

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	
Appellee	:	16-0284
	:	Case No: _____
VS.	:	
	:	C.A: 14-AP-0055
Quentin Franklin	:	
Appellant	:	C.P: 2014 CRC I000031

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT QUENTIN FRANKLIN

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EXPLANATION OF WHY THIS CASE
IS A CASE WHICH RAISE A
SUBSTANTIAL CONSTITUTIONAL
QUESTION

This cause presents four critical issues that raises a substantial constitutional question:(1) was there sufficient evidence to establish that appellant engaged in sexual contact with another person for the purpose of sexually arousing or gratifying either person,(2) is a conviction for gross sexual imposition against the manifest weight of the evidence where there is no evidence presented that appellant purpose for engaging in sexual contact was for the purpose of sexual arousal or gratification,(3) did the trial court commit plain error when it failed to exclude hearsay testimony despite the failure of trial counsel to object, and (4) was appellant denied his constitutional rights of due process and assistance of counsel when trial counsel failed to object or otherwise exclude hearsay testimony that was prejudice to the appellant.

In this case, the appellate court's decision to uphold the trial courts verdict was constitutionally wrong. The appellate court failed to examine the entire record with due diligence, if done so they would have established that there were insufficient evidence and that the verdict of the trial court was against the manifest weight of the evidence.

Sexual Contact is defined in R.C.2907.01(B) as " any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttocks, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

The Ohio Supreme Court has held that through the definition of sexual contact in R.C.2907.01(B), gross sexual imposition as described in R.C.2907.05(A)(4) requires proof of touching for th the purpose of sexually arousing or gratifying either person.

The statute requires a specific intent behind the touching -the touching must be intended to achieve sexual arousal or gratification. The state's evidence failed to show that there was any sexual contact that was for the purpose of sexual arousal or gratification of either person.

The appellate court is required to examine the entire record when an argument is made against the manifest weight of the evidence. "Manifest Weight" does not involve looking at the evidence in the light most favorable to the state or deferring to the trier of fact.

The appellate court concluded that after reviewing the record, they cannot say that the trial court clearly lost it's way when it rejected the appellant's testimony, which presented a different version of events that three other witnesses: E.B., J.B., and Ms. Baldrige. The appellate court's conclusion is not right because the record will show that when E.B.'s asked where a certain incident occurred at she would give four locations.(Tr.p.43) E.B. explained that she wrote these incidents down but, at the same time she testified that she didn't.(Tr.p.45-6) She testified that she wrote exactly what happened in the journal" I didn't really put like what he did. I just said he was doing bad things....(Tr.p.36) One incident happened in two locations at the same time.(Tr.p.52-4) During her recorded interview, E.B. stated that all of the touching would occur in her bedroom.(State's Exhibit 3) Also, she stated during her recorded interview that no other part of appellant's body touched her and that she was "Never" inappropriately touched any place other than her bedroom.(State's Exhibit 3) E.B. said these incidents would occur mostly at nighttime and when no one else was around.(Tr.p.44) She testified that everyone including Makayla and Gavin would be at the home.(Tr.p.73) E.B. said that the third disclosure she told her mother while they were in the car waiting to pick L.B. up from softball practice.

(Tr.p.82) Ms.Baldrige testified that this conversation with E.B. happened at the home and E.B. did not tell her this stuff about the touching in March of 2013.(Tr.p.187)

There is plenty self contradictory issues that were replete throughtout the record. The trier of fact did not believe J.B. when it came to her own allegations. There is more than a mere bit of Ms.Baldrige's testimony that is in conflict with the testimony provided by E.B. **THERE ARE MORE ISSUES WITHIN THE RECORD THAT DEMONSTRATES THAT THE TRIER OF FACT CLEARLY LOST HIS WAY.**

The trial court committed plain error when it failed to exclude the hearsay testimony of Ms.Baldrige despite the failure of the trial counsel to object. Plain error under Crim. R.52(B), there must be an error that constitutes an "obvious" defect in the trial proceedings."STATE V. BARNES(2002), 94 Ohio st.3d 21,27.

The state concluded that when hearsay testimony is essentially cumulative to a declarant's in court testimony, any resulting error is harmless. STATE V. ROYSTON, 9th dist. summit No.19182,1999 WL 1215297*2(Dec, 15 1999) Certain statements of Ms.Baldrige constituted hearsay that should have been excluded from the record because it was not cumulative to E.B.'s or J.B.'s in court testimony. Ms.Baldrige said E.B. told her he would touch her vagina while in her mother's bed. (Tr.p,147) This constitutes hearsay because E.B. did not testify to this at no time. Ms.Baldrige said that E.B.'s words were Quentin is touching her private areas.(Tr.p.144) This statement constitute hearsay because E.B. testified to a completely different version at trial. Ms.Baldrige testified that Quentin had touched her butt.(Tr.p.182) J.B. at trial testified that she did not tell Ms.Baldrige this.(Tr.p.121)

The record contains numerous statements from Ms. Baldrige that constitutes hearsay that was not cumulative to E.B.'s in court testimony, admitted into evidence. This testimony should have been objected to by appellant's trial counsel. The trial court erred and abused its discretion in the admission of this hearsay testimony which affected the outcome of the trial.

Finally, the appellant was denied his constitutional right of due process based upon ineffective assistance of counsel. The trial counsel's performance fell below an objective standard of reasonable representation when he failed to object to statements that constituted hearsay and by not suppressing his client's recorded video statements. The appellant's recorded interview contained hearsay statements used by the sheriff to interrogate him, relayed by Ms. Baldrige, Ms. Miller, as well as Ms. Belanger and summarized in the police report. The trial counsel prejudiced his client when he failed to take the necessary precautions to protect him and properly object when appellant's Fifth and Sixth Amendment rights were being violated. The trial counsel failed to suppress the appellant's recorded statement from being submitted into evidence, knowing that the sheriff used those statements to interrogate him.

Ultimately, the appellant was denied his constitutional right of due process based upon ineffective assistance of counsel, when his trial counsel failed to object to statements that constituted hearsay and failed to suppress the appellant's video recorded statement with multiple hearsay statements used against him which affected the outcome of the trial. The appellate court decision was wrong, this case needs to be looked at again in the interest of justice.

STATEMENT OF THE CASE AND FACTS

Appellant, Quentin Franklin was indicted on January 28, 2014 by the wayne county grand jury in a twelve count indictment in case number 2014 CRC-I000031. On October 2, 2014 at the close of the state of Ohio's evidence, appellant made a Rule. 29 motion which was granted by the trial court as to 7, 8, 11, and 12, dismissing each of those counts.(Trial tr. 267-8) The verdict was read in open court on october 14, 2014 with the finding of guilt as to counts 9 and 10 and not guilty of counts 1-6.(Verdict tr.1-5) Appellant was sentenced by the trial court to a term of incarceration for thirty six months on each count to be ran concurrently.(Sentencing tr.13) Appellant in December of 2014, filed an appeal to the ninth appellate court, challenging the conviction and sentence. On January 11, 2016 the appellate court upheld the trial court's decision.

E.B. testified that her first memory of inappropriate touching occurred while they were residing at the rittman house. (Tr.p.31) She testified that she was sleeping in bed with her mom and the appellant, but when her mother got up to shower and get ready for work, Mr.Franklin rubbed her butt while rubbing her back.(Tr.p.31) E.B. explained that it started outside of her clothing and forward.(Tr.p.34) When the prosecutor clarified if this was the "Same Exact Incident", E.B. testified that it was and thereafter she started to sleep in her own room.(Tr.p.35) During the recorded interview with Ms.Miller, E.B. told Ms. Miller that the first instance occurred while her mother was not home.(State's Exhibit 3) E.B. further stated that appellant was seated on the bed then laid down next to her.(State's Exhibit 3)

According to E.B., she was laying on top of the covers while appellant was under the covers.(State's Exhibit 3) E.B. during her interview described appellant's actions as touching and squeezing her buttocks.(State's Exhibit 3) E.B. advised that the next time anything unusual occurred was approximately two months later when appellant entered her room, took off her pants and started touching her.(State's Exhibit 3) She stated that all of the touching would occur in her room.(State's Exhibit 3) She further explained that he would start by just touching then insert his finger(s).(State's Exhibit 3) E.B. advised Ms. Miller that appellant touched her breast and her buttocks under her clothes at the same time he touched her vagina.(State's Exhibit 3) When questioned further, E.B. stated that "No" other part of appellants body touched her and that she was "NEVER" inappropriately touched any place other than her room.(State's Exhibit 3)

E.B. sister, J.B. had uncovered a diary that E.B. kept in which she wrote her thoughts and her testimony was that the only comments she made regarding these incidents were that " I DIDNT REALLY PUT LIKE WHAT HE DID. I JUST SAID HE WAS DOING BAD THINGS(Tr.p.36-7) J.B. gave the diary to the girls mother who discussed the diary with E.B.(Tr.p.37) The incident would occur mostly at nighttime and when "NO" one else was around.(Tr.p.44)

The second disclosure made by E.B. to her mother was in written form that she then read out loud.(Tr.p.45) E.B. testified that the next specific time was while she was staying in her sister's room.(Tr.p.51-2) She stated that this time was worse, he started with hands but then used his mouth and tongue on her vagina.(Tr.p.52-3) While discussing this incident, E.B. states" **WELL, LIKE I REMEMBER LIKE, I STILL REMEMBER IT LIKE EVERYTHING THAT HAPPENED.** This happened on the couch.(Tr.p.53) E.B. said appellant touched her breat maybe twice.(Tr.p.63)

Though E.B. had previously testified that nobody was around during these incidents, On re-direct she admitted that at times that the appellant's children would be sleeping in the same room .(Tr.p.84) J.B. testified however, as appellant was found not guilty of all counts pertaining to her, her testimony is not included herein. (Tr.p.89-135)

Ms.Baldrige stated that the inappropriate touching of E.B. came to her attention in June of 2011.(Tr.p.143) Ms.Baldrige stated that E.B.'s words in her journal were that Quentin was touching her private areas.(Tr.p.144) Nearly a year later, Ms. Baldrige stated she had gotten home from work on a saturday and the appellant was sitting at the table with the girls and they appeared to be in trouble.(Tr.p.150) Ms. Baldrige explained that E.B. disclosed that the appellant was touching her again.(Tr.p.151) E.B. stated that appellant had been touching J.B.'s buttocks as well.(Tr.p.152) Ms.Baldrige testified that E.B. told her in addition to the rubbing of the vagina, there was insertion of fingers and J.B. said it was a one time incident.. ..(Tr.p.154-5)

Around March of 2013, E.B. told Ms. Baldrige that appellant had started touching her again in the fall when school started.(Tr.p.163) Again the girls were in trouble for disobeying the rules.(Tr.p.163-7) Ms. Baldrige explained that it was after E.B. and J.B. knew that they were in trouble did any disclosure occur.(Tr.p.187)

On May 17, 2013 Ms.Baldrige denied any previous concerns about sexual abuse.(Tr.p.212)

Ms.Belanger documents exactly what the child states to her and E.B. told her that Mr. Franklin puts his fingers inside her ,touched her buttocks with his hands, and place his mouth and tongue on her vagina.(Tr.p.229-30)

E.B. further told Ms. Belanger that appellant fondled her breast, licked her privates, and kissed her "bottom parts", her boobs, both on top and underneath her clothing. (Tr.p.229-30) She also stated in her report that E.B. showed no signs, symptoms, indicators, or behaviors of someone who had been sexually abused. Ms. Belanger then completed a physical examination of E.B. and found nothing noteworthy. (Tr.p.231-5)

ARGUMENT IN SUPPORT OF PR

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of law No I:

The evidence was insufficient to sustain a finding of guilt because the state failed to present evidence to establish beyond a reasonable doubt the elements necessary to support a conviction.

Sexual Contact is defined in R.C.2907.01(B) as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

The Ohio Supreme Court has held through the definition of sexual contact in R.C.2907.01(B), gross sexual imposition as described in R.C.2907.05(A)(4) **REQUIRES PROOF OF TOUCHING" FOR THE PURPOSE OF SEXUALLY AROUSING OR GRATIFYING EITHER PERSON."** (EMPHASIS ADDED)

The statute "REQUIRES" a specific intent behind the touching - the touching must be intended to achieve sexual arousal or gratification. The state's evidence failed to show that there was sexual contact that was for the purpose of sexual arousal or gratification of either person.

Proposition of law No II:

The verdict was against the manifest weight of the evidence. Unlike sufficiency, " Manifest Weight " does not involve looking at the evidence in the light most favorable to the state or deferring to the trier of fact. Although a court of appeals may determine that a judgement of a trial court is sustained by sufficient evidence, that the court may nevertheless conclude that the judgement is against the manifest weight of the evidence. "Id.387, citing ROBINSON, 162 Ohio st. at 487.

Appellant's convictions were against the weight of the evidence. At the sentencing proceeding, the trial court specifically stated that it relied upon the testimony of E.B. , Ms.Baldrige and the DVD interviews. If this was in fact the case there were multiple variations within E.B.'s accounting of events as well contradictory evidence from Ms.Baldrige as to the substance of E.B.'s disclosures to her.

Proposition of law No III:

The trial court committed plain error when it failed to exclude the hearsay testimony of Ms.Baldrige despite the failure of the trial counsel to object.

To have plain error under Crim.R.52(B), there must be an error that constitutes an " obvious " defect in the trial proceedings and that affects the defendants " substantial " rights. STATE V. BARNES(2002),94 Ohio st.3d 21, 27.

Ms.Baldrige was permitted to relate what E.B. and J.B. had told her without limitation despite the fact that the statements were being made for the truth of what the children had told her. A statement other than one made by the declarant while testifying that is offered into evidence to prove the truth of the matter asserted is inadmissible unless it falls within a limited number of exceptions, Evidence. Rule. 801. Ms. Baldrige testimony does not fall within any of the delineated

exceptions yet was relied upon heavily by the trier of fact in this matter. As there was no physical evidence, this case was based solely upon the credibility of E.B.'s testimony. E.B. told multiple variations of what occurred, broad generalities of a time frame, and the lack of record as to what the sexual contact was for the finding of guilt, Ms. Baldrige's testimony buttressed E.B.'s testimony providing it the support needed for a conviction. further, the fact finder explicitly stated his reliance upon the testimony of Ms. Baldrige, thus further indicating that impact of the inadmissible hearsay testimony in this case was substantial.

Appellant submits that admission of the hearsay testimony created an obvious defect in the proceedings affecting his constitutional rights.

Proposition of law No IIII:

The appellant was denied his constitutional right of due process based upon ineffective assistance of counsel.

The United States constitution that all persons shall not be deprived of life, liberty or property without due process of law. U.S CONST. AMEND V.

Appellant bears the burden of proof on the issue of counsel's alleged ineffectiveness. STATE V. CALHOUN(1999), 86 Ohio st .3d 279, 289, 714 N.E.2d 905.

Two Prong test,(1) Appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation, STRICKLAND V. WASHINGTON(1984), 466 U.S.668, 687, 104 s.ct. 2052, 80 L.Ed.2d 674, STATE V BRADLEY(1989), 42 Ohio st.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. (2) Appellant must demonstrate that he was prejudice by counsel performance.

If Counsel's errors, the result of the proceedings would have been different. BRADLEY, 42 Ohio st.3d at paragraph three of syllabus.

Trial counsel for appellant fell below an objective standard of reasonable representation. Counsel failed to object to any of Ms. Baldrige's testimony relating to the hearsay statements of E.B. and J.B.. The introduction of appellants recorded statement that contained multiple hearsay statements used during the interrogation and summarized in the police report.

Trial counsel failed to properly object when the appellants Fifth and Sixth Amendment rights were being violated.

Trial counsel prejudiced his client by failing to object to the line of questioning and admission of this evidence as it was relied upon heavily by the finder of fact.

CONCLUSION

For the reasons discussed above this case is a case which raises a substantial constitutional question. The appellant request that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits

Respectfully submitted

Quentin Franklin



Quentin Franklin, Pro-se

CERTIFICATE OF SERVICE

I certify that a copy of this memorandum in support of jurisdiction was sent by ordinary U.S. mail to counsel for appellees Daniel R Lutz (Wayne county prosecutor as well as Nathan R Shaker Assistance prosecuting attorney at 115 W. Liberty Str, Wooster, Ohio 44691 on February 12, 2016.


Quentin Franklin, Pro-se

STATE OF OHIO
 COUNTY OF WAYNE
 STATE OF OHIO

FILED
 9TH DISTRICT
 COURT OF APPEALS
 2016 JAN 14 AM 7 49

IN THE COURT OF APPEALS
 NINTH JUDICIAL DISTRICT

Appellee
 v.
 QUENTIN R. FRANKLIN
 Appellant

TIM NEAL
 CLERK OF COURTS

C.A. No. 14AP0055
 APPEAL FROM JUDGMENT
 ENTERED IN THE
 COURT OF COMMON PLEAS
 COUNTY OF WAYNE, OHIO
 CASE No. 2014 CRC-1 000031

DECISION AND JOURNAL ENTRY

Dated: January 11, 2016

HENSAL, Presiding Judge.

{¶1} Quentin Franklin appeals his convictions for gross sexual imposition in the Wayne County Court of Common Pleas. For the following reasons, this Court affirms.

I.

{¶2} The victim, E.B., was born on September 24, 2000, and is the second of three daughters to Mother and her first husband, Travis. The couple divorced in May 2006. Shortly thereafter, Mother began dating the defendant, Mr. Franklin. Mr. Franklin moved into the family home within a few months and the couple ultimately married in 2010.

{¶3} According to E.B., Mr. Franklin began molesting her in 2011. The molesting started with Mr. Franklin touching her buttocks on the outside of her clothes, but escalated to touching her beneath her clothes, including inserting his fingers into her vagina, putting his mouth on her vagina, and touching her buttocks and breasts.

{¶4} Mother testified that she first became aware of these incidents in June 2011 when J.B., her eldest daughter, found E.B.'s journal, which alluded to the sexual abuse. E.B. testified that she did not disclose the incidents to Mother because she feared it would break up her family. E.B. also testified that Mr. Franklin told her he would take away her phone if she told anyone, that her whole family would go to jail, and that she would be placed in foster care.

{¶5} After Mother confronted Mr. Franklin about the alleged touching, Mr. Franklin left the family home for the night and stayed with his sister. According to Mother and E.B., when Mr. Franklin returned, he apologized for his actions and promised he would not do it again.

{¶6} Almost one year passed before Mother became aware of any further incidents. At that time, E.B. told Mother that Mr. Franklin was touching her again and J.B., for the first time, told Mother that he had touched her buttocks. Mother confronted Mr. Franklin, who again left the family home and stayed with his mother for about a week. Mr. Franklin returned for a second time and remained in the family home until March 2013.

{¶7} In March 2013, E.B. told Mother that Mr. Franklin was still touching her. After yet another confrontation, Mr. Franklin left the family home for the third and final time. As a result of these incidents, Mother and Mr. Franklin divorced in December 2013.

{¶8} A grand jury indicted Mr. Franklin on twelve counts of criminal conduct based upon the allegations of sexual abuse made by his former step-daughters, E.B. and J.B. Mr. Franklin waived his right to a jury trial and the case proceeded to a bench trial.

{¶9} After the State's case-in-chief, the defense made – and was granted – a Criminal Rule 29 motion as to four counts, which included counts for unlawful sexual contact with a minor and sexual imposition. At the conclusion of the bench trial, the trial court found Mr. Franklin guilty of two counts of gross sexual imposition based upon the allegations of E.B. The

trial court found Mr. Franklin not guilty of the remaining counts and sentenced him to two 36-month sentences to run concurrently.

{¶10} Mr. Franklin now appeals his convictions and raises four assignments of error.

II.

ASSIGNMENT OF ERROR I

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A FINDING OF GUILT BECAUSE THE STATE FAILED TO PRESENT EVIDENCE TO ESTABLISH BEYOND A REASONABLE DOUBT THE ELEMENTS NECESSARY TO SUPPORT THE CONVICTIONS.

{¶11} Mr. Franklin argues that his convictions are not supported by sufficient evidence. Specifically, he argues that the State failed to present sufficient evidence to establish that he had sexual contact with E.B. for the purpose of sexual gratification of either person. Whether a conviction is supported by sufficient evidence is a question of law, which we review de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In making this determination, we must view the evidence in the light most favorable to the prosecution:

An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶12} The trial court found Mr. Franklin guilty of two counts of gross sexual imposition under Revised Code Section 2907.05(A)(4). Section 2907.05(A)(4) prohibits sexual contact with a person less than thirteen years of age regardless of whether the offender knows the age of that person. "Sexual contact" is defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast,

for the *purpose* of sexually arousing or gratifying either person.” (Emphasis added.) R.C. 2907.01(B). “A person acts purposely when it is the person’s specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender’s specific intention to engage in conduct of that nature.” R.C. 2901.22(A).

{¶13} Mr. Franklin argues that the State presented no evidence to establish that he acted with the purpose of sexually arousing or gratifying himself or E.B., and, therefore, that he did not have “sexual contact” with E.B. But as this Court has previously explained, “in the absence of direct testimony regarding sexual arousal or gratification, the trier of fact may infer a purpose of sexual arousal or gratification from the ‘type, nature and circumstances of the contact, along with the personality of the defendant.’” *State v. Antoline*, 9th Dist. Lorain No. 02CA008100, 2003-Ohio-1130, ¶ 64, quoting *State v. Cobb*, 81 Ohio App.3d 179, 185 (9th Dist.1991).

{¶14} Here, E.B. testified that Mr. Franklin touched her numerous times over a two-year period. She testified that Mr. Franklin touched her breasts and buttocks, inserted his fingers into her vagina, and put his mouth on her vagina. E.B. further testified that he touched her mostly at nighttime when no one else was around. The trial court, as the trier of fact, was free to believe or disbelieve any or all of E.B.’s testimony. *State v. Just*, 9th Dist. Wayne No. 12CA0002, 2012-Ohio-4094, ¶ 42. Viewing this evidence in a light most favorable to the prosecution, the trial court could have reasonably inferred that Mr. Franklin touched E.B. for the purpose of sexually arousing or gratifying either himself or E.B. Therefore, the trial court did not err in finding that the State met its burden of proving the essential elements of gross sexual imposition beyond a reasonable doubt. Mr. Franklin’s first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶15} Mr. Franklin also argues that his convictions are against the manifest weight of the evidence. If a defendant asserts that a conviction is against the manifest weight of the evidence,

an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

State v. Otten, 33 Ohio App.3d 339, 340 (9th Dist.1986). Because Mr. Franklin waived his right to a jury trial, the trial court assumed the trier-of-fact function of the jury. *Cleveland v. Welms*, 169 Ohio App.3d 600, 2006-Ohio-6441, ¶ 16 (8th Dist.).

{¶16} Weight of the evidence pertains to the greater amount of credible evidence produced in a trial to support one side over the other side. *Thompkins*, 78 Ohio St.3d at 387. An appellate court should only exercise its power to reverse a judgment as against the manifest weight of the evidence in exceptional cases. *State v. Carson*, 9th Dist. Summit No. 26900, 2013-Ohio-5785, ¶ 32, citing *Otten* at 340.

{¶17} Mr. Franklin argues that his convictions are against the manifest weight of the evidence for the same reasons articulated in his sufficiency argument. Mr. Franklin also argues that the testimony of E.B. was not credible because she gave inconsistent accounts of what happened to Mother, a sexual abuse caseworker, a sexual assault nurse, and to the court at trial.

{¶18} E.B.'s testimony, however, was corroborated, in part, by the testimony of Mother and her sister, J.B. Additionally, Mr. Franklin's own testimony corroborated E.B.'s testimony

with respect to the relevant time frame as well as the confrontations he had with Mother regarding the abuse and related departures from the family home.

{¶19} “Credibility determinations are primarily within the province of the trier of fact.” *Just*, 2012-Ohio-4094 at ¶ 42, citing *State v. Violet*, 9th Dist. Medina No. 11CA0106-M, 2012-Ohio-2685, ¶ 11. “The fact-finder ‘is free to believe all, part, or none of the testimony of each witness.’” *Id.*, quoting *State v. Cross*, 9th Dist. Summit No. 25487, 2011-Ohio-3250, ¶ 35. Here, the trial court reviewed all of the evidence and assessed the credibility of the witnesses, including E.B., J.B., Mother, the sexual abuse caseworker, the sexual assault nurse, Mr. Franklin, his friend, and three of his family members. Having reviewed the record, we cannot say that the trial court clearly lost its way when it rejected Mr. Franklin’s testimony, which presented a different version of the events than three other witnesses: E.B., J.B., and Mother. *See Thompkins*, 78 Ohio St.3d at 387. Mr. Franklin’s convictions, therefore, are not against the manifest weight of the evidence. Mr. Franklin’s second assignment of error is overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO EXCLUDE THE HEARSAY TESTIMONY OF [MOTHER] DESPITE THE FAILURE OF TRIAL COUNSEL TO OBJECT.

{¶20} Mr. Franklin next argues that the trial court committed plain error by failing to exclude certain testimony of Mother despite his trial counsel’s failure to object. Specifically, he argues that the trial court erred in allowing Mother to relate what her daughters told her about the abuse and that the trial court relied on this alleged inadmissible testimony in finding Mr. Franklin guilty of two counts of gross sexual imposition.

{¶21} The State argues that Mother’s statements regarding what E.B. told her were not hearsay because they were not offered to prove the truth of the matter asserted. Rather, they

were offered to establish a timeline of events and to explain how law enforcement became involved. The State further argues that, even if the statements were hearsay, they were cumulative of E.B. and J.B.'s testimony and, therefore, any error in failing to exclude them was harmless.

{¶22} The doctrine of plain error requires that there must be: (1) a deviation from a legal rule; (2) that is obvious, and; (3) that affects the appellant's substantial rights. *State v. Hardges*, 9th Dist. Summit No. 24175, 2008–Ohio–5567, ¶ 9. An error affects the appellant's substantial rights if it affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶23} Assuming, *arguendo*, that Mother's statements constituted hearsay under Evidence Rule 802 – and further assuming they did not fall within any of the exceptions provided under Rule 803 – Mr. Franklin has failed to demonstrate that any error in failing to exclude Mother's testimony affected the outcome of the trial. In this regard, "[w]hen hearsay testimony is essentially cumulative to a declarant's in-court testimony, any resulting error is harmless." *State v. Royston*, 9th Dist. Summit No. 19182, 1999 WL 1215297, *2 (Dec. 15, 1999), citing *State v. Tomlinson*, 33 Ohio App.3d 278, 281 (12th Dist.1986).

{¶24} E.B. testified that Mr. Franklin inappropriately touched her numerous times over a two-year period of time. She further testified that Mr. Franklin left the family home three times as a result of these incidents. Mother similarly testified that Mr. Franklin left the family home three times and recounted what E.B. told her about the sexual abuse. Because Mother's testimony was cumulative of E.B.'s in-court testimony, any resulting error was harmless and,

therefore, the trial court did not commit plain error. *See State v. May*, 3d Dist. Logan No. 8-11-19, 2012-Ohio-5128, ¶ 50 (holding that the trial court did not commit plain error by admitting allegedly hearsay statements because any error in admitting them was harmless).

{¶25} With respect to Mother's testimony regarding what J.B. – who also testified – told her, Mr. Franklin provides no authority or citations to the record indicating which statements he is referring to, or how these alleged hearsay statements affected the outcome of the trial. *See* App.R. 16(A)(7). The trial court, therefore, did not commit plain error in failing to exclude the alleged hearsay testimony despite his trial counsel's failure to object. Mr. Franklin's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

THE APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT OF DUE PROCESS BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶26} In his final assignment of error, Mr. Franklin argues that his trial counsel was ineffective because he failed to object to Mother's testimony relating what E.B. and J.B. told her about the sexual abuse. He also argues that his counsel was ineffective for failing to object to the introduction of his video-recorded statement to the police, which, he argues, contained multiple hearsay statements.

{¶27} To prevail on a claim of ineffective assistance of counsel, Mr. Franklin must show: (1) that counsel's performance was deficient to the extent that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984).

{¶28} A deficient performance is one that falls below an objective standard of reasonable representation. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the

syllabus. A court, however, “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Strickland* at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 100 (1955).

{¶29} As discussed above, Mr. Franklin’s trial counsel’s failure to object to Mother’s testimony regarding what her daughters told her about the abuse resulted in harmless error. Mr. Franklin, therefore, cannot establish that he was prejudiced, i.e., that the result of the trial would have been different, by his trial counsel’s failure to object to Mother’s testimony.

{¶30} Mr. Franklin further argues that his trial counsel’s performance was deficient because he failed to object to the introduction of the deputy’s analysis of Mr. Franklin’s credibility and guilt, which was contained at the end of his video-recorded statement. After sound issues prevented the State from playing the video-recorded statement in open court, the trial judge agreed to view the video in private as part of his review of the evidence. At that time, Mr. Franklin’s trial counsel requested that the trial judge not view the deputy’s analysis of Mr. Franklin. Both the trial judge and the State explicitly agreed that the deputy’s statements would not have been admissible at trial and, therefore, should not be viewed. Mr. Franklin, therefore, cannot establish that his trial counsel’s conduct was deficient in this regard. To the extent that Mr. Franklin argues that his trial counsel’s performance was deficient because he failed to object to the introduction of his video-recorded statement, Mr. Franklin has pointed us to no authority supporting his position, nor has he demonstrated prejudice. App.R. 16(A)(7). We decline to construct an argument on his behalf. Mr. Franklin’s fourth assignment of error is overruled.

III.

{¶31} Mr. Franklin's assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



JENNIFER HENSAL
FOR THE COURT

CARR, J.
SCHAFFER, J.
CONCUR.

APPEARANCES:

JENNIFER SCOTT, Attorney at Law, for Appellant.

DANIEL R. LUTZ, Prosecuting Attorney, and NATHAN R. SHAKER, Assistant Prosecuting Attorney, for Appellee.