

Released 8/26/26

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

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Case No. 24CA11
	:	
v.	:	
	:	
Jason R. McCormick,	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	

APPEARANCES:

William R. Gallagher and Elizabeth Conkin, Arenstein & Gallagher, Cincinnati, Ohio, for appellant.

Jason D. Holdren, Gallia County Prosecutor, Isaac Beller, Assistant Gallia County Prosecutor, and Philip D. Bogdanoff, Special Assistant Prosecutor, Gallipolis, Ohio, for appellee.

Smith, P.J.

{¶1} Appellant, Jason R. McCormick, appeals the judgment of the Gallia County Court of Common Pleas convicting him of 28 counts of rape in violation of R.C. 2907.02(A)(2). He raises six assignments of error on appeal, challenging the admission of certain evidence, alleging due process violations, prosecutorial misconduct, and cumulative error, and also challenging the sufficiency and manifest weight of the evidence. His assignments of error are set forth verbatim below. However, because we find no merit to the arguments raised

under any of appellant's assignments of error, they are overruled and the judgment of the trial court is affirmed.

FACTS

{¶2} On May 3, 2023, appellant was indicted for 28 counts of rape in violation of R.C. 2907.02(A)(2), all first-degree felonies. The indictment collectively alleged that appellant had raped Jane Doe, a minor, 28 times during a time period beginning on November 1, 2018, and continuing until April 3, 2023. The minor identified in the indictment is M.M., the victim herein, which is appellant's biological daughter. The indictment stemmed from allegations initially made by the victim to school officials at Buckeye Hills Career Center, where she was a student, claiming that appellant had raped her repeatedly and regularly beginning at age 13 and continuing until the abuse was disclosed in April of 2023, at which time she was 17 years old.

{¶3} Appellant retained counsel and the matter proceeded through discovery. On June 7, 2024, the State filed a "Notice of Its Intent to Use Various Evidence That Will Require Rulings of Admissibility." The notice provided that the State intended to call several school officials as witnesses regarding the disclosures made by the victim at school on the day the initial disclosure of abuse was made. The State separately filed a "Notice of Its Intent to Use the Child's Forensic Interview and Its Admissibility." The notice informed the court that the

victim was interviewed by a forensic interviewer at Nationwide Children's Hospital and was subsequently seen by a physician. The notice provided that the State intended to play the video interview during trial and also intended to call the forensic interviewer as a witness.

{¶4} The matter proceeded to a five-day jury trial beginning on June 10, 2024. On the morning of the first day of trial, the parties and court addressed several pretrial matters, including the State's intent to introduce the video of the forensic interview of the victim. The defense argued that the majority of the interview was for investigative purposes and should not be played for the jury. The defense also raised a potential *Crawford* violation. The State argued that the statements made by the victim during the interview were for purposes of medical treatment and diagnosis. It was ultimately agreed that an in-camera statement-by-statement review of the video would need to take place prior to the introduction of the video.

{¶5} The State's notice of intent to have school officials testify to the disclosures made by the victim was also addressed prior to the start of trial. The State argued that the victim's statements it intended to introduce through the testimony of the school officials were made during an ongoing emergency and therefore were admissible as excited utterances. The defense argued that the statements did not constitute excited utterances and therefore were inadmissible

hearsay. The defense further argued that the startling occurrence for purposes of the excited utterance analysis was the underlying sexual abuse itself and that the last alleged incident occurred on April 3, 2023, while the disclosures were not made until April 21, 2023. The defense also argued that the statements could not constitute excited utterances, claiming that testimony by the victim's friend, Gracie, indicated the victim had gone to school on the morning at issue with a prior plan to disclose the abuse and, therefore, the statements at issue were planned and not spontaneous.

{¶6} It became apparent during these arguments that the parties were in disagreement as to what specific event constituted a “startling occurrence” for purposes of determining whether the statements were admissible under the excited utterance exception to the rule against hearsay. The defense argued that, based upon Gracie's testimony, the victim and her biological mother devised a plan whereby the victim would inform school officials that she was being sexually abused.¹ The State, however, argued that a safety plan devised between the victim and her mother consisted of the victim's mother contacting the victim's paternal grandfather to ask if the victim could come and live with him, and to also ask that he go and pick the victim up from school on the day at issue. The State argued that

¹ The record indicates that the victim's biological parents split up when the victim was a young child and the victim initially moved out of state with her mother. At some point thereafter, possibly when the victim was between five and seven years old, the victim began living with appellant full time and had no more contact with her mother until April of 2023, at which point she was able to make contact with her through her friend's social media account.

the failure of the safety plan, which was evidenced by the victim's stepmom showing up at school to pick her up early rather than the victim's grandfather coming to pick her up, constituted a startling occurrence which prompted the victim to disclose the abuse to school officials. The trial court deferred ruling on the issue at that time, instead stating "we'll have to see how it all plays out."

{¶7} At that time, voir dire began. After a jury was seated, arguments regarding the admission of the victim's statements as excited utterances resumed, as did arguments regarding what constituted the "startling occurrence." After hearing further arguments, the trial court ultimately found that the startling occurrence was the failure of the safety plan coupled with the victim being extremely frightened to be put back into the situation she was trying to get out of. The court noted appellant's objection and the State presented its case.

{¶8} The State presented 14 witnesses, as follows: 1) Rebecca Stump, the victim's teacher at Buckeye Hills Career Center; 2) Gracie Halley, the victim's friend and classmate; 3) Lisa Lewis, the dean at Buckeye Hills; 4) Brandy Stevens, a school counselor at Buckeye Hills; 5) Chris Gruber, a jail commander at the Gallia County Sheriff's Office; 6) Seth Argabright, a sergeant in the Gallia County Sheriff's Office; 7) Sharon Denny, the victim's biological mother; 8) Nicole Augsback, a forensic scientist in the DNA section at the Ohio Bureau of Criminal Investigations (hereinafter "BCI"); 9) Jordan Shaffer, a Gallia County Deputy

Sheriff and also the Buckeye Hills School Resource Officer; 10) Justin Rice, a detective with the Gallipolis Police Department; 11) M.M., the victim herein; 12) Adam Holcomb, a lieutenant in the Gallia County Sheriff's Office; 13) Shallon Schuldt, a detective with the Gallia County Sheriff's Office; and 14) Michelle Hasenkamp, a masters degreed social worker and forensic interviewer employed by Nationwide Children's Hospital.

{¶9} Stump, Lewis, Stevens, and Shaffer all testified regarding the victim's demeanor on the morning that the disclosures were made to school officials and also testified regarding the victim's statements. Over objections by the defense, the victim's statements were admitted through their testimony as excited utterances. The testimony of each of these witnesses will be fully recounted below under our analysis of appellant's first assignment of error. Denny, the victim's biological mother, testified regarding the manner in which she came into contact with the victim prior to the disclosures, as well as her role leading up to the disclosures and her role thereafter. Augsback testified regarding the DNA evidence that was recovered from the appellant's bed comforter and explained her analysis of that evidence and the results thereof. Hasenkamp testified regarding the forensic interview she conducted of the victim and portions of the video of that forensic interview were played for the jury.

{¶10} Importantly, the victim testified at length at trial. She testified for a number of hours and her testimony covers over 300 pages of the 1500-page trial transcript. She testified in detail regarding the history of both physical abuse and sexual abuse inflicted upon her by appellant. Her testimony will also be incorporated more fully below, as pertinent to our analysis of appellant's assigned errors. The State thereafter rested its case, followed by the defense, who rested its case without presenting any evidence.

{¶11} The jury ultimately found appellant guilty on all counts as charged in the indictment. On July 15, 2024, appellant was sentenced to an aggregate minimum prison term of 121 years and an aggregate maximum prison term of 126.5 years. It is from the July 22, 2024 sentencing judgment entry that appellant now brings his timely appeal, setting forth six assignments of error for our review.

ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING JASON'S HEARSAY OBJECTIONS AND FINDING M.M.'S ANSWERS TO QUESTIONS WHILE AT SCHOOL ADMISSIBLE AS EXCITED UTTERANCES, THEREBY VIOLATING JASON'S RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND HIS FIFTH AMENDMENT RIGHT TO A FAIR TRIAL.
- II. THE TRIAL COURT ERRED IN ADMITTING M.M.'S FORENSIC INTERVIEW IN ITS ENTIRETY, WHERE PORTIONS WERE NOT SUBJECT TO CROSS-

EXAMINATION, THEREBY VIOLATING JASON'S RIGHTS UNDER THE TO [SIC] DUE PROCESS OF LAW, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, HIS FIFTH AMENDMENT RIGHT TO A FAIR TRIAL, AND HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

- III. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT ALLOWED THE PROSECUTOR TO MISSTATE THE DNA EVIDENCE, THEREBY DENYING JASON'S RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND HIS FIFTH AMENDMENT RIGHT TO A FAIR TRIAL.
- IV. THE CUMULATIVE IMPACT OF THE ERRORS COMMITTED BY THE TRIAL COURT DEPRIVED JASON OF A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION SIXTEEN OF THE OHIO CONSTITUTION DUE PROCESS CLAUSES.
- V. WHERE JASON'S CONVICTIONS ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE, JASON WAS DENIED DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT [SIC] OF THE UNITED STATES CONSTITUTION THAT THE STATE PROVE EVERY ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT.
- VI. WHERE JASON'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, JASON WAS DENIED DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH

AMENDMENT TO THE UNITED STATES
CONSTITUTION.

ASSIGNMENT OF ERROR I

{¶12} In his first assignment of error, appellant contends that the trial court abused its discretion in overruling his hearsay objections and in finding the victim’s answers to questions while at school admissible as excited utterances. He argues that the admission of the victim’s statements to school officials violated his right to due process. The State contends the trial court did not abuse its discretion in admitting the statements as excited utterances and further argues that even if the admission of the statements was in error, the error was harmless as the statements were simply cumulative to the testimony of the victim, who testified at trial.

Standard of Review

{¶13} Initially, we observe that trial courts typically enjoy broad discretion to determine whether a declaration falls within a hearsay exception. *State v. McKelton*, 2016-Ohio-5735, ¶ 97 (hearsay rulings ordinarily reviewed for abuse of discretion unless constitutional rights implicated under Confrontation Clause); *State v. Dever*, 64 Ohio St.3d 401, 410 (1992) (“trial court has broad discretion to determine whether a declaration should be admissible as a hearsay exception”). Appellate courts, therefore, generally will not disturb a trial court's evidentiary ruling unless the court “ ‘has clearly abused its discretion and the defendant has been materially prejudiced thereby.’ ” *State v. Obermiller*, 2016-Ohio-1594, ¶ 61,

quoting *State v. Issa*, 93 Ohio St.3d 49, 64 (2001). As we noted earlier, an abuse of discretion implies that a court's attitude is unreasonable, arbitrary or unconscionable. *E.g.*, *State v. Clinton*, 2017-Ohio-9423, ¶ 60, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

Excited-Utterance Exception to the Hearsay Rule

{¶14} 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.” Evid.R. 801(C). Hearsay is inadmissible in evidence at trial, unless it falls under an exception to the Rules of Evidence. Evid.R. 802; *State v. Maxwell*, 2014-Ohio-1019, ¶ 129; *State v. Lykins*, 2019-Ohio-3316, ¶ 92 (4th Dist.).

{¶15} Evid.R. 803(2) contains the excited-utterance exception. This rule permits a trial court to admit a hearsay statement into evidence “if it relates ‘to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.’ ” *State v. Fry*, 2010-Ohio-1017, ¶ 100, quoting Evid.R. 803(2). A court may admit a hearsay statement under the excited utterance exception under the following circumstances:

“(a) there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement of declaration spontaneous and unreflective,

(b) the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties so that such domination continued to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs,

(c) the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and

(d) the declarant had an opportunity to observe personally the matters asserted in his statement or declaration.”

State v. Jones, 2012-Ohio-5677, ¶ 166, quoting *Potter v. Baker*, 162 Ohio St. 488 (1955), paragraph two of the syllabus.

{¶16} The excited utterance “ ‘exception derives its guaranty of trustworthiness from the fact that [the] declarant is under such state of emotional shock that his reflective processes have been stilled. Therefore, statements made under these circumstances are not likely to be fabricated.’ ” *State v. Taylor*, 66 Ohio St.3d 295, 300 (1993), quoting McCormick, Section 297 (2d ed. 1972).

Additionally, as explained in *Taylor*, excited utterances

“are considered more trustworthy than hearsay generally on the dual grounds that, first, the stimulus renders the declarant incapable of fabrication and, second, the impression on the declarant's memory at the time of the statement is still fresh and intense. Accordingly, Rule 803(2) assumes that excited utterances are not flawed by lapses of memory or risks of insincerity.”

Taylor at 300, quoting 1 Weissenberger's Ohio Evidence (1992), Section 803.16.

{¶17} The amount of time that elapses “between the statement and the event is relevant but not dispositive of” whether a declarant's statement occurred while still under the stress of the startling occurrence. *Jones* at ¶ 168, quoting *Taylor* at 303; *State v. Wallace*, 37 Ohio St.3d 87, 90 (1988). In fact, “ ‘[t]here is no per se amount of time after which a statement can no longer be considered to be an excited utterance.’ ” *Jones* at ¶ 168, quoting *Taylor* at 303. Instead, “ ‘[t]he central requirements are that the statement must be made while the declarant is still under the stress of the event and the statement may not be a result of reflective thought.’ ” *Id.*, quoting *Taylor* at 303; *Stough v. Indus. Comm.*, 142 Ohio St. 446 (1944), paragraph one of the syllabus (“A declaration or statement, to be admissible as part of the *res gestae*, is not required to be exactly simultaneous with the primary fact in controversy, but it must be a spontaneous or an impulsive declaration or statement and not the mere narration of a past transaction.”).

{¶18} A court that must determine whether a declarant's statement occurred while under stress of the startling occurrence must examine the particular facts of the case and not “ ‘ ‘ ‘attempt to formulate an inelastic rule delimiting the time limits within which an oral utterance must be made in order that it be termed a spontaneous exclamation.’ ” ’ ” *Jones* at ¶ 168, quoting *Taylor* at 303, in turn quoting *State v. Duncan*, 53 Ohio St.2d 215, 219-220 (1978). Furthermore, reviewing courts should affirm a trial court's conclusion that a statement fits the

excited-utterance exception when its “ ‘decision appears to be a reasonable one, even though the reviewing court, if sitting as a trial court, would have made a different decision.’ ” *Taylor* at 305, quoting *Potter* 499-500.

{¶19} In *Jones*, the Court determined the declarant's statement to be an excited utterance when the evidence showed that the declarant “was highly upset and screaming” when she “blurted out” the circumstances of the startling occurrence (i.e., learning that defendant killed a person). *Id.* at ¶ 169. The Court concluded that the declarant's demeanor, when making the statement, showed that she remained “under the influence of the startling occurrence when she made her excited utterance.” *Id.*, citing *State v. Wallace, supra*, at 90-91 (statement excited utterance even though 15-hour interval between startling occurrence and utterance and declarant unconscious for part of that time), and *State v. Baker*, 137 Ohio App.3d 628, 649 (12th Dist. 2000) (several-hour interval between startling occurrence and utterance); *State v. Huertas*, 51 Ohio St.3d 22, 31 (1990) (statement excited-utterance when “declarant was ‘very agitated,’ ‘in serious pain’ and ‘had not calmed down’ from the stress of” startling event, i.e., a stabbing). In contrast, simply remaining “upset” after a startling occurrence “does not meet the standard for admissibility under Evid.R. 803(2).” *Taylor* at 303 (concluding the circumstances that surrounded the declarant's statement suggested he had time to reflect on the event and to give “a narrative account” of the event). *Id.*

{¶20} However, statements made in response to questions can also be considered excited utterances. *See State v. Wallace, supra*, at 91 (finding admissibility where the questioning does not negate the spontaneity of the declaration). The *Wallace* Court determined that declarations may be admitted consistent with the excited-utterance exception to the hearsay rule “provided certain safeguards are met.” *Id.* at 93. More specifically, the Court held that

[T]he admission of a declaration as an excited utterance is not precluded by questioning which: (1) is neither coercive nor leading, (2) facilitates the declarant’s expression of what is already the natural focus of the declarant’s thoughts, and (3) does not destroy the domination of the nervous excitement over the declarant’s reflective faculties.

Id.

Wallace ultimately found that questions such as “Who hurt you?”, “Do you know what happened to you?”, and “Do you know the name of the person who hurt you?” were questions that “served to facilitate [the victim’s] expression rather than to cause reflection.” *Id.*

Legal Analysis

{¶21} As noted above, the arguments raised under this assignment of error challenge the trial court’s admission of certain alleged hearsay statements made by the victim as excited utterances. Appellant argues that the statements themselves do not meet the definition of an excited utterance because they were made as part of a planned disclosure. He further argues that the statements cannot qualify as

excited utterances because they were made in response to various questions being asked by school officials, rather than being made spontaneously. More specifically, appellant challenges the admission of the victim's statements that were introduced through the testimony of Rebecca Stump, Lisa Lewis, Brandy Stevens, and Deputy Jordan Shaffer, all employees of Buckeye Hills Career Center.

{¶22} To summarize, appellant was convicted of 28 counts of rape, the victim of which was his biological daughter, M.M. The victim alleged that the rapes occurred regularly, beginning at age 13 up until she was 17 years old in 2023. The last instance of rape allegedly occurred on April 3, 2023. On April 20, 2023, after initially making contact with her biological mother just a week or so prior, the victim disclosed to her mother that she was being both physically and sexually abused by appellant. The testimony at trial indicated that at the time the disclosure was made to the victim's mother (Denny), Denny encouraged the victim to either call the police or tell her teachers. Denny further asked the victim if there was anywhere she could go, such as a friend or family member's house. The victim responded that she believed her grandpa, Paul McCormick (appellant's father), would help her and let her live with him. Based upon the testimony of both Denny and the victim, it appears that a plan was devised whereby Denny would contact Paul once the victim got on the school bus the next morning and she

would ask him if the victim could live with him and ask him to go pick her up from school.

{¶23} It appears from the trial transcript that the victim arrived at school, went to class as scheduled, and had some contact via text message with Denny regarding the plan. Denny informed her that she called Paul and told him what had been happening, but that Paul asked her if he could call her back. An hour or more passed with no return phone call. The victim was aware of this.

{¶24} Early in the school day, the victim was called to the office to be ready to leave to go with her stepmom, Heidi, for a doctor's appointment. Simultaneously, the victim tried to contact Denny and discovered her phone had been disabled. Realizing that the plan had fallen apart, knowing there was no actual doctor's appointment (because she had never once been taken to the doctor), and believing she was about to be returned home, the victim became extremely upset and stated she did not want to go home. When some students informed the victim's teacher, Rebecca Stump, that she needed to protect the victim, Stump took the victim into the hallway.

{¶25} Stump testified that when this event began, the victim stood up, was shaking, was very upset, and remained so when she was taken into the hallway, at which point the victim told Stump she was afraid to go home. Stump asked school counselor, Brandy Stevens, for assistance and informed Stevens that the victim was

afraid to go home. Stump testified that she and Stevens took the victim into an office, describing the victim as being upset, shaky, and unhappy. Stump testified that Stevens asked the victim why she did not want to go home, to which she responded that she was being physically abused. Stump testified that when the victim disclosed she was being physically abused, her leg was shaking up and down, her hands were shaky, and she had an upset look on her face.

{¶26} Stump further testified that immediately thereafter, Stevens went across the hall and got Lisa Lewis, the dean, to assist. While all four were in the room together, Lewis asked the victim what was going on and why she didn't want to go home. Stump testified that Lewis then requested assistance from Deputy Shaffer, the school resource officer. Stump explained that the resource officer asked the victim what was going on and why she didn't want to go home. Stump testified that the victim stated she was afraid to go home, was being physically abused, and had been raped. She testified that the victim's demeanor was the same as when she disclosed the physical abuse just prior. Stump's testimony was followed by Lewis, Stevens, and Shaffer.

{¶27} Lewis, the dean of the school, described the victim's demeanor as upset, crying, and having trouble walking. She testified that she asked the victim what was going on, to which the victim responded that there was no appointment. She then asked the victim if she was feeling unsafe, to which the victim responded

that her dad had been abusing her, and she didn't understand why someone was there to pick her up. She testified that the victim kept stating "there is no appointment." At that time, Lewis called for the resource officer, as the victim's stepmom was still waiting at the office.

{¶28} Brandy Stevens, the school counselor, testified that the victim was very visibly upset, was shaking and crying, and stating she did not want to go home with her stepmom when she encountered her. She asked the victim what was going on, to which the victim stated that she had recently been in contact with her biological mom in order to try to get some help because there was physical abuse going on in her home. The victim further stated that her biological mom was reaching out to her grandpa to see if there was a chance she could go live with him. Stevens testified that, in her opinion, at the time the victim made these statements she was "still visibly very upset, not wanting to go home, almost terrified." Stevens further testified that once the school resource officer arrived, the victim disclosed there had been sexual abuse as well and she went on to testify that the victim then further disclosed some specific instances of abuse where she had been forced to give appellant oral sex and had been forced to engage in anal sex with him.

{¶29} Deputy Jordan Shaffer, the school resource officer, testified that when he encountered the victim, she was scared, was in an "emotional state," her face

was red, he could tell she had been crying, and wasn't acting like herself. He asked what was going on, to which the victim responded that Heidi said she had an appointment, but she didn't have an appointment. Shaffer testified that he called the office and asked them to buy some time with Heidi, who was still waiting. He then stated to the victim "I know you're scared, you're upset um, I need to know why." He then asked if there was abuse. He testified that the victim began crying, was very upset, and said "he's raping me. My dad's raping me." At that point, Shaffer called the police and told Heidi that the victim would not be leaving with her.

{¶30} Defense counsel objected repeatedly to the statements of the victim as testified to by Stump, Stevens, Lewis, and Shaffer. The defense argued that these statements were part of a planned disclosure of the sexual abuse, a plan which had been devised between the victim and Denny the night prior. In support of his argument, appellant argued that the victim's friend, Gracie, had testified there was a "plan" that day that the victim would go talk to the resource officer and see if she could get some help. We note that Gracie's testimony was at odds with the testimony of both the victim and Denny, who both testified that the "plan" was that Denny would call Paul McCormick and see if he would go pick the victim up from school. Gracie's testimony was also at odds with what actually occurred that day, considering that the victim went to school and attended her classes as usual,

waiting for a call to be picked up by Paul, rather than going straight to the resource officer.

{¶31} Aside from arguing that the statements did not constitute excited utterances because they were planned, the defense argued that the “startling occurrence” for purposes of the excited utterance definition was the underlying sexual abuse, and that it had been weeks since the last alleged rape had occurred. The State, however, argued that the startling occurrence was the victim’s realization that the “safety plan” she had worked out had failed, that her phone had been cut off, and that her step-mom, not her grandpa, was there to pick her up for a doctor’s appointment which the victim knew did not exist. The trial court agreed with the State, finding as follows:

Court: I am um, finding that the startling event uh, is that when [the victim] goes to school there’s a safety plan and then once she gets there uh, and she finds out that the safety plan is not going the way it was planned and instead an event happens with her stepmother coming that she is frightened to go with um, and, saying she has an appointment that [the victim] doesn’t know anything about. So the startling event is that the safety plan doesn’t go the way she anticipates and she is extremely frightened to be put back in the situation she’s trying to get out of.

Mr. Wiseman: So then would the statement have to relate to the safety plan? Because these statements . . .

Court: Well the . . .

Mr. Wiseman: . . . that they're trying to get in are I've been abused back in November of 2018, '19, '20, '21, '22 and '23, April of '23. That has nothing to do with a safety plan.

Court: Sure it does. That's what she's . . .

Mr. Wiseman: It has to do . . .

Court: . . . trying to be safe from.

{¶32} Appellant contends on appeal that the trial court erred in determining that the startling occurrence was the failure of the safety plan, arguing that the startling occurrence could only have been the sexual abuse itself. Appellant argues that no case in Ohio supports the trial court's interpretation of the disruption of the safety plan as a startling occurrence. Appellant further argues that the fact there was a plan to report the abuse is what precludes classification of the statements as excited utterances.

{¶33} In support of his arguments, appellant primarily relies on *State v. Butcher*, 2007-Ohio-118 (11th Dist.). *Butcher* involved the disclosure of sexual abuse by two children, ages five and six. *Id.* at ¶ 2. While spending the night with their grandmother and after getting out of the bathtub, the girls approached their grandmother, acting agitated and nervous. *Id.* at ¶ 3. The girls were jumping from one foot to the other, looking at each other and saying "you tell her. No, you tell her." *Id.* The girls then said "Oh, lets tell her together. Okay, we're going to tell

her on the count of three.” *Id.* The girls then dropped to the floor, “crying and moaning,” and stated “Jerry was sexing with them.” *Id.* at ¶ 4. When grandma asked who Jerry was, the children said “Jerry, who lives with Aunt Portia.” *Id.* Grandma questioned the girls further and learned that Jerry had “put his man thing in them,” and that it happened “at Jerry’s house.” *Id.* at ¶ 5. Grandma then related the girls’ statements to her daughter, the girls’ mother. *Id.* at ¶ 6. It was determined that the last time the girls had spent the night at Butcher’s house was more than two months prior. *Id.* at ¶ 30. The trial court permitted the girls’ mother and grandmother to testify at trial regarding the statements the girls made, classifying them as excited utterances.

{¶34} Butcher was convicted and appealed. The appellate court ultimately reversed despite the fact that both children testified at trial. In finding the trial court erred in admitting the statements as excited utterances, the court reasoned that the girls simply being “upset,” and not becoming “upset” until after they made their disclosure two months after the abuse had occurred, coupled with the fact that the children deliberated before making the disclosure as evidenced by disclosing the abuse “on the count of three,” did not qualify the statements as excited utterances. *Id.* at ¶ 29-30, 34. Determining that the statements did not constitute excited utterances, the court did not address Butcher’s further challenge that the statements were the product of questioning. *Id.* at ¶ 37.

{¶35} Despite appellant’s reliance on *Butcher* and his urgency that we find that case instructive to the present case, we find the present case to be distinguishable from *Butcher*. Initially, we note that the startling occurrence in *Butcher* was the sexual abuse itself that occurred over two months prior to the disclosure. There was no claimed startling occurrence other than the abuse itself in that case, just a decision made by two little girls two months later to finally tell someone.

{¶36} Further, although appellant argues that the startling occurrence here could be nothing other than the underlying sexual abuse itself and that no case in Ohio has interpreted a startling occurrence in the manner the trial court did here, even the *Butcher* court acknowledged that other cases have involved “the ‘startling event’ being not the sexual assault itself, but a subsequent event that caused the ‘stress of the excitement’ of the earlier sexual assault to reoccur.” *Butcher* at ¶ 33, quoting *State v. Dubose*, 1989 WL 142916, *2 (Nov. 22, 1989, 8th Dist.) (where the court determined that the startling event was a hand gesture directed at the child by the offender which referred back to a prior incident of gross sexual imposition) and *State v. Kincaid*, 1995 WL 608407, *4-6 (Oct. 18, 1995, 9th Dist.) (where the court determined that a swat on the victim’s butt by another child constituted a startling event prompting a statement regarding prior abuse that had occurred). *See also State v. Nitz*, 2004-Ohio-6478 (12th Dist.) (where the court

determined the startling event was an offender's threat to a child that she "was going to get it bad tomorrow" if she left with her grandmother that night, which was made after the offender had previously scalded the child with hot water).

{¶37} In *Nitz*, the court found that the child's statement recounting that appellant told her she "was going to get it bad" qualified as an excited utterance in response to a startling event, the startling event being "that appellant, who had scalded her with hot water only one week earlier, had threatened her if she left with her aunt." *Nitz* at ¶ 22. After the child's initial statement in *Nitz*, she was questioned by her aunt whether what had happened and if her back was hurting. *Id.* at ¶ 4. The child then disclosed that appellant had burned her by pouring hot water on her out of shampoo bottles. *Id.* The court likewise found these statements to be excited utterances, reasoning in part that the child

was under competing stresses: one was the lingering stress from appellant having threatened her just before she left with [her aunt], and the second was from the stress created by the incident in which appellant scalded her by twice pouring hot water over her head from a shampoo bottle.

Nitz at ¶ 24.

{¶38} We find the case presently before us to be much more akin to *Dubose*, *Kincaid*, and especially *Nitz*, than it is to *Butcher*. As such, we find no error or abuse of discretion on the part of the trial court in determining that the startling occurrence in the present case was not the underlying sexual abuse itself, but rather

the failure of the safety plan, which would result in the victim's imminent return to the home and the father who had inflicted severe, systematic, and ongoing sexual abuse upon her. Much like in *Nitz*, the record indicates that the victim here was under the competing stresses of 1) the sudden and apparent breakdown of the safety plan resulting in her facing an imminent return home; and 2) the stress created by the underlying, extensive sexual abuse that had been occurring for four years right up until just a few weeks prior to the disclosure.

{¶39} The record is clear that the victim displayed nervous excitement as she was not only upset, but she was crying, shaking, and at times having trouble walking. It is clear that the victim's statements were made immediately upon realizing the safety plan had fallen through and the statements related to her fear stemming from the failure of that plan and her imminent return home. The statements initially appeared to be spontaneous and even after being asked follow-up questions, the statements remained unreflective and indicative of her actual impressions based upon her stated fears and underlying reasons for her fears. Furthermore, the nervous excitement initially displayed by the victim persisted during the time school administrators asked follow-up questions trying to understand the reason for her fear of leaving with her stepmom and returning home. Moreover, nothing in the record indicates the questions posed to the victim were coercive or leading or that they served to do anything other than facilitate the

victim's expression of what was already the focus of her thoughts. We likewise conclude the questions posed did not destroy the domination of the nervous excitement over the victim's reflective faculties.

{¶40} Thus, we conclude the trial court correctly determined the startling occurrence to be the breakdown in the safety plan and we further determine that the trial court did not abuse its discretion in admitting the statements at issue as excited utterances. Furthermore, had we determined the statements were erroneously admitted, we firmly conclude that any error constituted harmless error.

{¶41} Crim.R. 52(A) provides: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." An error is harmless when the error did not impact the verdict, the error was harmless beyond a reasonable doubt, and after excising the erroneously admitted evidence, the remaining evidence establishes the defendant's guilt beyond a reasonable doubt. *State v. Harris*, 2015-Ohio-166, ¶ 37. Additionally, "the 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. Williams*, 2016-Ohio-322, ¶ 37 (2d Dist.).

{¶42} In the case sub judice, the victim testified and gave direct testimony that far exceeded the initial disclosures made at school. The victim's testimony covered over 300 pages of the trial transcript and was estimated to span

approximately 5 hours. She testified that her plan that day consisted of having Denny call her grandpa to come pick her up from school and asking if she could live with him. She described in detail how she felt when she realized her plan had failed, including that she felt like she was having an anxiety attack and couldn't even hardly think. She testified in detail regarding how the abuse began and how it progressed from oral sex to anal sex, to vaginal sex, and then to regular and ongoing oral and vaginal sex combined. While she testified to several specific memorable incidents, she also explained that the incidents happened so frequently that she couldn't count them and sometimes got them confused. Any statements admitted into evidence by the school staff were merely the tip of the iceberg and were cumulative to the victim's extensive trial testimony.

{¶43} Further, we reject appellant's argument that he was prejudiced by the court allowing person after person to testify regarding the victim's statements, thereby essentially lending credibility to her later testimony. Appellant essentially argues that the school officials' testimony was improper because it bolstered the victim's later testimony. However, courts have held that “ ‘[a] party may introduce testimony to “bolster” or corroborate another witness's testimony as long as the testimony is relevant and not objectionable on specific evidentiary grounds.’ ” *State v. Sims*, 2023-Ohio-1179, ¶ 92 (4th Dist.). We have already found the statements at issue were admissible under Evid.R. 803(2). Furthermore, the

witnesses who recounted the statements at issue related the factual nature of the events of that morning chronologically and did not offer any opinions on the victim's veracity.²

{¶44} Accordingly, based upon the foregoing, we find no merit to appellant's first assignment of error and it is therefore overruled.

ASSIGNMENT OF ERROR II

{¶45} In his second assignment of error, appellant contends that the trial court erred in admitting the victim's forensic interview in its entirety where portions were not subject to cross examination, arguing that the admission of certain statements violated his right to confront witnesses against him and that the admission thereof was prejudicial. He contends that because this argument implicates the confrontation clause, the standard of review is de novo, rather than abuse of discretion. The State responds by arguing that because the victim in this case testified at trial and was subject to cross-examination, there was no confrontation clause violation.

Standard of Review

{¶46} Generally, “ ‘[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court.’ ” *State v. Dean*, 2015-Ohio-4347, ¶

² The only testimony that bordered on offering an opinion on the victim's veracity was brought into the record when defense counsel repeatedly questioned each of the witnesses as to whether they can tell when a child is lying, whether the victim had ever gotten into trouble in school before, and whether or not they knew the victim had gotten in trouble at her previous school a couple times, including for bringing alcohol to school.

87, quoting *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. However, because appellant's assignment of error alleges evidentiary issues that involve constitutional protections, in particular confrontation clause concerns, these arguments should be reviewed de novo. See *State v. Felts, supra*, at ¶ 28, citing *State v. Gerald*, 2014-Ohio-3629, ¶ 59 (4th Dist.), in turn citing *State v. Jeffers*, 2009-Ohio-1672, ¶ 17 (4th Dist.).

Constitutional Right to Confrontation

{¶47} “The Sixth Amendment's Confrontation Clause provides, ‘[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.’ ” *State v. Maxwell*, 2014-Ohio-1019, at ¶ 34. The Confrontation Clause of the Sixth Amendment is made applicable to the states by the Fourteenth Amendment. *State v. Issa*, 93 Ohio St.3d 49, at fn. 4. Consequently, this constitutional right applies to both federal and state prosecutions, but the right of confrontation in Article I, Section 10 of the Ohio Constitution provides no greater right of confrontation than the Sixth Amendment. *State v. Arnold*, 2010-Ohio-2742, ¶ 12. In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that the Confrontation Clause guarantees a defendant's right to confront those “who ‘bear testimony’ ” against him. *Id.* at 51. The clause essentially “guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.” *Coy v. Iowa*, 487 U.S.

1012, 1016 (1988). The clause thus protects a defendant's rights to “ ‘physically * * * face those who testify against him, and * * * to conduct cross-examination.’ ” *Id.* at 1017, quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987). Thus, a testimonial out-of-court statement of a witness is inadmissible “unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.” *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009), citing *Crawford* at 54.

{¶48} Importantly, this Court has observed that “ ‘the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination.’ ” *State v. Lykins*, 2019-Ohio-3316, ¶ 89, quoting *California v. Green*, 399 U.S. 149, 158 (1970). As explained in *Green*:

This conclusion is supported by comparing the purposes of confrontation with the alleged dangers in admitting an out-of-court statement. Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the “[“]greatest legal engine ever invented for the discovery of truth[”]”; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Green at 158, quoting 5 Wigmore’s 1367.

Legal Analysis

{¶49} Initially we must note that, contrary to appellant's assertions, the video of the forensic interview was not played in its entirety for the jury. The State had a transcript of the interview created to assist both the parties and the court at trial. The first eight pages of the interview were edited out, as were the last several pages of the interview. Thus, the corresponding portions of the video were not played for the jury.

{¶50} Over appellant's objection, the trial court endeavored to go over the transcription of the interview ahead of time with defense counsel and the State, outside the presence of the jury. The record indicates that appellant made a blanket objection to any portion of the video interview being admitted into evidence and specifically alleged a *Crawford* violation, despite the fact that the State intended to have the victim testify at trial. When appellant raised a potential *Crawford* violation, the trial court suggested that the victim testify before the State offered the testimony of the advocacy center interviewer, which was the point in time when the State planned to introduce the video to the jury. This was suggested by the trial court to avoid a scenario where testimonial statements might be admitted through the recorded interview and then the victim later decide not to testify. Although appellant requested a continuing objection to the admission of the video

be made of record, he voiced no objection to the plan that the victim testify prior to the child advocacy center interviewer.

{¶51} Further, it is clear from the record that defense counsel was provided with a full transcription of the recorded interview and therefore knew which statements by the victim would be later admitted when the interview was played for the jury. Although defense counsel essentially failed to participate in the page by page, and sometimes line by line, review of the video transcript on the basis that he was arguing none of the contents was admissible, appellant now argues on appeal that three specific exchanges that occurred during the recorded interview did not come up in the victim's trial testimony, which occurred prior to the playing of the video. He therefore contends that he was denied his right to confront the victim on these issues.

{¶52} In particular, the exchanges to which appellant complains are summarized as follows:

1. The victim volunteered to the interviewer that appellant told her that the penis she was seeing was fake and that the ejaculate she was seeing was tartar sauce;
2. When the interviewer asked the victim if appellant had ever told her not to tell anyone what was happening, the victim stated yes and that he had told her if she told anyone that Heidi would get in trouble too, and that she believed him; and
3. When the interviewer asked what appellant's penis looked like, the victim stated it was circumcised and was 5-6 inches long, and that appellant had pubic hair and also had a scar on his belly.

Appellant argues that because the State did not question the victim on these statements, during cross-examination he was not permitted to cross-examine her regarding them and was therefore denied his right to confront her.

{¶53} In *Lykins, supra*, this Court was presented with an argument that trial counsel was ineffective for failing to object to the admission of statements by a child victim made during an interview at the Mayerson Center, which is a child advocacy center much like the center connected with Nationwide Children's Hospital here. *Lykins* at ¶ 87. The underlying basis of *Lykins'* argument was that the admission of the statements violated his constitutional right to confrontation. *Id.* However, noting that the victim in the case had testified at trial and therefore had been subjected to cross-examination, we rejected that argument, reasoning in part as follows:

The *Green* court also stressed that none of its decisions interpreting the Confrontation Clause had required exclusion of "out-of-court statements of a witness who is available and testifying at trial." *Id.* at 161. Instead, most of the court's cases had been "focused on precisely the opposite situation—situations where statements have been admitted in the absence of the declarant and without any chance to cross-examine him at trial." *Id.* These situations had been subjected to careful scrutiny because they dispensed "altogether with the literal right to 'confrontation' and cross-examination * * *." *Id.* at 162. Consequently, the Confrontation Clause does not require exclusion of prior statements of a witness who testifies at trial. *Id.* at 164; accord *State v. Arnold*, 147 Ohio St.3d 138, 2016-Ohio-1595, 62 N.E.3d 153, ¶ 66 (regarding admission of prior inconsistent statement, the Sixth Amendment only requires that a witness be "present in open court and confronted about his prior

statement by all concerned: the state, the court, and defense counsel”); *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 64 (stating that “admission of hearsay does not violate the Confrontation Clause if the declarant testifies at trial”); *State v. Kersbergen*, 12th Dist. Butler No. CA2014-10-218, 2015-Ohio-3103, 2015 WL 4611007, ¶ (determining that victim's out-of-court statements made at Mayerson Clinic did not violate Confrontation Clause when victim testified at trial); *State v. Gray*, 12th Dist. Butler No. CA2011-09-176, 2012-Ohio-4769, ¶ 48 (holding that “when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements”); *State v. Isa*, 2d Dist. Champaign No. 07-CA-37, 2008-Ohio-5906, 2008 WL 4899121, ¶ 16 (“Confrontation Clause does not bar admission of out-of-court statements where the defendant has the benefit of full and effective cross-examination of the declarant at the trial”).

Lykins, supra, at ¶ 90

{¶54} Here, although appellant may have technically been deprived of cross-examining the victim on two of these statements (items 1 and 3 above), the State did question the victim on redirect as to why she did not disclose the abuse earlier. In response, the victim testified that she just always felt like she couldn’t tell anyone and that no one would believe her. This would have been a prime opportunity, had appellant wished, to conduct recross and ask her if there was any other reason why she felt she couldn’t tell anyone, thereby possibly drawing out the inconsistency with her prior interview statement where the victim stated appellant told her that Heidi would get in trouble if she told anyone. However, appellant elected not to do so. We also find it hard to believe that appellant would

have asked the victim any follow-up questions regarding her statements related to a fake penis/tartar sauce, or the description of appellant's penis had he had the opportunity to do so.

{¶55} In any event, assuming the introduction of these two statements did, in fact, constitute a confrontation clause violation, such violations are still subject to a harmless error analysis. *See State v. Hood*, 2012-Ohio-6208, ¶ 43 (“The harmless-error rule is applicable to Confrontation Clause violations.”). “ ‘The State bears the burden of establishing that any error did not affect the defendant’s substantial rights.’ ” *State v. Felts*, 2016-Ohio-2755, ¶ 42 (4th Dist.), citing *State v. Morris*, 2014-Ohio-5052, ¶ 23. As noted above, Crim.R. 52(A) provides: “Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.”

{¶56} As observed by this Court in *Felts*, the Supreme Court of Ohio has applied the following analysis to determine whether an error has affected the substantial rights of the defendant so as to require a new trial:

“First, it must be determined whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict.” *State v. Harris*, 142 Ohio St.3d 211, 2015-Ohio-166, 28 N.E.3d 1256, ¶ 37, citing *Morris* at ¶ 25 and 27. Second, it must be determined whether the error was not harmless beyond a reasonable doubt. *Id.* at ¶ 37, citing *Morris* at ¶ 28. Once the prejudicial evidence is excised, the remaining evidence is weighed to determine whether it establishes the defendant's guilt beyond a reasonable doubt. *Id.* at ¶ 37, citing *Morris* at ¶ 29, 33. In reviewing the remaining evidence, we are mindful that our

role is not that of supreme fact finder. But rather we must consider the impact the excised testimony had on the jury in determining if there is no reasonable possibility the tainted evidence contributed to the conviction. To accomplish this, we must focus on both the impact the prohibited testimony had on the verdict and the strength of the remaining evidence. *Morris, supra.*

Felts at ¶ 43.

{¶57} Applying these factors here, we conclude that the errors were harmless beyond a reasonable doubt. First, we believe that the testimony at issue would have only had a slight impact, if any at all, on the verdict considering the nonsensical nature of the testimony contained in item one and considering the age and assumed knowledge of the victim with respect to the nature of the testimony in item three. More specifically, with respect to item three, this is not a case involving a child of tender years who would not have been able to describe a penis or a male's genital area absent some sort of abuse. The victim here was 17 years old at the time the abuse ended and was a nursing student.

{¶58} Second, we cannot conclude that the error was not harmless beyond a reasonable doubt. As described in more detail below, the victim's trial testimony, which is sufficient to sustain the convictions on its own, encompassed several hundred pages of the trial transcript and included detailed accounts of multiple incidents of sexual abuse that occurred over a four-year period at the hands of appellant. The victim's testimony was consistent with excited utterances made to

school officials on the day of the initial disclosure and was by and large consistent with statements she made for purposes of medical diagnosis and treatment to the forensic interview from the child advocacy center. Third, we can only conclude there is no reasonable possibility that a jury would have acquitted appellant in the absence of the offending testimonial evidence when the remaining evidence is viewed through the eyes of a reasonable jury.

{¶59} In light of the foregoing, we hold that appellant's federal and state constitutional right to confrontation was not violated by admitting the child's statements through the playing of the recorded forensic interview. Accordingly, his second assignment of error is overruled.

ASSIGNMENT OF ERROR III

{¶60} In his third assignment of error, appellant contends that the trial committed plain error in allowing the prosecutor to misstate the DNA evidence, thereby depriving him of his right to due process of law. The State responds by arguing that there was no misstatement as to the DNA evidence and, therefore, the trial court did not commit plain error.

Standard of Review

{¶61} Appellant concedes that because there was no objection raised to the prosecutor's comments during trial, he has waived all but plain error. Appellate courts may consider a forfeited argument using a plain-error analysis. (Citations

omitted). *State v. Sims*, 2023-Ohio-1179, *supra*, at ¶ 56. For the plain error doctrine to apply, the party claiming error must establish 1) that “ ‘an error, i.e., a deviation from a legal rule’ ” occurred; 2) that the error was “ ‘an “obvious” defect in the trial proceedings’ ”; and 3) that this obvious error affected substantial rights, i.e., the error “ ‘must have affected the outcome of the [proceedings].’ ” *State v. Rogers*, 2015-Ohio-2459, ¶ 22, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002); *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 209 (1982) (“A ‘plain error’ is obvious and prejudicial although neither objected to nor affirmatively waived which, if permitted, would have a material adverse affect on the character and public confidence in judicial proceedings.”).

{¶62} As set forth below, we do not believe that the trial court obviously erred by failing to sua sponte lodge an objection and interrupt the State’s opening or closing arguments with respect to its description of the DNA evidence that it either planned to introduce or had already introduced. As a result, the plain-error doctrine does not apply to the arguments raised under this assignment of error.

Prosecutorial Misconduct

{¶63} “Prosecutorial misconduct constitutes reversible error only in rare instances.” *State v. Edgington*, 2006-Ohio-3712, ¶ 18 (4th Dist.), citing *State v. Keenan*, 66 Ohio St.3d 402, 405 (1993). Accordingly, courts ordinarily will not reverse a judgment on the basis of prosecutorial misconduct unless “the

prosecutor's conduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' ” *State v. Belton*, 2016-Ohio-1581, ¶ 125, quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). In order to answer that question, we must consider two factors: 1) whether the conduct was improper; and if so 2) whether it prejudicially affected the defendant’s substantial rights. *Id.*, citing *State v. Maxwell*, 2014-Ohio-1019, ¶ 243. Courts assess prejudice by examining “the effect of the misconduct ‘... in the context of the entire trial.’ ” *State v. Wilks*, 2018-Ohio-1562, ¶ 172, quoting *Keenan* at 410.

{¶64} We further note that “[t]he benchmark of the prosecutorial misconduct analysis is ‘the fairness of the trial, not the culpability of the prosecutor.’ ” *State v. Obermiller*, 2016-Ohio-1594, *supra*, at ¶ 99, quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982). *See also State v. Garrett*, 2022-Ohio-4218, ¶ 144, citing *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Accordingly, “[n]ot every intemperate remark by counsel can be a basis for reversal.” *State v. Landrum*, 53 Ohio St.3d 107, 112 (1990). Instead, “[t]he test for prosecutorial misconduct is whether the conduct complained of deprived the defendant of a fair trial.” *State v. Jackson*, 92 Ohio St.3d 436, 441 (2001), citing *State v. Apanovitch*, 33 Ohio St.3d 19, 24 (1987).

{¶65} “Opening statements serve to inform the jury about the nature of the case and to outline the facts that each party intends to prove.” (Emphasis in

original) *State v. Nicholson*, 2024-Ohio-604, ¶ 282. “Prosecutors have wide latitude in opening statement but cannot use that opportunity to introduce evidence.” *State v. Fannon*, 2018-Ohio-5242, ¶ 58 (4th Dist.). The prosecution may, however, “refer to evidence it intends to present during trial.” *State v. Gilbert*, 2005-Ohio-5536, ¶ 16 (10th Dist.). The prosecution thus may “summarize,” “describe,” or “anticipate evidence,” but it “risks a mistrial when it engages in an attempt to actually introduce evidence.” *Id.*

{¶66} Moreover, “opening statements should not include matters that attempt to influence or sway the jury by making statements that counsel knows will not be supported by competent or admissible evidence.” *State v. Wuensch*, 2017-Ohio-9272, ¶ 34 (8th Dist.), citing *Maggio v. Cleveland*, 151 Ohio St. 136, 140-141 (1949). However, “unless ... counsel ‘deliberately attempt[ed] to influence and sway the jury by a recital of matters foreign to the case,’ remarks made during opening statements cannot form the basis of a misconduct claim.” *State v. Nicholson*, 2024-Ohio-604, at ¶ 282, quoting *Maggio* at paragraph two of the syllabus.

{¶67} “During closing arguments, the prosecution generally has wide latitude to convincingly advance its strongest arguments and positions.” *State v. Gibson*, 2003-Ohio-4910, ¶ 35 (4th Dist.), citing *State v. Phillips*, 74 Ohio St.3d 72, 90 (1995). The prosecution “may freely address what the evidence has shown

and what reasonable inferences may be drawn from that evidence.” *State v. Wuensch*, 2017-Ohio-9272, ¶ 38 (8th Dist.). The prosecution must, however, avoid going beyond the evidence presented in order to obtain a conviction. *E.g.*, *State v. Smith*, 14 Ohio St.3d 13, 14 (1984) (stating that prosecutor has a duty “to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury”). “[P]rosecutors must be diligent in their efforts to stay within the boundaries of acceptable argument and must refrain from the desire to make outlandish remarks, misstate evidence, or confuse legal concepts.” *State v. Fears*, 86 Ohio St.3d 329, 332 (1999).

{¶68} However, a court that is reviewing claims of prosecutorial misconduct during closing argument must not focus on isolated comments but must examine the prosecution's closing argument in its entirety to determine whether the prosecutor's comments prejudiced the defendant. *E.g.*, *State v. Keenan*, *supra*, at 410. “A conviction will be reversed only where it is clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would not have found appellant guilty.” *State v. Benge*, 75 Ohio St.3d 136, 141-42 (1996), citing *State v. Loza*, 71 Ohio St.3d 61, 78 (1994).

{¶69} In the present case, appellant recognizes that trial counsel did not object to the prosecutor's statements during opening or closing statements. Thus, he agrees that plain-error review applies to these alleged instances of prosecutorial

misconduct. We therefore review these claims to determine whether the prosecutor obviously engaged in misconduct so as to affect the outcome of the trial. *See State v. Whitaker*, 2022-Ohio-2840, ¶ 85 (defendant's failure to contemporaneously object to alleged prosecutorial misconduct forfeits all but plain error).

Legal Analysis

{¶70} Here, appellant contends that the State misstated the DNA evidence in both its opening and closing arguments, deliberately “twisting” the expert’s testimony to suggest that the victim and/or Heidi were contributors, but just not major contributors to the DNA evidence located on appellant’s bed comforter. Appellant specifically complains of two different statements made by the prosecution during trial, one during opening statements and one during closing statements. During opening statements, the prosecutor stated as follows:

There’s enough there, there’s not enough there to determine Heidi or [the victim] being a major contributor. They can’t be included or . . . Or sorry, Heidi and [the victim] basically can’t be excluded.

A review of the transcript reveals that the broader context of this statement was as follows:

It comes back that there was semen found on that comforter matching Jason McCormick to some odds of one in a trillion or so. There’s a mixture of DNA that’s not sufficient quality for comparison to a standard from any other individual. Meaning there’s Jason plus one. There’s enough there, there’s not enough

there to determine Heidi or [the victim] being a major contributor. They can't be included or . . . Or sorry, Heidi and [the victim] basically can't be excluded from that.

{¶71} Then, during closing arguments, the prosecutor stated as follows:

“Heidi and [the victim] could not be excluded. They weren't major contributors.”

A review of the transcript reveals that broader context in which these statements were made was as follows:

* * * all nine were semen stains and Jason McCormick, one in a trillion or some big number like that, confirmed. Heidi and [the victim] couldn't be excluded. They were not major contributors. So what that DNA analysis was able to tell you is that it's Jason plus at least one other.

{¶72} The DNA expert from BCI who testified at trial confirmed that she tested the comforter from appellant's bed against DNA standards for appellant, the victim, and also Heidi. A review of the trial transcript reveals the following exchanges between the prosecution and the DNA expert, in pertinent part, as follows:

Q: And what were your conclusions in this case?

A: So item one was screened for the present [sic] of semen and semen was identified. * * * So in this case there was semen identified from the sample taken from the comfortable [sic]. Um, they, the swabbing of that area that was sampled um, was a mixture once the DNA profile was run. Just means there's more than one person's DNA present. Um, however there was only one person that was contributing enough DNA for me to be able to say anything about them. So I think of this as if you're driving in your car listening to the radio and you start to drive

away from wherever that radio station is coming from you'll start picking up other radio stations. You can tell there's another song on there in the background but you don't know what, you can't identify it. You don't [sic] what song it is. So you can tell there's more DNA there, I just can't say anything about it. So that's kind of what's happening in this case. Um, the person however, the major person that was contributing enough DNA to be able to say something about that DNA profile was consistent with Jason McCormick and the estimated frequency of that DNA profile that was found in this sperm fraction um, is rarer than 1 in one trillion unrelated individuals. * * *

Q: Thank you. So let me understand this. So you identified Jason McCormick and had a sperm or semen, so the sperm fraction there.

A: That is correct.

Q: And then that's plus at least one other individual but we can't say who?

A: Correct.

Q: *And there's not enough there to exclude Heidi or [the victim]?*

A: *Yes. Because like if we go back to that radio analogy you can't make out what that song is. So it's the same thing, there's not enough DNA there for me to be able to include or exclude anyone else in that sample. I can tell you there's something there, it's just, it's just not strong enough for me to be [sic] able to say anything.*

(Emphasis added).

{¶73} Later on, during cross examination, the defense questioned the expert as follows:

Q: * * * Um, so then your findings um, you, if I understood right item 1.1 you found the major contributor to be Jason McCormick?

A: Yes, consistent with Jason McCormick, yes.

* * *

Q: Okay. Um, and then Hei . . . your conclusion further states Heidi and [the victim] are not the major contributor. And what does that mean?

A: So basically for us that just means that Heidi and [the victim] do not have the same DNA profile as Jason. Because the only thing that I am able to interpret in this scenari . . . like in this specific um, DNA profile was the profile that was consistent with Jason. So that is our way of saying that Heidi and [the victim] do not have the same DNA profile as Jason. They're not the major contributor. I can't say anything else about what's in that remaining portion positive or negative.

Q: Okay. And I just want to make sure because as I read this or, or just from a layperson's understanding it says they are not the major contributor you're not saying that they are a minor contributor?

A: I unfortunately can't say anything about that additional data.

Q: Okay. You just know that there is more than one person, correct?

A: Yep.

Q: It's like that song in the background, correct?

A: Yes.

Q: Um, that you cannot say anything about?

A: Yeah, I can hear that it's there, but I just can't tell what it is.

Q: *And further I think you said you cannot ex . . . it's not enough to exclude anyone?*

A: Exclude or include.

Q: Or include. Okay. So just for my understanding if I would have, if we would have given you as opposed to uh, three DNA standards, right?

A: Yep.

Q: *If I would have given you 200 DNA standards are your findings the same?*

A: *Yes. It would have just been a very, very long list of all those people that says not the major contributor.*

(Emphasis added).

{¶74} After a close review of the expert's testimony, provided both on direct examination and cross-examination, we conclude that the prosecution's statements during opening and closing arguments were completely consistent with the expert's testimony at trial. The prosecution argued during closing that there was not enough information to determine that the victim or Heidi were major contributors and that there also wasn't enough information to exclude them. During closing arguments, the prosecution stated that the DNA evidence indicated the presence of appellant's DNA plus one other individual's DNA, that the victim and Heidi were not major contributors, and they also couldn't be excluded. All of

these statements reflect the evidence introduced at trial and, contrary to appellant's argument, did not constitute a twisting of the testimony to suggest that the victim was a contributor, just not a major contributor. Therefore, we cannot find that these statements constituted prosecutorial misconduct or that the trial court's failure to sua sponte lodge its own objection to the statements resulted in plain error. Accordingly, having found no merit to the arguments raised under appellants' third assignment of error, it is overruled.

ASSIGNMENT OF ERROR IV

{¶75} In his fourth assignment of error, appellant contends that he was denied a fair trial due to the cumulative effect of the errors alleged in his first three assignments of error. He summarily argues as follows:

Where the State's case was based solely on M.M.'s claims, to the exclusion of any scientific, medical, eyewitness or other objective evidence, and the cumulative effect of the trial court's errors was to deny Jason his constitutional right to a fair trial, this Court should sustain his Fourth Assignment of Error.

The State responds by arguing that "[w]here none of appellant's individual assignments of error have merit, 'he cannot establish an entitlement to relief simply by joining those claims together.' " *State v. Benge*, 2021-Ohio-152, ¶ 66 (4th Dist.). For the following reasons, we agree with the State.

Standard of Review

{¶76} 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. Garner*, 74 Ohio St.3d 49, 64 (1995), citing *State v. DeMarco*, 31 Ohio St.3d 191 (1987), paragraph two of the syllabus; *State v. Ruble*, 2017-Ohio-7259, ¶ 75 (4th Dist.). “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, ¶ 106 (4th Dist.), citing *State v. Harrington*, 2006-Ohio-4388, ¶ 57 (4th Dist.). The cumulative error doctrine does not apply where the defendant “cannot point to ‘multiple instances of harmless error.’ ” *State v. Mammone*, 2014-Ohio-1942, ¶ 148 (“And to the extent that Mammone more broadly invokes the doctrine of cumulative error, that doctrine does not apply because he cannot point to ‘multiple instances of harmless error.’ ”), quoting *State v. Garner, supra*, at 64; *State v. Colonel*, 2023-Ohio-3945, ¶ 64-66 (4th Dist.); *State v. Fannon*, 2018-Ohio-5242, ¶ 124-125 (4th Dist.).

Legal Analysis

{¶77} Here, with the exception of two arguable errors which we determined to be harmless beyond a reasonable doubt, we have found no merit to appellant’s

preceding assignments of error.³ Thus, because appellant has not pointed to “multiple instances of harmless error,” we cannot conclude that cumulative errors violated his constitutional right to a fair trial. Therefore, we find no merit to the arguments raised under appellant’s fourth assignment of error. Accordingly, appellant’s fourth assignment of error is overruled.

ASSIGNMENTS OF ERROR V AND VI

{¶78} For ease of analysis, we address appellant’s fifth and sixth assignments of error in conjunction with one another. In his fifth assignment of error, appellant contends that his convictions were not supported by sufficient evidence. In his sixth assignment of error, he contends that his convictions are against the manifest weight of the evidence. Appellant essentially challenges his convictions on all counts of the indictment to the extent they were based upon the testimony of a single witness, the victim. He further challenges his convictions to the extent there was no corroborating evidence, such as DNA testing or medical evidence indicating the victim had scarring, tearing, infection, mental health symptoms, or other physical signs of sexual assault.⁴ He makes no arguments

³ In appellant’s first assignment of error, we found no error occurred with respect to the admission of the victim’s statements as excited utterances and alternatively found that, even if the statements were admitted in error, such error was harmless, especially in light of the victim’s extensive testimony at trial. In appellant’s second assignment of error we assumed, *arguendo*, that error occurred regarding the admission of two statements by the victim during her forensic interview, however, we determined the admission of those statements had little, if any, impact on the verdict, especially considering the remaining evidence and thus, we found any error harmless beyond a reasonable doubt.

⁴ Appellant also argues that the fact numerous other witnesses were permitted to testify and repeat the victim’s allegations should not lend credence to the victim’s testimony. However, we have already determined that the

regarding the specific counts or specific incidences or forms of rape alleged by the victim. The State responds by arguing that a rape conviction may rest solely on the victim's testimony and there is no corroboration requirement, particularly in cases involving the rape of a child by a parent. The State further recounts the evidence it introduced to support the convictions above and beyond the victim's testimony.

Standard of Review

{¶79} Initially, we observe that “sufficiency” and “manifest weight” present two distinct legal concepts. *Eastley v. Volkman*, 2012-Ohio-2179, ¶ 23 (“sufficiency of the evidence is quantitatively and qualitatively different from the weight of the evidence”); *State v. Thompkins*, 78 Ohio St.3d 380 (1997), syllabus; accord *State v. Jordan*, 2023-Ohio-3800, ¶ 15 (lead opinion). A claim of insufficient evidence invokes a due process concern and raises the question whether the evidence is legally sufficient to support the verdict as a matter of law. *Thompkins, supra*, at 386. When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. *Id.* at syllabus. The “critical inquiry” on appeal “is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in

victim's statements were admissible through the various other witnesses under the excited utterance exception to the rule against hearsay.

the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979); *e.g.*, *State v. Jenks*, 61 Ohio St.3d 259, 273 (1991). Furthermore, a reviewing court is not to assess “whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.” *Thompkins, supra*, at 390 (Cook, J., concurring).

{¶80} Thus, when reviewing a sufficiency of the evidence claim, an appellate court must construe the evidence in a light most favorable to the prosecution. *E.g.*, *State v. Hill*, 75 Ohio St.3d 195, 205 (1996); *State v. Grant*, 67 Ohio St.3d 465, 477 (1993). 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. Tibbetts*, 92 Ohio St.3d 146, 162 (2001); *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001).

{¶81} “Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence.” *Thompkins, supra*, at 387. “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. Leonard*,

2004-Ohio-6235, ¶ 81, quoting *State v. Getsy*, 84 Ohio St.3d 180, 193-194 (1998), in turn citing *State v. Eley*, 56 Ohio St.2d 169 (1978), syllabus; accord *State v. Nicholson*, 2024-Ohio-604, ¶ 71. A court that is considering a manifest-weight challenge must “ ‘review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses.’ ” *State v. Beasley*, 2018-Ohio-493, ¶ 208, quoting *State v. McKelton*, 2016-Ohio-5735, ¶ 328. The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. *State v. Issa*, *supra*, at 67; *State v. Murphy*, 2008-Ohio-1744, ¶ 31 (4th Dist.). “ ‘Because 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*, 2010-Ohio-2420, ¶ 20, quoting *State v. Konya*, 2006-Ohio-6312, ¶ 6 (2d Dist.), in turn quoting *State v. Lawson*, 1997 WL 476684 (2d Dist. Aug. 22, 1997).

{¶82} As the *Eastley* court explained:

“ ‘[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment must be made in favor of the judgment and the finding of facts.

* * *

If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.’ ”

Id., at ¶ 21, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984), fn.3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, 191-192 (1978).

Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact finder, as long as a rational basis exists in the record for its decision. *State v. Picklesimer*, 2012-Ohio-1282, ¶ 24 (4th Dist.); accord *State v. Howard*, 2007-Ohio-6331, ¶ 6 (4th Dist.) (“We will not intercede as long as the trier of fact has some factual and rational basis for its determination of credibility and weight.”).

{¶83} Accordingly, 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. *E.g., Eley*; accord *Eastley* at ¶ 12, quoting *Thompkins, supra*, at 387, in turn quoting Black's Law Dictionary 1594 (6th ed.1990) (judgment not against the manifest weight of evidence when “ ‘the greater amount of credible evidence” ’ ” supports it). 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.’ ” *Thompkins, supra*, at 387, quoting *State v.*

Martin, 20 Ohio App.3d 172, 175, (1st Dist. 1983); *accord McKelton* at ¶ 328. A reviewing court should find a conviction against the manifest weight of the evidence only in the “ ‘exceptional case in which the evidence weighs heavily against the conviction.’ ” *Thompkins* at 387, quoting *Martin, supra*, at 175; *accord State v. Clinton*, 2017-Ohio-9423, ¶ 166; *State v. Lindsey*, 87 Ohio St.3d 479, 483 (2000).

{¶84} We also observe that when an appellate court concludes that the weight of the evidence supports a defendant's conviction, this conclusion necessarily includes a finding that sufficient evidence supports the conviction. *E.g., State v. Waller*, 2018-Ohio-2014, ¶ 30 (4th Dist.). Thus, a determination that the weight of the evidence supports a conviction also is dispositive of an insufficient-evidence claim. *Id.*

Legal Analysis

{¶85} Appellant was convicted of 28 counts of rape in violation of R.C. 2907.02(A)(2), all first-degree felonies. R.C. 2907.02 provides, in pertinent part, that “[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.” R.C. 2907.01(A) defines sexual conduct as follows:

“Sexual conduct” means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any

instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

{¶86} As set forth above, the victim in this case was appellant's daughter.

Her age spanned from age 13 to age 17 during the timeframes alleged in the indictment. Appellant does not challenge his conviction on any specific count of rape by arguing that particular elements were not proven or that the alleged actions did not occur during the timeframe alleged. Instead, as set forth above, appellant challenges his convictions on all counts to the extent they were based upon the victim's testimony alone, without any corroborating medical or DNA evidence.

{¶87} We first observe that "a rape conviction may rest solely on the victim's testimony, if believed." *State v. Patterson*, 2014-Ohio-1621, ¶ 40 (8th Dist.). Moreover, no requirement exists "that a rape victim's testimony be corroborated as a condition precedent to conviction." *State v. Lewis*, 70 Ohio App.3d 624, 638, (4th Dist. 1990); *accord State v. Johnson*, 2006-Ohio-6404, ¶ 53 ("[c]orroboation of victim testimony in rape cases is not required"); *State v. Horsley*, 2018-Ohio-1591, ¶ 74 (4th Dist.) (quoting *Patterson* and *Lewis* for the foregoing two propositions); *State v. Barnes*, 2014-Ohio-47, ¶ 31 (2d Dist.) (physical evidence need not corroborate "testimonial evidence of sexual abuse"). Appellant concedes that "a conviction can be based on the testimony of a single witness," but argues that "the testimony must establish the elements of the crime

beyond a reasonable doubt.” Appellant contends that a jury’s belief in a witness’ testimony “is not synonymous with a finding of proof beyond a reasonable doubt” and argues that “[t]here have been cases where the juries believed the defendant most likely or probably or must have committed the crime of which he was accused, but did not find the state met its burden of proof.”

{¶88} However, contrary to appellant’s reference to such scenarios, which he fails to support with case citation, the present matter does not constitute such a situation. Here, the victim’s trial testimony encompassed approximately 300 pages of the trial transcript. She testified before the jury for hours, describing how appellant repeatedly raped her from the time she was 13 years old until she was 17. She explained that she was forced to perform oral sex on appellant during her junior high years as a punishment for misbehaving. She testified that she was anally raped a minimum of three times and up to a maximum of five times beginning her freshman year, again as a punishment when she would get into trouble. After that, vaginal rapes began and occurred on a weekly basis, unless she was on her period, up until early April of 2023, just a few weeks before she finally disclosed what was happening. She described in detail the manner in which she was raped, where the rapes occurred, and explained that she did not come forward sooner because appellant had also been physically abusive to her and had convinced her that no one would believe her. After considering this testimony, the

jury unanimously found appellant guilty on all counts, obviously determining that the State met its burden of proof.

{¶89} Appellant further argues that even if his convictions were supported by sufficient evidence, that errors by the trial court, prosecutorial misconduct, inconsistent statements by the victim, the victim's motivation to lie, and an absence of corroborating evidence rendered his convictions against the manifest weight of the evidence. Although there were some inconsistent statements made by the victim when comparing her Child Advocacy Center video, police interview, and trial testimony, the victim explained that some of her initial statements were affected by the initial stress she was under when the report was made. She provided explanations for other inconsistencies, sometimes pointing out that interviewers did not ask the same exact questions or ask the questions in the same way. Again, the victim testified at trial at length and was thoroughly cross-examined regarding the inconsistencies in the presence of the jury. Importantly, the victim's initial report to police, statements made to the CAC interviewer, and her trial testimony all painted a picture of repeated and systematic rape occurring at the hands of appellant for all of her teenage years up until she disclosed the abuse. Also, though some details varied from report to report, the victim's statements were by and large very consistent with one another.

{¶90} In particular, the victim testified to eight very specific incidents when appellant raped her. She testified that the first incident occurred when she was in seventh grade. She explained that as a punishment after she had gotten in trouble, appellant pulled his pants down, shoved her head down and put his penis in her mouth. When she complained she didn't like it, he grabbed her by the hair and threw her off him. She testified that she remembered that he smelled salty and musky. She testified that the second incident occurred about a week later when appellant called her upstairs to his bedroom after she had gotten in trouble and he told her "you know what you have to do." She said he made her turn the fan off and put her head under the blanket. She testified that he ejaculated in her mouth and made her swallow it. She testified that it tasted salty and bitter. The victim testified that she could not say when the next time it occurred because "it happened so frequently." She did, however, testify that she remembered a third time when appellant made her give him a "blow job" in the basement.

{¶91} The victim testified regarding a fourth incident that occurred which involved anal rape. She explained that during her freshman year in high school she had gotten into trouble for bringing alcohol to school. As a punishment, appellant pulled his pants down and made her sit down on his penis. She explained that he put his penis in her butt and made her move up and down. When she told him to stop and that it hurt, he got mad and threw her off of him. She further testified that

she was anally raped by appellant three to five times. She testified in more detail regarding a fifth incident where appellant forced her give him a “blow job” and made her cover his penis with her “spit” and then insert it into her “butt.” She testified that he ejaculated inside her that time, and she remembered that she had to run downstairs to the toilet and push it out of her.

{¶92} She testified that a sixth specific incident occurred in the summer of 2021 after appellant found out she and her female cousins had made a video of themselves dancing around in their shorts and sports bras while on a Tennessee vacation with their grandparents. She testified that appellant “switched” her and left bruises on her, he then forced her to clean their barn while naked. She testified that the next day, appellant called her up to his room, made her turn the fan off, had her push his blanket to the side, made her take all her clothes off and he proceeded to put his penis in her vagina. She testified that he told her to keep going despite her telling him that it hurt and that he then tapped her thigh and told her get off and then put his penis in her mouth, ejaculated in it, and forced her to swallow it. She testified that she was mad that he took her virginity and that she didn’t fight back because she knew she couldn’t.

{¶93} She testified about a seventh incident that involved appellant vaginally raping her in a green jeep that was sitting in their barn. She further testified that from the time they started, the vaginal rapes occurred once or twice

every week, unless she was on her period, or had not gotten into trouble. She testified that she would have to pull her pants down to show appellant she was on her period and that during the weeks she was not vaginally raped, appellant would still make her give him “blow jobs.” She explained that appellant stopped anally raping her because “he didn’t like having poop on his penis.”

{¶94} The victim finally testified regarding an eighth specific incident that occurred on April 3, 2023. That was the last time that appellant vaginally raped her before she disclosed the abuse on April 21, 2023. During that incident, she was home on spring break when appellant called her up to his room and vaginally raped her. She testified that she used a pink rag from the shower to clean him up afterwards. She testified that she “just did it” and did not resist. She explained that she just wanted it over with and that she didn’t want to know what the consequences of saying no would be.

{¶95} Finally, with respect to the force element of the offenses, the victim testified regarding various physical punishments inflicted upon her over the years, including being whipped with a switch to the point of bruising, also being “whooped” with a belt or boot, having food withheld if she was in trouble, being forced to clean the basement for three days in a row, and also witnessing appellant being abusive toward her step-mother. She testified that she had witnessed

appellant grab her stepmom by the hair, rip her shirt, push her, slap her, and grab her by the throat.

{¶96} Moreover, as noted by the State in its brief, because this case involves a parent-child relationship, force need not be overt. This Court has held that “[i]n cases involving children ‘coercion is inherent in the parent-child relationship and * * * under these special circumstances “[f]orce need not be overt and physically brutal, but can be subtle and psychological.” ’ ” *State v. Wright*, 2001-Ohio-2473, *14 (4th Dist.), *quoting State v. Schaim*, 65 Ohio St.3d 51, 54-55 (1992), in turn citing *State v. Eskridge*, 38 Ohio St.3d 56, 58-59 (1988). As further observed in *Eskridge*:

“* * * Sexual activity between a parent and a minor child is not comparable to sexual activity between two adults with a history of consensual intercourse. The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose.”

Eskridge at 59, quoting *State v. Etheridge*, 319 N.C. 34, 47 (1987). *See also, State v. Dye*, 82 Ohio St.3d 323, 329 (1998).

Thus, in *Wright*, this Court concluded that “when an alleged perpetrator of the sexual abuse is a person in a position of authority over the child, force may be inferred.” *Wright* at *14.

{¶97} After our review of the record, we do not believe that appellant's 28 rape convictions are against the manifest weight of the evidence. Instead, our review reveals that the record contains substantial, competent and credible evidence to support a finding that he committed all 28 offenses, and very likely more than 28 offenses. Despite some inconsistencies in the victim's trial testimony and prior statements, the jury heard those inconsistencies and was free to accept or reject the victim's testimony. It apparently resolved the inconsistencies in favor of the State, which was within its province to do as the trier of fact. For these same reasons, we conclude that sufficient evidence supports appellant's 28 rape convictions. Accordingly, because we find no merit to arguments raised under appellant's fifth and sixth assignments of error, they are both overruled.

{¶98} Furthermore, having found no merit to any of appellant's assignments of error, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED. Costs are to be assessed to appellant.

The Court finds there were reasonable grounds for this appeal.

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

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period set forth in the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

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

Hess, J. and Wilkin, J., concur in Judgment and Opinion.

For the Court,

Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 22, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.