[Cite as *State v. Taylor*, 2025-Ohio-2250.]

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

STATE OF OHIO,	:	
	:	Case No. 23CA14
Plaintiff-Appellee,	:	
	:	
v.	:	DECISION AND JUDGMENT
	:	ENTRY
ROBERT KEITH TAYLOR,	:	
	:	
Defendant-Appellant.	:	**RELEASED: 06/18/2025**

APPEARANCES:

Brian T. Goldberg, Cincinnati, Ohio, for appellant.

Anneka P. Collins, Highland County Prosecuting Attorney, and Adam J. King, Assistant Highland County Prosecuting Attorney, Hillsboro, Ohio, for appellee.

Wilkin, J.

{¶1} This is an appeal from a Highland County Court of Common Pleas judgment entry of conviction in which appellant, Robert Keith Taylor, was found guilty by a jury of three counts of rape with the additional finding that the two victims, C.B. and B.P., were less than ten years old at the time of the sexual assault. Based on the jury's guilty verdicts and additional findings, the trial court imposed a prison term of life without parole on each count to be served concurrently.

{¶2} Taylor presents seven assignments of error challenging his convictions. In the first assignment of error, Taylor maintains his constitutional right to present a defense was violated when the trial court concluded that three of his witnesses violated the trial court's separation of witnesses order and

excluded them from testifying. We disagree and overrule his assignment of error. The proffered testimony of the three defense witnesses is inadmissible and Taylor fails to demonstrate he was materially prejudiced by the trial court's decision to exclude their testimony.

{¶3} In the second assignment of error, Taylor argues that the trial court committed reversible error when it improperly added an alternate juror after selecting and swearing in the jurors. We disagree and overrule the second assignment of error. The added alternate was not involved in the deliberation process, thus, any error was harmless.

{¶4} In the third assignment of error, Taylor argues that the trial court committed plain error when it permitted one of the child victims to testify to other acts that were not indicted. We disagree and find no plain error and overrule this assignment of error. B.P.'s testimony was proper as it demonstrated Taylor's grooming process and course of conduct of sexually abusing her over a period of three years.

{¶5} In the fourth assignment of error, Taylor argues that the trial court abused its discretion when, over his objection, the court admitted hearsay evidence in the form of the victims' complete interviews with a forensic interviewer with the Mayerson Center at Cincinnati Children's Hospital. We find any error to be harmless and overrule Taylor's fourth assignment of error.

{¶6} In the fifth assignment of error, Taylor argues that the trial court committed plain error when it failed to provide the jury with specific instructions on unanimity with regard to the first and second counts. Taylor maintains that a

specific instruction on unanimity was required because B.P. testified to several sexual abuse conduct. Thus, the jury should have been instructed that they were required to be unanimous as to which sexual conduct act supported each of the two counts of rape involving B.P. We disagree. The trial court properly instructed the jury pursuant to the requirements of the law and Taylor fails to demonstrate that the outcome of the case would have been different. Therefore, we overrule Taylor's fifth assignment of error.

{¶7} In the sixth assignment of error, Taylor argues that the prosecution committed misconduct during the rebuttal closing argument by referring to C.B. and B.P. as "victims." Taylor claims the "victim" reference is improper vouching. We disagree and find no misconduct by the prosecution. The references were based on the evidence presented that Taylor sexually abused C.B. and B.P. We thus, overrule Taylor's sixth assignment of error.

{¶8} In the final assignment of error, Taylor argues his convictions are against the sufficiency and manifest weight of the evidence because the only witnesses were C.B. and B.P. Taylor maintains there is no corroborating evidence of the abuse and both C.B. and B.P. were testifying to events that occurred numerous years prior. We disagree and find that the jury did not lose its way in finding C.B. and B.P.'s testimonies credible. Both testified to specific incidents in which Taylor committed the offense of rape. We, thus, overrule Taylor's seventh assignment of error.

FACTS AND PROCEDURAL BACKGROUND

{¶9} During C.B.'s science class while in high school in which the teacher was teaching the students about genetics and incest, C.B. began tearing up and the teacher noticed she was very upset. The teacher placed a note on C.B.'s desk and asked if she was well and told her to go outside to the hallway. The teacher shortly followed C.B. to the hallway and this is when C.B. revealed she was raped by Taylor, her uncle.

{¶10} The teacher took C.B. to the school's guidance counselor and an investigation ensued. As part of the investigation, C.B., and her "sister" B.P., were interviewed at the Mayerson Center at Cincinnati Children's Hospital. Taylor was also interviewed by Detective Sergeant Vincent Antinore of the Highland County Sheriff's Office.

{¶11} Based on the investigation, Taylor was indicted for two counts of rape with B.P., as the victim, and one count of rape with C.B., as the victim. All three counts included the additional specification that both victims were less than ten years old at the time of the sexual assault. Taylor pleaded not guilty and the matter proceeded to a jury trial.

{¶12} Both C.B. and B.P. testified at trial. B.P. was 18 years old when she testified, but was around 8 years old when Taylor raped her. Taylor is married to B.P.'s aunt and used to live across the street from her grandmother's house, and at one point, lived in a camper in her grandmother's backyard. B.P. and C.B. lived almost their entire lives with their grandmother since their parents were unfit

to care for them. And for several months, due to B.P.'s father's use of drugs at the grandmother's house, B.P. and C.B. lived with Taylor and his wife.

{¶13} C.B. was 15 years old at the time of her testimony, but was approximately 8 years old when Taylor raped her. In the spring of 2017, C.B., some of her siblings, and Taylor camped in her grandmother's backyard. At night, while they were all in the large tent, C.B. woke up and asked to sleep on the mattress with Taylor. C.B. moved from the floor to the mattress and started dozing off. At one point, she woke up to "his private parts in my butt." She could hear him grunting and moaning, and his hands were around her. Taylor was behind her and this lasted about five minutes. When Taylor was done, he got up and left the tent. C.B. also left the tent and went inside the house and used the restroom. She saw blood as she wiped and threw away her leggings and underwear because they were wet. C.B.'s bottom hurt for a few days. After this incident, Taylor did not sexually abuse her again, but he made many sexual comments that made her uncomfortable.

{¶14} B.P. testified to several incidents in which Taylor sexually assaulted her. The first one she recalled was going to Taylor's bedroom and watching pornographic VHS videos. One time, while B.P. was about to shower in the bathroom that was attached to Taylor and his wife's bedroom, Taylor came into the bathtub and forced her to sit on his lap. She recalls a back and forth movement for about ten minutes and Taylor was facing away from her. Taylor forced his penis inside her vagina and it hurt. B.P. recalled other assaults that occurred in the camper where Taylor:

> would have me lay down on the bed and he would usually, I remember there would usually be a movie on, most of the time. So, I would usually be like watching a movie or something and he would lay down like behind me, like I would be on the foot of the bed and then he would lay behind me. And then I remember he would put his hand like into my pants and into my underwear and start touching me on like my vagina area. And would force his fing…like penetrate me with his fingers and um, yeah.

{¶15} She also recalled a purple vibrator that Taylor used and put inside her vagina. She remembers being in pain. Taylor also used a cotton-candy-flavored lubricant that he would place on his penis and would tell B.P. to suck his penis. She also testified that Taylor taught her how to masturbate him.

{¶16} B.P. continued to testify of other assaults including one time in which she and Taylor were in his van on their way back to her grandmother's house. Taylor pulled the van over, and while they were clothed, he grabbed B.P. and placed her on his lap facing him. He kept a hold of her hips and was moving back and forth. Taylor was making sounds and this lasted for about ten minutes.

{¶17} Both C.B. and B.P. testified that they did not tell anyone, including none of the social services workers, as they were both scared and did not want to be blamed for separating the siblings from each other. Neither of them wanted to cause any more issues for the family.

{¶18} Taylor testified on his behalf and was the sole defense witness. He denied the allegations and stated how much he loved C.B and B.P. and they were like his children. And that he did not believe they feared him, and, with B.P., he helped her learn to drive. Taylor explained that he recalled an incident with the purple vibrator which belongs to his wife. He recalled B.P. finding the vibrator and removing it from a drawer from his and his wife's bedroom. He told

B.P. this is not yours and do not touch it again. He testified that he did not abuse C.B. or B.P.

{¶19} The jury found Taylor guilty of three counts of rape with the special finding that both C.B. and B.P. were under the age of ten years old. Immediately following the jury's verdict, the trial court proceeded to sentencing. At the sentencing hearing, Taylor declined to address the trial court. The trial court imposed the mandatory prison term of life without the possibility of parole as to each count. The trial court ordered the sentences to be served concurrently and classified Taylor as a Tier III sexual offender. It is from this judgment of conviction entry that Taylor appeals.

FIRST ASSIGNMENT OF ERROR

MR. TAYLOR'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND TO COMPULSORY PROCESS WAS VIOLATED WHEN THE TRIAL COURT REFUSED TO ALLOW HIM TO PRESENT NECESSARY DEFENSE WITNESSES.

{¶20} In the first assignment of error, Taylor argues that his constitutional right to present a defense was violated when the trial court excluded the testimony of three key defense witnesses. The trial court excluded the three witnesses because they violated the separation of witnesses order in which they were seen viewing the trial on YouTube. Taylor's trial counsel informed the trial court that these witnesses were not informed of the separation order and stressed that Taylor did not encourage or know of the violations. Further, the exclusion of these witnesses was prejudicial, because, as proffered, they would have attacked the credibility of the victims, whose testimonies were the sole basis of the convictions as there was no corroborating evidence of the alleged

sexual abuse. Therefore, Taylor maintains he was denied his constitutional right to present a defense and was deprived of a fair trial.

{¶21} The State in response contends that Taylor was not prejudiced by the trial court's exclusion of the three witnesses for violating the separation order. The State asserts that the proffered testimony of the three witnesses would not have been admitted. This is because their testimony would have been excluded as it is improper extrinsic evidence attacking the character of the victims. Additionally, the State maintains that Taylor was the one who requested the separation of witnesses and should be held accountable for ensuring his witnesses were aware of the trial court's order. And the three witnesses violated the separation order twice in which after being informed by a court personnel to not view the trial, they continued to watch it.

Law and analysis

I. Witness separation order proceedings

{¶22} At 11:18 a.m., a couple of hours into the trial, the trial judge received a note from court personnel that Magistrate Williams observed defense witnesses watching the trial on YouTube. As a result of this note, the judge inquired of the magistrate and she elaborated as follows:

> I walked through the hall several times, I suspected that they were watching it. So, I made a comment make sure that no one is watching the trial on YouTube. I came back through and caught them all watching, very obviously watching and went and got Ben Reno, we went out and questioned them. They admitted that they have watched all of the witnesses.

{¶23} The trial court found that the three witnesses violated its order of

separation of witnesses, and questioned Taylor's counsel if he knew who the witnesses were. The three witnesses were identified as Kennedy Taylor, Jennifer Penix, and Raevyn Taylor, and the trial court excluded them from testifying. Taylor's counsel requested a mistrial and argued that the violation of the trial court's separation of witnesses order was not because of anything Taylor did. Taylor's trial counsel further attested that

> [t]here are no notices around the courthouse stating that participants in the proceedings cannot watch and she was not in the courtroom at the time that we moved for separation of witnesses. So there was no instruction given to her or to Kennedy or Raevyn about not being in the courtroom or watching anything on YouTube. We believe that it prejudices the Defendant's defense way beyond any other issues because they are his defense witnesses and without those we basically, we cannot offer the defense that we had anticipated and that we had planned on. So, we do ask for a mistrial at this point in time.

{¶24} The trial court denied Taylor's motion for mistrial and reminded everyone that

> it was a defense motion to separate witnesses. The Court indicated I didn't know who the witnesses were and so each party would have to take care policing themselves and doing that. Thirdly, you know telling them they can watch it on YouTube, anybody can watch it on YouTube unless you are a witness and there is a separation and then you are not allowed to. And the way it was described by Magistrate Williams was that when she came out they tried to hide it from her, she warned them they weren't allowed to do it and when she walked by they were doing it again. So, that indicates intentional misconduct on their part. And so, the Defendant is not entitled to have a mistrial based upon the defenses own failure to comply with the, with the separation of witnesses. So, unless the State is willing to waive the separation and again the note that I indicated and I asked said they had watched everything that had happened up until 11:18 when it was reported to me. And that would have included all of the witnesses, it wouldn't have included maybe the last twenty or thirty minutes of [B.P.]'s testimony.

{¶25} After the State rested its case, Taylor's counsel stated that he wished to call the three witnesses but that the trial court excluded them from testifying. The trial court re-stated the exclusion order:

> and again it's clear they knew they weren't suppose[d] to be doing that because the Magistrate said when that when she walked by they were, they were, they pulled their phones away and as she walked by and then when she went back again she, they hadn't turned the phones off, she could hear them. [S]he went in her office and said she knew that that was what they were doing and she could see from her office they were looking at it on their phone. And that's when she told them to turn it off immediately. But she had previously warned them they could not do it. So, they intentionally violated the order. So, the Court is going to exclude that, those witnesses.

II. Standard of review and law

{¶26} Pursuant to Evid.R. 615(A)

> at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. An order directing the "exclusion" or "separation" of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses.

{¶27} "The purpose of separating witnesses is to prevent them from hearing the testimony of other witnesses and tailoring their testimony accordingly." *State v. Stroud*, 2023-Ohio-569, ¶ 41 (11th Dist.), citing *State v. Waddy*, 63 Ohio St.3d 424 (1992); Evid.R. 615.

{¶28} Ordinarily, exclusion of witnesses is a decision within the sound discretion of the trial court. *State v. Smith*, 49 Ohio St. 3d 137, 142 (1990).

> However, where the court seeks to exclude a witness for violating a separation order, there must be a showing that the party calling the witness consented to, connived in, procured or had knowledge of the witness' disobedience. Secondly, the testimony

> sought to be introduced must be important to the defense such that exclusion of the evidence constitutes prejudicial error.

Id.

{¶29} "Therefore, in order to conclude that a trial court's exclusion of a disobedient witness was proper pursuant to *Smith*, a reviewing court must either find that the defense encouraged or knew of the witness's violation, and if the defense did not, then it must find that the witness's exclusion caused no prejudice to the defendant." *State v. Santibanez*, 2023-Ohio-3404, ¶ 17 (6th Dist.), quoting *State v. DeWitt*, 2010-Ohio-4777, ¶ 61-63 (7th Dist.).

{¶30} In the matter at bar, there is no affirmative conduct by Taylor that caused the three witnesses to violate the separation order by viewing the trial proceedings on YouTube. It may be asserted that Taylor was negligent in failing to ensure the witnesses were aware of the trial court's separation of witnesses order that was requested by him, but it does not rise to the level of consenting to, conniving in, procuring or having knowledge of the three witnesses' behavior. *See Smith*, 49 Ohio St. 3d 137, 142 (1990). We previously held that due to

> the implications on the accused's constitutional right to compulsory process, exclusion for violation of an evidentiary rule requires more than a showing of mere negligence on the defense side. Rather, in order to constitutionally justify the drastic sanction of exclusion, there should be evidence of some affirmative misconduct by the defendant.

State v. Nichols, 2012-Ohio-1608, ¶ 44 (4th Dist.).

{¶31} Therefore, what we need to determine, is "if the witness was wrongfully prevented from testifying, did it constitute prejudicial error or was it 'harmless beyond a reasonable doubt?' " *State v. Evans*, 1994 WL 277881, *5

(2d Dist. June 22, 1994), citing *Smith*, 49 Ohio St. 3d 137, 142-143 (1990). And the Supreme Court has cautioned that a reviewing court should be slow to interfere and not reverse a trial court's ruling admitting or excluding evidence, unless the trial court has abused its discretion and the defendant has been materially prejudiced. *State v. Maurer*, 15 Ohio St. 3d 239, 265 (1984).

III. Proffered testimony of the three witnesses

{¶32} Prior to Taylor's testimony at trial, his counsel placed on the record the proffered testimony of the three excluded witnesses. For his wife, Jennifer, Taylor proffered she would testify to the following:

> that she discussed this with [B.P.] when [B.P.] talked to her about it and that [B.P.] admitted that she was lying. That she was lying because at Christmas Eve this past year [B.P.] had asked [Taylor] to provide alcohol for her and possibly [C.B.] for Christmas Eve. He declined to do so, she was mad about that. She asked Jennifer Penix, Jennifer also declined to do that and [B.P.] made some comment about well, I'll get mine or something along those lines. [B.P.] also requested that Jennifer Penix purchase[] for her something called sex dice.
>
> . . .
>
> But and that Jennifer declined to do so. Then [B.P.] called [Taylor] and asked him for the same thing, sex dice, he declined to purchase those. And once again, she was upset and said that he would regret that.

{¶33} After this proffer, the trial court indicated that this is all hearsay regarding what B.P. told Jennifer. Taylor's trial counsel stated that it would not be hearsay because Taylor would be testifying and the testimony should be admissible as it is statements between him and his wife:

> that [B.P.] called her and asked her to purchase sex dice. And that she declined to do so. [Jennifer] then called [Taylor] and said you'll never guess what just happened, what [B.P.] asked for. [Taylor] said sex dice. So, it was a conversation between [Taylor] and Jennifer.

{¶34} Taylor's counsel continued with the proffer of the anticipated testimony from the remaining two witnesses:

> RaEvyn (sic.) would testify, actually both RaEvyn (sic.) and Kennedy would testify to times when [B.P.], usually [B.P.] but also [C.B.] would take things from their rooms and hide them or keep them for themselves but then lie about it and say they were told that they could have these things. And things like makeup and things like that, it's the foundation that they were lying about things. . . . This is why these are all important witnesses.

IV. No prejudice in the exclusion of the defense witnesses

{¶35} As the above outlined proffered testimonies demonstrate, the testimony of the three witnesses would not have been admissible.

{¶36} Evid.R. 608(A) provides that:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) The evidence may refer only to character for truthfulness or untruthfulness, and (2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

{¶37} We previously emphasized that

> A witness cannot testify about whether another witness is being truthful in a particular instance because that infringes upon the role of the jury. . . . "While Evid.R. 608(A) permits testimony regarding a witness's general character or reputation for truthfulness, the rule prohibits testimony regarding a witness's truthfulness on a particular occasion." *State v. Pawlak*, 8th Dist. Cuyahoga No. 99555, 2014-Ohio-2175, 2014 WL 2167887, ¶ 41.
>
> . . .
>
> *See State v. Cook*, 3rd Dist. Union No. 14-19-26, 2020-Ohio-3411, 2020 WL 3409900, ¶ 41 (a witness can be asked about a child victim's general character for truthfulness or untruthfulness to undermine the child's credibility. However, a defense counsel's questions concerning the child's credibility with respect to the child's particular allegations against defendant are improper.)

State v. Shepard, 2024-Ohio-1408, ¶ 31, 32 (4th Dist.).

{¶38} The prohibition of testimony regarding a witness's truthfulness on a particular occasion is because such testimony infringes upon the role of the fact finder. *Id*. Taylor's proffered testimony of his wife is in direct conflict of the application of Evid.R. 608(A) and our previous holding. According to Taylor, Jennifer would testify that B.P. is lying about the particular sexual abuse – the specific allegations against Taylor.[1]

{¶39} As to the other two witnesses, their proffered testimony is that both C.B. and B.P. lie and steal items from their room. This testimony would attack the character of the victims with specific instances, and again is inadmissible. Evid.R. 608(B) requires that

> for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid.R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, *be inquired into on cross-examination of the witness* (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as *to which character the witness being cross-examined has testified*. (Emphasis added.)

{¶40} Both C.B. and B.P. testified at trial and were subject to cross-examination. Taylor failed to question either victim if the allegations of sexual abuse are fabricated, question them regarding their reputation in the community as being dishonest, and question them of specific incidents in which they were accused of stealing or lying. Moreover, Taylor failed to question B.P. and C.B. if they previously made false sexual abuse allegations. *See State v. Boggs*, 63

[1] As part of his argument, Taylor maintains that it was imperative to have his wife, Jennifer, testify that the purple vibrator belonged to her. We disagree as the ownership of the vibrator was not in dispute.

Ohio St.3d 418, 421 (1992) (The Supreme Court of Ohio explained that because false accusations do not fall within the rape shield statute, "a defendant is permitted under Evid.R. 608(B), in the court's discretion, to cross-examine the victim regarding such accusations if 'clearly probative of truthfulness or untruthfulness.' ").

{¶41} Further, none of the character attack evidence would be admissible pursuant to Evid.R. 404(A)(2), which provides:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, subject to the following exceptions: . . . (2) Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

{¶42} Here, Taylor's witnesses' proffered testimony is that C.B. and B.P. are liars and they are acting in conformity therewith by lying about the sexual abuse. This is inadmissible. And the exception in rape cases to admit "evidence of the origin of semen, pregnancy, or sexually transmitted disease or infection, or the victim's past sexual activity with the offender," does not apply here. *See* R.C. 2907.02(D).

{¶43} Therefore, because none of the proffered testimony of Taylor's three witnesses would have been admissible, he fails to demonstrate that he was materially prejudiced by the trial court's decision to exclude them. Additionally, as we address in the seventh assignment of error, Taylor's convictions are supported by the sufficiency and manifest weight of the evidence.

{¶44} Accordingly, we overrule Taylor's first assignment of error.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADDED AN ALTERNATE JUROR FROM THE JURY VENIRE AFTER ALL JURORS AND ALTERNATE JURORS HAD ALREADY BEEN SWORN IN.

{¶45} In the second assignment of error, Taylor argues that the trial court committed reversible error by improperly adding an alternate juror after all jurors were selected and sworn in. The trial court replaced the alternate juror without providing Taylor the opportunity to question the newly seated alternate juror or provide Taylor with the option to use a preemptory challenge. Taylor contends that there is nothing in the Ohio Revised Code or the Rules of Criminal Procedure that permit the trial court to replace a juror after the jury was sworn in and seated.

{¶46} The State in response maintains that even if we assume the trial court erred, the error is harmless because the second alternate who was assigned after the jury was sworn in did not participate in the deliberation process. The alternate juror remained an alternate juror.

Law and analysis

{¶47} We begin by outlining the jury selection procedure that occurred here. Taylor pleaded not guilty to the three counts of rape and the matter proceeded to a jury trial. During the jury's selection, several jurors were excused before 12 jurors and 2 alternates were selected. The selected 12 jurors and 2 alternates were sworn in and released to the jury room. However, minutes later, the trial court was informed that juror number four indicated she would be biased

as her uncle is the former chief of police. The trial court questioned this juror and based on her responses, the trial court discharged this juror from service. The trial court then consecutively replaced juror number four, who was just discharged, with juror number five, and juror number five was replaced with juror number six and so on. The release of juror number four left one alternate juror seat empty, thus, a second alternate juror was needed.

{¶48} In order to find a replacement for the second alternate juror, the trial court requested that one member of the jury venire return to the courtroom. This juror was not questioned and was simply assigned as the second alternate juror. After the replacement of the second alternate juror, the record indicates that Taylor requested a mistrial and that the trial court denied Taylor's motion.

{¶49} Taylor now asserts that the selection of the second alternate juror, after the jury was sworn in and without providing him with the opportunity to question this juror, is reversible error. We disagree and find that any error is harmless.

{¶50} R.C. 2945.29 outlines the procedure for selecting a replacement juror member:

> If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and has been discharged by the court, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled.

{¶51} As the plain language of the statutory provision provides, a new trial is not required unless "all alternate jurors have been made regular jurors" and then a juror becomes incapacitated. That did not occur here. Only one alternate juror was moved and took the place of a discharged regular juror. One of the original alternate jurors remained as an alternate. Further, the newly selected alternate remained a second alternate juror and was not part of the deliberations.

{¶52} Crim.R. 24(G)(1) provides that

> [t]he court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors.

{¶53} The trial court here followed the sequential numerical order of seating the jurors. The record, however, fails to establish that the trial court subjected the newly selected second alternate juror to the same examination and challenges as the previous jurors.

{¶54} We agree with the State that any error in continuing the selection of the alternate juror without providing Taylor the opportunity to question this juror is harmless error. This is because harmless error is "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A). Our finding that any error is harmless is consistent with the Eighth District Court of Appeals decision in *State v. Cruz*, in which the court held:

> Cruz fails to demonstrate how any of the alleged errors in seating the alternate juror could possibly have affected the outcome

> of the trial. In particular, at the conclusion of the case, the trial court excused the alternate juror and the juror did not participate in the deliberation process. Given that the alternate juror did not deliberate or vote on the ultimate outcome of the case, it is inconceivable that any irregularities in that juror's selection affected any of Cruz's fundamental rights. We thus decline to find plain error in this case.

2013-Ohio-1889, ¶ 36 (8th Dist.).

{¶55} The Second District Court of Appeals also held that "where an alternate juror is excused before deliberations begin, any constitutional error in the handling of a peremptory challenge to that alternate juror cannot have affected the outcome of the trial, and is therefore necessarily harmless, so that no presumption of prejudice arises." *State v. Carver*, 2008-Ohio-4631, ¶ 3 (2d Dist.).

{¶56} We find Taylor's reliance on *State v. Mock*, 187 Ohio App.3d 599 (7th Dist. 2010), misplaced, as *Mock* is factually distinguishable from the case at bar but legally supportive of our decision. In *Mock*, as the jury selection was coming to an end, the trial court realized that there was an empty seat in the selected 12 regular jurors, and that one juror was seated twice. *Id.* at ¶ 25, 26. Thus, there were two regular juror seats that needed to be filled. *Id*. Instead of moving up the selected two alternate jurors, the trial court "seated the next prospective jurors from the venire and then administered the oath." *Id*. at ¶ 28. The Seventh District found the procedure to be erroneous but nonetheless the court overruled the assignment of error and affirmed Mock's conviction because "while the jury-selection process in this case was poorly executed, appellant does not contend that he can demonstrate that he suffered any prejudice based on the record before us." *Id*. at ¶ 36.

{¶57} Similarly here, Taylor fails to demonstrate how the selection of the second alternate juror, who was not part of the deliberation, prejudiced him. Accordingly, we overrule Taylor's second assignment of error.

THIRD ASSIGNMENT OF ERROR

> THE TRIAL COURT COMMITTED PLAIN ERROR BY PERMITTING THE STATE OF OHIO TO INTRODUCE OTHER ACTS OF ALLEGED SEXUAL CONDUCT BY MR. TAYLOR THAT HE WAS NOT INDICTED FOR.

{¶58} In the third assignment of error, Taylor maintains that the trial court committed plain error when it allowed the State to admit highly prejudicial and irrelevant other acts that were alleged to have been committed by Taylor, but he was not indicted of committing. Taylor was indicted of committing two acts of rape, however, at trial, B.P. testified to other sexual contact and sexual conduct that was not alleged in the indictment. According to Taylor, this evidence was not relevant and was highly prejudicial.

{¶59} In response, the State argues that no plain error occurred as there was evidence of sexual conduct to support Taylor's convictions. The State maintains that if we conclude an error occurred, the error would be harmless because Taylor's convictions are supported by B.P.'s testimony to vaginal intercourse in the bathtub and the insertion of the purple vibrator in her vagina.

Law and analysis

{¶60} "The burden of demonstrating plain error is on the party asserting it." *State v. Quarterman*, 2014-Ohio-4034, ¶ 16. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). In order to establish plain error, Taylor "must show

that (1) there was an error or deviation from a legal rule, (2) the error was plain and obvious, and (3) the error affected the outcome of the trial." *State v. Mohamed*, 2017-Ohio-7468, ¶ 26, citing *State v. Barnes*, 2002-Ohio-68, ¶ 27. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 97 (1978). A "substantial right" is a "right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1).

{¶61} Generally, "[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. Pursuant to Evid.R. 404(B)(1), "Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." But this evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Evid.R. 404(B)(2). And Evid.R. 404(B)(2) "is not an exhaustive listing." *State v. Morris*, 2012-Ohio-2407, ¶ 18.

{¶62} "[E]vidence of other acts is admissible if it is offered for a purpose other than to prove the character of a person in order to show action in conformity with that character, Evid.R. 404(B), it is relevant when offered for that purpose, Evid.R. 401, and the danger of unfair prejudice does not substantially outweigh its probative value, Evid.R. 403." *State v. Kirkland*, 2014-Ohio-1966, ¶

68, citing *State v. Williams,* 2012-Ohio-5695, ¶ 20. Unfair prejudice " 'refers to evidence which tends to suggest decision on an improper basis.' " *State v. Russell*, 2022-Ohio-1746, ¶ 80 (4th Dist.), quoting *State v. Lang*, 2011-Ohio-4215, ¶ 89.

{¶63} We disagree with Taylor and find that the admission of B.P.'s testimony of other incidents of sexual abuse other than those indicted was not erroneous, was not unfairly prejudicial, and did not affect the outcome of the case. B.P. at the time of the sexual abuse was eight years old. Being a child victim in tender years, she was not expected to know the specific dates of when her uncle, Taylor, was sexually abusing her. *See State v. Scott*, 2020-Ohio-3230, ¶ 40 (12th Dist.). As with child victims of sexual abuse, Taylor's indictment provided under each count that he committed rape during approximately a two-year time period.

> In sexual abuse cases involving children, this court has held that it may be impossible to provide a specific date in the indictment. *State v. Vunda*, 12th Dist. Butler Nos. CA2012-07-130 and CA2013-07-113, 2014-Ohio-3449, 2014 WL 3892998, ¶ 36. The problem is compounded where the accused and the victim are related or reside in the same household, situations which often facilitate an extended period of abuse. *Id.*

Id. at ¶ 40.

{¶64} B.P. in her testimony in describing the many sexual assaults she suffered from Taylor, testified to more than the two sexual conduct acts in the indicted two counts. Contrary to Taylor's assertions, the admission of B.P.'s testimony of viewing pornography VHS tapes with him, the incident in the van of Taylor placing her on his lap while clothed and thrusting back and forth, the

digital penetrations in the camper, and masturbation of Taylor were properly admitted to demonstrate the absence of mistake or accident, and Taylor's grooming of B.P.

> [E]vidence of other acts can be relevant to show that the offender groomed the victim for sexual activity. *State v. Jeffries*, 2018-Ohio-162, 104 N.E.3d 900, ¶ 27 (8th Dist.). " 'Grooming refers to deliberate actions taken by a defendant to expose a child to sexual material; the ultimate goal of grooming is the formation of an emotional connection with the child and a reduction of the child's inhibitions in order to prepare the child for sexual activity[.]' " *Williams* at ¶ 21, quoting *United States v. Chambers*, 642 F.3d 588, 593 (7th Cir.2011).

State v. Thomas, 2018-Ohio-4345, ¶ 50 (2d Dist.).

{¶65} Additionally, B.P. testified to specific sexual conduct acts, the vaginal intercourse in the bathtub, and Taylor's use of the purple vibrator in penetrating her vagina that support Taylor's convictions. We, therefore, cannot find that Taylor was unfairly prejudiced because of the admission of the other sexual assault acts.

{¶66} Accordingly, we find Taylor cannot meet his burden in demonstrating that an error occurred that affected the outcome of the case. We, thus, overrule Taylor's third assignment of error.

FOURTH ASSIGNMENT OF ERROR

> THE TRIAL COURT COMMITTED ERROR BY ALLOWING THE STATE OF OHIO TO PLAY BOTH INTERVIEWS FROM THE MAYERSON CENTER IN THEIR ENTIRETY.

{¶67} In the fourth assignment of error, Taylor argues that the trial court committed error by admitting C.B. and B.P.'s entire Mayerson forensic interviews.

Taylor maintains that the trial court admitted the interviews without considering the factors pursuant to the Fourth District Court of Appeals' holding in *State v. Benge*, 2021-Ohio-152 (4th Dist.). And these interviews are full of hearsay and should have been excluded because they do not meet the medical diagnosis or treatment exception pursuant to Evid.R. 803(4).

{¶68} Taylor asserts that due to the trial court's error, inadmissible prejudicial evidence was admitted, including C.B.'s initial disclosure of the abuse and how Taylor makes her uncomfortable and creeps her out. Further, the jury heard B.P.'s statement of how people accused her of lying, but she is not lying as she is aware of the seriousness of the accusations and the punishment Taylor faces. Further, the admitted portion of the interview included B.P.'s statements regarding Taylor taking a lie detector test, even though that statement was stricken by the court, it should have been excluded prior to its presentation to the jury. Taylor concludes that the statements that met the medical diagnosis exception were minimal, whereas, the inadmissible hearsay statements were overwhelming and warrant reversal of his convictions.

{¶69} The State disagrees and asserts that even though the trial court failed to parse out what would qualify as admissible under Evid.R. 803(4), we nonetheless should affirm Taylor's convictions. The State submits that the admission of some of the statements that were not for medical diagnosis purpose were harmless since there was ample evidence to support the convictions. Additionally, both victims testified and were subject to cross-examination.

Law and analysis

{¶70} Generally, "[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. Accordingly, "we review a trial court's hearsay rulings for an abuse of discretion." *State v. McKelton*, 2016-Ohio-5735, ¶ 97. An abuse of discretion "is more than a mere error of law or judgment; it implies that a trial court's decision was unreasonable, arbitrary or unconscionable." *State v. Martin*, 2017-Ohio-7556, ¶ 27, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶71} Hearsay is "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 in the statement." Evid.R. 801(C). A "statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Evid.R. 801(A). And a "declarant" is "a person who makes a statement." Evid.R. 801(B).

> Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio.

Evid.R. 802.

{¶72} One such exception is statements made

> for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Evid.R. 803(4).

{¶73} "Courts have held that young rape victims' statements to social workers, clinical therapists, and other medical personnel are admissible under Evid.R. 803(4)." *Benge*, 2021-Ohio-152, ¶ 50 (4th Dist.). We outlined, however, a non-exhaustive list a trial court should consider in determining whether the statements should be admitted:

> The first factor is the "selfish-motive" doctrine, i.e., "the belief that the declarant is motivated to speak truthfully to a physician because of the patient's self-interest in obtaining an accurate diagnosis and effective treatment." *Knauff*, *supra*, at ¶ 28, quoting *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, at ¶ 34, citing *State v. Eastham*, 39 Ohio St.3d 307, 312, 530 N.E.2d 409 (1988) (Brown, J., concurring). We further noted in *Knauff* that another factor courts should consider is the medical professional's professional subjective reliance on the statement because "physicians, by virtue of their training and experience, are quite competent to determine whether particular information given to them in the course of a professional evaluation is 'reasonably pertinent to diagnosis or treatment [,]' and are not prone to rely upon inaccurate or false data in making a diagnosis or in prescribing a course of treatment." *Knauff* at ¶ 28, citing *Eastham* at ¶ 41, 530 N.E.2d 409, quoting *King v. People* (Colo. 1990), 785 P.2d 596, 602.
>
> Further, *Muttart's* non-exhaustive list of additional factors that a court should weigh when it considers whether out-of-court statements should be admissible under this exception are:
>
> (1) Whether medical professionals questioned the child in a leading or suggestive manner and whether the medical professional followed proper protocol in eliciting a disclosure of abuse;
>
> (2) Whether the child had a reason to fabricate, e.g., a pending legal proceeding or bitter custody battle;
>
> (3) Whether the child understood the need to tell the medical professional the truth; and
>
> (4) Whether the age of the child could indicate the presence or absence of an ability to fabricate a story.

Id. at ¶ 48, 49.

{¶74} Emily Harman is a forensic interviewer at the Mayerson Center at Cincinnati Children's Hospital. She testified that a forensic interview is a method

of talking with someone who has experienced trauma. The information obtained in the interview is used

> to inform and direct our multiple disciplinary team members, to assist our child abuse physicians in making recommendations for evaluation and treatment, to assess and again make recommendations for psychological care and to also just ensure the overall safety of the, the person being interviewed.

{¶75} In January 2023, C.B. and B.P. came to the Mayerson Center and forensic interviewer Harman conducted an interview. During her direct-examination, the State requested to play portions of the interviews. Taylor objected: "[i]t's not best evidence, we've already had the girls testify. There's no reason to have this when we've already had the testimony of the girls and full of hearsay and inappropriate to admit it." The trial court overruled the objection and admitted the exhibit: "these are exceptions to the hearsay rule because its an interview for diagnostic purposes under . . . evidence rule 803[,]" and "they've been subject to cross examination."

{¶76} The State then proceeded to play a portion of each interview but the complete interviews were admitted as an exhibit. Of the portions played at trial, Taylor has issues with several of the statements. We first address Taylor's claim that it was erroneous to permit B.P.'s statement relating to Taylor taking a lie detector test. The trial court sustained Taylor's objection to this statement and instructed the jury to disregard it, and "[a] jury is presumed to follow the instructions given to it by the trial judge." *State v. Loza*, 71 Ohio St. 3d 61, 75 (1994). Therefore, Taylor has failed to provide any proof that the jury ignored the trial court's instructions, and therefore, we find the jury did not consider this

statement in finding Taylor guilty.

{¶77} With regard to Taylor's objection to the remaining hearsay statements, we find the admission of these statements to be harmless. Pursuant to Crim.R. 52(A), harmless error is "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." " '[T]he admission of hearsay is harmless error where the declarant was also a witness and examined regarding matters identical to those contained in the hearsay statements.' " *State v. Sims*, 2023-Ohio-1179, ¶ 71 (4th Dist.), quoting *State v. Williams*, 2016-Ohio-322, ¶ 37 (2d Dist.). Thus, " '[w]here other admissible evidence mirrors improper hearsay, the error in allowing the hearsay is generally deemed harmless, since it would not have changed the outcome of the trial.' " *State v. Gibbs*, 2024-Ohio-6125, ¶ 47 (5th Dist.), quoting State *v. Williams*, 2017-Ohio-8898, ¶ 17 (1st Dist.).

{¶78} C.B. and her teacher both testified to the circumstances that led to C.B. finally revealing the sexual abuse she experienced, and both testified prior to the playing of C.B.'s forensic interview. Therefore, the interview included cumulative evidence that was previously properly admitted. The same is true as to Taylor making C.B. uncomfortable and creeping her out in which during her direct-examination, she testified that Taylor continued to make inappropriate sexual comments.

{¶79} Taylor testified on his behalf and denied sexually abusing C.B. and B.P., thus, Taylor was accusing them of lying. As is well established, the jury independently assesses the credibility of each witness. *State v. Dillard*, 2014-

Ohio-4974, ¶ 28 (4th Dist.). Therefore, the jury was free to believe the victims' recount of the sexual abuse or Taylor. Moreover, we reiterate that

> Assuming without deciding that we find the aforementioned testimony was inadmissible, the error was harmless. The Supreme Court of Ohio has held that error is harmless if "there is no reasonable possibility that the evidence may have contributed to the accused's conviction." *State v. Bayless* (1976), 48 Ohio St.2d 73, 357 N.E.2d 1035, paragraph seven of the syllabus. The court has also stated that it is appropriate to find error harmless where there is "either overwhelming evidence of guilt or some other indicia that the error did not contribute to the conviction." *State v. Ferguson* (1983), 5 Ohio St.3d 160, 166, fn. 5, 450 N.E.2d 265. When considering whether error is harmless, our judgment is based on our own reading of the record and on what we determine is the probable impact the statement had on the jury. See *State v. Kidder* (1987), 32 Ohio St.3d 279, 284, 513 N.E.2d 311.

State v. Drew, 2008-Ohio-2797, ¶ 31 (10th Dist.). *See State v. Jeffers*, 2009-Ohio-1672, ¶ 19 (4th Dist.) ("even if we assume for purposes of argument that the statements' admission constitutes error, we do not believe that such error constitutes reversible error.").

{¶80} As such, B.P's statements that she was accused of lying is cumulative to Taylor's claims. And B.P. testified at trial and asserted that she was sexually abused by Taylor. The jury was in the best position to assess her credibility, regardless of the statements made in the portion played to the jury of the forensic interview.

{¶81} Accordingly, we find that the playing of the portion of the forensic interviews that included statements that did not meet any of the hearsay exceptions is harmless. The overwhelming evidence presented at trial demonstrates Taylor's guilt of sexually abusing C.B. and B.P. and we find

nothing in the interviews contributed to Taylor's guilt. Taylor's fourth assignment of error is overruled.

FIFTH ASSIGNMENT OF ERROR

THE TRIAL COURT COMMITTED PLAIN ERROR BY NOT PROVIDING A SPECIFIC JURY INSTRUCTION ON UNANIMITY.

{¶82} In the fifth assignment of error, Taylor argues that the trial court committed plain error when it failed to provide the jury specific instructions on unanimity regarding which sexual conduct corresponded with each rape count involving B.P. Taylor maintains that the error affected the outcome of the case because B.P. testified to three separate and distinct acts of rape but he was only indicted of committing two acts. Thus, Taylor asserts that it was imperative for the jury to be instructed that they unanimously agree which act was committed for each rape count involving B.P.

{¶83} The State disagrees and contends that Taylor failed to object to the trial court's jury instructions. The State argues that Taylor's claim is without merit since the jury instructions provided were proper and Taylor cannot demonstrate the outcome of the trial would have been different.

Law and analysis

{¶84} The trial court

> generally has broad discretion in deciding how to fashion jury instructions. *State v. Hamilton*, 4th Dist. Scioto No. 09CA3330, 2011-Ohio-2783, 2011 WL 2397088, ¶ 69. However, "a trial court must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. "Additionally, a trial court may not omit a requested instruction, if such instruction is 'a correct, pertinent statement of the law and [is] appropriate to the facts * * *.'

> " *Hamilton* at ¶ 69, quoting *State v. Lessin*, 67 Ohio St.3d 487, 493, 620 N.E.2d 72 (1993). "When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case." *State v. Ellis*, 5th Dist. Fairfield No. 02 CA 96, 2004-Ohio-610, 2004 WL 251809, ¶ 19.

State v. Jones, 2018-Ohio-239, ¶ 10 (4th Dist.).

{¶85} In the matter at bar, the trial court instructed the jury regarding reasonable doubt, that the burden is on the State to establish each element of the offense, and the definition of the elements. The trial court also instructed the jury that each count must be considered separately and pursuant to Crim.R. 31(A), that a verdict must be unanimous. Taylor did not object to the jury instructions, but now claims that the jury instructions were incomplete. Taylor claims that the unanimity finding of the jury should also apply to the specific sexual conduct committed as to counts one and two that involve B.P.

{¶86} As we previously outlined, Taylor has the burden of demonstrating that a plain error occurred. *Quarterman*, 2014-Ohio-4034, ¶ 16. And pursuant to Crim.R. 52(B), plain errors may be noticed if it can be established that an error occurred, the error was obvious, and the error affected the outcome of the case. *Mohamed*, 2017-Ohio-7468, ¶ 26, citing *Barnes*, 2002-Ohio-68, ¶ 27. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long*, 53 Ohio St.2d 91, 97 (1978).

{¶87} In support of his claim that an error occurred, Taylor cites to *State v. Guenther*, 2006-Ohio-767 (9th Dist.), and *State v. Bowling*, 2015-Ohio-360 (12th

Dist.). But as we demonstrate below, both cases support our conclusion that Taylor's argument has no merit. We first note that both cases involved sexual imposition charges, thus, involved sexual contact and not sexual conduct. Second, the Ninth District Court of Appeals found that the trial court committed error in the jury instructions, but nonetheless, the Ninth District affirmed Guenther's convictions because any error was not outcome determinative based on the evidence. *Guenther* at ¶ 36. In *Guenther*,

> The State presented evidence regarding three distinct incidents and four distinct sexual contacts with the victim.
>
> . . .
>
> This Court agrees with appellant's argument that the State attempted to support each separate count of the indictment with the same evidence from three different incidents. The State could have charged appellant with three separate counts, but chose not to do so at its discretion. The error arises, however, where the jury was not specifically instructed under these circumstances that it must be unanimous in its determination that one distinct incident formed the basis for its guilty verdict in regard to one count, while another distinct incident formed the basis for its guilty verdict in regard to the other count. Because the trial court only gave a general unanimity instruction, specifically that the jury must be unanimous in its verdict, it is unclear whether the jury convicted appellant of gross sexual imposition, for example, by finding the element of force in regard to the food room incident, and the element of sexual contact in regard to the office incident. Moreover, based on the trial court's general instruction, it is unclear whether some jurors might have found that appellant had sexual contact with the victim in the office, while others might have premised their verdict on a finding that appellant had sexual contact with the victim in the food room or small room. Accordingly, the trial court's general unanimity instruction was insufficient to ensure that the individual jurors did not "pick and choose" evidence from the various distinct incidents to satisfy the elements of the charges.
>
> . . .
>
> This Court's plain error analysis, however, does not end here. . . . In this case, this Court finds that appellant has not met that burden. Based on our analysis in regard to appellant's seventh assignment of error, this Court finds that the manifest weight of the evidence supports the conclusion that appellant's intentions and

> conduct in each of the three incidents fully supported his conviction on each of the charges. Accordingly, *appellant has failed to demonstrate that the outcome of his trial would have been different but for the trial court's failure to give the jury a more particularized unanimity instruction*. Appellant's first assignment of error is overruled. (Emphasis added.)

2006-Ohio-767, at ¶ 33, 34, 36.

{¶88} In the more recent decision in *Bowling*, the Twelfth District found no error by the trial court in solely providing the jury a general unanimity instruction as to the verdict:

> "[A] general unanimity instruction will ensure that the jury is unanimous on the factual basis for a conviction, even where an indictment alleges numerous factual bases for criminal liability." *State v. Johnson*, 46 Ohio St.3d 96, 104 (1989). "[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Id*. While there are exceptions to this general rule as outlined in *Johnson* and in *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, we found in *Blankenburg* that juror unanimity is not a concern when a case involves sexual abuse perpetrated against a minor and the jury believes that a pattern of conduct of sexual abuse occurred.
>
> In this instance, a general juror unanimity instruction was given. As the jury was only required to believe or disbelieve a pattern of conduct of sexual abuse occurred, t*he trial court was not required to provide instructions compelling the jury to agree on the specific incidents they believed established gross sexual imposition for the years indicated in the indictment*. *See State v. Ambrosia*, 67 Ohio App.3d 552, 561 (6th Dist.1990) (finding an instruction compelling the jury to agree as to the date, time, or events in child rape case would have been erroneous as the jury was only required to find the victim's testimony true to find defendant guilty of raping the victim over a period of years as alleged in the indictment). As such, a specific jury instruction was not necessary. Consequently, the trial court did not err, let alone commit plain error, in giving a general unanimity jury instruction. (Emphasis added.)

2015-Ohio-360 at ¶ 31, 32.

{¶89} We agree with the Twelfth District's decision that a specific unanimity instruction is not required in the matter at bar. Taylor was indicted of committing rape over approximately a three-year period in both counts involving B.P. And in order to be convicted of rape, the jury was required to find that he committed sexual conduct. Thus, the jury was required to find that Taylor committed vaginal penetration, anal penetration, fellatio or cunnilingus. *See* R.C. 2907.01(A). The Supreme Court in a plurality opinion stated that

> Conversely, the *Schad* rule applies when the jury's focus is on a defendant's acts that are morally equivalent. . . . Similarly, *we do not require all jurors to agree whether a defendant raped a victim orally, vaginally, or anally, because all three constitute "sexual conduct" in violation of the rape statute*. In such cases, there is no violation of the jury unanimity rule as long as all of the jurors agree that there was sufficient penetration to satisfy the "sexual conduct" element of the crime of rape. *Thompson*, 33 Ohio St.3d at 11, 514 N.E.2d 407. (Emphasis added.)

State v. Gardner, 2008-Ohio-2787, ¶ 65.

{¶90} The Seventh District Court of Appeals in *State v. Herns*, applying *Gardner*, overruled Herns' argument that the jury instructions were improper because they included the definition of cunnilingus when no evidence was presented to support the finding of cunnilingus. 2023-Ohio-4714, ¶ 89 (7th Dist.), *appeal not accepted*, 2024-Ohio-1228, ¶ 94. The Seventh District reiterated

> Here, Appellant was charged with two counts of rape. It was alleged, and corresponding evidence was presented, that Appellant raped T.R. orally, anally, and vaginally. Although we agree there was no evidence presented that Appellant committed rape via cunnilingus, the inclusion of an unnecessary definition was harmless since there was ample evidence by direct testimony that Appellant orally, anally, and vaginally raped T.R. *There is a unanimous verdict that a rape occurred "because all three constitute 'sexual conduct' in violation of the rape statute*." *Id*. (Emphasis added.)

Id. at ¶ 97.

{¶91} Similarly here, the evidence demonstrated that Taylor committed sexual conduct against B.P. It is not required that the jury be unanimous as to which sexual conduct supported each of the rape counts. *See Gardner* at ¶ 65 (plurality opinion) ("we do not require all jurors to agree whether a defendant raped a victim orally, vaginally, or anally, because all three constitute "sexual conduct" in violation of the rape statute.") What was required is the finding that Taylor committed sexual conduct. And here the evidence is clear that Taylor penetrated B.P.'s vagina on multiple occasions and in various means: vibrator, his fingers, and intercourse. Penetration occurred and the offense of rape was established.

{¶92} Accordingly, we find Taylor cannot meet his burden in demonstrating that an error occurred that affected the outcome of the case. We, thus, overrule Taylor's fifth assignment of error.

SIXTH ASSIGNMENT OF ERROR

> THE STATE OF OHIO VOUCHED FOR THE CREDIBILITY OF THE ALLEGED VICTIMS DURING CLOSING ARGUMENT DEPRIVING MR. TAYLOR OF HIS RIGHT TO A FAIR TRIAL.

{¶93} In the sixth assignment of error, Taylor maintains that the State committed prosecutorial misconduct during closing arguments by repeatedly referring to C.B. and B.P. as victims. Taylor claims this was improper vouching for their credibility and warrants reversal of the convictions.

{¶94} The State disagrees and notes that Taylor did not object to the prosecution's closing statements and he cannot demonstrate plain error. The

State claims that the statements by the prosecution of "victim" during closing argument occurred on two occasions and did not affect the outcome of the case. Thus, the State maintains that it cannot be concluded that the "victim" reference was so pervasive that it rendered Taylor's trial unfair.

Law and analysis

{¶95} During the prosecution's rebuttal closing argument, which spanned over 22 pages in the transcript, there were 4 references to the word victim:

> These are two kids that know the streets. How they handle their lives, how they handled this abuse, how they handles (sic.) this trauma, it's different. And it's different for every single person that is a *victim* of sexual assault. And until you've been there you can't judge how they should act.
>
> . . .
>
> Now, you've heard from the *victims* and Robert Taylor and essentially the entire crust of the defense is that these two girls are lying through their teeth. But you watched them testify and you heard their testimony. You decide if you believe them.
>
> . . .
>
> The girls relaying to you exactly what happened to them is direct evidence from the *victims* themselves. And look at the specific things the girls remember, a purple vibrator, the flavor of lubricant, the VHS style movie, the drawer where the purple vibrator was kept. [C.B.'s] reaction when she heard someone else talking about rape and incest. That's not faked, that's not made up.
>
> . . .
>
> There's no question that [B.P.] and [C.B.] are ideal *victims* for this Defendant. These girls are super vulnerable kids. They have been in and out of Children Services custody, in and out of foster care, they were terrified of being taken away from Nancy, grandma Nancy, and terrified of being taken away from each other. (Emphasis added.)

{¶96} Taylor did not object to the prosecution's closing remarks. Thus, we must review the issue under the plain error standard of review. "The burden of demonstrating plain error is on the party asserting it." *Quarterman*, 2014-Ohio-4034, ¶ 16. "Plain errors or defects affecting substantial rights may be noticed

although they were not brought to the attention of the court." Crim.R. 52(B). In order to establish plain error, Taylor "must show that (1) there was an error or deviation from a legal rule, (2) the error was plain and obvious, and (3) the error affected the outcome of the trial." *Mohamed*, 2017-Ohio-7468, ¶ 26, citing *Barnes*, 2002-Ohio-68, ¶ 27. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long*, 53 Ohio St.2d 91, 97 (1978).

{¶97} Taylor fails to meet his burden in demonstrating plain error. In assessing prosecutorial misconduct in closing arguments, the question is " 'whether the remarks were improper and, if so, whether they prejudicially affected [the] substantial rights of the defendant.' " *State v. Hessler*, 90 Ohio St.3d 108, 125 (2000), quoting *State v. Smith*, 14 Ohio St.3d 13, 14 (1984). A "substantial right" is a "right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1).

{¶98} A conviction may be upheld notwithstanding a prosecutor's improper remarks when it is "clear beyond a reasonable doubt that the jury would have returned a verdict of guilty" regardless of the comments. *United States v. Hasting*, 461 U.S. 499, 511-512 (1983). "The touchstone of the analysis 'is the fairness of the trial, not the culpability of the prosecutor.' " *State v. Leonard*, 2004-Ohio-6235, ¶ 155, quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

{¶99} First, we note that the trial court on numerous occasions instructed the jury that closing arguments are not evidence and are not to be considered in

deliberations. As demonstrated above, it is well-established that "[a] jury is presumed to follow the instructions given to it by the trial judge." *Loza*, 71 Ohio St. 3d 61, 75 (1994). Second, as we outline in the seventh assignment of error, there was ample direct evidence establishing Taylor's guilt of rape.

{¶100} Third, the prosecution's closing remarks referring to C.B. and B.P. as victims were not improper vouching. "Vouching occurs when the prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue." *State v. Myers*, 2018-Ohio-1903, ¶ 145. That did not occur here. Rather, the prosecution's remarks were based on the evidence presented and was not vouching for their credibility. "A prosecutor may state his or her opinion if it is based on the evidence presented at trial." *State v. Diar*, 2008-Ohio-6266, ¶ 213.

{¶101} In support of his argument, Taylor requests that we reverse his convictions similar to the Tenth District Court of Appeals decision in *State v. Almedom*, 2016-Ohio-1553 (10th Dist.). Contrary to Taylor's assertions, the *Almedom* case is distinguishable from his case. In *Almedon*, the trial court consistently referred to the minors in the case as "victims." *Id*. at ¶ 2. The trial court made one comment before any testimony was provided and stated: "It is my understanding that in this case that all victims are under the age of 13," and in explaining why there was a delay in starting on time, the trial court stated: "This case involves three victims who are children, and they live with the mother[.]" *Id*. at ¶ 3, 4. And during the jury selection, the prosecution also referred to the children as victims. *Id*. at ¶ 4. Further, a detective referred to the

children as victims. Thus, "the jury had been told repeatedly that the three girls were victims[,]" and prior to the presentation of any evidence. *Id*. at ¶ 5.

{¶102} Additionally, trial counsel for Almedom, failed to file any pre-trial motion and failed to object to large portions of improper questioning according to the Tenth District. *Id*. at ¶ 7, 8. Therefore, the Tenth District held that "the conduct of defense counsel linked with the prejudicial comments of the trial judge when added to those of the assistant prosecuting attorney during jury selection undermined the proper function of the adversarial process." *Id*. at ¶ 10.

{¶103} In the matter at bar, however, the only reference to C.B. and B.P. as victims was during the prosecution's rebuttal closing argument. And the four references of "victim" referred to the evidence presented through C.B. and B.P's prior testimony. Taylor does not claim that his trial counsel was deficient and there is nothing in the record to indicate the trial court improperly influenced the jury in finding C.B. and B.C. more credible than Taylor.

{¶104} We find Taylor's case similar to *State v. Nichols*, in which the Tenth District found the prosecution's remarks to be fair and proper:

> Here, the prosecutor's references to Hanna Geiger as a "victim" were made only during rebuttal closing argument. As discussed above, during closing argument, the prosecutor is free to comment on "what the evidence has shown and what reasonable inferences may be drawn therefrom." (Internal quotations and citations omitted.) *Fudge* at ¶ 48. In our view, the prosecutor's references to Hanna Geiger as a "victim" entailed fair comment on what the evidence had shown and were not improper. Thus, there was no misconduct on the part of the prosecutor in referring to Hanna Geiger as a victim, and there was no error on the part of the trial court in denying the motion for mistrial on this basis.

2020-Ohio-4362, ¶ 39 (10th Dist.).

{¶105} We similarly overruled a claim of prosecutorial misconduct finding: "[b]y referring to J.L. as a victim or a survivor of sexual assault, as in *Thacker,* no improper vouching occurred because the prosecutor did not express personal belief about the victim's credibility." *Benge*, 2021-Ohio-152, ¶ 58.

{¶106} Accordingly, we find that Taylor failed to demonstrate the prosecution's remarks were improper and that the victim reference in the State's rebuttal closing argument affected the outcome of the case. We therefore, overrule Taylor's sixth assignment of error.

SEVENTH ASSIGNMENT OF ERROR

MR. TAYLOR'S CONVICTIONS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND ARE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶107} In the final assignment of error, Taylor claims that his convictions are not supported by the sufficiency and manifest weight of the evidence. Taylor asserts that the only evidence is the testimony of the two minors with no corroborating physical evidence or any witnesses to the abuse. Thus, according to Taylor, their testimony was insufficient since they are testifying to things that occurred years prior when they were less than ten years old. Therefore, the convictions should be reversed.

{¶108} The State disagrees and claims that there was sufficient evidence to support the verdicts and the verdicts were not against the manifest weight of the evidence. The State asserts that both victims testified to specific sexual assaults with C.B. testifying to anal intercourse when she was eight years old, and B.P. testified that when she was approximately eight years old Taylor had

vaginal intercourse with her, inserted a vibrator in her vagina, and forced her to perform oral sex on him. Additionally, the State maintains that there is no basis to conclude the trier of fact lost its way and created a manifest miscarriage of justice to warrant reversal.

Law and analysis

{¶109} When reviewing whether the evidence is sufficient to sustain a conviction, the focus is on the adequacy of the evidence. *See State v. Sims*, 2023-Ohio-1179, ¶ 115 (4th Dist.). Thus, "[t]he standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt." *Id*.

{¶110} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983). "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Const. Co.*, 54 Ohio St.2d 279 (1978), syllabus.

{¶111} The weight and credibility of evidence are to be determined by the trier of fact. *State v. Kirkland*, 2014-Ohio-1966, ¶ 132. The trier of fact "is free to believe all, part or none of the testimony of any witness," and we "defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility." *Dillard*, 2014-Ohio-4974, ¶ 28 (4th Dist.), citing *State v. West*, 2014-Ohio-1941, ¶ 23 (4th Dist.).

{¶112} In addition, "[a] verdict is not against the manifest weight of the evidence because the finder of fact chose to believe the State's witnesses." *State v. Chancey*, 2015-Ohio-5585, ¶ 36 (4th Dist.), citing *State v. Wilson*, 2014-Ohio-3182, ¶ 24 (9th Dist.), citing *State v. Martinez*, 2013-Ohio-3189, ¶ 16 (9th Dist.). Moreover, " '[w]hile the jury may take note of inconsistencies and resolve or discount them accordingly, * * * such inconsistences (sic.) do not render defendant's conviction against the manifest weight or sufficiency of the evidence.' " *State v. Corson*, 2015-Ohio-5332, ¶ 31 (4th Dist.), quoting *State v. Proby*, 2015-Ohio-3364, ¶ 42 (10th Dist.), citing *State v. Gullick*, 2014-Ohio-1642, ¶ 10 (10th Dist.).

{¶113} A finding that a conviction is supported by the manifest weight of the evidence is "also dispositive of the issue of sufficiency." *Sims*, 2023-Ohio-1179, ¶ 120 (4th Dist.), citing *State v. Waller*, 2018-Ohio-2014, ¶ 30 (4th Dist.).

{¶114} Taylor was convicted of three counts of rape in violation of R.C. 2907.02(A)(1)(b) that provides: "No person shall engage in sexual conduct with another 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." There was the additional specification that C.B. and B.P. were less than ten years old. Pursuant to R.C. 2907.01(A), 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.

{¶115} The first two counts of rape in the indictment involved B.P. She testified that when she was approximately eight years old, while preparing to take a bath, Taylor came into the restroom, went into the bathtub and forced B.P. to sit on his lap. Taylor forced his penis into B.P.'s vagina. B.P. testified that there was penetration, it lasted for approximately ten minutes, and it hurt. B.P. testified to other sexual conduct incidents that occurred. Taylor's use of a purple vibrator that he inserted into B.P.'s vagina, the use of cotton-candy-flavored lubricant that Taylor would place on his penis and have B.P. suck on his penis, and while in the camper Taylor would force his fingers into B.P.'s vagina. B.P.'s testimony was specific and established the elements of rape.

{¶116} The third count of rape in the indictment involved C.B. who testified that when she was approximately eight years old, while camping with Taylor and some of her siblings, she asked to sleep on the same mattress as Taylor. After moving to the mattress, C.B. began dozing off but was awakened when Taylor placed "his private parts" in C.B.'s bottom while he was holding her from behind. Taylor's private part penetrated C.B.'s bottom as she felt pain for several days. Additionally, after Taylor was done and C.B. went inside the house to the

restroom, she saw blood when she wiped and threw away the leggings she was wearing because they were wet.

{¶117} Contrary to Taylor's assertions, the testimonies of B.P. and C.B. were sufficient to establish that he committed rape. " 'It is well settled that a rape conviction may rest solely on the victim's testimony, if believed, and that "[t]here is no requirement that a rape victim's testimony be corroborated as a condition precedent to conviction." ' " *State v. Canterbury*, 2015-Ohio-1926, ¶ 62 (4th Dist.), quoting *State v. Patterson*, 2014-Ohio-1621, ¶ 40 (8th Dist.), quoting *State v. Lewis,* 70 Ohio App.3d 624 (4th Dist. 1990).

{¶118} Additionally, the jury was in the best position to assess the credibility of B.P. and C.B. The disclosure of the abuse was spontaneous as C.B. reacted while in class learning about genetics and incest. And both testified they did not disclose the abuse because they were afraid and did not want to be the reason the siblings would be separated from each other.

{¶119} Accordingly, we find that the jury did not lose its way in finding C.B. and B.P.'s testimony reliable and finding Taylor guilty of rape. Taylor's seventh assignment of error is overruled.

CONCLUSION

{¶120} Having overruled Taylor's seven assignments of error, we affirm his convictions and sentence.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. 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 Highland 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 Abele, 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.