS UNDER EVID.R. 804(A)(3) AND 804(B)(6) OVER DEFENSE COUNSEL'S OBJECTIONS. EVID.R. 804.

IV. THE TRIAL COURT ERRED WHEN IT ADMITTED HEARSAY STATEMENTS UNDER EVID.R. 801(D)(1)(C) OVER DEFENSE OBJECTIONS. EVID.R. 801.

V. JASON ROWLAND'S CONVICTION FOR RAPE IS NOT SUPPORTED BY SUFFICIENT EVIDENCE. FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND OHIO CONSTITUTION, ARTICLE I, SECTION 10. R.C. 2907.02.

VI. MR. ROWLAND'S CONVICTIONS ARE NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE. FIFTH AND

FOURTEENTH AMENDMENTS, U.S. CONSTITUTION; ARTICLE I, SECTIONS 10 AND 16, OHIO CONSTITUTION. R.C. 2907.02.

VII. THE TRIAL COURT ERRED WHEN IT IMPOSED BOTH A PRISON SENTENCE AND COMMUNITY CONTROL SANCTIONS.

VIII. THE CUMULATIVE EFFECT OF THE ABOVE-REFERENCED ERRORS DENIED JASON ROWLAND A FAIR TRIAL AND DUE PROCESS OF LAW. FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, U.S. CONSTITUTION; ARTICLE I SECTIONS 10 AND 16 OHIO CONSTITUTION. STATE V. DEMARCO, 31 OHIO ST.3D 191, 509 N.E.2D 1256 (1987).

First Assignment of Error

{¶49} Rowland argues that the trial court committed plain error by admitting highly prejudicial evidence. Rowland maintains that "relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." [Rowland's Brief p. 11] Rowland argues that permitting the testimony of Dr. Bethel and Carlisle and their accompanying exhibits was unfairly prejudicial to him.

{¶50} Rowland cites Dr. Bethel's testimony that R.C. was referred to him for "counseling after disclosure of sexual abuse." Dr. Bethel indicated that R.C. showed "indicators consistent with trauma." He maintained that there was concern that Shoshana did not support R.C.'s treatment and R.C. had regressed due to family conflict. Dr. Bethel indicated that it was Rowland who had sexually abused R.C., and he had not participated in any "offender treatment."

{¶51} Carlisle's testimony similarly identified Rowland as R.C.'s assailant. Carlisle also likened the juvenile court proceedings to the criminal proceedings in the instant case. She stated that the juvenile court adjudicated that R.C. had

been sexually abused, which was " 'kind of equivalent of a sentencing in a criminal court kind of if you were found guilty or not guilty. Obviously, not guilty or no abuse the case ends.' "

{¶52} Rowland claims that the prosecutor continued to ask unduly prejudicial questions of Carlisle, such as was there contact between R.C. and Rowland. Carlisle responded no because that was an order of the court. He also references Carlisle's labeling of Rowland as the " 'perpetrator' " and that he was ordered to take sex abuse counseling.

{¶53} Finally, Rowland cites the case management plan that identified him as R.C.'s abuser, that he needed to take sex offender therapy, and that indicated R.C. and P.R. had been removed from his home.

{¶54} Rowland argues that the aforementioned testimony and evidence left the jurors with the impression that Rowland had already been convicted of rape and GSI. He asserts that this misunderstanding was never corrected because counsel never objected to the testimony and the court never gave a limiting or curative instruction. Therefore, he claims that he was unfairly prejudiced by this evidence because it "confused the issues and *misled* the jury." (Italics sic.)

{¶55} In response, the state points out that because Rowland did not object to this evidence, he has waived all but plain error, which means that Rowland has the burden of demonstrating that but for the error, the outcome of the trial clearly would have been different.

{¶56} The state asserts that all relevant, probative evidence is likely prejudicial to a defendant. The state maintains that only evidence that is unfairly prejudicial is subject to exclusion, which is evidence that might result in an improper basis for the jury's decision, such as evidence that "appeals to a jury's emotions rather than intellect." [State's brief p. 10] The state asserts that it did not use the testimony of Carlisle or Dr. Bethel to appeal to the jurors' emotions.

{¶57} Dr. Bethel was a trauma therapist who treated R.C. after it was learned that R.C. had been abused. Statements made by R.C. to Dr. Bethel were admissible as statements made for the purpose of medical diagnosis or treatment. Dr. Bethel's letter was merely "a recitation of [Rowland's] status as the offender as had been reported by R.C. to Dr. Bethel, during her forensic interview, to Christina Carlisle, to Ashley Graham, and to Nancy Haynes." [State's Brief p. 12]

{¶58} The state similarly claims that Carlisle's testimony was not unfairly prejudicial. Her testimony reflected her role in the investigation, developing the safety plan, and supporting the abuse and neglect findings of R.C. in the juvenile court. Her testimony clearly established that the juvenile court proceedings regarding R.C.'s abuse were not criminal, but instead were civil in nature, which uses a different standard of proof. The state claims that Carlisle's testimony was necessary to outline the steps that were taken after R.C. disclosed the abuse.

Law

1. Standard of Review

{¶59} "The general rule is that 'an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.' " *State v. Awan*, 22 Ohio St. 3d 120, 122, 489 N.E.2d 277 (1986), quoting *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus . However, appellate courts "have discretion to consider forfeited issues using a plain-error analysis." *State v. McCoy*, 4th Dist. Pickaway No. 19CA1, 2020-Ohio-1083, ¶ 19, citing *Risner v. Ohio Dept. of Natural Resources, Ohio Div. of Wildlife*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 27.

{¶60} " 'To prevail under the plain-error standard, a defendant must show that an error occurred, that it was obvious, and that it affected [the party's] substantial rights,' *i.e.*, the trial court's error must have affected the outcome of the trial." *Id.*, quoting *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 62. However, " '[w]e take "[n]otice of plain error * * * with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." ' " *Id*., quoting *Obermiller* at ¶ 62, quoting *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978).

{¶61} "The admission or exclusion of evidence generally rests within a trial court's sound discretion." *Id.* at ¶ 20, citing *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 25. "A trial court has broad discretion to determine whether to exclude evidence under Evid.R. 403(A), and ' "an appellate court should not interfere absent a clear abuse of that discretion." ' " *Id*., quoting

State v. Yarbrough, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 40. "[A]n abuse of discretion implies that a court's attitude is unreasonable, arbitrary, or unconscionable." *Id*. citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

2. Evidence

{¶62} "[A]s a general rule, all relevant evidence is admissible." *McCoy*, 4th Dist. Pickaway No. 19CA1, 2020-Ohio-1083 at ¶ 20, citing Evid. R. 402. Pursuant to Evid.R. 403 (A) a court must exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

> Unfairly prejudicial evidence is evidence that "might result in an improper basis for a jury decision." *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 169, 172, 743 N.E.2d 890 (2001), quoting Weissenberger's Ohio Evidence (2000) 85-87, Section 403.3. It is evidence that arouses the jury's emotions, that " 'evokes a sense of horror,' " or that " 'appeals to an instinct to punish.' " *Id.* " 'Usually, although not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect.' " *Id.* Thus, "[u]nfavorable evidence is not equivalent to unfairly prejudicial evidence." *State v. Bowman*, 144 Ohio App.3d 179, 185, 759 N.E.2d 856 (12th Dist.2001).

State v. Sheets, 4th Dist. Jackson No. 21CA6, 2023-Ohio-2591, ¶ 96.

{¶63} However, Evid.R. 403(A) "manifests a definite bias in favor of the admission of relevant evidence, as the dangers associated with the potentially inflammatory nature of the evidence must substantially outweigh its probative value before the court should reject its admission." *State v. White*, 4th Dist. Scioto No. 03CA2926, 2004-Ohio-6005, ¶ 50. "Thus, '[w]hen determining

whether the relevance of evidence is outweighed by its prejudicial effects, the evidence is viewed in a light most favorable to the proponent, maximizing its probative value and minimizing any prejudicial effect to the party opposing admission.' " *McCoy* at ¶ 21, quoting *State v. Lakes*, 2d Dist. Montgomery No. 21490, 2007-Ohio-325, ¶ 22.

Analysis

{¶64} We begin our analysis by agreeing with Rowland's assertion that merely because evidence is relevant does not prevent it from being excluded if it is unfairly prejudicial. Even relevant evidence is inadmissible if it is unfairly prejudicial. Evid.R. 403 (A). The very nature of the testimony of Dr. Bethel and Carlisle and their documents, which identified Rowland as R.C.'s assailant and discussed various aspects of the sexual assault, is certainly unfavorable to Rowland, but "[u]nfavorable evidence is not equivalent to unfairly prejudicial evidence." *State v. Blake*, 2012-Ohio-3124, 974 N.E.2d 730, ¶ 41 (12th Dist.) (Presentation of cumulative witness testimony was not unfairly prejudicial).

{¶65} Dr. Bethel testified that R.C. identified Rowland as her abuser. Carlisle testified that on January 4, 2012 she received a call from law enforcement indicating that R.C. had been sexually abused by her step-father, Rowland.

{¶66} During her testimony, Carlisle compared sexual assault proceedings in juvenile court to sexual assault proceedings in a criminal court:

> [Prosecutor]: And the dispositional hearing [in the juvenile court] is where [the court] determines where they're going to be staying or if it * * * custody is continued?

> [Carlisle]: Um * * * our agency had been custody of the kids June 1st when the judge made an *adjudication of sexual abuse* on [R.C.] The * * * I guess the * * * the way I typically describe dispositional hearing to families and children is that it's kind of like what happens next or what happens now? (Emphasis added.)
> [Prosecutor]: Mmhmm * * *
> [Carlisle]: [*K*]*ind of like the equivalent of a sentencing in a criminal court* kind of if you were found guilty or not guilty. Obviously, not guilty or no abuse ends if the judge finds a child to be abused well this is what you have to do now so that we can work toward what our next plan is which in this case was unification.
>
> (Emphasis added.)

{¶67} The case plan also identified Rowland as R.C.'s abuser, required him to attend sex offender counseling, and that both R.C. and P.R. were removed from their home.

{¶68} Rowland maintains that this evidence confused and misled the jury into believing he had already been found guilty.

{¶69} The testimony from Dr. Bethel and Carlisle identifying Rowland as R.C.'s assailant is certainly prejudicial to Rowland as being probative in identifying her attacker, but we do not find it unfairly prejudicial.

{¶70} Regarding Carlisle's discussion comparing a sex abuse case filed in juvenile court with a sex abuse case filed in criminal court, it is important to recognize that she also explained the differences between those cases:

> [Prosecutor]: Okay, when you said * * * when you say you have a *trial in Juvenile Court* * * * um * * * understanding that's a *different standard* * * * " (Emphasis added.)
> [Carlisle]: *Yes*

> [Prosecutor]: [I]*t's not criminal. It's a civil matter*. Um * * * is that in regards to the allegations of the abuse and neglect?" (Emphasis added.)
> [Carlisle]: Yes, it was in regard to the sexual abuse allegation.

{¶71} Carlisle offered additional testimony that highlighted the difference between a sexual abuse case filed in juvenile court versus a sex abuse case filed in criminal court. She stated that she was an employed "Social Services Worker" who investigates child abuse and neglect. She maintained that if her investigation discovered a child had been sexually abused, a case was filed in "juvenile court." And if the juvenile court found the child had been abused, a case plan was formulated to protect the abused child and to guide treatment, including a case management plan.

{¶72} She further explained when she is investigating a sex abuse case, the prosecutor's office appoints an investigator to assist her. When her investigation was completed, if requested, she would provide her information to law enforcement who would then provide it to the prosecutor's office for the possible filing of criminal charges. We find Carlisle's testimony explains that child abuse cases in juvenile court are different from sex abuse cases filed against the offender in criminal court.

{¶73} In this case that distinction was further highlighted during closing arguments when defense counsel reminded the jury in this case that the state had the burden of proving Rowland's guilt "beyond a reasonable doubt." And this was reemphasized when the court instructed the jurors that the state had the burden of proving to the jury that Rowland was guilty of "every essential element" of rape and GSI "beyond a reasonable doubt." Defense counsel's reminder and

the court instruction made clear that it was the jury herein that was responsible for determining whether Rowland was guilty or not.

{¶74} Viewing this evidence in a light most favorable to the state, we find that the prejudicial value of this evidence does not substantially outweigh its probative value because it would not confuse or mislead the jury. Therefore, we find that Rowland failed to prove admission of this evidence was an obvious error, or that it created a manifest miscarriage of justice to support finding plain error. Accordingly, we find no reversible error and overrule Rowland's first assignment of error.

Second Assignment of Error

{¶75} In his second assignment of error Rowland asserts that he was denied effective assistance of counsel. Rowland claims that his trial counsel repeatedly failed to object to testimony that a juvenile court judge had found him guilty of the same offense for which he is being tried in this case under a lower burden of proof. Consequently, his counsel's failure to object to this evidence permitted the jury to hear unfairly prejudicial testimony that misled them into believing that he was already guilty. In support of his ineffective assistance of counsel claim, Rowland also cites the trial court's comment to his counsel suggesting that some of the testimony provided by the state's witness was "objectionable in the court's mind[.]"

{¶76} In response, the state maintains that Rowland's counsel was not ineffective. The failure to object alone is not enough to sustain a claim of ineffective assistance of counsel. The jury did not hear that Rowland was

convicted of rape or GSI in another case. The jury was aware that the burden of proof in the juvenile court was different from the burden in the instant case.

{¶77} Alternatively, even if counsel's representation was deficient for not objecting to this evidence, the state asserts that Rowland cannot show that this failure prejudiced him because there is additional evidence that supported his guilt.

Law

{¶78} To demonstrate ineffective assistance of counsel, Rowland "must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different." *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1988), paragraph two of the syllabus. Failure to demonstrate either prong of this test "is fatal to the claim." *State v. Jones,* 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14, citing *Strickland*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶79} Rowland "has the burden of proof because in Ohio, a properly licensed attorney is presumed competent." *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62, citing *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999), citing *Vaughn v. Maxwell*, 2 Ohio St.2d 299, 209 N.E.2d 164 (1965). "In order to overcome this presumption, the petitioner

must submit sufficient operative facts or evidentiary documents that demonstrate that the petitioner was prejudiced by the ineffective assistance." *Id.*, citing *State v. Davis*, 133 Ohio App.3d 511, 513, 728 N.E.2d 1111 (8th Dist.1999). To demonstrate prejudice, Rowland "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694.

{¶80} " '[W]here the failure to object does not constitute plain error, the issue cannot be reversed by claiming ineffective assistance of counsel.' " *State v. Jarrell*, 2017-Ohio-520, 85 N.E.3d 175, ¶ 54 (4th Dist.), quoting *State v. Teitelbaum*, 2016-Ohio-3524, 67 N.E.3d 85, ¶ 113 (10th Dist.), citing *State v. Roy*, 10th Dist. Franklin No. 14AP-223, 2014-Ohio-4587, ¶ 20.

Analysis

{¶81} First, we note that the trial court's comments regarding the effectiveness of Rowland's counsel are not dispositive of our analysis of the effectiveness of Rowland's counsel. Moreover, as we found in resolving Rowland's first assignment of error, admission of the testimony of Dr. Bethel, Carlisle, and their accompanying exhibits was not plain error. In particular, we found any confusion caused by Carlisle's testimony regarding juvenile and criminal court cases was alleviated by defense counsel's reminder of the beyond-a-reasonable doubt threshold and by admonitions of the trial court that it is the jury's duty to determine whether Rowland was guilty or not.

{¶82} Therefore, having found that Rowland could not prove plain error regarding the trial court's admission of the aforementioned evidence, his claim that his counsel was deficient for not objecting to the admission of this evidence lacks merit. *Jarrell* at ¶ 54. Even if Rowland could provide that his counsel's representation was deficient, he cannot prove those actions caused him prejudice, which is an essential element of a successful ineffective assistance of counsel claim. Accordingly, we overrule his second assignment of error.

Third Assignment of Error

{¶83} In his third assignment of error, Rowland asserts that the trial court erred when it admitted R.C.'s hearsay statements under Evid.R. 804(A)(3) and (B)(6). Rowland acknowledges that a ruling to admit or exclude evidence is typically reviewed under an abuse of discretion standard. However, here he claims that the court misunderstood what the term "unavailability" in Evid.R. 804(A)(3) means, so that issue should be reviewed under a de novo standard of review.

{¶84} Rowland claims that the trial court erred in finding that R.C. was unavailable due to a partial memory loss. He argues that to be unavailable for purposes of Evid.R. 804(A)(3), a witness must have a complete loss of memory of the entire matter. In support Rowland cites four cases: *State v. Donlow*, 7th Dist. Mahoning No. 21 MA 0046, 2022-Ohio-1518, ¶ 36-37, *State v. Gonzales*, 6th Dist. Wood Nos. WD-19-068 & WD-19-069, *State v. Bryant*, 12th Dist. Warren No. CA2007-02-024, 2008-Ohio-3078, and *State v. Price*, 5th Dist. Delaware Nos. 2019 CA 19 and 2019 CA 20, 2020-Ohio-132. Rowland points

out that R.C. testified and attempted to answer questions from the state even when she felt uncomfortable in doing so. Therefore, the trial court erred in finding that R.C. was partially unavailable as a witness for purposes of Evid.R. 804(A)(3). Rowland claims that if the trial court erred in finding that R.C. was unavailable his rights under the Confrontation Clause were also violated.

{¶85} Rowland further claims that even if the trial court did not err in finding R.C. was unavailable, the state failed to prove by a preponderance of the evidence that Rowland took part in wrongdoing that caused R.C. to be unavailable as a witness, which is required under Evid.R. 804(B)(6) for R.C.'s prior statements to be admissible. Rowland asserts that he had no direct contact with R.C. He made no threats to R.C. or her family regarding her testimony. To the extent that he made calls and sent letters about resuming a romantic relationship with Shoshana, the state offered no evidence that R.C. felt pressured to change her testimony.

{¶86} Therefore, Rowland maintains that R.C.'s hearsay statements as testified to by Hill, Allen, and agent Cooper should not have been admitted. The testimony of these witnesses identified Rowland as R.C.'s abuser and supported that R.C. had been raped. These inflammatory hearsay statements were prejudicial to Rowland. Therefore, his conviction should be reversed and a new trial ordered.

{¶87} In response, the state maintains that "[t]he trial court properly found that R.C.'s testimony indicating her inability to remember who assaulted her rendered her unavailable pursuant to Evid.R. 804(A)(3), and [Rowland's] role in

making her unavailable made her prior statements regarding the issue admissible pursuant to Evid.R. 804(B)(6)." And contrary to Rowland's assertion that the trial court misconstrued what it means to be "unavailable," the state maintains that the true issue here involves the admission and exclusion of evidence. Thus, the state claims that our standard of review is whether the trial court abused its discretion.

{¶88} The state argues that nothing in Evid.R. 804(A)(3) indicates that to be unavailable the witness must be completely unable or unwilling to testify. The state cites Evid R. 804(A)(3), which requires a lack of memory of their prior statement or statements for the witness to be unavailable.

{¶89} The state claims that a witness may lack memory for numerous reasons, including lapse of time, senility, incompetency, etc. The state argues that R.C.'s inability to recall who sexually assaulted her is similar to the victim in *State v. Burns*, 5th Dist. Licking No. 2012-CA-37, 2012-Ohio-4706. The victim in *Burns* could not recall what had happened 13 years before and had been diagnosed as having suppressed painful memories.

{¶90} When R.C. took the witness stand, before she was even asked a question, she spontaneously stated "I can't remember who it is," referring to her assailant. Therefore, the state argues that the trial court properly determined that R.C. was unavailable as a witness under Evid.R. 804(A)(3) because she could not recall the subject matter of her prior statements.

{¶91} Next, the state argues that under Evid.R. 804(B)(6) an out-of-court statement is admissible as an exception to hearsay when the witness is

unavailable due to the wrongdoing of a party against whom the statement is offered. The state claims it has provided evidence that wrongdoing by Rowland caused R.C. to be unavailable (i.e., his actions caused R.C. to suppress/forget the identity of her assailant). The state claims that jail calls and letters between Rowland and Shoshana, as well as testimony from Dr. Bethel, Hill, Allen, and agent Cooper supported the proposition that Rowland caused R.C. to be unavailable to testify as to the identity of her assailant.

{¶92} The state notes that Dr. Bethel testified that there was conflict in R.C.'s family. He indicated that there was a substantial likelihood that a child would be impacted if, during unsupervised visits with a parent, that parent talked about the perpetrator or suggested the child forget what happened.

{¶93} Hill testified that R.C. told her that she (R.C.) believed that it was her fault her family had been separated and she wanted her family back. She also testified that when R.C. and P.R. no longer lived with their mother, Rowland called to talk to P.R., but not R.C.

{¶94} Agent Cooper testified that when R.C. was ten years old, she refused to speak of the abuse in front of her family, but was willing to discuss it when out of their presence.

{¶95} After years of not communicating during his incarceration pending his trial in this case, Rowland started calling Shoshana, up to five times per week. These calls were recorded by agent Cooper who also listened to them. During these calls, Shoshana and Rowland expressed their love for each other and about getting back together.

{¶96} The state claims that in a 2020 letter, Rowland told Shoshana that the only way that they would get back together was "if [R.C.] would recant and tell the truth." [State's Brief 23] In some of the calls, Rowland told Shoshana that "he wanted R.C. to tell the prosecutor that she did not remember" what she had previously said about this case. Rowland would tell Shoshana that "he did not want to obstruct, but asked her to tell R.C. that he was proud of her, as long as she told the 'truth.' " However, "[w]hen taken in context, particularly in light of Rowland's letter sent in April 2020, this statement about telling the 'truth' was tongue and cheek. He wanted R.C. to recant and tell the version of the 'truth' that would benefit him." [State's brief p. 22] Agent Cooper testified that it appeared R.C. was present during a majority of these calls, which were typically put on speaker.

{¶97} The state also presented evidence that R.C. felt pressure from her own family to recant her claim against Rowland. Allen testified that after Rowland began calling and writing Shoshana, he (Allen) was invited to Shoshana's house. Once there, however, P.R. and R.C.'s girlfriend told Allen that R.C. did not want anything to do with him. P.R. accused Allen of being the one who assaulted R.C. and in response Shoshana nodded her head.

{¶98} Even if R.C.'s prior statements were improperly admitted, the error was harmless because there was other admissible evidence that supports Rowland's convictions. The state cites R.C.'s forensic interview where she identified Rowland as making R.C. touch him where he peed and him touching her vagina under her clothes. She described how and when Rowland touched

her vagina. That "[s]he consistently stated to Dr. Bethel, Teresa Hill, and other family members and professionals, that it was 'daddy Jason' who sexually assaulted her."

{¶99} Therefore, the state maintains that we should overrule Rowland's third assignment of error.

Law

1. Standard of Review

{¶100} An exception to hearsay, "[f]orfeiture by wrongdoing has long been recognized as an equitable exception to a defendant's constitutional right to confront the witnesses against him." *State v. McKelton*, 148 Ohio St. 3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 96, citing *Giles v. California,* 554 U.S. 353, 366, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008). Ordinarily, courts "review a trial court's hearsay rulings for an abuse of discretion." *Id*. at 97 citing *State v. Hymore,* 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967). However, "evidentiary rulings that implicate the Confrontation Clause" must be reviewed de novo. *Id*., citing *United States v. Henderson,* 626 F.3d 326, 333 (6th Cir.2010); *see also State v. Patterson*, 5th Dist. Stark No. 2023CA00027, 2023-Ohio-3579, ¶ 17; *State v. Dillion*, 2023-Ohio-777, 210 N.E.3d 748, ¶ 40 (10th Dist.); *State v. Hommes*, 11th Dist. Ashtabula No. 2022-A-0065, 2023-Ohio-4868, ¶ 17. "[A]n appellate court conducts a de novo review, without deference to the trial court's determination." *State v. Blanton*, 2018-Ohio-1278, 110 N.E.3d 1, ¶ 50 (4th Dist.). Therefore, our review of Rowland's third assignment of error is de novo.

2. Evid.R. 804(B)(6), Doctrine of Forfeiture by Wrongdoing

{101} Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Sheets*, 4th Dist. Jackson No. 21CA6, 2023-Ohio-2591, ¶ 100, quoting Evid.R. 801(C). "Hearsay is not admissible at trial unless it falls within an exception to the Rules of Evidence." *Id*., citing *State v. Stapleton*, 4th Dist. Pickaway No. 19CA7, 2020-Ohio-4479, ¶ 22.

{¶102} Hearsay may be admitted into evidence under the Doctrine of Forfeiture, Evid.R. 804(B)(6). *McKelton*,148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.2d 508 at ¶ 96. Evid.R. 804(B)(6) states:

> *Forfeiture by Wrongdoing*. A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement. [Emphasis sic.]

"To admit statements under [Evid.R. (B)(6)], a prosecutor must show by a preponderance of the evidence that (1) the defendant engaged in wrongdoing that *caused* the witness to be *unavailable* and (2) one *purpose* for the wrongdoing was to make the witness *unavailable* to testify." (Emphasis added.) *McKelton* at ¶ 96, citing *Fry* at ¶ 106. Preponderance of the evidence means that the witness's unavailability was more likely than not caused by the defendant. *See State v. Abernathy*, 4th Dist. Scioto No. 07CA3160, 2008-Ohio-2949, ¶ 54. "The staff notes to Evid.R. 804(B)(6) also make clear that, 'the wrongdoing need

not consist of a criminal act.' " *State v. Ford*, 6th Dist. Lucas Nos. L-20-1054 and L-20-1112, 2021-Ohio-3058, ¶ 34.

{¶103} "A court considering the admissibility of a statement under the doctrine of forfeiture by wrongdoing may make 'rational inferences' from the evidence presented by the state to determine whether the defendant participated in procuring the witness's absence with the intent to prevent the witness from testifying." *State v. Dillon*, 10th Dist. Franklin No. 21AP-666, citing *State v. Austin*, 7th Dist. No. 16 MA 0068, 2019-Ohio-1185 ¶ 39. It is important to note that "the forfeiture by wrongdoing rule only requires the defendant to intentionally procure the witness's unavailability." *State v. Henderson*, 2018-Ohio-5124, 125 N.E.3d 235, ¶ 24 (7th Dist.), citing *Davis v. Washington*, 547 U.S. 813, 833, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). To procure does not require the defendant himself to be the one who personally contacts the witness. Thus, "a defendant's intentional procuring of witness's unavailability from trial may be performed by others acting on his behalf." *State v. Paskins*, 2022-Ohio-3810, 199 N.E.3d 680, ¶ 42 (5th Dist.), citing *Henderson* at ¶ 24, citing *Giles v. California*, 554 U.S. 353, 361, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008).

{¶104} Finally, [a] witness is "unavailable" under Evid.R. 804(A)(3) if he or she "testifies to a lack of memory of the subject matter of the [witness/]declarant's statement[.]" "Ohio courts have previously found a declarant to be 'unavailable' where the declarant testifies as to his or her lack of memory concerning the events that occurred on a particular date that are the subject of the declarant's statement." *Bryant*, 12th Dist. Warren No. 2007-02-024, 2008-Ohio-3078, ¶ 44,

citing *State v. Gibson*, 2d Montgomery No. 14213, 1994 WL 672514, *2-3 (Nov. 30, 1994).

Analysis

1. The Trial Court Did Not Err in Finding R.C. was Unavailable

{¶105} Because its language is clear, we find no need to interpret Evid.R. 804(A)(3) as Rowland urges. Evid.R. 804(A)(3) simply states that a witness is "unavailable" if he or she "testifies to a *lack of memory* of the *subject matter* of the *declarant's statement*." (Emphasis added.)

{¶106} At trial, before even being asked a question, R.C. volunteered: "I don't think it was him. I just * * * now that I'm looking back into the memory, I'm seeing a completely different silhouette. I * * * *I just can't remember who it is*." (Emphasis added.) The prosecutor for the state then asked R.C. if she remembered telling him about Rowland. R.C.'s head then began to twitch and she indicated that she felt like her "emotions are about to switch off." She indicated that she remembered talking to the prosecutor but ever since COVID her memories have faded with just "bits and pieces" of her memory coming back but she indicated "*I don't remember who still though*." (Emphasis added.) On cross-examination, Rowland's counsel asked R.C. again if she remembered who sexually assaulted her and she responded "*Nope I don't*." (Emphasis added.) Rowland's counsel then assured R.C. that it was okay if she knew the identity of her assailant and she responded, "*I honestly don't know*." (Emphasis added.)

{¶107} Based on our de novo review of the record, we find that throughout R.C.'s testimony she testified that she could not remember the subject matter of

prior statements she had made pertinent to the sexual assault she experienced. Thus, consistent with the language in Evid.R. 804(A)(3), we find that R.C. was unavailable as a witness.

2. The Trial Court Did Not Err in Determining that Rowland Acted Wrongfully Intending and Causing R.C.'s Unavailability

{¶108} Next, we consider whether the trial court erred in finding that Rowland engaged in wrongdoing that intended, and, in fact, caused R.C. to be unavailable as a witness.

{¶109} Dr. Bethel testified that because there was some question of whether Shoshana was supportive of R.C.'s allegations against Rowland, it was his decision not to incorporate her into R.C.'s therapy.

{¶110} Agent Cooper testified that after Rowland sexually abused R.C., he left Ohio for the state of Washington and seldom contacted Shoshana, P.R., or R.C. However, that changed after he was arrested for the rape and GSI charges in this case and he was incarcerated pending trial. During his incarceration, Rowland frequently contacted Shoshana by phone and through letters.

{¶111} Rowland made approximately 450 calls to Shoshana while awaiting trial. R.C. was often present during these calls. Agent Cooper testified that Rowland and Shoshana often spoke about R.C.'s testimony. During one call, Rowland was interested in having R.C. speak to the prosecutor "wanting her to basically tell her she didn't remember or something like that[.]" During another call, Rowland wanted Shoshana to ask R.C. to talk to his lawyer because he is

trying to keep him (Rowland) out of prison. Rowland asked Shoshana to put the call on speaker. R.C. was present during that call.

{¶112} Agent Cooper testified that R.C. really wanted to travel. Rowland often spoke to P.R. about taking her on a trip when he got out of jail. However, during these discussions, R.C. was never included in the travel plans.

{¶113} Rowland and Shoshana also exchanged many letters in which they professed their affection for each other. In one letter Shoshana expressed her desire for she and Rowland to get back together, which agent Cooper read for the judge:

> So [R.C.] asked me earlier today if we were back together. I told her no, she asked why, and then didn't say why she asked. This * * * this * * * I think she meant to say this is confusing * * * it says this confusing apparently, she had a gut feeling to ask but it doesn't bother her. Um * * * lol Uh * * * that's all I could get out of her but the idea had me thinking about it but * * * uh * * * um * * * which * * * I'm sorry * * * thinking a bit which brought my mind back to you not being in jail and * * * yeah * * * you're my damn addiction and my kryptonite and one way or another I will get my fix.

Rowland wrote a letter back to Shoshana, asking: "My big question is she asking if we're together? Is she asking for herself? Or for Russ? I'm not too concerned with whether or not she's ok with it. The only way that we'd ever be back together is if she would recant and tell the truth."

{¶114} Allen testified that suddenly R.C. no longer wanted to see him and that P.R. asserted that it was Allen who assaulted R.C. Also, during the girls' disclosure to Allen that they no longer wanted to see him, Shoshana was nodding her head.

{¶115} Finally, Hill testified that R.C. told her that she (R.C.) believed that it was her fault the family broke up and she wanted her family back. She also testified that when R.C. and P.R. no longer lived with their mother, Shoshana would call to talk to P.R., but not R.C.

{¶116} Based on the aforementioned testimony, we infer that it is more likely than not that Rowland through his communications with R.C., as well as through actions of others on his behalf, engaged in wrongful actions that suppressed R.C.'s memory regarding the identity of her assailant as well as the facts of the sexual assault. Therefore, we find that the trial court did not err in admitting R.C.'s prior out-of-court statements that identified Rowland as her assailant and as to particular facts of the sexual assault. Accordingly, we overrule Rowland's third assignment of error.

Fourth Assignment of Error

{¶117} Rowland maintains that identification of R.C.'s assailant was not at issue in this case. Rowland claims that R.C. testified that Rowland was *not* her assailant. Therefore, the trial court erred when it admitted R.C.'s prior statements identifying Rowland as her assailant. Rowland claims the trial court's decision in this regard was a misinterpretation of Evid.R. 801(D)(1)(c), which is an issue of law so our review is de novo.

{¶118} Alternatively, he claims that if the trial court properly determined that identifying R.C.'s assailant was an issue in this case, the state was unable to satisfy Evid.R. 801(D)(1)(c). Evid.R. 801(D)(1)(c) permits admission of a prior statement of identification if the declarant *testifies* at trial, the subject of the

questioning pertains to the statement, and the statement is one of identification that demonstrates the reliability of the prior identification. Appellant argues that the trial court's finding that R.C. was unavailable to testify under Evid.R. 804(A)(3) and 804(B)(6) is irreconcilable with the trial court's finding that R.C. was available to testify pursuant to Evid.R. 801(D)(1)(c). "R.C. cannot be both unavailable to testify and available to testify at trial[.]"

{¶119} In response, the state claims that R.C. testified, but could not recall who abused her, so the identity of R.C.'s assailant was an issue in this case. Because a trial court has discretion whether to admit or deny evidence, this court's standard of review is an abuse of discretion. The state argues that the trial court's admission of R.C.'s prior identification of Rowland as her assailant was not an abuse of discretion.

{¶120} The state maintains that under Evid.R. 801(D)(1)(c) a statement is not hearsay if the circumstances demonstrate the reliability of the prior identification. When identification of a defendant is at issue and prior identification of that defendant has been made, that identification can be proved by other witnesses pursuant to R.C. 2945.55.

{¶121} In this case, R.C. had previously and consistently disclosed to a neighbor and others that Rowland had abused her. Because of these indicia of reliability, R.C.'s statements were admissible under Evid.R. 801(D)(1)(c).

{¶122} The state further asserts that R.C. did testify at trial and was subject to cross-examination. The trial court determined her unavailability based on her testimony that she could not remember the identity of her assailant.

Thus, the state maintains "trial court's finding of unavailability pursuant to Evid.R. 804(A)(3) was not irreconcilable with a finding that her prior identification was admissible pursuant to Evid.R. 801 (D)(1)(c)." [State's brief p. 28]

Law

1. Standard of Review

{¶123} A court has discretion to admit evidence under Evid.R. 801(D)(1)(c). *See State v. Steward*, 2020-Ohio-4553, 159 N.E.3d 356, ¶ 44 (10th Dist.), citing *State v. Anderson*, 7th Dist. Montgomery No. C.A. 13003, 1994 WL 95228, *3 (Mar. 23, 1994). A court abuses its discretion if its decision is "unreasonable, arbitrary, or unconscionable use of discretion, or as a view or action that no conscientious judge could honestly have taken." *State v. Brady*, 119 Ohio St. 3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23, citing *State v. Cunningham,* 113 Ohio St.3d 108, 2007-Ohio-1245, 863 N.E.2d 120, ¶ 5.

2. Evid.R. 801(D)

{¶124} Evid.R. 801(D)(1)(c) states that

> [a] statement is not hearsay if:
>
> (1) *Prior Statement by Witness. The declarant testifies at trial* or hearing *and is subject to examination concerning the statement*, and the statement is
>
> * * *
>
> (c) *one of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification.* (Initial italics sic.; emphasis added.)

The staff notes to Evid.R. 801(D)(1)(c) state:

> If a witness has made an identification prior to appearing in court to testify and such identification is the result of the witness having actually perceived the person identified, evidence of such identification is admissible *regardless of whether or not the witness can now make an identification*. 4 Weinstein's Evidence § 801(d)(1)(C) [01] (1977). The rationale for the rule is that the perception made nearer the event is at least as likely, if not more likely, to be accurate than a subsequent identification in the court room. (Emphasis added.)

{¶125} In *State v. Close*, 4th Dist. Washington No. 3CA30, 2004-Ohio-1764, two juvenile sisters accused their adoptive father of sexually abusing them. *Id*. at ¶ 3-6. Subsequently, both recanted their allegations with one child alleging that it was her biological father, not her adoptive father, who sexually abused her. *Id.* at ¶ 4, 6.

{¶126} At trial, the defendant alleged that the girls' statements to the investigators were "inadmissible hearsay and that the only possible theory upon which the State could have questioned the girls regarding their statements is an impeachment theory." *Id*. at ¶ 20. However, among other reasons, this Court stated that "Evid.R. 801(D)(1)(c) provides that a statement does not constitute hearsay when it relates to the identification of a person, if the circumstances demonstrate the reliability of the prior identification." *Id*. at ¶ 22. The court continued:

> in this case the identity of the perpetrator was called into question by Connie's testimony that she now believes her biological father committed the abuse against her. Circumstances demonstrate the reliability of Connie's prior identification, particularly the fact that the details she provided to investigators matched the details Close provided in his confession. Therefore, Connie's prior statements to investigators were admissible pursuant to Evid.R. 801(D)(1)(c).

Id.

{¶127} In an Evid.R. 801(D)(1)(c) analysis, the victim's familiarity with the perpetrator can demonstrate reliability in the witness's identification. *See State v. Steward*, 2020-Ohio-4553, 159 N.E.2d 356, ¶ 38 (10th Dist.). The Arizona Supreme Court has recognized that a hearsay declarant's "spontaneity" and "consistency" in their statement may also indicate trustworthiness. *State v. Robinson*, 735 P.2d 801, 811 (Ariz.1987). For example, the Court found that a minor "explained [her abuse] with little prompting." *Id*. The Court also recognized that the minor's "statements to Carrol Decker in late September was essentially the same as her statement to Danielle Parr in August." *Id*.

Analysis

{¶128} Although she could not identify her assailant, R.C. did testify and was subject to cross-examination at trial consistent with Evid.R. 801(D)(1)(c). Similar to *Close*, R.C. made out-of-court statements that identified Rowland as having sexually abused her, but at trial she was unable to identify her assailant. As in *Close*, the trial court herein admitted R.C.'s prior statements identifying Rowland as her assailant under Evid.R. 801(D)(1)(c). Consistent with our analysis in *Close*, we find R.C.'s prior statements identifying Rowland as her assailant are admissible even though she was unable to identify Rowland as her assailant at trial. *See* staff notes to Evid.R. 801(D)(1)(c).

{¶129} R.C.'s prior statements identifying Rowland as her assailant exhibit traits of trustworthiness/reliability. Having lived with Rowland, R.C. was obviously familiar with him for purposes of identifying him. She consistently identified "daddy Jason" as her abuser to Dr. Bethel, Huscheck, and agent

Cooper. We find it worth noting here that Huscheck described a forensic interview is a "*non-leading*, *neutral fact*" method of obtaining information from children. (Emphasis added.)

{¶130} We further find that Rowland's argument that R.C. was unavailable to testify under Evid. R. 804(A)(3) and 804(B)(6) is irreconcilable with the trial court's finding that R.C. was available to testify pursuant to Evid.R. 801(D)(1)(c) lacks merit. R.C. *did testify*, but was found unavailable as a witness because she could not recall the subject matter of certain prior statements.

{¶131} Therefore, we find that the trial court's admission of R.C.'s prior statements identifying Rowland as having sexually abused her was not unreasonable, arbitrary, or unconscionable. Thus, we overrule Rowland's fourth assignment of error.

Fifth Assignment of Error

{¶132} In his fifth assignment of error, Rowland argues that there is insufficient evidence to support his rape conviction. Rowland asserts that an essential element of rape is the insertion of any part of the body by the defendant into the vagina of the victim. Rowland contends that there is insufficient evidence to prove that Rowland inserted his finger into R.C.'s vagina. We note that Rowland was also convicted of GSI, but he does not challenge this conviction in either his fifth or sixth assignments of error. Therefore, Rowland's GSI conviction remains unchallenged in this appeal.

{¶133} Regarding his rape conviction, Rowland specifically alleges that the state did not prove that he inserted his finger into R.C.'s vagina.

Rowland maintains that the state used leading questions when asking R.C. about the assault, e.g., the state asked if her assailant rubbed in her vagina to which R.C. responded affirmatively. Rowland next cites R.C.'s testimony on cross-examination when she was asked whether someone rubbed "in [her] vagina or on her vagina," she stated that she could not remember.

{¶134} Rowland also cites the following passage from Huscheck's interview of R.C. at CPC:

> [Huscheck]: When he touched you under your clothes, did he touch you on your skin, or inside your body, or something else?
> [R.C.]: [Pointing to the front of the female anatomy drawing] There.
> [Huscheck]: Did it go on your skin, inside, or something else?
> [R.C.]: On my skin.
> [Huscheck]: On your skin. K. On your skin, under your clothes. Did I say that right?
> [R.C.]: Yes.

{¶135} Rowland argues that this testimony, as well as R.C.'s prior statements, raises significant doubt as to whether he penetrated R.C.'s vagina with his finger, a necessary element of rape. Therefore, he argues that his conviction is not supported by sufficient evidence.

{¶136} In response, the state asserts that there is sufficient evidence to support Rowland's rape conviction. The state cites R.C.'s trial testimony in which she testified on direct examination that the assault involved someone "rubbing *in* her vagina." (Emphasis sic.) The state acknowledges that during her interview by Huscheck, R.C. stated that her assailant touched her "on her skin." However, the state suggests that as R.C. grew more comfortable discussing the assault,

she disclosed more details. For instance, several years later when she was interviewed by agent Cooper, she disclosed to him that Rowland put his finger inside her while they were at Mamma Teresa's house.

{¶137} The state maintains, that in viewing this evidence in a light most favorable to the state, there is sufficient evidence to support Rowland's rape conviction. Therefore, the state argues that we should overrule his fifth assignment of error.

Law

1. Standard of Review

{¶138} "When a court reviews the record for sufficiency, '[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.' " *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "The sufficiency-of-the-evidence test 'raises a question of law and does not allow us to weigh the evidence.' " *State v. Knowlton*, 2012-Ohio-2350, 971 N.E.2d 395, ¶ 11 (4th Dist.), quoting *State v. Smith,* 4th Dist. Pickaway No. 6CA7, 2007-Ohio-502, ¶ 34, citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983). "Rather, the test 'gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *Smith* at ¶ 34, quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560

(1979). Thus, "a reviewing court will not overturn a conviction on a sufficiency of the evidence claim unless reasonable minds could not reach the conclusion that the trier of fact did." *State v. Nelson*, 2023-Ohio-3566, ___ N.E.3d ___, ¶ 31 (4th Dist.), citing *State v. Tibbetts*, 92 Ohio St.3d 146, 162, 749 N.E.2d 226 (2001).

2. Rape

{¶139} Rowland was found guilty of rape in violation of R.C. 2907.02(A)(1)(b), which states:

> No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:
>
> * * *
>
> (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

"Sexual conduct" is defined as

> 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.

R.C. 2907.01 (Emphasis added.)

Analysis

{¶140} R.C. testified at trial that she had been sexually assaulted twice, even identifying the locations as her prior home in Jackson, Ohio and again at "Mamma Teresa's" house. However, aside from knowing her attacker was male, she was unable to recall his identity. Her testimony on the specific facts of the assault was inconsistent. On direct examination she testified that her assailant

rubbed "in" her vagina, but on cross-examination she could not recall whether she was rubbed "in or on" her vagina.

{¶141} However, R.C. repeatedly and consistently identified Rowland as her assailant to numerous witnesses over the years. And those witnesses testified to that fact at Rowland's trial, including Dr. Bethel, Huscheck, Carlisle, and agent Cooper.

{¶142} R.C. also disclosed facts during her interview by agent Cooper indicating that Rowland committed rape.

[Cooper]:	"Did he touch you * * * was it just on the outside of your privates?"
[R.C.]:	"Uh, hu, inside."
[Cooper]:	"It was inside."
[R.C.]:	"Mm mh. And that's about all I remember."
[Cooper]:	"Ok, what did he touch you with?"
[R.C.]:	"His finger."
[Cooper]:	"His finger? And you are saying, did you saying that he put his finger inside you?"
[R.C.]:	"Hm mh."
[Cooper]:	"So when Jason put his finger inside you, do you know how deep?"
[R.C.]:	Barely inside."

{¶143} After viewing this evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of rape proven beyond a reasonable doubt, i.e., that Rowland used his finger to penetrate R.C.'s vagina. Therefore, we find that Rowland's rape conviction was supported by sufficient evidence and overrule his fifth assignment of error.

Sixth Assignment of Error

{¶144} In his sixth assignment of error, Rowland asserts that his rape conviction is against the manifest weight of the evidence. Similar to his lack-of-sufficient-evidence argument, Rowland maintains that there is a lack of persuasive evidence that Rowland inserted any body part into R.C.'s vagina.

{¶145} Rowland claims that agent Cooper failed to clarify some of R.C.'s vague statements. For example, Rowland claims that agent Cooper did not clarify what R.C. meant when she said he touched my "you-know-what," "inside" or "barely inside." Rowland also maintains that the statements that R.C. made in agent Cooper's interview should be excluded as hearsay.

{¶146} In response, the state argues that the jury did not lose its way in convicting Rowland of rape. The state cites R.C.'s testimony that Rowland touched her inside her vagina. It also cites agent Cooper's interview of R.C. wherein R.C. told Cooper that Rowland touched inside her vagina, which is sufficient to constitute sexual conduct for purposes of committing rape.

{¶147} The state asserts that this court should not second guess the jury's verdict. Therefore, the state urges this court to overrule Rowland's sixth assignment of error.

Law

{¶148} The " 'question to be answered when a manifest-weight issue is raised is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt." ' " *State v. Madison*, 4th Dist. Washington No. 22CA23, 2023-Ohio-4261, ¶ 29, quoting *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-

6235, 818 N.E.2d 229, ¶ 81, quoting *State v. Getsy*, 84 Ohio St.3d 180, 193-194, 702 N.E.2d 866 (1998), citing *State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978), syllabus.

> In determining whether a criminal conviction is against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that reversal of the conviction is necessary.

State v. Colonel, 2023-Ohio-3945, ___ N.E.3d ___, ¶ 54 (4th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

However, " '[b]ecause the trier of fact sees and hears the witnesses and is particularly competent to decide "whether, and to what extent, to credit the testimony of particular witnesses," we must afford substantial deference to its determinations of credibility.' " *Barberton v. Jenney*, 126 Ohio St.3d 5, 2010-Ohio-2420, 929 N.E.2d 1047, ¶ 20, quoting *State v. Konya*, 2d Dist. Montgomery No. 21434, 2006-Ohio-6312, ¶ 6.

{¶149} "Consequently, if the prosecution presented substantial credible evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence." *Madison*, 4th Dist. Washington No. 22CA23, 2023-Ohio-4261, ¶ 32, citing *Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978). "A court may reverse a judgment of conviction only if it appears that the fact finder, when it resolved the conflicts in evidence, ' "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial

ordered." ' " *Madison* at ¶ 32, quoting *State v. Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). " 'When conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony.' " *State v. Cooper*, 2007-Ohio-1186, 170 Ohio App.3d 418, 867 N.E.2d 493, ¶ 17 (4th Dist.), quoting *State v. Mason,* Summit No. 21397, 2003-Ohio-5785, ¶ 17.

Analysis

{¶150} As we recognized infra, we found that there is sufficient evidence to support Rowland's rape conviction. Here Rowland argues that although sufficient, the evidence is not persuasive and we should intercede and reverse Rowland's conviction under the weight-of-the-evidence standard of review. In this assignment of error Rowland focuses on the proposition that the evidence is not persuasive.

{¶151} Rowland suggests that some of R.C.'s responses to agent Cooper's questions were "vague" and needed clarification. For example it is unclear what R.C. meant when she said he touched my "you-know-what." Even accepting the term my "you know what" is vague and not clear, the following statements make clear that Rowland inserted his finger into R.C.'s vagina, which is rape:

> [Cooper]: Did he touch you * * * was it just on the outside of your privates?
> [R.C.]: Uh, hu, inside.
> [Cooper]: It was inside.
> [R.C.]: Mm mh. And that's about all I remember.
> [Cooper]: Ok, what did he touch you with?

[R.C.]: His finger.
[Cooper]: His finger? And you are saying, did you saying that he put his finger inside you?
[R.C.]: Hmmh.
[Cooper]: So when Jason put his finger inside you, do you know how deep?
[R.C.]: Barely inside.

{¶152} We acknowledge that R.C. also provided some testimony or statements that could be construed as inconstant in coming to a conclusion that she had been raped. For example, on cross-examination, she testified that she could not remember whether she was touched in or on her vagina. However, she was nervous during her testimony as evidenced by her various ticks. But her statements as testified to by other witnesses such as agent Cooper corroborated that Rowland raped her. Further, we are required by law in a manifest-weight-of-the evidence challenge to afford the jury "substantial deference" in their credibility determinations. Simply because the jury believed the state's evidence does not cause Rowland's conviction to be against the manifest weight of the evidence.

{¶153} We do not find that the jury clearly lost its way so as to create such a manifest miscarriage of justice that compels this court to step in as a thirteenth juror and reverse Rowland's conviction and order a new trial ordered. Therefore, we find that Rowland's rape conviction is not against the manifest weight of the evidence. Accordingly, we overrule Rowland's sixth assignment of error.

Seventh Assignment of Error

{¶154} Rowland asserts that the trial court erred in sentencing him to prison and a no-contact order. He claims that the current statutory scheme

permits a court to impose a prison term or a community control sanction on each criminal count, but not both.

{¶155} In response, the state concedes that a court can sentence a criminal defendant to prison or a community control sanction.

{¶156} In *State v. Anderson*, the defendant was convicted of kidnapping and rape and was ordered to have no contact with the victim, and sentenced to a prison term. 143 Ohio St.3d 173, 2015-Ohio-2089, 35 N.E.3d 512, ¶ 2. The Court recognized that a no-contact order was a community control sanction. *Id.* at ¶17. It further determined that " 'felony sentencing statutes * * * require courts impose either a prison term or community control sanctions on each count.' " *Id*. at ¶ 23, quoting *State v. Berry,* 2012-Ohio-4660, 980 N.E.2d 1087, ¶ 21 (3d Dist.). Therefore, the Court vacated the "no contact order."

{¶157} Because the trial court herein improperly sentenced Rowland to a prison term and a community control sanction (i.e., the no-contact order), we sustain Rowland's seventh assignment of error. Pursuant to *Anderson*, we remand this case to the trial court for it to vacate the no-contact order.

Eighth Assignment of Error

{¶158} In his eighth assignment of error, Rowland asserts that the cumulative effect of the above-mentioned errors deny him a fair trial and due process of law.

{¶159} **"**Under the cumulative-error doctrine, 'a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial

court error does not individually constitute cause for reversal.' " *State v. Fannon*, 2018-Ohio-5242, 117 N.E.3d 10, ¶ 124 (4th Dist.) citing *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995). "Before we consider whether 'cumulative errors' are present, we must first find that the trial court committed multiple errors." *State v. Smith*, 2016-Ohio-5062, 70 N.E.3d 150, ¶ 106 (4th Dist.).

In this case we have found *one* error (trial court erred in imposing a no-contact order), which will be remedied on remand. Therefore, we find no cumulative error, so we overrule his eighth assignment of error.

CONCLUSION

{¶160} We overrule Rowland's first, second, third, fourth, fifth, sixth and eighth assignments of error, but we sustain his seventh assignment of error and remand this matter to the trial court to vacate the no-contact order imposed on Rowland. Therefore, we affirm Rowland's judgment of conviction and remand the matter for the trial court to vacate the no-contact order.

JUDGMENT AFFIRMED, BUT CAUSE IS REMANDED FOR THE TRIAL COURT TO VACATE THE NO-CONTACT ORDER.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED BUT THE CAUSE IS REMANDED FOR THE COURT TO VACATE THE NO-CONTACT ORDER and the appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Common Pleas Court to carry this judgment into execution.

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

Smith, P.J. and Hess, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Kristy S. Wilkin, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.