[Cite as *State v. Wolff*, 2009-Ohio-2897.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 07 MA 166
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
JOHN E. WOLFF, Jr.,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 06 CR 978.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: June 9, 2009

[Cite as *State v. Wolff*, 2009-Ohio-2897.]

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this court. Appellant, John E. Wolff, Jr., appeals the decision of the Mahoning County Court of Common Pleas that convicted him of sixteen counts of rape and nine counts of gross sexual imposition, subsequent to a jury trial.

{¶2} Wolff argues that there was insufficient evidence as to the force and the substantially impaired victim elements, that the trial court erroneously barred evidence through the Rape Shield Statute without weighing the evidence, and prevented meaningful cross-examination of the victims. Wolff also argues that the trial court erroneously allowed prejudicial hearsay statements under the prior consistent statement exception. Wolff further argues that the joint prosecution for both victims and all counts resulted in the denial of a fair trial.

{¶3} The State provided sufficient evidence to support the force element of Wolff's convictions. The State did not present sufficient evidence of substantial impairment of the victim to support the jury's convictions in Counts 26 and 27, though the issue is rendered moot by the trial court's merger of Counts 26 and 27 into Counts 22 and 23. The trial court did not commit error in preventing the introduction of evidence normally barred by the Rape Shield Statute, and Wolff did not properly request the introduction of such evidence in the manner required by the statute. The hearsay statements vaguely alleged by Wolff fell within the prior consistent statement hearsay exception, or were otherwise not facially inadmissible through alternative hearsay exceptions. Any alleged error was rendered harmless through the cross-examination of both of the victim-declarants. Finally, as Wolff did not file a motion to separate trials and did not object to joint prosecution at any point during his proceedings, he has waived the alleged error.

{¶4} Wolff's first, second, third, fourth, and sixth assignments of error are meritless. Wolff correctly argues that the jury's convictions on Counts 26 and 27 were based on legally insufficient evidence, but the error is rendered harmless by the trial court's merger of those two counts. Wolff's fifth assignment of error is also meritless. Accordingly, the judgment of the trial court is affirmed.

Facts

{¶5} On September 14, 2006, Wolff was indicted on ten counts of rape, in violation of R.C. 2907.02(A)(1)(b)(B), special felony (Counts 1-10); three counts of rape, in violation of R.C. 2907.02(A)(2)(B), 1st degree felony (Counts 11-13); five counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4)(B), 3rd degree felony (Counts 14-18); and two counts of gross sexual imposition, in violation of R.C. 2907.05(A)(1)(B), 4th degree felony (Counts 19-20), all alleged to have been committed against victim AB. Wolff was additionally indicted on five counts of rape, in violation of R.C. 2907.02(A)(2)(B), 1st degree felony (Counts 21-25); three counts of rape, in violation of R.C. 2907.02(A)(1)(c)(B), 1st degree felony (Counts 26-28); and three counts of gross sexual imposition, in violation of R.C. 2907.05(A)(1)(B), 4th degree felony (Counts 29-31), against victim SA.

{¶6} The charges stemmed from allegations that Wolff sexually abused his two stepdaughters, AB and SA. AB alleged that Wolff sexually abused her when she was eight through fourteen years old, from 2000 to 2006. SA alleged that Wolff sexually abused her when she was thirteen and fourteen years old, in 2000 and 2001.

{¶7} Wolff was appointed counsel, and entered a not guilty plea at his arraignment. Five pretrial hearings were held between October 25, 2006 and July 19, 2007, but were not transcribed for the record. On December 4, 2006, the court granted Wolff's motion for a bill of particulars, though the record does not indicate that the State complied. On August 8, 2007, Wolff filed two motions in limine, one to prohibit the State's witnesses from testifying as to the truth and veracity of AB and SA's out of court statements, and one to limit the State's display of exhibits while not being actively used. The trial court overruled Wolff's motion in limine regarding exhibits, and did not explicitly rule on Wolff's other motion in limine.

{¶8} Wolff's trial before a jury commenced on August 13, 2007. For the State's case in chief, the following witnesses testified: AB; SA; Karen Pico, a school counselor to whom AB reported abuse on April 4, 2006; Selina Summerville, SA's aunt and guardian; John Rusnak, a police officer who took AB's statement on April 4, 2006; Kim Woods, a

Children's Services caseworker who performed a forensic interview with AB on April 4, 2006; Janet Gorsuch, a nurse practitioner who examined AB and SA on November 20, 2001 and examined AB on April 4, 2006; and Becky Haddle, a Children's Services forensic investigator who interviewed SA and AB on November 7, 2001.

{¶9} AB testified that Wolff and AB's mother were married in 1999. Wolff lived with AB and her mother, and her brother. AB's half-sister, SA would stay with them on weekends and during the summer. Wolff was unemployed and stayed at home full-time with the children. AB testified that she was raped by Wolff, starting when she was eight years old. AB explained that Wolff would usually initiate physical contacts by asking AB to rub his back while AB was in her night clothes, and then would engage in a variety of sexual contacts with her. AB stated that Wolff engaged in sexual activities with her once or twice a week at first, later escalating to most days of the week. AB stated that she generally did not verbally resist, but sometimes attempted to physically resist Wolff. AB testified that the abuse would usually happen when her mother was gone at work. It also happened when her mother was at bingo, and sometimes when her mother was at home.

{¶10} The abuse lasted until 2001, when AB and SA decided to tell their mother and SA's aunt, Selina Summerville about the abuse. Their mother confronted Wolff, who denied the abuse. The following day, AB and SA told Summerville, and they went to an emergency room to have rape kits performed. AB stated that the medics "found something" on her sister, but nothing on her. AB remembered talking to a Children's Services worker, in a little room with a video camera, and telling her the details described in the foregoing testimony. AB testified that Wolff did not have contact with her for three months after the accusation. However, after those three months, Wolff moved back in with AB and her mother and AB decided she could "give him another chance." AB recanted the accusation to her mother. AB testified that she recanted to her mother because she felt bad for the emotional pain that her mother was going through. AB stated that she did not want to see her mother in an unhappy state, and felt as though she was the one who caused her mother's unhappiness. AB stated that the abuse started back up a few months later, starting with less frequency and then progressing

similarly to the last time.

{¶11} AB described Wolff as being much bigger than her and as being the disciplinarian of the house. AB testified that Wolff imposed strict rules, and the children would get in trouble if they did not ask for permission before using the bathroom, eating or drinking, or going outside. Wolff would discipline the children by paddling them. AB stated that she was afraid of Wolff because of his size and because of his use of corporal punishment. AB was afraid to tell her mother again about the abuse because she thought it would "crush her" and because AB was scared of what Wolff would do.

{¶12} At some point before the 2001 accusation, AB witnessed her half-sister, SA, and Wolff in bed, and saw the covers moving. AB did not have any contact with SA between 2001 and November of 2006, as SA's aunt continued to have custody of her and no longer permitted SA to go to Wolff's residence.

{¶13} When AB renewed her allegations against Wolff in 2006, she at first told close friends, then the officer at the school, then Pico. Shortly before AB made the accusation, she swabbed her mouth after she had performed oral sex on Wolff. AB saved the swab in a plastic bag and later gave it to a security guard at her school. AB testified that she told Pico all of the details related in the foregoing testimony.

{¶14} AB stated that, as she grew up, she started rebelling against Wolff's rules, and was angry with him about not being allowed to do certain things or wear certain clothes. AB denied that she had fabricated the 2006 accusation as a reaction to her anger with Wolff over other issues.

{¶15} The State's second witness, SA, testified that she lives with her Aunt, Summerville, and that she stayed with her mother and Wolff during weekends and summers prior to 2001. When SA was very young, she lived with her biological father. Subsequent to an unspecified event, SA began to live with her aunt, who became her guardian. SA stated that she took special education classes because she was learning disabled, and that Wolff knew that she was learning disabled.

{¶16} SA stated that she was raped by Wolff, and that the abuse was usually precipitated by her giving Wolff backrubs or stomach rubs. SA did not remember how old

she was or the dates of the abuse. SA stated that she verbally resisted. SA was afraid of Wolff because he was bigger and stronger than her. Wolff paddled SA for breaking rules of the house, such as needing to ask permission to get food or drinks. SA testified that she talked with AB about Wolff's abuse, and they decided to tell their mother, then Summerville.

{¶17} SA remembered going to the hospital after her allegations, and remembered talking to people, but said she did not remember who she talked to. SA later stated that she did remember describing Wolff's abuse in 2001 one time to a woman from Children's Services. She remembered that she was fourteen at the time she went to the hospital, and that the abuse had started approximately one year prior to that. During cross examination, counsel asked if SA had been to doctors before for any reason when she was nine and ten years old. Counsel was stopped from questioning, and after a sidebar conversation that was not recorded, objection to Wolff's questioning was sustained.

{¶18} The State's third witness, Karen Pico, testified that she was a crisis counselor and interventionist at AB's school. AB asked to speak with her at school on April 4, 2006, and told Pico that she had been raped by her stepfather, and that the abuse had gone on for seven years. Pico testified that AB described various sexual activities with Wolff. AB gave Pico the plastic bag containing the oral swab, which Pico gave to the Campbell Police. Pico testified that AB made a report to Officer Rusnak, and that her story remained consistent.

{¶19} The State's fourth witness, Summerville, testified that she is SA's paternal aunt, and that SA has lived with her since the age of nine. SA's biological father is in prison, and Summerville has had custody of SA since 1997. In 1997, SA had just been diagnosed as having a learning disability, and they did not think anything was "wrong" with her prior to that. Summerville took SA and AB to the hospital subsequent to rape allegations.

{¶20} After November 7, 2001, SA no longer visited her mother or Wolff. When SA disclosed the abuse to Summerville in 2001, Summerville first called the mother, who said that she did not believe the girls. Summerville said that she was going to take SA to

the hospital, and that the mother should take AB to the hospital as well, or else Summerville would call the police. At the hospital, SA directly told the personnel what had happened, without Summerville's assistance. Summerville testified that SA sometimes has trouble distinguishing when things happen, has lied on occasion in the past, and has accused people of doing things that were not true. Summerville testified that SA made up such things when she was younger, but does not do so currently. Summerville testified that, other than the above allegations, SA complained to Summerville about being paddled at Wolff's house.

{¶21} The State's fifth witness, Officer John Rusnak, testified that he responded to a call regarding AB at her school on April 4, 2006. AB told Rusnak that she had been forced to perform oral sex on her stepfather and that she had taken a swab of her mouth. Rusnak took a written statement from AB, put the envelope with the swab into a plastic evidence bag, and stowed it in an evidence locker. Rusnak did not remember if he personally took the swab from their locker to the crime lab, or if Sergeant Nicolau did. After Rusnak's initial contact and taking of AB's statement, he handed the case over to CSB and had no further involvement.

{¶22} The State's sixth witness, Kim Woods, testified that she was the Children's Services caseworker who interviewed AB in 2006. She initially interviewed AB at school on April 4, 2006, in the presence of Pico and Rusnak. At that time, AB stated that she had been sexually abused by her stepfather over the course of seven years. While still at the school, AB became upset and was crying "because she thought her stepdad either knew that she was disclosing or that he was coming to school to get her." Woods conducted a forensic interview with AB later that day at the Tri-County CAC, in the presence of the nurse practitioner, Gorsuch. Although AB was agitated at school, AB did not appear to be upset while at the CAC. At the forensic interview, AB described the sexual conduct by Wolff. Woods spoke with AB's mother at her house, who said she did not believe the accusation was true. Woods stated that she communicated back and forth with the police department and the CAC, and was a liaison between the two. During the forensic interview, AB stated that she had previously made allegations but had

recanted them.

{¶23} At a bench discussion before the jury was brought in for the second day of the State's case in chief, Wolff protested the prevention of cross examination of SA regarding previous false allegations of abuse, and previous acts of abuse. Wolff claimed that, had he been permitted to ask his intended questions, he would have asked "had she been previously molested by someone else and had she blamed others for molestations." Wolff stated that he would have asked Summerville about SA's false accusations against Clemente Alicia, who was acquitted of rape, about Mark Belchik, who died before prosecution could happen, and against SA's grandparents. The State argued that questions regarding previous acts of abuse should have been brought up in a Rape Shield Statute hearing three days before trial. The State also argued that Wolff would need to prove that there had been no sexual activity for the false allegations, and that there was medical evidence of sexual activity in the Clemente Alicia case. Wolff argued that the Rape Shield Statute was undermining his right to due process. The trial court found Wolff's argument unpersuasive.

{¶24} The State continued its case in chief with the testimony of its seventh witness, Janet Gorsuch, the nurse practitioner who performed medical examinations of SA and AB in 2001 and of AB in 2006 at the CAC.

{¶25} In 2001, Gorsuch took a medical history of SA (then age 14) and observed the forensic interview conducted by Haddle. During the interview, SA described Wolff's sexual activities with her. SA stated that, on one occasion, his penis made contact with her anus and she experienced pain in that area the following day. Gorsuch then performed a physical examination, and found some scarring around SA's anus. Gorsuch noted a flattening of the folds around the anus, indicating over-dilation. Gorsuch testified that, based on SA's interview statements along with physical findings, her findings were consistent with sexual abuse. Gorsuch also explained that SA's anal injuries were "nonspecific indicators," meaning they could be caused by anything that might overdilate the anus.

{¶26} In 2001, Gorsuch took a medical history of AB (then age 9), and observed

the forensic interview conducted by Haddle. Gorsuch testified as to AB's interview statements, where AB described various sexual contacts in great detail. Wolff did not object for hearsay or any other reason during this portion of testimony. Gorsuch was unable to perform a complete physical examination of AB due to labial adhesions, which indicated chronic irritation. Gorsuch explained that such chronic irritation was a "nonspecific indicator," meaning it could be caused by a number of things, not necessarily sexual abuse. After treating the labial adhesion, Gorsuch later completed an examination of AB, finding nothing abnormal.

{¶27} On April 4, 2006, Gorsuch went through the same procedure with AB (then age 14), again taking a medical history and observing the forensic interview conducted by Woods. In AB's interview, she described actions similar to those described in 2001. AB additionally described an event where Wolff vaginally penetrated her, causing bleeding for two days. Gorsuch then performed a physical examination, and found redness of the labia minora, a tear in AB's hymen, scarring in AB's posterior fourchette, and a healing anal fissure. Gorsuch testified that the hymenal tear and posterior fourchette scar indicated penetrating trauma. Gorsuch stated that the posterior fourchette scar was well healed, and that the anal injury was still healing, but could not estimate the age of the scars beyond recent and not-recent. Gorsuch's conclusion was that "her examination is consistent with sexual abuse based on a physical examination of clear evidence of blunt force trauma and her history." Gorsuch also stated that the physical symptoms AB exhibited could be considered as indicators of penetration trauma as a result of consensual sex.

{¶28} For its eighth witness, the State played the deposition tape of Becky Haddle, who testified that she was the Children's Services caseworker who interviewed both AB and SA on November 7, 2001. Haddle was called after-hours by the hospital to interview the girls regarding allegations. Haddle called the police, and the police came to the hospital after Haddle had interviewed the girls. Haddle stated that Summerville was in the room during the forensic interview. During the interview, SA stated that "her stepfather had sexually abused her, had touched her in her private parts." SA reported a variety of

sexual conduct that Wolff had with her and described the appearance of his ejaculate. SA reported to Haddle that she did not know when the abuse started, and estimated one year. SA stated that the abuse would occur while her mom was at work, and that no one witnessed the abuse. Haddle observed that SA was able to tell Haddle what happened in a clear way, and was able to understand Haddle's questions and answers appropriately.

{¶29} Haddle interviewed AB alone at first, though AB's mother came into the room and would not leave for a portion of the interview. During the interview, AB reported that Wolff sexually abused her while her mother was at work, with no witnesses. AB described the sexual activities by Wolff, the appearance of his genitals and ejaculate, and the pain accompanying the penetration. AB stated that the abuse began one year prior, when she was eight years old.

{¶30} On November 13, 2001, Haddle noted that the risk against the children was minimized because Wolff was confirmed to be out of the mother's house, and because the mother had signed a safety plan regarding the girls. Subsequent to the hospital interviews, Haddle scheduled interviews for both girls to occur at the CAC on November 20, 2001. Haddle scheduled the appointment because she "felt that the children needed to be examined for any diseases or if they had any signs of sexual abuse." Haddle testified that the girls' statements during the video-taped interviews were consistent with the statements that they had made to Haddle at the hospital on November 7, 2001. Haddle noted that the mother did not seem to believe the girls. The mother stated that SA "has lied about [Wolff] sexually abusing her in the past, and she told a counselor that he had sex with her on top of a washing machine. And [SA] lies a lot, too."

{¶31} Subsequent to the interview, Haddle gave information to the police as requested. Haddle stated that she had wanted to transfer the case for ongoing services and monitoring, but her supervisor had her close the case because the risk had been minimized by Wolff being out of the house and the mother signing the safety plan. Haddle closed one case on January 3, 2002, and had no further contact. Haddle closed SA's case in 2001 because SA was living with her aunt, with no contact with Wolff, thus completely removed from risk. Haddle stated that her role was more to provide services

to the children, but was also to investigate the situation in order to protect them.

{¶32} At the close of the State's case, Wolff moved for acquittal for charges based on the dates not being proven for some alleged offenses. He also alleged lack of proof of: force, age of the victims; substantial impairment of SA; and, sexual contact versus conduct. The State dropped two counts of rape by force, one count of rape with substantially impaired victim, and one count of gross sexual imposition (Counts 24, 25, 28, and 31) involving SA because she had been removed from Wolff's home prior to the dates that these four offenses allegedly happened. The trial court otherwise denied Wolff's motion for acquittal.

{¶33} For Wolff's case in chief, the following witnesses testified: Vivian Wolff, mother of SA and AB and wife of appellant; Dawna Wolff, appellant's sister; Robert Garrett, family friend of appellant; John Perdue, a detective who submitted the 2001 rape kits to BCI for analysis; Anthony Marzullo, an officer who transported the 2001 rape kits to BCI in 2006; Joshua Kelly, a police officer who responded to the call on November 7, 2001; Joseph Moran, a police officer who picked up the children at Wolff's household on November 7, 2001; Ismael Carballo, a police sergeant who responded to the November 7, 2001 call; Russell Edelheit, a forensic scientist who examined the 2001 rape kit in 2006; Marisa Litch, a Children's Services caseworker who was assigned to the family in 2006; Chad Britton, a forensic scientist who examined AB's mouth swab on May 1, 2006; Gus Nicolau, a police investigator who transported AB's mouth swab on April 18, 2006; Milton Eskew, a police officer who took a written statement by Wolff on November 14, 2001; Rudy Klein, a family friend of appellant; Chelsea Klein, daughter of Rudy Klein and family friend of appellant; Melissa Garrett, family friend of appellant; and John Wolff.

{¶34} Vivian testified that her daughters made accusations against Wolff to her in 2001. When she confronted Wolff about the accusations, he denied them, and she believed him. She discussed the allegations with Wolff and the girls, but did not call Children's Services or anyone else. A day or two later, she took AB to the hospital along with SA and Summerville at Summerville's request. Vivian told the police that AB and SA have a tendency to lie, but did not remember what else she told the police.

{¶35} Vivian testified that, prior to 2001, SA stayed with her every other weekend, and more often during the summers. Vivian testified that Wolff did not work because she and Wolff wanted him to stay at home to take care of the children. Vivian testified that she also stayed at home for approximately one year during 2003-2004 while she was recovering from a spinal and nerve injury.

{¶36} After the 2001 accusations, Wolff lived with Vivian for a month, then moved out. They were closing on a house at that time. Around the beginning of 2002, Vivian received a letter from Children's Services, AB recanted her accusation, and Wolff moved back in with them. AB did not tell Vivian why she had originally made the accusation, but "just said that she lied and she wanted us to be a family." Vivian did not report AB's recantation to CSB or the police.

{¶37} AB began to argue frequently with Vivian and Wolff, starting when AB was 12 or 13 years old, about things such as clothing and social activities. Vivian testified that she did not know about AB's 2006 accusation until Children's Services came to her house to gather AB's belongings. She had difficulty believing AB's 2006 accusation.

{¶38} Robert Garrett testified that he was a long time family friend of Wolff, and testified as to his general knowledge about the timing of the accusations and AB recanting her original accusation. Robert housed AB for a period after her 2006 accusations, but AB was not allowed to stay with them after she broke the rules by having boys at the house while adults were not present. Robert said that AB told him that she had "made up" the 2001 accusations, but did not say why.

{¶39} Officer Joshua Kelly testified that he was called to the hospital on November 7, 2001 regarding possible molestation of two children. The mother stated that the girls had made the allegation on November 4, 2001, and said that the conduct had been happening for approximately one year. Kelly questioned SA with her mother in the room, SA reported that Wolff's actions included fellatio, ejaculation, genital to anal contact, and vaginal penetration, and occurred when her mother was at work or otherwise away from the house. Kelly questioned AB alone, and AB reported that Wolff would wake her up early in the morning and have her rub his back and sides, described genital to anal and

vaginal contact, fellatio, and making her touch his penis, while her mother was at work or otherwise away. Kelly's supervisor made calls to children's services, and Haddle from CSB came to the hospital.

{¶40} Defendant Wolff took the stand to testify on his own behalf. The couple agreed that Wolff would stay at home to take care of AB and her brother while Vivian worked. Wolff stated that he had denied the 2001 allegations to Vivian and the police, but moved out of the house so that the children could continue to live with Vivian.

{¶41} Wolff said that it was common in their family for the children to give him back rubs, to brush his hair, and also to give Vivian back rubs. The children would sometimes come into his bed, give him backrubs, watch TV, and/or nap. Wolff stated that he had the kids rub his back before the 2001 allegations, and that he had the kids rub his back, stomach and sides after the allegations, but not right away.

{¶42} Wolff and Vivian had been trying to get a house, and were approved for a home loan shortly after the allegations were made. Wolff stated that he and Vivian continued to go through with the house purchase because Wolff wanted the family to live there even if he would not end up being able to.

{¶43} The first allegations were made Sunday, November the 4th, and he spent the following day with SA without incident. Wolff complied with all police requests, and was never contacted by Children's Services. Wolff received a letter from CSB stating that the case was closed in January 2002. On cross examination, Wolff noted that the letter said that there were "circumstantial medical, or other isolated indicators of child abuse or neglect, lacking confirmation." Vivian called Wolff soon after the receipt of the CSB letter, and told him that AB had recanted her story. They all moved into the new house together, and AB apologized to him for lying.

{¶44} Wolff testified that he did paddle the children for discipline in the house, but not SA, since he did not technically have custody of her. Wolff testified that he had strict rules in the house because of certain incidents that had happened in the past, for the sake of safety and knowing where the kids were at all times, and to keep them from taking food to their bedrooms. Wolff stated that he did have a bad temper, and at one

point punched a hole in the wall after arguing with AB. AB became more rebellious as she got older, and they argued frequently.

{¶45} On August 21, 2007 the jury returned a verdict of not guilty on two counts of rape which had allegedly occurred prior to November 2000, the time period when the victims testified that the abuse began. The jury returned a guilty verdict on all remaining counts.

{¶46} On August 29, 2007, Wolff filed a motion for acquittal, arguing that the State's witnesses provided self-serving if not fabricated testimony about the victims, that the convictions were based on insufficient evidence and were against the manifest weight of the evidence. On the same day, Wolff also filed a motion for new trial, arguing that the court erroneously prevented Wolff from presenting evidence both of SA's prior sexual abuse and SA's prior false allegations of sexual abuse. Wolff also argued that the court denied his right to confrontation by allowing in the testimonial hearsay statements through Haddle, Woods, Gorsuch, and Kelly, and that the statements at least should have been excluded pursuant to Evid.R. 403(A) – explaining that such bolstering of the victims' credibility is the exact thing he wanted to prevent in his motion in limine – accusing the court of allowing "verification by repetition." Finally, Wolff again argued in the motion for new trial that the decision was based on insufficient evidence and was against the manifest weight of the evidence.

{¶47} On the same day, the court denied both of Wolff's motions, finding that the decision was based on sufficient evidence and was not against the manifest weight of the evidence. The trial court did not comment on Wolff's claim of irregularities in the proceedings because "Defendant's Brief does not provide any argument to this assertion." The court also stated that Wolff did not attempt to admit any prior sexual activity evidence for any of the reasons listed in R.C. 2907.02(D), thus there was no error of law in prohibiting that evidence.

{¶48} On August 29, 2007, the trial court sentenced Wolff to nine consecutive life sentences, five consecutive ten-year sentences, five consecutive five-year sentences, two consecutive sets of concurrent eighteen-month sentences and merged the remaining

convictions.

Insufficient Evidence – Force Element

{¶49} As an initial matter, we have noted that Wolff failed to make any citations to the record at any point in his brief as required by App.R. 16(A). We have used our discretion to ascertain the areas of the record that are pertinent to this appeal, pursuant to App.R. 12.

{¶50} The first and fifth assignments of error both raise claims of insufficient evidence, and will be discussed together out of order.

{¶51} In his first of six assignments of error, Wolff asserts:

{¶52} "The Trial Court erred in denying the motion for acquittal when there was no evidence presented as to force."

{¶53} Wolff argues that the State did not prove the element of force for any of the charged offenses, and thus that the convictions on Counts 2-13, 19-20, 22-23, and 29-30 were based on insufficient evidence.

{¶54} Sufficiency of the evidence is a legal standard that is used to determine whether there is adequate evidence to allow the case to go to the jury or "whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-0052, 678 N.E.2d 541. A conviction will only be reversed under this standard if, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.; *State v. Goff*, 82 Ohio St.3d 123, 138, 1998-Ohio-369, 694 N.E.2d 916.

{¶55} For the various offenses charged against Wolff, the force element is as follows: "Force means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1). In the context of a parent-child relationship, force of a subtle psychological or emotional nature is sufficient for a finding of force. *State v. Schaim*, 65 Ohio St.3d 51, 55, 1992-Ohio-31, 600 N.E.2d 661, *State v. Eskridge* (1988), 38 Ohio St.3d 56, 59, 526 N.E.2d 304. The Ohio Supreme

Court explained in *Schaim* that the lower threshold for force in a parent-child relationship is based on the amount of control that parents have over their children and the amount of dependence the children have on their parents. *Schaim* at 55. "The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose." *Eskridge* at 59.

{¶56} Wolff was the step-father, primary caretaker, and primary household disciplinarian of the victims, according to the testimony of witnesses for both the prosecution and the defense. Both victims were minor dependent children when the offenses occurred. Given the relationship between the parties, the lower threshold standard of force applies to all applicable offenses charged against Wolff.

{¶57} In his own brief, Wolff stated that he was in a position of authority over the victims, that he was much bigger than the victims, that he was the disciplinarian of the victims' household, that he regularly exercised corporal punishment on the victims, and that the victims were afraid of him. Wolff indicates that these factors do not support a finding of force, because he never specifically paddled or threatened to paddle the victims for refusing to comply with his sexual conduct. This argument is not well taken, as actual violent force or explicit threats of force directly related to sexual demands are not a necessary part of the force element in the context of a relationship between a parent and young children.

{¶58} The State provided sufficient evidence in this context to prove the element of force beyond a reasonable doubt for Counts 2-13, 19-20, 22-23, and 29-30. Wolff's first assignment of error is meritless.

Insufficient Evidence - Substantially Impaired Victim Element

{¶59} In his fifth assignment of error, Wolff asserts:

{¶60} "The trial court erred in allowing any conviction based upon the victim being unable to appraise the nature of the conduct to stand."

{¶61} Wolff argues that the State did not present evidence to prove substantial impairment of SA, and thus that the convictions on Counts 26 and 27 were based on

insufficient evidence. Wolff is correct: the jury verdicts for Counts 26 and 27 were not based on legally sufficient evidence. However, the trial court's merger of those two counts rendered any error to be harmless beyond a reasonable doubt.

{¶62} A violation of R.C. 2907.02(A)(1)(c) involves engaging in sexual conduct with a non-spouse, when "[t]he other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age." In the context of this case, the State needed to prove that SA had a mental condition, that the condition substantially impaired her ability to consent, and that Wolff was aware of the mental condition and resulting substantial impairment.

{¶63} Because the term "substantially impaired" is not defined in the Ohio Revised Code, the term "must be given the meaning generally understood in common usage." *State v. Zeh* (1987), 31 Ohio St.3d 99, 103, 31 OBR 263, 509 N.E.2d 414. In order to establish substantial impairment, the State must demonstrate "a present reduction, diminution or decrease in the victim's ability, either to appraise the nature of his conduct or to control his conduct. This is distinguishable from a general deficit in ability to cope, which condition might be inferred from or evidenced by a general intelligence or I.Q. report." *Zeh* at 104.

{¶64} According to the Ohio Administrative Code, a learning disability is differentiated from cognitive or other disabilities such as motor control issues or mental retardation. Ohio Adm. Code 3301-51-01 (B)(10)(d)(x). It can include issues from brain injury to dyslexia. Id. It does not seem reasonable to infer that a person would be unable to appraise the nature of her conduct or to control her conduct solely from the fact that a person is learning disabled.

{¶65} In the context of general mental functioning, an example of a mental condition causing substantial impairment was described recently by the Eighth District. The State demonstrated that the victim had various developmental disorders, but most important to a finding of substantial impairment was that, as a result of his mental

condition, the victim was unable to "accurately assess appropriate social relationships and appropriate physical contact." *State v. Kleyman*, 8th Dist. No. 90817, 2008-Ohio-6656, at ¶32. In the case at hand, SA testified that she was learning disabled. The State did not provide any testimonial or other evidence as to how SA's learning disability affected her, beyond the fact that she "learns differently" from everyone else and had to take special education classes in high school.

{¶66} This is extremely similar to the example discussed in *Zeh*, supra. Although the holding of *Zeh* was limited, the Supreme Court noted that expert testimony regarding a victim's performance on intelligence and social adaptive ability tests, by itself, proves little more than the victim's ability to function in an educational environment. *Zeh* at 104.

{¶67} The State argues that the trier of fact was able to observe SA's demeanor and level of functioning during her testimony at trial in order to determine that she was substantially impaired. It is true that the State may prove substantial impairment "by the testimony of persons who have had some interaction with the victim and by permitting the trier of fact to obtain its own assessment of the victim's ability to either appraise or control her conduct." *State v. Hillock,* 7th Dist. No. 02-538-CA, 2002-Ohio-6897, at ¶21. However, the argument proposed by the State is one of credibility. We cannot stretch the presumption of a general credibility finding into proof of a substantive fact. The State still had the burden of providing facts to prove to the jury that SA was substantially impaired. Proof of a learning disability in and of itself does not satisfy the State's burden of production for both the mental condition *and* the substantial impairment sub-elements within R.C. 2907.02(A)(1)(c).

{¶68} Viewed in a light most favorable to the prosecution, SA's testimony that she was learning disabled satisfied the "mental condition" component of R.C. 2907.02(A)(1)(c). However the State did not present any information regarding the effect of SA's mental condition on her ability to consent. The State therefore did not provide sufficient evidence for the substantial impairment element.

{¶69} Because the State did not prove substantial impairment, the convictions on Counts 26 and 27 were based on legally insufficient evidence. The State contended at

oral argument that the error was rendered harmless because Counts 26 and 27 were charged in the alternative to Counts 22 and 23, and the trial court merged the convictions. This is partially correct. In its closing rebuttal, the State mentioned that the jury could find Wollf guilty of 22 and 23, and in the alternative, 26 and 27, but also asked that the jury find Wolff guilty of all four counts. The counts were not charged in the alternative and the trial court did not provide any jury instructions indicating that the verdicts were to be in the alternative, and instead instructed the jury that they may find Wolff guilty of all aforementioned counts.

{¶70} However, the trial court subsequently merged Counts 26 and 27 into Counts 22 and 23, which were based on legally sufficient evidence. When a trial court dispatches with a count through merger, any error in the jury's verdict on the merged count is rendered harmless beyond a reasonable doubt. *State v. Powell* (1990), 49 Ohio St.3d 255, 263, 552 N.E.2d 191 (superseded by constitutional amendment on other grounds); see also *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, at ¶132. Therefore, the erroneous verdicts against Wolff on Counts 26 and 27 were rendered harmless beyond a reasonable doubt. Wolff's fifth assignment of error is thus meritless.

Inadmissible Hearsay

{¶71} In his second assignment of error, Wolff asserts:

{¶72} "The Trial Court erred in allowing hearsay statements to be admitted from numerous sources based upon the fact that the declarants testified and were subject to cross-examination."

{¶73} Wolff argues that the court erroneously allowed hearsay statements of the victims at trial; because the victims were not accused of recent fabrication, rehabilitation through prior consistent statements was thus uncalled for. The State argues that Wolff's second assignment of error should be disregarded because Wolff failed to include any citations to the record, failed to indicate which statements constituted the objectionable hearsay now argued, failed to indicate which hearsay statements were allowed in through the prior consistent statement exclusion, and failed to address any standard of review, as

required by App.R.12(A)(2). While we agree that Wolff has not presented a proper argument, we will exercise our discretion to review the proceedings as they apply to the specific claim that Wolff has raised in this assignment of error: erroneous use of the prior consistent statement exception to the rule against hearsay. The only discussion of the prior consistent statement exception occurred during the testimony of Haddle.

{¶74} Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). "The purpose of the hearsay rule is to keep untrustworthy evidence, particularly evidence that is not subject to cross-examination, away from the jury or trier of fact." *State v. Crable*, 7th Dist. No. 02 BA 24, 2003-Ohio-4884, at ¶7. "The trial court has broad discretion to determine whether a declaration should be admissible as a hearsay exception." *State v. Dever*, 64 Ohio St.3d 401, 410, 1992-Ohio-41, 596 N.E.2d 436. An appellate court will not reverse a trial court's decision to admit or exclude certain evidence, absent an abuse of discretion. *State v. Hand,* 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E. 2d 151, at ¶92. An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140.

{¶75} Pursuant to Evid. R. 801(D)(1)(b), a statement is not hearsay if "[t]he declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive." This rule only allows in hearsay statements which were made prior to the motivation to fabricate. *State v. Nichols* (1993) 85 Ohio App.3d 65, 71, 619 N.E.2d 80. "Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited." *Tome v. U.S*. (1995), 513 U.S. 150, 157, 115 S.Ct. 696, 701, 130 L.Ed.2d 574.

{¶76} The only instance in the record when the prior consistent statement

exclusion was referenced was during the closed court review of the deposition of Haddle, the Children's Services caseworker who interviewed AB and SA in 2001. Upon Wolff's objection to hearsay statements of SA, the court stated "Would you agree that 801(D)(1)(b) provides that statements are not hearsay if declarant testifies at trial subject to cross examination concerning statements? * * * You cross examined the witness. This is coming in after the witness was cross examined. The objection is overruled." Wolff also objected to Haddle's hearsay statements of AB, which the court stated that it overruled for the same reason.

{¶77} Hearsay is not allowed in through the prior consistent statement exception just because the witness has been cross-examined. The statement is only allowed if the witness has been accused of recent fabrication, and the statement quoted was made prior to the motivation to make such fabrication. The requirement that the statement occur prior to the motive "is based on the notion that an untruthful story does not become more truthful because it is repeated." *State v. Kimbrough* (July 9, 1999), 11th Dist. No. 97-L-274, at *9. Thus, hearsay statements by AB and SA are not automatically admissible pursuant to 801(D)(1)(b) merely due to their prior testimony and cross-examination.

{¶78} Although the trial court gave an overbroad statement of the law, the exception nonetheless applied to hearsay statements of AB. During opening statements and cross-examination of AB, defense counsel implied that AB's 2006 accusations were false and motivated by teenage rebellion and anger about the limitations Wolff was placing on her. Haddle's testimony described AB's 2001 statements, which were made prior to AB's teenage years and prior to such alleged tension. The statements were thus made prior to the alleged motivation to fabricate, and Haddle's testimony regarding AB's 2001 statements was admissible pursuant to 801(D)(1)(b).

{¶79} The same accusation and motivation is not present in SA's case. SA's only statements were made during 2001, and defense alleged that those 2001 statements were fabricated from the beginning. Thus Evid.R. 801(D)(1)(b) does not apply. However, given the context of the 2001 interview, SA's hearsay statements were admissible

pursuant to the medical exception under Evid.R. 803(4).

{¶80} Out of court statements are not excluded as hearsay if they are "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Evid.R. 803(4). The medical diagnosis or treatment hearsay exception can apply to psychological issues, and may be applied to counselors or social workers. *State v. Chappell* (1994) 97 Ohio App.3d 515, 646 N.E.2d 1191.

{¶81} In order for such hearsay to be admissible, the medical context must not be for the purpose of gathering information against the accused. *State v. Chappell* (1994), 97 Ohio App.3d 515, 534, 646 N.E.2d 1191; *State v. Vaughn* (1995), 106 Ohio App.3d 775, 780, 667 N.E.2d 82. When a social worker or therapist's function is "a subterfuge to gather information against the accused," a child's statement to them does not fall under the 803(4) hearsay exception. *State v. Woods*, 8th Dist. No. 82789, 2004-Ohio-2700, at ¶11. In cases where a social worker's function is only to substantiate or unsubstantiate a child's claims, or when the interview is conducted at the direct request of, and especially in the presence of law enforcement, courts of this state have generally held that the 803(4) hearsay exception does not apply. *Woods*; *Chappell*.

{¶82} The reliability of a hearsay statement gathered for the purpose of medical diagnosis or treatment is not due to the use of that statement by medical or other personnel, but rather through the mental state of the declarant in the context of the interview. *State v. Dever* (1992), 64 Ohio St.3d 401, 410, 1992-Ohio-41, 596 N.E.2d 436. In determining the admissibility of the child's declaration under Evid.R. 803(4), a trial court must consider the circumstances surrounding it. *State v. Dever* (1992), 64 Ohio St.3d 401, 410, 1992-Ohio-41, 596 N.E.2d 436. The several factors to consider include: whether the child was questioned in a leading or suggestive manner, whether the child had a motive to fabricate, and whether the child understood the need to tell the truth. *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, at ¶49.

{¶83} According to witness testimony, Haddle's interview with AB and SA occurred

on November 7, 2001, the same day that the girls made the allegations against Wolff. Haddle interviewed the girls at the hospital, shortly after Summerville had taken them there. The interview occurred prior to the arrival and involvement of the police, and prior to the formal interview process of the CAC. Although it was Haddle who called the police and who then referred the girls to the CAC for the taped interview and medical examination, her stated role at the time of the interview was to assess the safety of the children and provide any necessary services. Haddle stated that she scheduled the CAC appointment because she felt that the children needed to be examined for any diseases or physical signs of sexual abuse. There was no evidence to indicate that SA had a motivation to fabricate this particular information, though SA's mother stated at the time of the interview that SA had a tendency to lie. The testimony of Haddle and SA did not indicate that Haddle asked leading or suggestive questions. Given these factors, it would not be an abuse of discretion for a trial court to admit the hearsay testimony under the medical diagnosis exception, Evid.R. 803(4).

{¶84} The trial court did not abuse its discretion by admitting the hearsay statements of AB under the prior consistent statement exception of Evid. R. 801(D)(1)(b). Although this exception did not apply to SA's hearsay statements, her statements were alternatively admissible pursuant to Evid.R. 803(4). Because Wolff's assignment of error only referred to the hearsay exception based on the prior consistent statement rule, and because the only discussion of that exception occurred during Haddle's testimony, we end the analysis at this point, lest the court start presenting arguments for the appellant. See, e.g., *State v. Buehner*, 8th Dist. No. 81722, 2003-Ohio-3348, at ¶18. See also, App.R. 12(A)(2).

{¶85} Thus the trial court did not commit an abuse of discretion by admitting Haddle's hearsay statements of AB under the prior consistent statement exception. The trial court did not abuse its discretion by admitting Haddle's hearsay statements of SA due to their alternative admissibility pursuant to the medical hearsay exception. Accordingly, Wolff's second assignment of error is meritless.

Prevention of Cross-Examination on Prior False Accusation

{¶86} In his third assignment of error, Wolff asserts:

{¶87} "The Trial Court erred in preventing the cross examination of the alleged victims regarding prior false allegations of sexual abuse."

{¶88} Wolff argues that the trial court should have allowed Wolff to make a threshold question to SA as to whether she had made prior false accusations of rape. Wolff also asserts that the trial court should have required the State to provide evidence of sexual activity in SA's prior accusation in order to find that the accusation was barred by the Rape Shield Statute. The State counters that Wolff waived the argument on appeal, as he failed to object to the issue on the record.

{¶89} The Ohio Rape Shield Statute dictates that "[e]vidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value." R.C. 2907.02(D). It is within the sound discretion of a trial court to determine the relevancy of evidence in a rape prosecution and to apply R.C. 2907.02(D) to best meet the purpose behind the statute. *State v. Leslie* (1984), 14 Ohio App.3d 343, 346, 471 N.E.2d 503.

{¶90} A defendant has a statutory right to an in camera hearing on the subject of the Rape Shield Statute, if he has met certain procedural requirements: "Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial." R.C. 2907.02(E). Thus, in order to obtain review of evidence involving a victim's prior sexual activity, the defendant must normally submit a request to the trial court at least three days before trial.

{¶91} A completely false accusation of rape which does not involve any sexual

activity is not covered by the Rape Shield Statute. *State v. Boggs* (1992), 63 Ohio St.3d 418, 421, 588 N.E.2d 813. Instead, questioning regarding a previous false accusation of rape would be allowed purely for issues of credibility, pursuant to Evid.R. 607, 611(B) and limited by Evid.R. 608(B). Id. The trial court has the discretion to allow cross-examination about a victim's specific instances of conduct if it is "clearly probative of truthfulness or untruthfulness." Evid.R. 608(B). Thus the reviewing court will not disturb the trial court's decision absent an abuse of discretion. *State v. Hand,* 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E. 2d 151, at ¶92.

{¶92} The process for allowing cross-examination regarding false accusations of sexual offenses is as follows: First, the defense must ask if the victim has made any prior false accusations of rape. *Boggs* at 421. If the victim answers "no," the defense may not introduce extrinsic evidence, and the court has the discretion to allow or disallow further questioning on the topic. Id. However, if the victim answers "yes," the court must hold an in camera hearing to determine if the prior accusation involved any sexual activity. Id.

{¶93} In the case at hand, Wolff argues that he intended to bring forth evidence of prior false accusations which did not involve any sexual activity, and thus did not require any formal request prior to trial. However, Wolff failed to pose the threshold question to SA of whether she had made any prior false accusations of rape. On the second day of the State's case in chief, and after Wolff already cross-examined SA, Wolff complained that had been unable to ask SA about alleged false accusations.

{¶94} Wolff did not make any explicit request on the record for an in-camera hearing on the matter. In response to Wolff's untimely objection, the trial court heard arguments by both parties in a side bar recorded out of the presence of the jury. The trial court concluded that Wolff was barred from asking about any prior accusations.

{¶95} The record does not demonstrate that Wolff properly raised the issue of asking the "threshold question" to the trial court. The subject was impliedly discussed in the midst of SA's cross-examination, during a sidebar conversation which was not transcribed. In the event that discussions with the trial court are not transcribed for the record, the onus is on the appellant to provide a statement or other alternative to

establish a complete record for the reviewing court. App.R.9. "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Crane v. Perry City Bd. of Elections*, 107 Ohio St.3d 287, 2005-Ohio-6509, 839 N.E.2d 14, at ¶37, quoting *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 15 O.O.3d 218, 400 N.E.2d 384. Wolff's untimely objection did not preserve the issue for appeal.

{¶96} Wolff did not properly raise the threshold question regarding prior false rape allegations at trial and thus waived the issue for appeal. His third assignment of error is meritless.

Evidence of Prior Sexual Abuse

{¶97} In his fourth assignment of error, Wolff asserts:

{¶98} "The Trial Court erred in preventing evidence of prior sexual abuse to be admitted based solely upon Ohio's Rape Shield Statute, without any analysis of whether the probative value of the evidence outweighed the State's interests advanced by protecting victims."

{¶99} Wolff argues that the court erred in preventing Wolff from presenting evidence that SA had been previously abused. Wolff argues that the evidence would have shown both an alternative source of SA's knowledge about sexual activity, and an alternative source for the injuries sustained by SA.

{¶100} In order for a party to "break through" the Rape Shield Statute and introduce evidence regarding another's prior sexual activities, R.C. 2907.02(E) mandates that "the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial."

{¶101} If a party does not request an in-camera hearing pursuant to R.C. 2907.02(E), that party waives the statutory right. *State v. Acre* (1983), 6 Ohio St.3d 140, 144, 6 OBR 197, 451 N.E.2d 802. In the present case, Wolff failed to make a timely

request for an in-camera hearing regarding his proposed evidence of SA's prior sexual activities. There are no motions on record requesting the introduction of evidence of prior sexual activity, and pre-trial hearings do not reflect that such a request was made.

{¶102} Moreover, Wolff did not request an in-camera hearing for this matter during trial, and did not argue to the court that he wanted to present the alternative sexual knowledge source argument. As Wolff had called witnesses to testify about SA's prior sexual activities at trial, there was no surprise or other circumstance amounting to "good cause" to allow for a last-minute in-camera hearing during trial.

{¶103} Wolff failed to request a hearing pursuant to R.C. 2907.02(E), waiving the issue. The trial court did not commit error in failing to sua sponte hold such a hearing. Accordingly, Wolff's fourth assignment of error is meritless.

Denial of Motion to Separate Trials

{¶104} In his sixth assignment of error, Wolff asserts:

{¶105} "The trial of all counts of the indictment jointly deny the Defendant his constitutional rights to a fair trial."

{¶106} Wolff argues that he was denied his right to a fair trial by being tried jointly on all counts with both victims. While Wolff claims that he timely filed a motion for separation of trials, there is no record of such a motion. The failure to raise an argument to the trial court results in the waiver of that argument for purposes of appeal. *Stores Realty Co. v. City of Cleveland Bd. of Bldg. Standards and Bldg. Appeals* (1975), 41 Ohio St.2d 41, 43, 70 O.O.2d 123, 322 N.E.2d 629.

{¶107} A trial court is not obligated to sua sponte order the separation of trials for a defendant, and there is no error in the failure to do so. Accordingly, Wolff's sixth assignment of error is meritless.

Conclusion

{¶108} Wolff did not demonstrate that his convictions were based on insufficient evidence, or that he suffered prejudice as a result. The trial court did not commit plain error in admitting hearsay statements of the victims at trial. Wolff did not adequately raise the Rape Shield Statute evidentiary issues or the issue of joinder at the trial level, and

therefore has waived any error for appeal.

{¶109} Accordingly, the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.