

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2007-Ohio-0809
Plaintiff-Appellee,	:	
v.	:	On Appeal from the Cuyahoga County Court of Appeals Eighth Appellate District
GORDON MALLETTE,	:	
Defendant-Appellant.	:	Court of Appeals Case No. CA-06-087984

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT GORDON MALLETTE**

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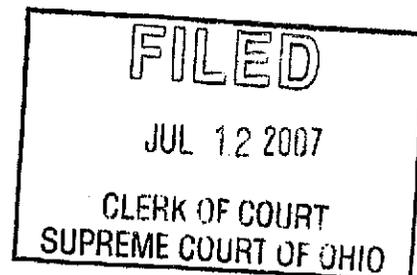


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**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTION QUESTION**

The complaining witness in this case was an eleven-year-old boy named Luke. Luke was on the verge of being grounded during part of the summer of 2005 for making sexual comments to some girls and pulling a girl's bathing suit down. When Luke's angry father confronted Luke about Luke's conduct, Luke claimed that Gordon Mallette had sexually abused him when the boy was in the first, second and third grades. Luke's father called Luke's mother and repeated Luke's allegations. The boy's mother, about to taxi down a runaway on a plane bound for Switzerland, had the pilot turn the plane around and returned home to her son.

Luke repeated his story to his mother, the police, a children's services caseworker and a counselor. As witnesses for the State, each repeated Luke's story in detail for the jury. The state did not present any physical or forensic evidence to support Luke's story.

Mallette argued that admission of Luke's hearsay statements violated his right to confront his accuser. The Court of Appeals rejected this claim, stating that the testimony merely explained the subsequent actions of the witnesses to whom the statements were made. The subsequent actions of the witnesses would have been explained by simply stating that Luke accused Mallette of sexually molesting him. The detail was not necessary and served only to bolster Luke's testimony.

The appellate court's rationale was premised upon this Court's decision in *State v. Thomas* (1980), 61 Ohio St.2d 223, 400 N.E.2d 401. The expansion of *Thomas*' holding to the extremes found in this case threatens every defendant's right to confrontation and the right to due process. Accordingly, this Court should accept jurisdiction over Mallette's case to prevent overextending *Thomas*' holding to the detriment of fundamental constitutional rights.

Additionally, the appellate decision in this case addresses whether the Court's remedy in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, violates the ex post facto and due process rights of those individuals whose offenses occurred prior to *Foster*. Acceptance of this case would resolve an issue that is repeatedly arising in the courts below. Accordingly, the Court should accept jurisdiction over this case.

## STATEMENT OF THE CASE AND THE FACTS

The complaining witness, Luke, was born in February, 1994. From kindergarten through third grade, he lived with his mother and stepfather at his grandmother's house. Gordon Mallette was the grandmother's live-in boyfriend.

In July 2005, Luke's mother received a call from a neighbor complaining that eleven-year-old Luke had pulled down a girl's bathing suit and made a sexual remark to the girl. Luke's parents discussed the incident and decided that Luke would be grounded while his mother was away on a trip to Switzerland. This meant that Luke would be confined indoors while staying at his father's house. Luke would not be allowed to watch television or play video games, could not stay at his grandmother's house during part of his mother's absence as originally planned.

The next day, Luke went to his father's house. Luke's father angrily discussed the incident with his son. It was then that Luke revealed that Mallette had repeatedly molested him.

Luke's father call Luke's mother to report what Luke told him. The boy's mother, on a plane departing for Switzerland, had the pilot turn the plane around on the tarmac and returned home to her son. Luke's parents notified the police.

A police detective and a caseworker at the Medina County Department of Children and Family Services interviewed Luke about his allegations. Luke also met with a counselor and underwent a physical examination, which revealed no physical signs of sexual abuse.

A Cuyahoga County grand jury returned an indictment charging Mallette with twelve counts of rape and twelve counts of kidnapping. All charges specified that the victim was under the age of ten. The rape charges additionally specified that Mallette used force or the threat of force, and the kidnapping charges specified that the crimes were committed with a sexual motivation.

At Mallette's jury trial, Luke testified that when he was in the first grade, he and Mallette began touching each other's genitals and buttocks. By the second grade, Luke claimed that the conduct included oral sex twenty to thirty times. Luke also testified that anal intercourse occurred ten to fifteen times, and that Mallette also tried to force Luke to perform anal sex on him, but Luke refused.

The jury convicted Mallette of all counts charged in the indictment. The trial court classified Mallette a sexual predator and sentenced him to twelve consecutive life sentences.

Mallette appealed the trial court's judgment. On March 5, 2007, the Cuyahoga County Court of Appeals affirmed the lower court's judgment.

The appellate court's judgment was filed in the Common Pleas Court on March 9, 2007. Mallette mistakenly read the latter date as the date the Court of Appeals entered judgment. Mallette filed a notice of appeal and memorandum in support of jurisdiction on April 23, 2007. *State v. Mallette*, No. 2007-0727. The Court subsequently dismissed the appeal as untimely. See, *05/01/2007 Case Announcements*, 2007-Ohio-2063. Mallette then moved the Court to grant him a delayed appeal. On, June 20, 2007, the Court granted Mallette's motion. See, *06/20/2007 Case Announcements*, 2007-Ohio-2904.

## ARGUMENT

### Proposition of Law No. I:

**A defendant is denied his constitutional rights to confrontation and due process when the trial court allows testimony from multiple witnesses that repeats in detail the alleged victim's statements to the witnesses regarding the alleged crime.**

On appeal, Mallette argued that the testimony of Luke's father, the detective, case worker and counselor, which repeated with specificity the statements made by Luke to each witness, violated Mallette's right to confront his accuser. The appellate court considered only the father's testimony for the alleged error because Mallette had not identified the other hearsay that was the basis for his error. The appellate court held that the testimony was admissible because it was not offered for the truth of the matter asserted, but rather was offered to "explain the actions of a witness to whom the statement was directed." *State v. Mallette*, Cuyahoga App. No. 87984, 2007-Ohio-715, at ¶15, citing *State v. Thomas* (1980), 61 Ohio St.2d 223, 400 N.E.2d 401.

The appellate court's broad interpretation of this Court's decision in *Thomas* violates a defendant's right to confront his accuser and his due process right to a fair trial. Fifth and Fourteenth Amendments, United States Constitution, Art. I, Sections 10 and 16, Ohio Constitution. The witnesses did not have to regurgitate each allegation Luke recited to explain their subsequent actions. The detailed descriptions of sexual activity were offered to prove the allegations against Mallette, because without bolstering Luke's claims through the adults, the State had no additional evidence to prove Mallette sexually abused the boy.

The Court should accept this case to limit the use of *Thomas* to its holding. Otherwise, the right of confrontation and due process will become secondary to the State's need to support uncorroborated claims of sexual abuse with the unlimited use of hearsay.

**Proposition of Law No. II:**

**A defendant is entitled to minimum sentence when no jury has found the facts needed to support a higher sentence and the offenses occurred prior to this Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-865.**

Prior to his convictions in the instant case, Gordon Mallette did not have a prior criminal history. Nonetheless, the trial court sentenced Mallette to twelve consecutive life terms. Mallette argued on appeal that the trial court's sentence violated his right to due process and the Ex Post Facto Clause of the United States and Ohio Constitutions.

This Court recently held that portions of R.C. 2929.14, 2929.19, and 2929.41 were unconstitutional. *State v. Foster*, 109 Ohio St.3d.1, 2006-Ohio-856, syllabus paragraphs 1,3, and 5. The Court's remedy was to excise the unconstitutional portions from the statute, a remedy fashioned from *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d. 621. *Foster* at ¶90. The incidents charged in Mallette's indictment occurred before *Foster* was decided. Accordingly, Mallette argued that *Foster*'s remedy could not be applied to his case.

The Cuyahoga County Court of Appeals rejected Mallette's ex post facto claim because Mallette had notice of the statutory maximum when incidents occurred. In making this determination, the appellate court considered the statutory maximum to be the upper ranges of the maximum penalty that could be imposed consecutively. But *Foster* expressly rejected the argument that the top of the sentencing range for each crime pre-*Foster* was the statutory maximum. *Foster* at ¶¶51, 53. As the Court observed, "[u]nlimited judicial discretion to sentence within a range is not currently authorized by statute. If required judicial facts are not found, certain sentences may not be imposed. These limitations create presumed statutory maximums that implicate Sixth Amendment protection. As *Foster* argues, his 'statutory maximum' sentence was limited to two years because the jury did not make the findings of fact

required to sentence him to consecutive sentences or to sentence him to more than the minimum.” Id. at ¶51.

In Mallette’s case, the statutory maximum did not include consecutive sentences, but rather minimum concurrent sentences. See former R.C. 2929.14(B),(E). Contrary to the appellate court’s conclusion, Mallette did not have notice of the statutory maximums for the offenses charged.

The *Foster* remedy is unconstitutional because it effectively raises the presumptive maximum sentences. *Miller v. Florida* (1987), 482 U.S. 423, 432, 107 S. Ct. 2446, 96 L. Ed. 2d 351. It also eliminates the presumption in favor of concurrent rather than consecutive sentences. As a result, the remedy violates the Ex Post Facto and Due Process Clauses of the United States Constitution. The *Foster* remedy also directly conflicts with the Legislature’s intent when it enacted the “truth-in-sentencing” reforms embodied in the severed statutes.

Due process prohibits retroactive application of any judicial construction of a criminal statute that is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue. *Bowie v. City of Columbia* (1964), 378 U.S. 347, 354, 12 L. Ed. 2d 894, 84 S. Ct. 1697. As this Court has recognized, “an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law \* \* \*,” and thus violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State v. Garner* (1995), 74 Ohio St.3d 49, 57, 656 N.E.2d 623, quoting *Bowie v. Columbia*, 378 U.S. at 353 (internal citations omitted).

Accordingly, although the constitutional prohibition against ex post facto laws is applicable only to legislative enactments, judicial enlargement of a statute implicates the same concerns expressed by the Ex Post Facto Clause. *State v. Garner* (1995), 74 Ohio St. 3d at 57.

The Clause provides simply that “no State shall \* \* \* pass any \* \* \* ex post facto Law.” Art. I, § 10. The scope of the Ex Post Facto Clause’s protection includes “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” *Calder v. Bull*, 3 U.S. 386, 3 Dallas 386, 390, 1 L. Ed. 648, 3 Dall. 386 (1798) (seriatim opinion of Chase, J.).

Based upon these basic constitutional concerns, the United States Supreme Court vacated a state prisoner’s sentence because the state’s revised sentencing guidelines, as applied to a defendant whose crimes occurred before the revisions took effect, violated the Ex Post Facto Clause and thus violated the prisoner’s right to due process. *Miller v. Florida* (1987), 482 U.S. 423, 432, 107 S. Ct. 2446, 96 L. Ed. 2d 351. In *Miller*, revisions to Florida’s sentencing guidelines, made after the defendant’s offense transpired, raised the “presumptive” sentence that the defendant could receive when he was finally sentenced. Florida’s revision of its sentencing guidelines fell within the ex post facto prohibition because it met two critical elements. First, the law was retrospective, applying to events occurring before its enactment; and second, it disadvantaged the offender affected by it. *Miller* at 430. A law is retrospective if it “changes the legal consequences of acts completed before its effective date.” *Miller* at 431, citing *Weaver v. Graham* (1981), 450 U.S. 24, 31, 101 S. Ct. 960, 67 L. Ed. 2d 17. As to the second element, the Court observed that it is “axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law.” *Id.* (internal citation omitted).

Additionally, due process demands that a defendant have fair warning of what constitutes a crime. *Bowie v. South Carolina*, at 350. Fair warning is denied, however, when there is an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face. *Id.* at 352. Consequently, if a judicial construction of a criminal statute is

“unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,’ [the construction] must not be given retroactive effect.” *Id.* at 354 (citation omitted).

*Foster’s* severance remedy contravenes fundamental ex post facto concerns that are protected by the due process clauses of our state and federal constitutions. Accordingly, the severance remedy cannot be applied to Mallette and other defendants whose crimes occurred prior to the *Foster* decision. The Court should accept jurisdiction over this case to enforce the due process rights of those individuals whose crimes predated *State v. Foster*.

**Proposition of Law No. III:**

**A defendant is denied effective assistance of appellate counsel when counsel’s failure to follow the appellate rules forfeits review of reversible error.**

The Ohio Appellate Rules unequivocally state that the appellant is required to cite to specific pages of the record in support of each assignment of error he presents for review. See, e.g., Ohio App. R. 16(A)(7); Ohio App. R. 16(D). For example, Rule 16(A)(7) provides:

“The appellant shall include in his brief ... [a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to ... parts of the record on which appellant relies.”

Similarly, Rule 16(D) states that:

“[r]eferences in the briefs to parts of the record shall be to the pages of the parts of the record involved; e.g., ... Transcript p. 231.... If reference is made to evidence, the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered and received or rejected.”

Mallette assigned as error the trial court’s admission of a large amount of inadmissible hearsay statements as a violation of Mallette’s federal and state constitutional right to confront his accusers. While Mallette’s statement of facts did offer a detailed account of the hearsay

admitted at trial, Mallette's appellate counsel forfeited Mallette's claim in his argument by not referencing the pages of the transcript where the inadmissible evidence was offered and received, in violation of App. R. 16(A) and (D).

In *Foster v. Bd. of Elections* (1977), 53 Ohio App.2d 213, 7 O.O.3d 282, 373 N.E.2d 1274, the Eighth District held, in pertinent part, in paragraph six of the syllabus:

Appellate Rule 12(A) provides that any errors not separately argued by brief may be disregarded. Appellate Rule 16(A)(4) requires that the brief contain an argument and that the argument include the contentions of the appellant and the reasons for his conclusion with citations to the appropriate authorities and to the parts of the record relied on. \* \* \* "

The appellate court held that the appellant's failure to comply by these rules precluded review of the assigned error. *Id.*, 53 Ohio App.2d at 228.

Given the plain meaning of the rules requiring citation to the record and the Cuyahoga County Court of Appeals' precedent enforcing those rules, appellate counsel was obliged to note those portions of the transcript which supported Mallette's assignment of error. Counsel's failure to do so denied Mallette his right to effective assistance of appellate counsel. *Evitts v. Lucey* (1985), 469 U.S. 387, 396, 105 S. Ct. 830; 83 L. Ed. 2d 821.

In *Evitts*, appellate counsel failed to file a "statement of appeal." That failure resulted in the dismissal of the appellant's only appeal from his criminal conviction. See *Evitts*, 469 U.S. at 389-390. The United States Supreme Court held that "counsel's failure to obey a simple court rule" led to a denial of meaningful appellate review, requiring a finding that appellate counsel rendered ineffective assistance. *Id.* at 392.

Counsel's failure to follow the appellate rules of procedure denied Mallette review of his constitutional errors. The confrontation clause guarantees that the prosecution's case will be subject to "the rigorous adversarial testing that is the norm of Anglo-American criminal

proceedings.” *Maryland v. Craig* (1990) , 497 U.S. 836. This is true even when the victim is a small child. *Id.* Additionally, due process provides each defendant the right to a fundamentally fair trial. Had counsel properly identified the hearsay admitted to convict Mallette, Mallette would have obtained meaningful review of his assigned constitutional error. Appellate counsel’s failure to do so denied Mallette effective assistance of appellate counsel.

**CONCLUSION**

For the foregoing reasons, the Court should accept jurisdiction over this case.

Respectfully submitted,

DAVID H. BODIKER #0016590  
Ohio Public Defender



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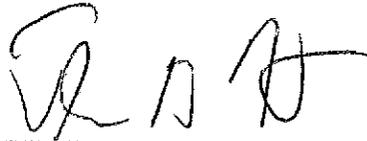
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT GORDON MALLETTE was forwarded by regular U.S. Mail, postage prepaid to the office of William D. Mason, Cuyahoga County Prosecutor, Justice Center, 9<sup>th</sup> Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 12th day of July, 2007.



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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
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	:	On Appeal from the Cuyahoga
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	:	Court of Appeals
Defendant-Appellant.	:	Case No. CA-06-087984

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**APPENDIX TO**

**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT GORDON MALLETTE**

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**FILED AND JOURNALIZED  
PER APP. R. 22(E)**

**MAR - 5 2007**

**GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY: [Signature] DEP.**

**ANNOUNCEMENT OF DECISION  
PER APP. R. 22(B), 22(D) AND 26(A)  
RECEIVED**

**FEB 22 2007**

**GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY: [Signature] DEP.**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXES

COLLEEN CONWAY COONEY, P.J.:

Defendant-appellant, Gordon Mallette ("Mallette"), appeals his conviction, sentence, and sexual predator status. Finding no merit to the appeal, we affirm.

In 2005, Mallette was charged with twelve counts of rape and twelve counts of kidnapping. All charges specified that the victim was under the age of ten. The rape charges additionally specified that Mallette used force or the threat of force, and the kidnapping charges specified that the crimes were committed with a sexual motivation.

The following evidence was adduced at Mallette's jury trial.

The victim, L.M., was born in 1994. From kindergarten through third grade, he lived with his mother ("mother") and stepfather on the second floor of his grandmother's home. L.M.'s grandmother lived with Mallette, but the couple had separate bedrooms.

In July 2005, mother received a call from a neighbor complaining that eleven-year-old L.M. had pulled down a girl's bathing suit and made a sexual remark to the girl. The next day, L.M. went to his father's house for a scheduled visit. L.M.'s father discussed the incident with his son. When pressed by his father about his actions and asked where he had learned that type of behavior, L.M. replied that he learned it from Mallette. L.M. then revealed that Mallette had repeatedly molested him.

L.M.'s parents notified the police. L.M. was interviewed by a sex-crimes detective and a caseworker at the Medina County Department of Children and Family Services. L.M. also met with a counselor and underwent a physical examination, which revealed no physical signs of sexual abuse.

L.M. testified that when he was in the first grade, he and Mallette began touching each other's genitals and buttocks. L.M. testified that, by the second grade, the conduct had escalated to oral sex.<sup>1</sup> He estimated that the oral sex occurred twenty to thirty times. L.M. also testified that Mallette attempted anal intercourse ten to fifteen times, and Mallette also tried to force L.M. to perform anal sex on him, but L.M. refused. He testified that all these acts occurred at his grandmother's residence, either in the living room or in Mallette's bedroom. L.M. testified that the sexual activity became less frequent when he was in the third grade and then stopped entirely when his family moved away.

Mallette testified on his own behalf and denied any sexual contact with L.M.

The jury convicted Mallette of all counts and specifications. The trial court designated Mallette a sexual predator and sentenced him to twelve consecutive life sentences. Mallette now appeals, raising six assignments of error.

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<sup>1</sup> The indictment specified acts that occurred only when L.M. was in the second grade.

Hearsay Testimony

In the first assignment of error, Mallette argues that the trial court erred by permitting hearsay testimony.

Mallette claims that the trial court erred when it permitted prosecution witnesses to testify to inadmissible hearsay statements. Mallette argues that the trial court, over defense objection, allowed witnesses to testify to hearsay statements solely to bolster L.M.'s credibility.

The trial court has broad discretion in the admission of evidence and, unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere. *State v. Cooper*, Cuyahoga App. No. 86437, 2006-Ohio-817, citing *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 224 N.E.2d 126. Moreover, if trial counsel fails to object to the admission of certain evidence or testimony, the objection is waived unless there is plain error in the admission. To prevail under a plain error analysis, a defendant bears the burden of demonstrating that, but for the error, the outcome of the trial clearly would have been different. *State v. Alexander*, Cuyahoga App. No. 87109, 2006-Ohio-4760; see Crim.R. 52(B). Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.*, citing *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804.

Mallette cites various transcript pages in the table of contents of his brief which refer to the testimony of L.M.'s mother, stepmother, father, and social worker. He fails, however, to even mention the testimony of the mother, stepmother, or social worker within the argument for the assigned error or to cite that part of the record. In fact, Mallette refers to only the father's testimony in his argument. Mallette has failed to support or demonstrate that any witness other than the father provided hearsay testimony, and we decline to make his arguments for him, because it is not our duty to root out all possible arguments. See *Cardone v. Cardone* (May 6, 1998), Summit App. Nos. 18349 and 18673; see App.R. 12(A)(2) and App.R. 16(A). Therefore, we will review only the father's testimony, to which he has referred. Further, and contrary to Mallette's assertions, trial counsel did not object to the father's testimony at trial; thus, we review the father's testimony solely for plain error.

"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). L.M.'s father testified that L.M. disclosed to him where the abuse occurred, that Mallette had touched L.M.'s penis and buttocks, masturbated in his presence, performed oral sex, and attempted anal intercourse.

We find that this testimony was part of a line of questioning to show how the father learned of the alleged abuse, his actions subsequent to the disclosure, and to describe the events that led to police involvement and eventually criminal charges against Mallette.

In *State v. Thomas* (1980), 61 Ohio St.2d 223, 400 N.E.2d 401, the Court, in discussing similar testimony, found that:

**“The testimony at issue was offered to explain the subsequent investigative activities of the witnesses. It was not offered to prove the truth of the matter asserted. It is well established that extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness to whom the statement was directed. \* \* \* The testimony was properly admitted for this purpose.”**

See also, *State v. Byrd*, Cuyahoga App. No. 82145, 2003-Ohio-3958.

We find that the father's statements about the sexual abuse did not constitute impermissible hearsay. The testimony regarding this information was not offered to prove the truth of the matter asserted, that is, to show that the abuse occurred, but to show how the witness proceeded with the information provided by the child. We therefore conclude that the trial court did not commit error, plain or otherwise, in allowing the father's testimony.

However, even if it was error to allow this testimony, we find that it was not so prejudicial as to constitute reversible error. Where there is no reasonable possibility that unlawful testimony contributed to a conviction, the error is

harmless and will not be grounds for reversal. *State v. Lytle* (1976), 48 Ohio St.2d 391, 358 N.E.2d 623, paragraph three of the syllabus, vacated on other grounds, *Lytle v. Ohio* (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154; see also, Crim.R. 52(A) (any error will be deemed harmless if it does not affect the defendant's substantial rights).

In this case, ample evidence existed to convict Mallette, even excluding the father's testimony. L.M. testified about the abuse as well as the events leading to his disclosure to his father. Therefore, the first assignment of error is overruled.

#### Sufficiency and Manifest Weight of the Evidence

In the second assignment of error, Mallette argues that the State failed to present sufficient evidence to sustain a conviction. In the third assignment of error, Mallette argues that his convictions are against the manifest weight of the evidence. Although these arguments involve different standards of review, we consider them together because we find the evidence in the record applies equally to both.

A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the State has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541. On review for sufficiency, courts are to assess not whether the State's

evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.* The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

In evaluating a challenge to the verdict based on manifest weight of the evidence, a court sits as the thirteenth juror and intrudes its judgment into proceedings that it finds to be fatally flawed through misrepresentation or misapplication of the evidence by a jury which has "lost its way." *Thompkins*, *supra*, at 387. As the Ohio Supreme Court declared:

**"Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.'" *Id.***

This court must be mindful that the weight of the evidence and the credibility of witnesses are matters primarily for the trier of fact. *State v. Bruno*, Cuyahoga App. No. 84883, 2005-Ohio-1862. A reviewing court will not reverse a verdict where the trier of fact could reasonably conclude from substantial

evidence that the prosecution proved the offense beyond a reasonable doubt. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus; *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132. Moreover, in reviewing a claim that a conviction is against the manifest weight of the evidence, a reviewing court cannot reverse a conviction unless it is obvious that the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814.

The jury convicted Mallette of twelve counts of rape and twelve counts of kidnapping. The statute governing rape, R.C. 2907.02(A)(1)(b), provides that "no person shall engage in sexual conduct with another when the other person is less than thirteen years of age, whether or not the offender knows the age of the other person." R.C. 2905.01 prohibits kidnapping and provides in pertinent part:

**"(A) No person \*\*\* in the case of a victim under the age of thirteen \*\*\*, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:**

**(2) To facilitate the commission of any felony \* \* \*;**

**(4) To engage in sexual activity \* \* \* with the victim against the victim's will. \* \* \***"

Mallette claims that the evidence is insufficient to sustain his convictions, and his convictions are against the manifest weight of that evidence because: (1)

there was no physical evidence, (2) L.M. did not tell anyone about the abuse for years, (3) L.M. was the only witness to testify about the crime, and (4) Mallette is a sixty-two-year-old grandfather with a "good reputation" and no prior criminal record.

We first note that proof of guilt may be made by real evidence, circumstantial evidence, and direct or testimonial evidence, or any combination of the three, and all three have equal probative value. *State v. Nicely* (1988), 39 Ohio St.3d 147, 529 N.E.2d 1236; *Jenks*, supra.

It is not surprising that there was no physical evidence of the abuse because L.M. did not tell anyone about it until two years after the abuse ended. The fact that there was no eyewitness to the molestation is also not surprising, given the secretive nature of the abuse. Moreover, physical evidence or eyewitness testimony was not necessary, given the victim's testimony detailing the years of abuse.

L.M. testified that the abuse occurred both when he was home alone with Mallette and when his grandmother was home. The sexual acts occurred either on the couch in the living room or in Mallette's bedroom. L.M. explained in detail the precautions Mallette would take in order to conceal the sexual acts. L.M. described how he would stand on the bed to look out the bedroom window to see if anyone was coming. L.M. detailed how the abuse occurred with their

clothes on and how they would quickly zip their pants if they heard the grandmother approaching.

L.M.'s testimony revealed a pattern of abuse that lasted approximately three years. He was able to describe distinct and multiple instances of abuse in graphic detail. Further, we find that witnesses for the State and the defense corroborated L.M.'s version of events. L.M.'s grandmother testified that she once walked into the living room and saw L.M. on the couch with Mallette, and L.M. had a "guilty" look on his face. Other family members testified that Mallette had frequently made inappropriate sexual gestures and comments toward them. L.M.'s clinical counselor testified that it is not uncommon for a delay to occur between the acts of sexual abuse and disclosure. Although Mallette testified that he never touched L.M. inappropriately, it was within the jury's province to determine whose testimony was more credible. A review of the testimony of the witnesses to whom L.M. disclosed the abuse reveals consistency from the time of disclosure through trial.

As to L.M.'s credibility, the weight and credibility to be given to that testimony were matters for the jury to determine. In addition, we note that Mallette's argument against conviction supports a manifest weight argument but fails to attack the sufficiency of the evidence. The main premise of his argument is that L.M. is not to be believed. In our review for sufficiency of the

evidence, we assess not whether the State's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Thompkins*, supra. Witness credibility, on the other hand, is a matter for the trier of fact and supports only his argument regarding the manifest weight of the evidence.

Therefore, we find that there was sufficient evidence to sustain the conviction. We also find that the jury did not lose its way and create such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered. The second and third assignments of error are overruled.

#### Sentence

Malette's fourth and fifth assignments of error challenge his sentence. Mallette argues that the trial court erred in sentencing him to consecutive and maximum sentences without making the appropriate findings.

The Ohio Supreme Court has declared R.C. 2929.14(E)(4), which governed consecutive sentences, and R.C. 2929.14(C), which governed maximum sentences, unconstitutional and excised the offending parts of the statutes from the statutory scheme. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470; applying *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621; *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531,

159 L.Ed.2d 403 and *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435.

In *Foster*, supra at ¶¶61, 64, and 67, the Ohio Supreme Court held that judicial fact-finding to impose the maximum or a consecutive sentence is unconstitutional in light of *Blakely*. The Court also held that "after the severance, judicial fact-finding is not required before a prison term may be imposed within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant." *Foster*, supra at ¶99. As a result, "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings and give reasons for imposing maximum, consecutive or more than the minimum sentence." *Foster*, supra at paragraph seven of the syllabus, and *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus.

R.C. 2971.03(A)(2) mandates a life sentence without parole for a forcible rape upon a victim less than thirteen years of age. Because the jury in this case found both that L.M. was less than thirteen years old at the time the abuse occurred and that force or the threat of force was used to commit the rapes, the trial court was required to impose a life sentence. The trial court sentenced Mallette to the maximum ten-year sentence for each count of kidnapping and ran the sentences concurrent to the life sentence for each count of rape. The

trial court then ran each life sentence consecutive, for a total of twelve consecutive life sentences. Pursuant to *Foster*, the trial court was not required to make any findings before imposing its sentence and had full discretion to sentence Mallette within the statutory range. Moreover, the trial court made no findings under the now unconstitutional statutes; thus, we find no error in the sentences.

Mallette next argues that *Foster* should not apply to his case because his alleged crimes occurred prior to the *Foster* decision. He also claims that his due process rights were violated with an ex post facto application of *Foster* because the alleged crimes occurred before *Foster* was released.

*Foster* addresses the constitutionality of sentences imposed pursuant to Am.Sub.S.B. No. 2, effective July 1, 1996. S.B. 2 is applicable to all offenses committed on or after that date. See *State v. Rush*, 83 Ohio St.3d 53, 1998-Ohio-423, 697 N.E.2d 634, certiorari denied (1999), 525 U.S. 1151, 119 S.Ct. 1052, 143 L.Ed.2d 58. Additionally, because *Foster* applies to all cases on direct review, *Foster* applies to the instant case.

We next consider whether *Foster* violates the Ex Post Facto Clause.

The Ex Post Facto Clause of Article I, Section 10 of the United States Constitution prohibits "every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." See

*Rogers v. Tennessee* (2001), 352 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 697 quoting *Calder v. Bull* (1798), 3 U.S. 386, 3 Dallas 386, 390, 1 L.Ed. 648, 3 Dall. 386 (seriatim opinion of Chase, J.). The United States Supreme Court placed similar restrictions on judicial opinions in *Bowie v. Columbia* (1964), 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894.

The Ohio Supreme Court has recognized that “an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law” and can violate due process “even though the constitutional prohibition against ex post facto laws is applicable only to legislative enactments.” *State v. Garner*, 74 Ohio St.3d 49, 1995-Ohio-168, 656 N.E.2d 623, quoting *Bowie*, supra, and citing *Marks v. United States* (1997), 430 U.S. 188, 191-192, 97 S.Ct. 990, 51 L.Ed.2d 260.

Thus, we look at both the federal and state constitutional ramifications of *Foster*. See *State v. McGhee*, Shelby App. No. 17-06-05, 2006-Ohio-5162 and *State v. Elswick*, Lake App. No. 2006-L-075, 2006-Ohio-7011. With respect to federal constitutional considerations, we note that due process guarantees notice and a hearing. Because the right to a hearing has not been implicated by *Foster*, we are concerned only with notice given to the defendant as to his potential sentence. In *McGhee*, supra at ¶15, the court found that “most federal circuit courts have held that defendants were on notice as to statutory maximums,

regardless of whether the federal sentencing guidelines were mandatory." *Id.*, (citations omitted). The *McGhee* court concluded that:

**"[b]ecause [the defendant-appellant] knew the potential statutory sentence for committing a first degree felony, because he had notice that Ohio's sentencing statutes were subject to judicial scrutiny, and because McGhee was unlikely to amend his criminal behavior in light of a sentencing change, we cannot find the Ohio Supreme Court's holding in *Foster* violates federal notions of due process as established in *Bowie* and *Rogers*." *Id.* at ¶19.**

In considering the state constitution, we look at the Ohio Supreme Court's intention behind the retroactive application of *Foster*. The Court applied its holding retroactively, but only to cases on direct appeal and those pending in the trial courts. *Id.* at ¶104. *Foster* applies retroactively because the court did not limit its holding to offenses committed on or after February 27, 2006.

A retroactive law is not necessarily unconstitutional. "A substantive retroactive law is unconstitutional, while a remedial retroactive law is not.\*\*\* A statute is substantive if it 'impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction.'" *Smith v. Smith*, 109 Ohio St.3d, 285, 2006-Ohio-2419, quoting *Beilat v. Beilat*, 87 Ohio St.3d 350, 354, 2000-Ohio-451, 721 N.E.2d 28.

As the appellate court stated in *Elswick*:

“[A] presumed sentence can be ‘taken away’ without the defendant’s consent.’ *McGhee* at ¶ 24. Thus, no vested right has been affected by *Foster*. *Id.* In addition, no accrued substantial right has been affected. *Id.* at ¶ 25. ‘[D]efendants are not entitled to enforce or protect specific sentences prior to sentencing.’ *Id.* A range of determinative sentences available for each degree of felony offense is established in R.C. 2929.14(A). ‘Even under S.B.2, defendants could not expect a specific sentence because judges could make findings to sentence anywhere within the range provided by R.C. 2929.14(A).’ *Id.*” *Elswick*, *supra* at ¶ 29.

Furthermore, the *Foster* court held that the Ohio sentencing scheme was intended to allow trial courts to select sentences within a range. The *Foster* court explained that:

“[T]he General Assembly provided a sentencing scheme of ‘guided discretion,’ for judges, intending that the required findings guide trial courts to select sentences within a range rather than to mandate specific sentences within that range. When mandatory sentences are intended, they are expressed. We, therefore, reject the criminal defendants’ proposed remedy of presumptive minimum sentences, for we do not believe that the General Assembly would have limited so greatly the sentencing court’s ability to impose an appropriate penalty.” *Id.* at ¶ 89.

In the instant case, Mallette had notice that the sentencing range was the same at the time he committed the offenses as when he was sentenced. *Foster* did not judicially increase the range of his sentence, nor did it retroactively apply a new statutory maximum to an earlier committed crime, nor did it create the possibility of consecutive sentences where none existed. As a result, we conclude

that the remedial holding of *Foster* does not violate Mallette's due process rights or the ex post facto principles contained therein.

Therefore, we overrule the fourth and fifth assignments of error.

### Sexual Predator Classification

In the sixth assignment of error, Mallette argues that the trial court erred when it classified him as a sexual predator because the court did not engage in a "meaningful analysis" and because the State failed to provide sufficient proof of a "likelihood to commit future crime."

A sexual predator is defined in R.C. 2950.01(E) as a person who has been convicted of or pled guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses. Thus, before classifying an offender as a sexual predator, the court must find by clear and convincing evidence that an offender is likely to commit a sexually oriented offense in the future. R.C. 2950.09(B)(4).

In *State v. Eppinger*, *infra*, the Ohio Supreme Court defined the clear and convincing evidence standard as follows:

**"Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal."**

*State v. Eppinger*, 91 Ohio St.3d 158, 164, 2001-Ohio-247, 743 N.E.2d 881, citing *Cross v. Ledford* (1954), 161 Ohio St. 469, 477, 120 N.E.2d 118. In reviewing a trial court's decision based on clear and convincing evidence, an appellate court must examine the record to determine whether sufficient evidence exists to satisfy the requisite degree of proof. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54.

Pursuant to R.C. 2950.09(B)(3), when making a determination as to whether an offender is a sexual predator, the trial court must consider all relevant factors, including but not limited to the following: the offender's age and prior criminal record, the age of the victim, whether the offense involved multiple victims, whether the offender used drugs or alcohol to impair the victim, whether the offender completed any sentence imposed for any conviction, whether the offender participated in available programs for sexual offenders, any mental disease or disability of the offender, whether the offender engaged in a pattern of abuse or displayed cruelty toward the victim, and any additional behavioral characteristics that contribute to the offender's conduct. R.C. 2950.09(B)(3)(a)-(j).

R.C. 2950.09(B)(2) does not require that each factor be met. It simply requires the trial court consider those factors that are relevant. *State v. Cook*, 83 Ohio St.3d 404, 426, 1998-Ohio-291, 700 N.E.2d 570; *State v. Grimes* (2001),

143 Ohio App.3d 86, 89, 757 N.E.2d 413. Further, "an appellate court should not substitute its judgment for that of the trial court when there exists competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial court judge." *Schiebel*, supra at 74, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

Mallette argues that the State failed to establish by clear and convincing evidence that he is likely to engage in one or more sexually oriented offenses in the future. Mallette points to his advanced age at the time of sentencing and his lack of criminal history.

The record demonstrates that the court considered all the factors under R.C. 2950.09(B). The court made specific and thorough findings regarding each factor and found by clear and convincing evidence that Mallette is likely to commit a sexually oriented offense in the future.

At the time the offenses were committed, the victim was under age ten. The court found that L.M. was Mallette's only victim, but also took into consideration the testimony of other family members regarding situations in which Mallette made inappropriate sexual gestures or comments toward them. The court noted that Mallette did not use alcohol or drugs to impair his victim. The court found, however, that Mallette "groomed" L.M. for molestation and turned him into his "child sex slave." The court also noted that Mallette used his

position of authority to facilitate his crimes. The court concluded that the nature of the abuse was so egregious that it was "one of the worst cases of molestation this court has ever [seen]."

Therefore, we find clear and convincing evidence existed to support the trial court's decision classifying Mallette as a sexual predator. The sixth assignment of error is overruled.

Accordingly, judgment is affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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

  
COLLEEN CONWAY COONEY, PRESIDING JUDGE

ANTHONY O. CALABRESE, JR., J. and  
ANN DYKE, J. CONCUR