ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, APPELLEE, V. FRANCISCO ROMERO, APPELLANT.	)	SUPREME CASE NO. 15-1102 ON APPEAL FROM THE FRANKLIN COUNTY COURT OF APPEALS, TENTH APPELLATE DISTRICT. APPEALS CASE NO. 14 AP 440 TRIAL CASE NO. 13 CR 2484

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT FRANCISCO ROMERO

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FILED
JUL 01 2015
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SUPREME COURT OF OHIO

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THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC AND GREAT GENERAL INTEREST

This case presents Three(3) critical issues affecting all persons charged with a crime in Ohio. This case is about evidence or lack thereof. Therefore, while this is a case involving a felony; it certainly presents a substantial constitutional question and is of public and great general interest. This Court must accept jurisdiction and review the facts and law on the merits.

This individual action arose out of a three count indictment against Appellant, Francisco Romero, for Gross Sexual Imposition as Third Degree Felonies. The issues presented for review all occured incident to a Jury Trial and its verdict as well as the trial court's rulings on evidence. This case is about admissible evidence. Moreover, the errors which were allowed and their effects deprived Mr. Romero of his constitutional right to a fair trial. In other words, the cummulative impact of these errors warrants reversal herein. **See State V. DeMarco, 31 Ohio St. 191 (1987); State V. Neyland, 139 Ohio St. 3d 353 (2014).**

Certainly, this Court should take the opportunity to clarify the need for convictions to be based on **only** admissible evidence. The introduction of hearsay testimony is prohibited by both the **Ohio Rules of Evidence and constitutional law. See Rule 802; 6th Amendment to the Constitution.** Here, the rule of law this Court must interpret is: If a court mistakenly allows hearsay into evidence; once reviewed by the appellate court, in order to affirm, the evidence in favor of conviction, **absent the hearsay,** must be so overwhelming that the admission of those

statements was harmless beyond a reasonable doubt. **See State V. Kidder, 32 Ohio St. 3d 279 (1987).** Here, the evidence was not so overwhelming; absent hearsay. In fact, even with hearsay, Appellant was found not guilty on count two. Remember, all three counts were alleged acts of Gross Sexual Imposition. In reality, there was not enough evidence to convict Mr. Romero of any crime. The weight and sufficiency of the evidence was greatly in question. This is why the State sought to introduce hearsay evidence; to bolster testimony of the alleged victim, who's credibility was also lacking. Her version of the facts was faulty and inconsistent with other evidence. Thus, allowing hearsay herein was improper and prejudicial to Appellant.

Specifically, the arguments in support of Propositions of law present the following issues for review: 1) When a trial court errs by permitting multiple witnesses to recount the victim's out-of-court statements about the event, over hearsay objections from defense counsel; an appellate court should reverse and vacate the trial court's error-prone decision. 2) When a trial court errs by allowing the State to elicit victim-impact evidence during the trial; the appellate court commits plain error by affirming or approving the prosecutors' actions. 3) The cummulative impact of a trial court's errors warrants reversal; and an appellate court commits reversible error when it affirms a proceedings with cummulative errors in violation of an appellant's due process rights. It is imperative herein, that this Court accept this case and allow **merit briefs** and hear arguments.

STATEMENT OF THE CASE AND FACTS

This case, in reality, is about errors and evidence. Specifically, admissible evidence to convict someone of a crime in Ohio. Here, there was no physical or medicial evidence. No blood or DNA. No eyewitnesses to the alleged acts; even though others were present at the time, only the testimony of the victim - **repeated many times though others** - which convicted the Appellant, Francisco Romero. More specifically, Mr. Romero appealed the Judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. He was found guilty of Two(2) counts of Gross Sexual Imposition and not guilty on a Third count. **See Trial Case No. 13 CR 2484.** Thereafter, the Appellant appealed to the Franklin County Court of Appeals, Tenth Appellate District, which erroneously affirmed this Judgment; despite the Court of Appeals finding that the **trial court erred twice with regard to evidence admitted.** In particular, the Court of Appeals concluded that the trial court did error in admitting Officer Brafford's **hearsay testimony** and erred in allowing victim impact testimony during trial. Nevertheless, concluding these errors to be harmless and not rising to the level of cummulative error depriving Appellant of a fair trial. **See Appeals Case No. 14 AP 440.** This is contended by Appellant to be error; in and of itself.

On May 8, 2013, the Appellant, Francisco Romero, was indicted on three counts of Gross Sexual Imposition; all arising from his alleged contact with Kimberly Shook; a friend of his daughter who was sleeping over at his ex-wife's house, when he stopped to see his daughter. He was charged with Third Degree Felonies as she was 11 years old at the time of the alleged incident. All acts were alleged to have occurred

during the same incident and only to Ms. Shook. Again, there was no physical or medical evidence of any crime. No blood or DNA. No eyewitnesses to corroborate Ms. Shook. Rather, it was her testimony repeated through other witnesses as well as the victim impact evidence which convicted Mr. Romero. However, even this evidence was lacking in weight and sufficiency as he was found not guilty on one count. A Jury trial commenced on March 17, 2014 and ended on March 24, 2014; when the Jury convicted Mr. Romero on counts one and three and found him not guilty as to count two. The Trial Court issued a Judgment Entry adopting the Jury's findings, classified him as a Tier II Sex Offender and sentenced him to 36 months in prison, non-mandatory, to run concurrently on each charge; as well as 5 years of post release control. The Appellant has timely appealed both the trial court and the Court of Appeals Decisions. This Appeal is properly before this Ohio Supreme Court for acceptance of Jurisdiction.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: When a trial court errs by permitting multiple witnesses to recount the victim's out-of-court statements about the event, over hearsay objections from defense counsel; an appellate court should reverse and vacate the trial court's error prone decision.

The introduction of hearsay testimony is prohibited by both the Ohio Rules of Evidence and constitutional law. Specifically, Ohio **Rule of Evidence 802** prohibits the admission of hearsay unless a relevant exception applies. Additionally, the **Sixth Amendment** squarely prohibits testimony from a witness; who does not have personal knowledge of the event. In other words, it is prohibited; if he or she is **only**

repeating the statements of another. **See Crawford V. Washington, 541 U.S. 36 (2004).** If a court mistakenly allows hearsay testimony into evidence, **"In the final analysis, the evidence in favor of conviction, absent the hearsay, must be so overwhelming that the admission of those statements was harmless beyond a reasonable doubt." State V. Kidder, 32 Ohio St. 3d 279, 284 (1987).**

In the instant case, the evidence in favor of conviction, absent the hearsay, **was not** so overwhelming that the admission of these hearsay statements was harmless beyond a reasonable doubt. As stated earlier, the evidence of guilt was greatly lacking and Mr. Romero was found not guilty on one count. The trial and appellate courts erred in omiting these facts from their analysis. Certainly, then, the admission of the hearsay - **conceded as such by the Court of Appeals - (at least, with regard to Officer Brafford);** must be considered highly prejudicial and therefore beyond any concept of merely harmless. Here, the alleged victim's mother, the officer who interviewed her **(again, Officer Brafford)**; and Alexis Romero, the Defendant-Appellant's daughter, were allowed to recount Kimberly Shook's statement to them about the events in question over objection. **None of these witnesses saw anything. They did not have personal knowledge of the event in question.** Clearly, these statements were hearsay outside any exception. The lower courts erred in allowing and affirming this testimony. Mr. Romero's convictions must be reversed.

Moreover, not only were these statements hearsay; they were testimonial in nature - **offered to prove the truth of the matter.** The State's argument that they fell into some sort of exception; such

as, excited utterance is meritless. The alleged victim did not say anything to her mother for over 24 hours afterwards. The trial court erred by overruling defense counsel's objections. None of the statements can be justified as being offered to explain a mother, officer or friend's actions following the statment. The witnesses could have simply indicated that they had a conversation about something upsetting with Kimberly Shook and took the decribed actions. Thus, only allowing Ms. Shook to testify to the event. The only reason to introduce Kimberly Shook's testimony - **through these other witnesses** - was to bolster her credibility and prove that her version of events is what did, in fact, happen. Therefore, improper. The Court of Appeals erred in their analysis and abused their discretion in allowing hearsay, but concluding it was harmless.

Moreover, here, the trial court also abused its discretion. While a trial court normally has broad discretion in the admission of any evidence, **it cannot allow hearsay unless it falls into some exception.** Here, defense counsel's objections were overruled without any explanation. These evidentiary rulings can be reversed; when it appears that the trial court abused its discretion. **State V. Jordan, 2006 Ohio 6224 (2006).** The term "abuse of discretion" connotes more than a mere error of law or judgment, it applies that the trial court's attitude was unreasonable, arbitrary or unconscionable. **See Blakemore V. Blakemore, 5 Ohio St. 3d (1983).** In the instant case, the trial court did not seem to care it was allowing hearsay, hardly even acknowledging the objections and gave **zero** explanations for admitting. This attitude must be seen as unreasonable, arbitrary and unconscionable. Clearly,

this was an abuse of discretion by the trial court.

Here, the evidence of guilt was not overwhelming; even with the hearsay. Remember, **again,** absent in the appellate court's analysis, the Defendant-Appellant was found **not guilty** on one count. Therefore, once the Court of Appeals determined that Officer Brafford's testimony was hearsay; a more careful review of the evidence should have occured. This did not happen herein. **See State V. Kidder, 32 Ohio St. 3d 279 (1987).** If it had, In reality, there were only two pieces of evidence. Kimberly Shook's testimony and Mr. Romero's testimony contra. Again, no physical or medical evidence. No blood or DNA. Once again, Ms. Shook's version is belied by the fact that no one else in the house saw or heard anything. Plus, if taken at face value, there is the possibility that she mistook his actions or motivations. Lastly, her testimony that he took a picture of her without the towel proved untrue. While Mr. Romero's version changed slightly; he consistently maintained that any contact was accidental. Given this analysis, it was error, in and of itself for the Court of Appeals to not overturn the convictions. **See State V. Pressley, 2003 Ohio 6069 (2003); State V. Blevins, 36 Ohio App. 3d 147 (1987).**

In conclusion, for the above reasons, Mr. Romero was denied a fair trial and the opportunity to confront witnesses against him. Additionally, the evidence of guilt was not overwhelming. The clear hearsay was prejudicial and plain error. This Court must accept jurisdiction and reverse the convictions.

Proposition of Law No. II: When a trial court errs by allowing the State to elicit victim-impact evidence during the trial; the appellate court commits plain error by affirming or approving the prosecutors' actions.

In essence, this Proposition is quite simple, but had a huge impact on Appellant's rights to a fair trial. The trial court erred by permitting the prosecutors to offer victim-impact evidence during the trial. This clearly was improper and highly prejudicial to Mr. Romero. Moreover, even the court of appeals **concedes** that it was error to admit, over defense objections, any such testimony. However, the appellate court, Tenth District, commited plain and reversible error by concluding the trial court error was harmless. While it was hard to understand; the Court of Appeals held that there was no reasonable possibility the challenged testimony contributed to a conviction. Such is clearly wrong. Furthermore, it was error, in and of itself.

Ohio Rule of Evidence 403(A) prohibits the introduction of testimony whose risk of unfair prejudice substantially outweighs its probative value. Let's be real, the Franklin County Prosecutor's Office knew it was improper to offer this testimony during the trial. Further, the individual prosecutor, Barbara A. Farnbacher, knew it was wrong as well. But, they did it anyway. Why? Everyone realized how weak the actual evidence of guilt was against Francisco Romero. The questions to elicit victim-impact evidence from the alleged victim's mother were intended to bolster the State's case. In other words, to gain sympathy from the jury. Certainly, such evidence was not relevant to guilt or innocence. The issue, then, turns to why the trial court allowed it, **over two seperate objections by defense counsel;** and how the appellate court,

after reviewing the **plain facts and concluding it was error,** held - **somehow -** that the admission of this evidence did not contribute to Mr. Romero's convictions. Really? How was this determined? Such analysis was very weak. Nevertheless, the Court of Appeals, then, ruled that the admission was harmless error. This Ohio Surpeme Court must accept jursidiction and help guide the lower courts with this pivotal issue affecting many, if not all, ohio defendants.

A trial court's decision to either permit or exclude evidence under **Rule 403(A)** is reviewed under an abuse of discretion standard. **Rigby V. Lake Cty., 58 Ohio St. 3d 269 (1991); State V. Wade, 2008 Ohio 4870 (2008).** The term "Abuse of discretion" connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. **State V. Adams, 62 Ohio St. 2d 151 (1980).** In this case, the trial court allowed Kimberly Shook's mother to testify **during the trial**; over objections, about the psychological harm that the alleged event caused Kimberly and her family. While such evidence may be allowed during the sentencing phase; it was improper during the trial. Victim-impact testimony tends to inflame the passions of the jury and adds substantial to the risk of conviction on facts unrelated to actual guilt. **State V. White, 15 Ohio St. 2d 146 (1968).** Here, there was no reasonable way for the appellate court to conclude that it did not contribute to Mr. Romero's convictions. This was error as well. Moreover, Mr. Romero's was denied a fair trial and fair appeal. His convictions must be reversed. This Court should accept jurisdiction to allow the lower court's errors to be fixed and prevent an injustice to occur again.

<u>Proposition of Law No. III</u>: The cummulative impact of a trial court's errors warrants reversal; and an appellate court commits reversible error when it affirms a proceedings with cummulative errors in violation of an appellant's due process rights.

In this last Proposition of Law, the Appellant, Francisco Romero, argues that it was reversible error for the appellate court to find errors by the trial court; in admitting hearsay and victim-impact testimony, and not concluding that the cummulative impact deprived him of a fair trial and requires reversal of his convictions. Here, the Appellant contends that there were at least Three(3) instances of hearsay and One(1) instance of improper victim-impact testimony **(objected to twice)**; as well as various errors in the proceedings, such as, the Franklin County prosecutor's office error in trying to present such evidence and the Judge ignoring the law. Further, we have the Court of appeals **finding at least Two(2) instances of error and not reversing the convictions.** This was error, in and of itself.

The **Cumulative Error Doctrine** is well settled in Ohio and Federal constitutional law. This Doctrine applies to numerous so called harmless errors that plague a case. However, it's not the number but rather the impact on a fair proceedings which dictates relief. Here, while the Appellant, Francisco Romero, does not concede that any of the errors were harmless; it was the impact which deprived him of a fair trial that matters. Accordingly, while the court of appeals may consider them harmless, the Two(2) errors recognized **(and presented as actual errors in Propositions One and Two)** rise to the level of prejudicial cumulative error arguably affecting the outcome. **See State V. DeMarco, 31 Ohio St. 3d 191 (1987); State V. Neyland, 139 Ohio St. 3d 353 (2014).**

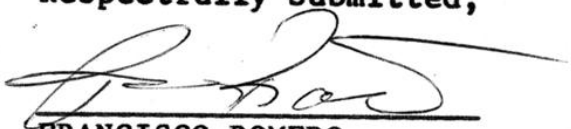
In the instant case, the cumulative impact of the errors certainly affected the outcome. Remember, this was a very weak case bolstered by hearsay and victim-impact testimony improperly **by design.** This was calculated error by the Franklin County Prosecutor's Office. They knew how much they could get away with and did it. Further, they knew the Judge was going to allow it or ignore it. This is what happened. The constitutional rights of Appellant, Francisco Romero, to a fair trial were far and away the very last consideration of the State of Ohio. This is not only wrong but unconstitutional. **See State V. Kirkland, 140 Ohio St. 3d 73 (2014); State V. Norman, 2013 Ohio 1908 (2013).** This case was a comedy of errors. It was clear prejudice; especially, in light of any presumption of innocence. Furthermore, the Court of Appeals compounded these errors; after finding error in admitting hearsay and victim-impact evidence, but ignoring it and ruling it harmless.

Under the doctrine of cumulative error, the Appellant, Francisco Romero's convictions must be reversed. He was deprived of a fair trial and the Court of Appeals erred by affirming the trial court's errors. This Court must accept jurisdiction to correct the lower court's clear and prejudicial mistakes. The State of Ohio cannot be allowed to ignore the law. This is a case of substantial constitutional question and of public and great general interest; which must be allowed to reach the merits.

CONCLUSION

Accordingly, in light of the above, this Court should accept jurisdiction, receive briefs; and hear arguments, if necessary, and correct the errors of the lower courts depriving the Appellant of his constitutional rights; and all other necessary and proper relief in the premises.

Respectfully Submitted,



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CERTIFICATE OF SERVICE
AND
DECLARATION OF MAILING

I, the Undersigned, do hereby certify that a copy of the foregoing was served, by regular U.S. Mail service, on the Attorney for Appellee, Barbara A. Farnbacher, Assistant Franklin County Prosecutor, 373 South High Street, 13th Floor, Columbus, Ohio 43215; and **I declare under penalities of perjury** that the original was deposited into CCI Institutional Mail addressed to the **Clerk of Courts, Ohio Supreme Court, 65 South Front Street, Columbus, Ohio 43215,** on this 29 Day of JUNE, 2015.

FRANCISCO ROMERO

Exhibit "A"

Franklin County Ohio Court of Appeals Clerk of Courts- 2015 May 19 12:05 PM-14AP000440

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 14AP-440 (C.P.C. No. 13CR-2484)
v.	:	
[F.R.],	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 19, 2015

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Barnhart Law Office LLC, and *Robert B. Barnhart*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Defendant-appellant, F.R., appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas pursuant to a jury verdict finding him guilty of two counts of gross sexual imposition.

{¶ 2} Appellant was indicted on three counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4), arising from his alleged sexual conduct with an 11-year-old girl, K.S. The crimes were charged as third-degree felonies because they involved a victim less than 13 years of age. R.C. 2907.05(C)(2).

{¶ 3} Following a trial, a jury returned guilty verdicts on Counts 1 and 3 and a not guilty verdict on Count 2. Thereafter, the trial court issued a judgment entry consistent

with the jury's verdicts, classified appellant a Tier II Sex Offender, and sentenced him to 36 months imprisonment and 5 years of post-release control. Appellant appeals the judgment, asserting the following three assignments of error:

> 1. The trial court erred when it permitted multiple witnesses to recount the victim's out-of-court statements about the event over hearsay objection from defense counsel.
>
> 2. The trial court erred when it allowed the State to elicit victim-impact evidence during the trial.
>
> 3. The cumulative impact of the trial court's errors warrants reversal.

{¶ 4} Evidence presented by the parties pertinent to the issues raised in this appeal establishes the following. K.S., the 11-year-old daughter of D.S., was best friends with A.R., the nine-year-old daughter of M.R. and appellant, and the two girls often had sleepovers at each other's houses. Although M.R. and appellant were divorced, appellant often visited A.R. at M.R.'s house. K.S. had a good relationship with appellant and M.R., and thought of them as her second parents.

{¶ 5} On Saturday, April 13, 2013, K.S. spent the night with A.R. at M.R.'s house. Because M.R. had to work that evening, she arranged for a friend to babysit the girls. K.S. testified that she and A.R. were playing with their dolls while they took a bath together. Appellant knocked on the bathroom door and told the girls it was time to get out of the bathtub. K.S. wrapped a towel around her body and walked across the hall to A.R.'s room to get dressed. A.R. remained in the bathroom to drain the bathtub and dry off the dolls. Appellant followed K.S. into A.R.'s bedroom and gave K.S. "a friendly side hug." (Tr. Vol. II, 134.) As he did so, he squeezed her right breast. Appellant then pinched her on the bottom over the towel, lifted the towel and slapped her on the bottom, pulled out his cell phone, motioned for her to take off her towel, and then said, "[d]on't worry. I won't tell nobody." (Tr. Vol. II, 135.) K.S. covered her face with her sleepover bag and saw a cell phone camera flash. Appellant then left A.R.'s room, stopped briefly in the bathroom to say goodbye to A.R., and left the house. Moments later, A.R. entered the bedroom. K.S. immediately told A.R. what appellant had done to her. Shortly thereafter, K.S. received several text messages from appellant making fun of her boyfriend. K.S. did not tell the

babysitter what had happened with appellant because she did not know her very well. Although she knew she would have to tell her parents about the incident the next day, she tried to forget about it and enjoy the rest of the sleepover.

{¶ 6} K.S. went home about 9:00 a.m. the next morning. At approximately 5:00 p.m. that evening, she told D.S. she needed to tell her something about appellant. According to D.S., K.S. related that she and A.R. were in the bathroom taking a bath around 9:00 p.m. the preceding night. K.S. did not take her pajamas into the bathroom with her; instead, she planned to put her pajamas on in A.R.'s bedroom. K.S. got out of the bathtub, wrapped herself in a towel, and opened the bathroom door. Appellant followed her into A.R.'s bedroom and, when he reached toward her to give her a hug, he grabbed her right breast, patted or pinched her bottom over the towel, and then flipped the towel up and slapped her on the bare bottom. Appellant then motioned for K.S. to drop her towel, pulled out his cell phone, and told her "[d]on't worry. I won't tell anybody." (Tr. Vol. II, 69.)

{¶ 7} After K.S. finished her story, D.S. immediately called the Reynoldsburg Police Department. At police urging, she drove K.S. to the police station, where Officer Craig Brafford interviewed K.S.

{¶ 8} Officer Brafford testified that K.S. averred she and A.R. were playing with the dolls in the bathtub at A.R.'s house the preceding night. At some point, appellant knocked on the bathroom door and told the girls to hurry up and get out of the bathtub. K.S. wrapped herself in a towel and ran across the hall to A.R.'s bedroom to put on her pajamas. A.R. remained in the bathroom to dry off the dolls. A short time later, while K.S. was still in A.R.'s bedroom, appellant entered the bedroom, approached K.S. from behind, and gave her a hug. As he hugged K.S., appellant pinched her right breast, patted her on the buttocks, and then patted her on the bare buttocks. He then held up his cell phone as if to take a picture with it and motioned for K.S. to drop her towel. K.S. did not drop her towel, and held a straw beach bag in front of her face. K.S. then saw a flash she assumed to have come from appellant's cell phone. Appellant left the bedroom as A.R. entered. K.S. immediately told A.R. what appellant had done.

{¶ 9} Detective Michael Binder also interviewed K.S. According to Detective Binder, K.S. asserted she was at A.R.'s house for a sleepover the preceding night. M.R.

had to leave the house to go to work, so another woman came to babysit the girls. K.S. and A.R. played with their dolls in the bathtub for about 45 minutes. Appellant knocked on the bathroom door and told the girls it was time to get out of the bathtub. A.R. stayed in the bathroom to dry off her dolls. K.S. wrapped herself in a towel and walked across the hall to A.R.'s bedroom to get dressed. Appellant followed her into A.R.'s room, squeezed her breast and pinched her buttocks over the towel, and then lifted the towel and slapped her bare buttocks. Appellant then motioned for K.S. to drop her towel, held up a cell phone as though he were going to take a picture of her, and said he "won't tell nobody." (Tr. Vol. III, 304.) K.S. thought appellant took a picture of her wearing the towel. Appellant eventually left the house, but later sent K.S. several text messages making fun of her boyfriend.

{¶ 10} Officer Brafford subsequently obtained a description of appellant's vehicle and eventually stopped him for committing a traffic violation. At Officer Brafford's request, appellant removed his cell phone and other miscellaneous items from his pockets. Detective Binder arrived at the scene, retrieved appellant's cell phone from Officer Brafford, and informed appellant that he was the subject of certain allegations regarding his conduct the night before. Appellant agreed to go to the police station for an interview with Detective Binder.

{¶ 11} During that interview, which was video recorded and played for the jury, appellant admitted he was at M.R.'s house the night before and told A.R. and K.S. to get out of the bathtub. According to appellant, both girls exited the bathroom at the same time wearing towels and then went into A.R.'s room across the hall. Appellant initially stated that nothing happened between him and K.S.; the two did not even speak to one another. However, after further questioning, appellant stated that he touched K.S. on the small of her back as she entered A.R.'s bedroom. When Detective Binder told appellant he had evidence that appellant had sexual contact with K.S., appellant adamantly denied doing so. Appellant admitted that he pretended to take a picture of K.S. while she was wearing the towel, but stated that he did not actually take a picture. Appellant also admitted he later sent text messages to K.S. about her boyfriend. Near the end of the interview, appellant denied touching K.S. on the buttocks over her towel, but stated that if he had done so, it was accidental and he was sorry about it. Appellant insisted he did not

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hug K.S. or touch her breast or bare buttocks. Following the interview, appellant agreed to return to the police station the next day for an interview with Detective Tim Doersam.

{¶ 12} In that interview, which was also video recorded and played for the jury, appellant initially stated he touched K.S. on the small of her back as he was guiding her and A.R. toward A.R.'s bedroom after the girls exited the bathroom. He denied following K.S. into A.R.'s bedroom, giving her a hug, or touching her on the buttocks, either over or under the towel. He admitted he pretended to take a picture of K.S. while she was wearing the towel, but stated he never intended to take a picture and did not do so. Later during the interview, appellant stated that he may have accidentally tapped K.S.'s bare buttocks when he steered K.S. and A.R. into A.R.'s bedroom. He also conceded he walked into A.R.'s room, gave K.S. a side hug, and probably touched K.S.'s breast accidentally while doing so. He further stated he apologized to K.S. for touching her breast. Appellant consistently denied motioning to K.S. to drop her towel, telling her not to worry because he would not tell anyone about him taking a picture, or intentionally touching K.S.'s breast or buttocks.

{¶ 13} Detective Binder obtained a search warrant for appellant's cell phone and enlisted another detective to perform a forensic analysis of the phone. That forensic analysis ultimately revealed no photograph of K.S.

{¶ 14} At trial, A.R. testified that on the night in question, appellant and his friend, J.V., stopped by the house to drop off some model rockets. At the time, she and K.S. were playing with dolls in the bathtub. Appellant knocked on the bathroom door and told the girls to get out of the bathtub. Both girls wrapped themselves in towels; K.S. walked across the hall to A.R.'s bedroom while A.R. remained in the bathroom to clean up the dolls and drain the bathtub. When A.R. exited the bathroom, appellant was standing in the hallway outside the bathroom. Appellant hugged and kissed A.R. and left. After appellant left, A.R. went into her bedroom, where she spoke to K.S. According to A.R., K.S. "was sort of shocked and upset" and said appellant had "touched her" on her breast and her bottom. (Tr. Vol. II, 229.)

{¶ 15} Appellant testified on his own behalf. According to appellant, when he and his friend, J.V., arrived at M.R.'s house, he put two model rockets on the kitchen table. K.S. and A.R. were in the bathroom taking a bath. At the babysitter's request, he told the

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girls to get out of the bathtub. A.R. exited the bathroom, and appellant took her into the kitchen to show her the rockets. A.R. then returned to the bathroom while appellant waited outside in the hallway. Appellant knocked on the bathroom door again and told the girls to get out of the bathtub. K.S. exited first; A.R. walked behind appellant and gave him a hug. Because both girls were wearing only towels, appellant hurried them across the hall into A.R.'s bedroom so J.V. would not see them. In doing so, appellant touched K.S.'s lower back over the towel; he did not touch her under the towel. A.R. said she left one of her toys in the bathroom and went back to retrieve it. Appellant remained in the hallway; A.R. eventually exited the bathroom, went into her bedroom, and closed the door. Appellant and J.V. then left. Appellant denied entering the bedroom with K.S. or taking a picture of K.S. with his cell phone.

{¶ 16} Appellant returned to M.R.'s house the next day. After he left that evening, he was stopped by a patrol officer and told a detective wanted to question him about his conduct the previous night. He voluntarily drove to the police station, where Detective Binder informed him K.S. had alleged he touched her inappropriately. Appellant agreed to an interview, and he told Detective Binder his version of the events. Appellant testified he was "scared" during the interview, but attempted to truthfully answer the detective's questions. (Tr. Vol. IV, 637.) Appellant averred that despite Detective Binder's repeated insistence that appellant took a cell phone picture of K.S. and touched K.S.'s breast and bare buttocks, appellant consistently denied doing so. However, appellant ultimately told Detective Binder that if he did touch K.S's breast and buttocks while he was ushering her into A.R.'s bedroom, it was accidental and he was sorry about it. He testified he made these statements only after being "badgered and badgered" by the detective. (Tr. Vol. IV, 645.)

{¶ 17} Appellant further testified he returned to the police station for a second interview on April 15, 2013, during which Detective Doersam repeatedly asked him if he touched K.S.'s breast or bare buttocks. Initially, appellant denied doing so; however, because the detective was "pushing and pushing and pushing" and appellant was "scared" and "under a lot of pressure," he ultimately stated that if he did touch K.S.'s breast or bare buttocks, he was sorry for doing so. (Tr. Vol. IV, 653-54.)

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{¶ 18} Appellant acknowledged sending K.S. several text messages about her boyfriend after he left M.R.'s house on April 13, 2013. He also testified he was "absolutely certain" that even if he did touch K.S. on the breast or buttocks, either over or under the towel, he did not do so for the purpose of sexual gratification. (Tr. Vol. V, 693.)

{¶ 19} In his first assignment of error, appellant contends the trial court erred in admitting hearsay testimony from D.S., Officer Brafford, and A.R. relating what K.S. told them about appellant's sexual misconduct. Appellant argues this testimony violated both the Ohio Rules of Evidence and his constitutional rights under the Sixth Amendment to the United States Constitution to confront the witnesses presented against him at trial.

{¶ 20} A trial court has broad discretion in the admission of evidence and its evidentiary rulings in this regard will not be reversed absent an abuse of that discretion. *State v. Jordan*, 10th Dist. No. 06AP-96, 2006-Ohio-6224, ¶ 19. "The term 'abuse of discretion' connotes more than a mere error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable." *Id.*, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 21} The Ohio Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Thus, "[t]o be hearsay, testimony must meet a two-prong test: it must concern an out-of-court statement, and it must be offered to prove the truth of the matter asserted. * * * If either element is not present, the statement is not hearsay." *State v. Menefee*, 10th Dist. No. 95APA03-266 (Sept. 29, 1995), citing *State v. Maurer*, 15 Ohio St.3d 239, 262 (1984). "Pursuant to Evid.R. 802, hearsay is inadmissible unless it falls within an exception provided by the rules of evidence." *State v. L.E.F.*, 10th Dist. No. 13AP-1042, 2014-Ohio-4585, ¶ 5.

{¶ 22} Appellant contends the testimony of D.S., Officer Brafford and A.R. "fall[s] squarely with the definition of hearsay," and that no relevant exception applies. (Appellant's Brief, 11.) Appellant specifically argues none of the testimony is "justified as being offered to explain a mother['s] or officer's or friend's actions following the statement." (Appellant's Brief, 11.) Appellant maintains "the only reason to introduce [K.S.]'s substantive statement was to bolster her credibility and prove that her version of events is what did, in fact, occur." (Appellant's Brief, 11.) Accordingly, argues appellant,

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the testimony should have been excluded. Appellant further contends the remaining evidence offered in support of appellant's conviction was not so overwhelming as to render harmless the trial court's failure to exclude the challenged testimony.

{¶ 23} We first address D.S.'s testimony recounting what K.S. said about appellant's sexual misconduct. At trial, appellant raised only a general hearsay objection to D.S.'s testimony, and the trial court overruled the objection without explaining its basis for doing so.

{¶ 24} The state asserts D.S.'s testimony was not hearsay because it was not offered to prove the truth of the matter asserted, that is, to show appellant engaged in sexual conduct with K.S. Rather, argues the state, D.S.'s testimony was offered only to explain her subsequent actions in contacting the police.

{¶ 25} "Out-of-court statements offered for reasons other than the truth are not hearsay." *State v. Willis*, 8th Dist. No. 97077, 2012-Ohio-2623, ¶ 11, citing *State v. Freeman*, 8th Dist. No. 85137, 2005-Ohio-3480, ¶ 40, citing *State v. Lewis*, 22 Ohio St.2d 125, 132-33 (1970). For example, "[b]ecause testimony offered to explain a witness' actions is not offered to prove the truth of the matter asserted, such testimony is not hearsay." *Menefee*, citing *State v. Congeni*, 3 Ohio App.3d 392, 398 (8th Dist.1981). " '[E]xtrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness to whom the statement was directed.' " *Id.*, quoting *State v. Thomas*, 61 Ohio St.2d 223, 232 (1980).

{¶ 26} D.S.'s testimony was not offered solely to explain how she proceeded with the information provided by K.S. Her testimony exceeded that which was necessary to establish a foundation for her subsequent conduct in contacting the police. To establish such a foundation, D.S. needed only to aver that K.S. reported that appellant had done something of a sexual nature to K.S. that upset or disturbed her. Instead, D.S. provided a detailed recitation of K.S.'s statements which included the elements of the crime of gross sexual imposition, that is, that appellant touched K.S.'s breast and buttocks. Accordingly, we do not agree with the state's argument that D.S.'s testimony was not hearsay.

{¶ 27} However, we do agree with the state's alternative contention that even if D.S.'s testimony did constitute hearsay, it was admissible as an excited utterance pursuant to Evid.R. 803(2). The excited utterance exception allows for the admission of hearsay

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testimony if (1) the declarant's statement relates to a startling event or condition, and (2) the declarant makes the statement while under the stress or excitement caused by the event or condition. Evid.R. 803(2). "The excited utterance exception to the hearsay rule exists because excited utterances are the product of reactive rather than reflective thinking and, thus, are believed inherently reliable." *State v. Ducey*, 10th Dist. No. 03AP-944, 2004-Ohio-3833, ¶ 17, citing *State v. Taylor*, 66 Ohio St.3d 295, 300 (1993).

{¶ 28} A declarant's statement need not be made within a certain time after the startling event in order to qualify as an excited utterance. *Id.* at ¶ 22, citing *Taylor* at 303. " 'There is no *per se* amount of time after which a statement can no longer be considered to be an excited utterance. The 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. Therefore, the passage of time between the statement and the event is relevant but not dispositive of the question.' " (Emphasis sic.) *Id.*, quoting *Taylor* at 303. " 'Relevant factors in ascertaining whether the declarant was in a sufficient state of excitement or stress include outward indicia of emotional state such as tone of voice, accompanying actions, and general demeanor.' " *Ducey* at ¶ 22, quoting *Osborne v. Kroger Co.*, 10th Dist. No. 02AP-1422, 2003-Ohio-4368, ¶ 46.

{¶ 29} In *State v. Fox*, 66 Ohio App.3d 481 (6th Dist.1990), an eight-year-old victim of sexual abuse reported the abuse to a social worker one day after the abuse occurred. The trial court admitted the social worker's trial testimony relating the child's statements under the excited utterance exception to the hearsay rule. On appeal, the defendant argued the child's statements could not be termed excited utterances because of the one-day time lapse between the startling event (the abuse) and the out-of-court declaration (the reporting of the abuse to the social worker). The appellate court concurred in the admission of the testimony, stating, at 489:

> "Lapse of time between the startling event and the out-of-court statement is not dispositive in the application of Evid.R. 803(2). Rather, the question is whether the declarant is still under the stress of nervous excitement from the event." *State v. Boston* (1989), 46 Ohio St.3d 108, 118, 545 N.E.2d 1220, 1230-1231, citing *State v. Duncan* (1978), 53 Ohio St.2d 215, 219-222, 7 O.O.3d 380, 382-384, 373 N.E.2d 1234, 1236-1238. * * * As applied to the statements of child declarants

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> who have been sexually assaulted, the admissibility of these statements depends upon the unique circumstances of each case. The focus is not on a specific time frame but upon whether the excitement of the assault is still dominant over the child declarant's thought processes and whether the child's statements were unreflective expressions of her belief.
>
> The record of the case before us reveals that approximately one day lapsed between the alleged sexual assault on August 2, 1988, and [the child's] interview with [the social worker]. The incident itself was of a shocking nature, and the child was described as distraught and tearful during this portion of the interview. Taking these facts into consideration, it is reasonable to find that [the child] was still in a state of excitement at the time of her statement to [the social worker].

{¶ 30} The court in *State v. Mader*, 8th Dist. No. 78200 (Aug. 30, 2001), held similarly. There, a 13-year-old victim of sexual abuse reported the abuse to her mother, her school counselor, and the police two to three days after the abuse occurred. The trial court admitted the testimony of these witnesses under the excited utterance exception to the hearsay rule. The appellate court concluded it was within the trial court's discretion to find the child was still under the stress of the event when she made the statements to the adults. In so concluding, the court observed, "[a] child is likely to remain in a state of nervous excitement longer than an adult. * * * A child also has less ability to reflect upon events, so their statements are less likely to be the result of reflective thought. * * * A child could still be under the stress of the incident days or weeks after the event." *Id.*, citing the dissent in *State v. Kebe*, 8th Dist. No. 73398 (Nov. 12, 1998). The court also noted the child was "hysterical and crying" when she reported the abuse and was only 13 years old at the time of the incident. *Id. See also State v. Wright*, 6th Dist. No. L-12-1327, 2013-Ohio-5910, ¶ 18 (test for excited utterance applied liberally to out-of-court statements made by child declarants alleged to have been sexually assaulted).

{¶ 31} In the present case, K.S. reported appellant's sexual misconduct to D.S. less than 24 hours after it occurred and less than 8 hours after she returned home. D.S. testified K.S. had an "apprehensi[ve] * * * upsetting, anxious tone in [her] voice" when reporting the incident. (Tr. Vol. II, 66.) D.S. testified she was not surprised K.S. waited until the next evening to tell her what had happened. According to D.S., K.S. said "she

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tried to tell me twice, and she thought she was going to throw up. She was upset about it. She was not in the wrong. But the thought of it made her sick." (Tr. Vol. II, 70.) Further, K.S. was only 11 years old at the time of the incident. In accordance with *Fox* and *Mader*, we conclude K.S.'s statements to D.S. qualified as an excited utterance because the statements related to the startling event of being sexually assaulted by appellant and were made while K.S. was still under the stress of that event. Accordingly, the trial court did not err in admitting D.S.'s testimony.

{¶ 32} We next address Officer Brafford's testimony relating K.S.'s statements about appellant's inappropriate sexual conduct. Appellant again raised only a general hearsay objection to the testimony, and the trial court again summarily overruled the objection.

{¶ 33} The state asserts Officer Brafford's testimony did not constitute hearsay because it was not offered to prove the truth of the matter asserted, that is, to show the sexual conduct occurred. Rather, argues the state, K.S's statements to Officer Brafford were offered only to explain his subsequent conduct in investigating the crime.

{¶ 34} Generally, a police officer is permitted to testify as to the underlying reasons for his conduct in investigating a crime, and such statements are, by definition, not hearsay. *State v. Blanton*, 184 Ohio App.3d 611, 2009-Ohio-5334, ¶ 38 (10th Dist.), citing *State v. Blevins*, 36 Ohio App.3d 147, 149 (10th Dist.1987), citing *Thomas* at 232. In *Blevins*, this court set forth the test for the admissibility of such testimony: "[t]he conduct to be explained should be relevant, equivocal and contemporaneous with the statements. * * * Additionally, such statements must meet the standard of Evid.R. 403(A)." *Id.* A trial court must exercise caution when determining the admissibility of an out-of-court declarant's statements to explain a police officer's conduct because "the potential for abuse in admitting such statements is great." *Id.* Further, " 'when the statements connect the accused with the crime charged, they should generally be excluded.' " *Blanton* at ¶ 39, quoting *State v. Humphrey*, 10th Dist. No. 07AP-837, 2008-Ohio-6302, ¶ 11.

{¶ 35} "[W]hen an officer relates out-of-court statements that establish the elements of the crime charged, the statements may exceed that which is needed to establish a foundation for the officer's subsequent conduct." *Willis* at ¶ 12, citing *State v. Gresh*, 5th Dist. No. 09-CAA-012-0102, 2010-Ohio-5814, ¶ 31. In *Gresh*, a police officer

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testified to the victim's statements that the defendant touched her inappropriately. The trial court admitted the testimony on the ground it was not offered for the truth of the matter asserted, but to explain the officer's investigative steps. On appeal, the court determined the testimony was improperly admitted because the officer's statements went beyond what was necessary to establish a foundation for the officer's subsequent conduct and the statements established the elements of the crime for which the defendant was charged. *Id.*

{¶ 36} In the present case, Officer Brafford's narration was not limited to a brief explanation of the basis for police involvement. Indeed, why Officer Brafford proceeded as he did had very little, if any, relevance or real importance in this case. Officer Brafford's testimony had real meaning and impact only if it was offered to prove the truth of what it asserts, which is that appellant sexually assaulted K.S. To that end, Officer Brafford's testimony clearly demonstrated the elements of the crimes with which appellant was charged. Indeed, Officer Brafford testified that K.S. reported to him that appellant touched her breast and buttocks. Accordingly, we disagree with the state's assertion that Officer Brafford's testimony was not hearsay. The state does not alternatively contend that even if Officer Brafford's testimony did constitute hearsay, it was admissible under one of the exceptions set forth in Evid.R. 803.

{¶ 37} Our conclusion that Officer Brafford's hearsay testimony was improperly admitted does not end our inquiry. This court has stated that " 'hearsay is generally inadmissible because the declarant is not testifying in court and the factfinder is unable to observe the declarant and decide whether the declarant's statement is worthy of belief.' " *State v. Bartolomeo*, 10th Dist. No. 08AP-969, 2009-Ohio-3086, ¶ 17, quoting *State v. Warren*, 8th Dist. No. 83823, 2004-Ohio-5599, ¶ 44. In addition, "[t]he admission of hearsay is harmless error where the declarant was also a witness and examined regarding matters identical to those contained in the hearsay statements." *State v. Smith*, 2d Dist. No. 20828, 2006-Ohio-45, ¶ 16, citing *State v. Allen*, 2d Dist. No. 1390 (May 24, 1996). *See also State v. Hubbard*, 12th Dist. No. CA2006-09-216, 2007-Ohio-6029, ¶ 14 (police detective's recitation of victim's statements to police did not prejudicially bolster victim's credibility because victim testified at trial and victim and detective were subject to cross-examination); *Gresh* (finding admission of police officer's hearsay testimony relating child

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victim's statement that defendant sexually abused her harmless because the victim testified at trial as to how and where the defendant touched her). Here, K.S. (the declarant) testified at trial, and her testimony, which during direct examination was to the same effect as Officer Brafford's testimony, was subject to cross-examination. *See Bartolomeo* at ¶ 17. Accordingly, any error in the admission of Officer Brafford's hearsay testimony was harmless.

{¶ 38} Lastly, we consider A.R.'s testimony describing what K.S. told her about appellant's sexual misconduct. Again, appellant raised only a general hearsay objection to the testimony, and the trial court overruled the objection without explanation.

{¶ 39} The state does not dispute A.R.'s testimony was hearsay. However, the state argues the testimony was admissible under the excited utterance exception to the hearsay rule. We agree. As noted above, the excited utterance exception permits the admission of hearsay testimony if the declarant's statement relates to a startling event and is made under the stress of that event. Immediately after A.R. entered her bedroom, which was within moments of appellant leaving the room, K.S. told her appellant had touched her breast and buttocks. K.S.'s statement to A.R. qualified as an excited utterance because it related to the startling event of appellant's sexual misconduct and was made under the stress of that event. Accordingly, the trial court did not err in admitting A.R.'s testimony.

{¶ 40} Appellant contends for the first time on appeal the admission of K.S.'s statements through the above noted testimony violated his Sixth Amendment right to confront the witnesses against him. In *Jordan*, this court addressed a Sixth Amendment claim similar to that presented here. There, a social worker interviewed a child victim of sexual abuse as part of the intake process at a hospital. At trial, the social worker recounted the child's description of the abuse. On appeal, the defendant argued for the first time the admission of the child's out-of-court statements through the social worker's testimony violated his Sixth Amendment right to confront the witnesses against him. This court found no plain error in the admission of the testimony. We explained, at ¶ 23-25:

> Under *Crawford v. Washington* (2004), 541 U.S. 36, regardless of its admissibility under the rules of evidence, a testimonial, out-of-court statement offered against an accused to establish the truth of the matter asserted may only be

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> admitted when the declarant is unavailable and where the accused has a prior opportunity to cross-examine the witness.
>
> *Crawford* further states 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." *Id.* at 59, fn. 9, citing *California v. Green* (1970), 399 U.S. 149, 162.
>
> Although [defendant] ultimately chose not to fully cross-examine [the child] at trial on the subject of these prior, out-of-court statements to [the social worker], she did testify, and [defendant] had the *opportunity* for effective cross-examination. Because the Confrontation Clause guarantees only an *opportunity* for cross-examination, the fact that a defendant has chosen not to avail himself of the opportunity does not violate the Confrontation Clause. *United States v. Owens* (1988), 484 U.S. 554, 559.

(Emphasis sic.)

{¶ 41} As in *Jordan*, K.S. (the declarant) testified at trial and appellant was provided the opportunity to cross-examine her on the subject of her prior statements to D.S., Officer Brafford, and A.R. Accordingly, we conclude appellant's Sixth Amendment right to confront witnesses against him at trial was not violated under the *Crawford* standard because appellant had a full opportunity to cross-examine the declarant who testified at trial. *Crawford v. Washington* (2004), 541 U.S. 36. *Jordan* at ¶ 25. *See also L.E.F.* at ¶ 11 ("because [the declarant] testified at trial and was subject to cross-examination, we are not presented with a Confrontation Clause issue"); *State v. McKinney*, 10th Dist. No. 13AP-211, 2013-Ohio-5394, ¶ 21. Appellant's first assignment of error is overruled.

{¶ 42} In his second assignment of error, appellant contends the trial court erred in permitting the prosecutor to elicit victim impact evidence at trial. Appellant specifically asserts the trial court erred in allowing D.S. to testify about the "psychological harm" appellant's conduct caused K.S. and her family. (Appellant's Brief, 14.)

{¶ 43} When the prosecutor asked D.S. what impact the April 13, 2013 incident had on her family, D.S. responded, "[a] lot of conversations that I have had to have with my children." (Tr. Vol. II, 77.) Appellant objected "to this line of questioning" on

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relevancy grounds. (Tr. Vol. II, 77.) The trial court summarily overruled the objection, and D.S. continued her testimony, stating, "there has been a lot of tears, not apprehension, a lot of uneasiness in the neighborhood. * * * We've had to have conversations with my son about why we are careful[.] * * * I had to have the same conversation with him from having spent the night down there before." (Tr. Vol. II, 77-78.) Appellant lodged the "[s]ame objection," which the trial court again summarily overruled. (Tr. Vol. II, 78.)

{¶ 44} Appellant maintains the challenged testimony was irrelevant and prejudicial in that it "offered a narrative of lost innocence and a neighborhood and friendship's [sic] shattered without any concern as to whether those results were relevant to [appellant's] guilt" and was "only designed to foster sympathy for K.S.'s family." (Appellant's Brief, 15-16.) The state argues the testimony was relevant to prove the offenses occurred and to corroborate K.S.'s testimony.

{¶ 45} Generally, any evidence having the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is admissible. *See* Evid.R. 401. However, testimony as to the effect a defendant's criminal acts have on the victim, the victim's family, or both, is usually irrelevant because it does not ordinarily involve the guilt or innocence of the accused. *State v. Wade*, 8th Dist. No. 90145, 2008-Ohio-4870, ¶ 17. "Rather than proving any fact of consequence on the issue of guilt, victim impact testimony tends to inflame the passions of the jury and risk conviction on facts unrelated to actual guilt." *Id.*, citing *State v. White*, 15 Ohio St.2d 146 (1968). However, "[v]ictim-impact evidence is admissible in certain circumstances, such as when the evidence relates to both the facts attendant to the offense and the effect on the victim." *State v. Rucker*, 2d Dist. No. 24340, 2012-Ohio-4860, ¶ 34, citing *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, ¶ 138.

{¶ 46} In the present case, the prosecutor's question regarding the effect appellant's conduct had on K.S. and her family was not relevant to appellant's guilt or innocence, and the only apparent purpose for the question was to elicit sympathy from the jury. The trial court thus erred in admitting the testimony. However, we find the admission of this evidence amounted to harmless error. Where there is no reasonable

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possibility the challenged testimony contributed to a conviction, the error is harmless and thus does not constitute grounds for reversal. *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, ¶ 62.

{¶ 47} The prosecutor did not dwell on the impact of the crimes on K.S. and her family, either during questioning or in closing argument. *See Rucker* at ¶ 34. In addition, appellant raises no challenge to either the weight or sufficiency of the evidence. *See Wade* at ¶ 20. K.S. testified in detail regarding the sexual abuse, and the persons to whom she reported the abuse offered testimony consistent with that of K.S. In addition, during his interviews with the police and at trial, appellant ultimately conceded he was in A.R.'s bedroom with K.S., that if he touched K.S.'s breast when he hugged her, it was accidental, and that he may have accidentally touched her buttocks while ushering her into A.R.'s bedroom. After assessing the evidence presented by both parties at trial, including the credibility of all witnesses, including appellant, the jury found appellant guilty of two counts of gross sexual imposition.

{¶ 48} Contrary to appellant's assertion, the victim impact testimony in this case was not similar to that admitted in *State v. Ponce*, 10th Dist. No. 95APA11-1450 (Oct. 10, 1996), and *State v. Presley*, 10th Dist. No. 02AP-1354, 2003-Ohio-6069. In *Ponce*, a rape victim testified she sought psychological counseling for emotional problems and nightmares stemming from the rape. In *Presley*, a rape victim testified she had nightmares about the rape and both the victim and her mother testified the victim attempted suicide as a result of the rape. In both cases, this court concluded the improper admission of the testimony prejudiced the defendant. Here, D.S. did not testify that K.S. sought psychological counseling or attempted suicide as the result of appellant's conduct. In fact, D.S. offered no specifics about the impact of appellant's conduct on K.S. Rather, D.S. offered only general testimony about "tears" and "uneasiness in the neighborhood" and that she had to talk about the incident with her son. Given the overall context of the trial, there is no reasonable possibility that the limited victim impact testimony contributed to appellant's conviction. The second assignment of error is overruled.

{¶ 49} In his third assignment of error, appellant contends the cumulative effect of the trial court's errors in admitting hearsay and victim impact testimony deprived him of a fair trial and requires a reversal of his conviction.

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{¶ 50} "Under the doctrine of accumulated error, a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the instances of trial-court error does not individually constitute cause for reversal." *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, ¶ 230, citing *State v. DeMarco*, 31 Ohio St.3d 191 (1987), paragraph two of the syllabus; *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, ¶ 140. "Errors which are separately harmless can, when considered together, violate an accused's right to a fair trial." *State v. Norman*, 10th Dist. No. 12AP-505, 2013-Ohio-1908, ¶ 61, citing *State v. Madrigal*, 87 Ohio St.3d 378, 397 (2000). However, " 'errors cannot become prejudicial by sheer weight of numbers.' " *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶ 261, quoting *State v. Hill*, 75 Ohio St.3d 195, 212 (1996).

{¶ 51} Although this court concluded the trial court erred in admitting Officer Brafford's hearsay testimony and D.S.'s victim impact testimony, we found those evidentiary errors to be harmless. These two harmless errors, even taken together, did not deprive appellant of a fair trial given the strength of the other evidence of guilt. In short, appellant has not demonstrated the cumulative effect of these two instances of harmless error deprived him of a fair trial. *See State v. Banks*, 10th Dist. No. 03AP-1286, 2005-Ohio-1943, ¶ 23; *State v. Jennings*, 10th Dist. No. 00AP-1283 (Sept. 13, 2001); *State v. Blackmon*, 10th Dist. No. 94APA05-773 (Feb. 14 1995). The third assignment of error is overruled.

{¶ 52} Having overruled appellant's three assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and KLATT, JJ., concur.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 14AP-440 (C.P.C. No. 13CR-2484)
v.	:	
[F.R.],	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on May 19, 2015, appellant's three assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs are assessed against appellant.

BROWN, P.J., TYACK, & KLATT, JJ.

/s/ Judge
Judge Susan Brown, P.J.

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Tenth District Court of Appeals

Date:	05-19-2015
Case Title:	STATE OF OHIO -VS- FRANCISCO J ROMERO
Case Number:	14AP000440
Type:	JEJ - JUDGMENT ENTRY

So Ordered

/s/ Judge Susan Brown, P.J.