[Cite as *State v. Menton*, 2009-Ohio-4640.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 07 MA 70
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
CHARLES MENTON,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 06CR531.
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Attorney Paul Gains Prosecuting Attorney Attorney Ralph Rivera Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Attorney John Laczko 4800 Market Street, Suite C Youngstown, Ohio 44512

JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: August 31, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Charles Menton appeals from his convictions entered in the Mahoning County Common Pleas Court. On appeal, he raises issues concerning admissibility of the victim's statements; the weight of the evidence; whether the indictment failed to charge certain mens rea elements; the exclusion of evidence that the victim had a prior felony drug conviction; ineffective assistance of counsel; merger; and, the lack of findings regarding the sexual predator label. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} On May 26, 2006, appellant was indicted on five counts of forcible rape in violation of R.C. 2907.02(A)(2). He was also charged with aggravated burglary in violation of R.C. 2911.11(A)(1) and kidnapping in violation of R.C. 2905.01(A)(4). The victim died prior to trial, for reasons unrelated to this offense. Trial began on January 29, 2007.

¶{3} Appellant filed a motion in limine seeking to exclude statements of the victim due to confrontation and hearsay issues. He amended this motion to refer specifically to the victim's statement to police at the scene and her statement to a sexual assault nurse hours after the offense. When renewed at trial, the court overruled appellant's objections to this presentation of the victim's statements.

¶{4} The state first presented the testimony of Felicia Baggett. She testified that she was related to the victim, whom she called by the title of aunt. (Tr. 223, 225). On December 31, 2005, Felicia visited the victim at her residence in Youngstown from 9:00 a.m. until 2:00 p.m. (Tr. 223-224). They made plans to cook for New Years Eve and watch the ball drop. (Tr. 254). Felicia testified that she was to return around 7:00 p.m., but she arrived late. (Tr. 225). When she knocked on the door, no one answered at first. After Felicia knocked again, the victim asked who was there. This confused Felicia because the victim had been expecting her and usually recognized her distinctive knock. (Tr. 225-226). Felicia responded and asked the victim to open the door. When she had to repeat herself, a male voice responded, "hold on a

minute." This further worried Felicia because there was no car in the drive and because the victim was gay. (Tr. 226).

¶{5} Finally, the victim opened the door, exited the house with socks but no shoes, grabbed Felicia's arm, and dragged her towards the car. She was crying and was hard to understand because she was talking very fast. Felicia had never seen the victim like this. (Tr. 227). She said someone kicked in her front door and kept repeating:

¶{6} "He just kept fucking me. He wouldn't leave. He wouldn't let me out till you came. We got to get out of here. We got to call the police." (Tr. 228) * * * He wouldn't get out of my house. He tried to fuck me in my ass." (Tr. 232).

¶{7} As they retreated, Felicia saw a man standing on the victim's front porch pulling up his pants. When Felicia started to confront the man, the man announced, "you can come up here if you want to cause I got something for you too." (Tr. 228-229). The victim was begging Felicia to get in the car and indicated the man had a weapon. (Tr. 229-230). The man reentered the house briefly and then exited towards the woods, leaving the front door wide open. (Tr. 230). The victim had no telephone and wished to drive to a phone; however, Felicia did not want to leave the victim's house unprotected and thought the neighbors across the street would call the police for her, which the victim doubted. (Tr.230-231). Thus, the victim drove down the street, and Felicia stayed to approach the neighbors and watch the house.

¶{8} Felicia testified that this all happened fairly quickly and said the police arrived within minutes. (Tr. 247). She believed she arrived at the victim's residence before 8:00 p.m. (Tr. 225). However, the 911 call came in at 9:45 p.m. (Tr. 375). Soon after the police arrived, the victim returned. Felicia entered the house with the officers and observed the broken door frame, misplaced objects and moved furniture. (Tr. 233-234, 246). She testified that the house did not look like this when she was there hours earlier. (Tr. 235). Based upon the victim's statement and the condition of the living room, including the location of the victim's underwear, Felicia concluded that the rape occurred on the living room floor. (Tr. 233, 246). Felicia also testified that after that day, the victim installed motion detectors inside and outside the house, swinging "booby traps" over the doors and trip wires. (Tr. 239-240).

¶{9} Officer Giovanni testified that right at the 10:00 p.m. start of shift, he responded to a 911 call about a general disturbance. (Tr. 264-265). He noted that Felicia was there when he arrived and the victim arrived momentarily. (Tr. 265). He described the victim as hysterical, crying, visibly shaken, and scared, with her clothes in disarray and scratches and other marks all over her face and hands. (Tr. 266). When the officer was asked what the victim said, the defense objected and an off-the-record discussion was held on the topic of confrontation. (Tr. 266-267, 330-337).

¶{10} The officer then testified that the victim disclosed that she had just been attacked by Charles Menton, whom the victim knew because her relative shared a child with him. She related that she had been entering her car, when appellant made demands and punched and choked her. (Tr. 267). She then agreed to drive him somewhere. After a brief drive, he exited the car at a stop sign. The victim went home, but within minutes appellant knocked at her door. (Tr. 268). When she refused to open the door, he kicked the door in and attacked her. She told the officer that appellant grabbed, hit, punched and choked her, flipped over tables, tore her clothes, and forced sex upon her over her objections. (Tr. 269-270). She related that he raped her for one and one-half hours straight during which he forced four separate vaginal penetrations and oral sex as well. (Tr. 269, 277).

¶{11} The officer then related his observations of the victim's injuries: a bite mark that broke through the skin on her right hand; scratches and redness on her arms, face and neck; bruising on her neck; and, ruptured blood vessels in her eyes. (Tr. 270). He also related his observations of the victim's two front rooms, which he said were in shambles: the wooden door frame was splintered off and lying on the floor inside the house; the love seat was turned over; cushions were everywhere; coffee tables and their contents were tipped over; and pictures were off the walls. (Tr. 271). Finally, he stated that the victim was still visibly shaken at the time the ambulance transported her, noting that the paramedic had to calm her down. (Tr. 275).

¶{12} The jury was then shown photographs of the inside of the victim's house by the crime lab officer, who attributed the broken door frame to a kick or push from the outside. (Tr. 283). Next, a sexual assault investigator testified that she

interviewed appellant in May 2006. He admitted that he was at the victim's house near midnight on New Year's Eve. (Tr. 311, 317). Appellant disclosed that he had ingested crack, marijuana and alcohol that day. He admitted that an altercation occurred during which he choked the victim. (Tr. 311). He also admitted that he engaged in vaginal intercourse with the victim that night. (Tr. 311). Appellant suggested to the jury in opening and closing that the state mischaracterized appellant's statement to the investigator and that the sex was consensual; however, he did not elicit testimony from this investigator showing that he informed her that the sex was consensual. (Tr. 220). Rather, the investigator was merely asked if appellant told her that the choking altercation and the sex were separate events. (Tr. 313).

¶{13} Appellant gave this investigator permission to have his DNA collected for testing. (Tr. 310-311). The victim's vaginal and rectal area swabs had tested positive for semen, and testing of the semen showed the presence of appellant's DNA. (Tr. 322, 497-499).

¶{14} The next witness was Officer Jankowski, who had arrived at the scene simultaneously with Officer Giovanni. The defense objected to this testimony urging that the state had already revealed the victim's statements through Officer Giovanni and that Officer Jankowski's testimony would improperly bolster that of Officer Giovanni. (Tr. 365). The state noted that this officer made his own observations, and the court overruled the objection. Officer Jankowski then reiterated the testimony of Officer Giovanni, minus any specifics on the sexual acts. (Tr. 374-374). He pointed out that the victim was upset, visibly shaken and so hysterical that they could barely decipher what she was saying. (Tr. 375).

¶{15} The state then called the sexual assault nurse examiner, who had been called to the hospital at 10:48 p.m. and who examined the victim around midnight. (Tr. 385). The defense objected to her testifying about the victim's statements. The defense alternatively requested that she only be permitted to reveal the victim's statements related to treatment and that she be prohibited from identifying appellant as the perpetrator. (Tr. 338-339). The court overruled these objections. The nurse testified that the victim informed her that appellant penetrated her vagina three times with his penis and one time with his finger and that she performed oral sex on

appellant one time. (Tr. 396). The victim told her that she had been physically restrained, hit with a fist many times, pushed face first into a pillow, fondled on her breasts and strangled with hands four times. (Tr. 397).

¶{16} The nurse then read a narrative statement relating that: appellant kicked in the door and attacked the victim; they fought for half an hour before he held her down to rape her; he punched her head, choked her three to four times, and hit her with an object; he said "don't make me kill you"; he disclosed that he had been waiting to have sex with her for years; after the first vaginal penetration was not going well, he made her perform oral sex and then vaginally penetrated her again; and, he then took a half-hour break while laying on top of her after which he vaginally penetrated her again. (Tr. 398-399).

¶{17} The nurse presented photographs of various injuries. She noted that the strangulation could have caused the broken blood vessels in the victim's eyes. (Tr. 397). Besides the various marks on the victim's body, she pointed out lacerations to the victim's cervix, her labia and her posterior fourchette (the band of tissue at the bottom of the vaginal opening), an injury seen in 70% of rape cases. (Tr. 393-394, 420).

¶{18} The state then rested its case. At this point, the defense asked that the state stipulate that the victim has a prior felony drug conviction. (Tr. 471). The state declined, and the court refused to admit this evidence. (Tr. 472). The defense then rested without presenting evidence.

¶{19} The jury found appellant guilty of one count of aggravated burglary, one count of kidnapping, and two counts of rape but not guilty of the three other counts of rape. A sentencing hearing was held on March 8, 2007. The court sentenced appellant to ten years on each count to run consecutively for a total of forty years and labeled him a sexual predator. This sentence was journalized in a March 12, 2007 entry. Appellant filed timely notice of appeal.

ASSIGNMENT OF ERROR NUMBER ONE

¶{20} Appellant sets forth six assignments of error, the first of which provides:

¶{21} "THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR BY OVERRULING DEFENDANT-APPELLANT'S MOTIONS IN LIMINE AND

MOTIONS TO EXCLUDE WITNESS TESTIMONY OF THE VICTIM BY OTHER WITNESSES IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHT TO CONFRONTATION OF WITNESSES PURSUANT TO THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF OHIO."

¶{22} Appellant's main contention here is that the following statements of the victim were presented in violation of the Confrontation Clause and/or constituted inadmissible hearsay: (1) the victim's statements to Felicia; (2) the victim's statements to the responding officers; and (3) the victim's statements to the sexual assault nurse.

¶{23} The Sixth Amendment's Confrontation Clause only applies to testimonial statements and does not apply to nontestimonial statements. *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, ¶21. If a statement is testimonial, then the Confrontation Clause requires a showing of both the declarant's unavailability and the defendant's opportunity to have previously cross-examined the declarant. Id. If the statement is nontestimonial, it is merely subject to the regular admissibility requirements of the hearsay rules.

¶{24} We begin with the victim's statements to Felicia. In order to determine whether a statement to a *non*-law enforcement person is testimonial, the "objective witness" test applies. *Siler*, 116 Ohio St.3d 39 at ¶26-27; *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, ¶25, 36, citing *Crawford v. Washington* (2004), 541 U.S. 36. This test requires the court to determine whether an objective witness would have reasonably believed that her statement would be available for use at a later trial. *Stahl*, 111 Ohio St.3d 186 at ¶36. The focus is on the expectation of the declarant at the time the statement is made, and the intent of the questioner is irrelevant unless it could affect a reasonable declarant's expectations. Id. (statements of a rape victim to a nurse were nontestimonial, even though they were made during an examination in a unit of the hospital specializing in collection of forensic evidence).

¶{25} Here, Felicia testified that the victim told her: "He just kept fucking me. He wouldn't leave. He wouldn't let me out till you came. We got to get out of here. We got to call the police." (Tr. 228). She also testified that the victim said: "He wouldn't get out of my house. He tried to fuck me in my ass." (Tr. 232). Finally, she testified

that the victim said that appellant kicked in her door and indicated that he had a weapon. (Tr. 228-230).

¶{26} We recently found that statements similar to the ones here do not violate the Confrontation Clause. *State v. Peeples*, 7th Dist. No. 07MA212, 2009-Ohio-1198, ¶30 (victim told friend over telephone that boyfriend recently beat her). Various Ohio appellate courts have also found that statements such as these made to a friend are not testimonial. *State v. Cook*, 8th Dist. No. 87265, 2007-Ohio-625, ¶17 (victim's statement to daughter that defendant put his finger in her vagina is not testimonial as it was to explain why she was upset); *State v. Myers*, 2d Dist. No. 2006CA2, 2006-Ohio-6125, ¶10-11 (testimony of witness that her friend had told her the defendant was driving around her house does not contain a testimonial statement).

¶{27} As we stated in *Peeples*, if the *Stahl* rape victim's statements to a nurse (trained in forensic recovery who was working at a special forensic hospital unit and who had her patients sign an acknowledgment that evidence would be provided to police) is not testimonial, then neither would be a crying person's statements to her friend concerning the cause of her injuries. See *Stahl*, 111 Ohio St.3d 186. In fact, *Stahl* favorably cited a federal case holding that a private conversation to a friend is not made under circumstances leading an objective person to reasonably believe that the statement will be available for use at a later trial. Id. at ¶32, citing *Horton v. Allen* (C.A. 1, 2004), 370 F.3d 75, 84. See, also, *Davis*, 541 U.S. 813, citing *Crawford*, 541 U.S. 36 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.")

¶{28} Here, the victim was speaking to a relative whom she called "my niece" or "my baby". (Tr. 225). The victim told Felicia what appellant did to her in a private conversation while crying hysterically and while trying to make an escape. These statements are not testimonial as an *objective witness* would not have reasonably believed her statements to a friend (explaining why she was upset and why she was trying to get away from her own house) would be available for later use at a trial. See *Stahl*, 111 Ohio St.3d 186 at ¶36. Thus, there is no Confrontation Clause issue regarding the victim's statements to Felicia.

¶{29} As aforementioned, there can still be a hearsay issue even if there is no confrontation issue. Thus, we move to address any suggestion that Felicia's testimony on what the victim told her constituted inadmissible hearsay. It is well established that the admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Robb* (2000), 88 Ohio St.3d 59, 68.

¶{30} The excited utterance hearsay exception allows testimony on "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Evid.R. 803(2). To be admissible under Evid.R. 803(2), a statement must concern an occurrence observed by the declarant that was startling enough to produce a nervous excitement in the declarant and must be made before there was time for such excitement to lose domination over her reflective faculties. *State v. Huertas* (1990), 51 Ohio St.3d 22, 31.

¶{31} Here, Felicia arrived while appellant was still holding the victim down. After Felicia knocked and yelled for the victim, the victim exited, dragging Felicia away from the house while wearing only socks. Felicia stated that the victim was crying and talking very fast. Felicia had never seen the victim in such a state. (Tr. 227). The man then exited the house after them and stood on the porch pulling up his pants. He made a crude and threatening comment to Felicia, reentered the house and then left towards the woods. The statements occurred while appellant was still present or immediately thereafter. There can be no question that these statements constituted excited utterances. (As to any statement Felicia testified to that the victim made when the police arrived, the victim was still under the stress of the event as is discussed infra under our analysis of whether the victim's statements to officers constituted excited utterances.)

¶{32} Finally, there is no indication that counsel objected to any of Felicia's testimony except where she disclosed that the victim indicated the man had a weapon. (Tr. 229). Based upon our analysis above, any failure to object was not error at all, let alone plain error, and was not ineffective assistance of counsel.

¶{33} We move to the officers' testimony as to the victim's statements. The United States Supreme Court once stated that testimonial statements include those made during a police interrogation. *Crawford*, 541 U.S. at 68. However, the Court

thereafter differentiated various statements to law enforcement officers based upon the purpose of the interrogation. *Davis v. Washington* and *Hammon v. Indiana* (2006), 547 U.S. 813 (consolidated cases).

¶{34} Thus, statements to law enforcement are only testimonial if they are made under circumstances objectively indicating that there is no ongoing emergency as the primary purpose of the interrogation is to establish past events relevant to a later criminal case. Id. at 820. However, such statements are nontestimonial if made during the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable the police to meet an ongoing emergency. Id.

¶{35} In applying these standards, the United States Supreme Court concluded in the *Davis* portion of the case that a 911 call was nontestimonial since any reasonable listener would recognize that the caller was facing an ongoing emergency and because the answers were necessary to resolve the present emergency rather than to simply learn what happened in the past. Id. at 829. The Court noted that a 911 call is not ordinarily designed to prove past facts but to describe circumstances requiring police assistance but recognized that the call can turn testimonial once the operator has gleaned the information needed to address the exigency of the moment. Id.

¶{36} In the *Hammon* portion of the case, officers had responded to a domestic disturbance. When the officers arrived, the wife was on the front porch; she stated that everything was fine and let the officers look around the house. There, they saw broken glass from a fireplace and met the husband, who also stated that everything was fine. The officer again asked the wife for details, and when the husband kept interrupting, they separated the pair for individual questioning. At that point, the wife stated that her husband had pushed her down and hit her. When the wife did not appear for the husband's bench trial, the trial court allowed the officer to testify as to what the wife told him during the separate questioning.

¶{37} The *Hammon* Court held that there was no emergency in progress during the interrogation, which was formal in that the couple was separated. Id. at 829-830. They did note, however, that initial inquiries at a crime scene can be

nontestimonial since officers called to investigate need to know who they are dealing with in order to assess the situation, the threat to community safety and the possible danger to the victim. Id.

¶{38} Thus, we apply the "primary purpose of the interrogation" test to evaluate the victim's statements made to law enforcement officers. See *Siler*, 116 Ohio St.3d 39 at ¶28. Here, the officers responded to a 911 call concerning a disturbance, but absolutely no details had been provided to the officers. (Tr. 264). Thus, they had no knowledge of the emergency to be faced. Felicia was standing in the street, the door to the house was wide open, and the victim arrived by car within moments of the officers' arrival. (Tr. 230-231, 265). Felicia testified that when the police arrived, the victim was still upset and was disheveled. (Tr. 231-232). She just kept repeating herself, saying over and over again what appellant did to her. (Tr. 232).

¶{39} Officer Giovanni testified that the victim was hysterical, crying, visibly shaken, and so scared that she had parked up the street to wait for the police. Her clothes were in disarray, and she had marks all over her face and hands. (Tr. 266). Appellant takes issue with Officer Giovanni's testimony that the victim said appellant raped her for an hour and a half wherein he forced intercourse four times and made her perform oral sex in between. (Tr. 269).

¶{40} However, the police needed to know with whom they were dealing in order to assess the situation, the threat to community safety and the possible danger to the victim. The victim's need for medical attention had to be addressed. Whether appellant was still around the area had to be assessed, especially considering that the front door was open and he did not drive there. "Such exigencies may *often* mean that 'initial inquiries' produce nontestimonial statements." *Hammon*, 547 U.S. 813.

¶{41} Moreover, there is no indication that the primary purpose of the investigation had turned from a response to an ongoing emergency into a more formal interrogation as found in *Hammon*. Id. (where Court relied upon the fact that when the officers arrived to investigate a disturbance, the wife twice stated that everything was fine and did not incriminate the husband until after the police had separated the couple in order to more thoroughly question them further). Notably, the victim was hysterically rambling, as opposed to answering specific questions formulated to prepare a case for

trial. The victim was still hysterical when she was taken away by the ambulance. None of the facts that constituted the essential elements of the offenses were the product of interrogation. As such, this confrontation argument is overruled.

¶{42} Next, we address the contention that the victim's statements to the officers did not constitute excited utterances. As aforementioned, to be admissible under Evid.R. 803(2), a statement must concern an occurrence observed by the declarant that was startling enough to produce a nervous excitement in the declarant and must be made before there was time for such excitement to lose domination over her reflective faculties. *State v. Huertas* (1990), 51 Ohio St.3d 22, 31 (affirming finding that a statement made forty-five minutes after the event but while the declarant was still agitated and in serious pain and had not calmed down to be an excited utterance). See, also, *Cook*, 8th Dist. No. 87265 at ¶20-21 (still under excitement even though incident occurred in early morning and daughter was told at lunch time).

¶{43} It is not disputed that it is a startling event to have your door kicked in, get assaulted for a half hour, get raped over and over for more than an hour and then finally escape to call police. This event would certainly produce nervous excitement.

¶{44} Moreover, it not unreasonable for the trial court to have found that the victim was still under this nervous excitement at the time she spoke to police. Felicia stated that the officers arrived within minutes of her attempt to get the neighbor to call 911. The victim returned within moments of the officers' arrival. As aforementioned, she was still hysterical, crying, shaking and disarrayed. There was no time for reflective thought. (Appellant's argument as to Felicia's timeline is discussed in the next assignment dealing with weight of the evidence.) The trial court could reasonably find that the victim's statements to police were made before there was time for such excitement to lose domination over her reflective faculties.

¶{45} At this point, we stop to address appellant's brief argument that Officer Jankowski should not have been permitted to testify because Officer Giovanni already did and that his testimony improperly bolstered that of Officer Giovanni. He cites no law on the argument as required by App.R. 16(A)(7). We can discern no reason why the state cannot present every witness available with relevant and admissible information. The trial court could use its discretion under Evid.R. 403(B) if it wishes to

avoid the needless presentation of cumulative evidence. However, this would be more reasonable in a case where an inordinate amount of witnesses heard an excited utterance, not in a case where merely two officers heard the statements.

¶{46} Thus, we move to his final argument here: that the court should not have permitted the sexual assault nurse examiner (often referred to as a S.A.N.E. nurse) to testify as to the victim's statements. Appellant notes that such a nurse acts with the purpose to collect forensic evidence for the state. Notably, the nurse received her S.A.N.E. training from a D.O.V.E. (Developing Options for Violent Emergencies) unit, the same type of nurse discussed by the Ohio Supreme Court in *Stahl*.

¶{47} The Ohio Supreme Court has applied the objective witness test, rather than the primary purpose test, to that of a D.O.V.E. nurse as she does not act as an agent of law enforcement. *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, ¶36, 43. As stated supra, this test requires the court to determine whether an objective witness would reasonably believe that her statement would be available for use at a later trial. *Stahl*, 111 Ohio St.3d 186 at ¶36. The focus is on the expectation of the declarant at the time the statement is made, and the intent of the questioner is irrelevant unless it could affect a reasonable declarant's expectations. Id.

¶{48} In applying these standards, the Ohio Supreme Court found that statements of the rape victim (who had also died before trial) to the D.O.V.E. nurse were nontestimonial, even though they were made during an examination in a unit of the hospital specializing in collection of forensic evidence and even though the victim was given a release stating the evidence would be provided to the state for prosecution of a crime. Id. at ¶43 (holding that a witness in this situation could reasonably believe that the medical examination, including the incident history statement, serves primarily as a medical function). The *Stahl* Court found that an objective witness would not believe that her statements were available for use at a later trial. Id. This included the victim's statement as to identification of the perpetrator. Id. at ¶1. Thus, under *Stahl*, the victim's statements to the nurse within hours of the rape would be considered non-testimonial. As such, there is no Confrontation Clause violation here.

¶{49} Next, we determine whether the statements to the nurse were admissible under the hearsay exception for:

¶{50} "Statements 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),

¶{51} On this topic, appellant briefly argues that the name of the perpetrator and the physical description of the sexual assault are not relevant to medical diagnosis or treatment. As to the latter contention, the description of how the assault took place, over how long of a period, how many times a person was hit, choked or penetrated, and what types of objects were inserted are all specifically relevant to medical treatment. They are part of the medical history. They are the reason for the symptoms. They let the examiner know where to examine and what types of injuries could be latent.

¶{52} As for the perpetrator's identity, there are discrepancies in the case law. For instance, in one case, a trial court used Evid.R. 803(4) to admit a murder victim's statements made at her physician's office. See *State v. Reynolds* (1998), 80 Ohio St.3d 670, 678. The victim had opined that her blood pressure was high because she was afraid of her young neighbor, who kept knocking on her door after dark. Id. The Supreme Court stated that her fear was admissible as a present sense impression under Evid.R. 803(3) and her statements about her blood pressure were admissible under Evid.R. 803(4). Id. The Court stated, however, that the other statements should have been excluded as hearsay, presumably referring to the statement that her neighbor kept knocking on her door at night. Id. However, the defendant had not objected below, and the Court found no plain error. Id.

¶{53} In another case, the Supreme Court has stated: "Generally, statements of fault are seen as outside the scope of Evid.R. 803(4) because such statements are usually not relevant to either diagnosis or treatment." *State v. Dever* (1992), 64 Ohio St.3d 401, 413. The Court then carved out an exception, holding that statements identifying the perpetrator of sexual abuse made by *a child* during a medical examination are admissible pursuant to Evid.R. 803(4), if made for the purpose of

diagnosis and treatment. Id. at 413-414. See, also, *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, ¶16-17, 47, 55-56 (applying Evid.R. 803(4) where statements were made to a social worker and related to a physician contained the perpetrator's identity). The *Dever* Court mentioned the need to ensure abuse would not continue and to assess the child's emotional and psychological well-being. (This latter issue could arise in cases of adults as well depending on who the attacker was. Here, appellant's child was related to the victim.)

¶{54} Notwithstanding the holding in *Reynolds* and *Dever*'s application only to children, some appellate courts have ruled admissible an adult victim's statement to a nurse that her injuries were caused by her boyfriend. See, e.g., *State v. Cockrell*, 10th Dist. No. 04AP-487, 2005-Ohio-2432, ¶30, 33 (noting that the statement concerned the "cause or external source" of the injuries under Evid.R. 803(4)); *State v. Bailey* (July 12, 2000), 9th Dist. No. 19716 (noting that the rule includes diagnosis or treatment related not only to physical injuries, but also to psychological injuries and physician screened for PTSD).

¶{55} Although the *Stahl* Court only ruled on the Confrontation Clause issue in deciding that the victim's statement to a D.O.V.E nurse was nontestimonial, *the Court presupposed that the identification portion of the statement was a statement for purposes of medical diagnosis and treatment*. *State v. Stahl,* 111 Ohio St.3d 186, 2006-Ohio-5482, ¶9, ¶18, ¶25, ¶47. However, this has more to do with the victim's purpose and may not necessarily mean that the other requirement was met: "insofar as reasonably pertinent to diagnosis or treatment". We also note that the *Stahl* Court stated that the victim may have thought the nurse needed the perpetrator's identity for the purpose of: "determining whether the assailant had any communicable diseases and whether any specified course of treatment might therefore be appropriate, and for purposes of structuring a release plan to determine the likelihood of repeated activity in a residential or community setting." Id. at ¶46.

¶{56} Here, the victim provided a statement regarding her immediate medical history, which happened to include appellant's name as the cause or external source of the injuries. The statement itself was made for the purpose of medical treatment. Unlike *Reynolds,* where the defendant was merely said to have frightened a victim in

the past, which possibly caused high blood pressure, appellant was said to have been the actual cause of the injuries presented. And, in a rape case there are certain reasons the identity of the assailant would be more "reasonably pertinent to diagnosis or treatment" under Evid.R. 803(4) than the identity of a person whose acts may or may not have caused high blood pressure. As noted in *Stahl*, there would be a concern for sexually transmitted diseases and maybe even genetic problems with a pregnancy. (In fact, knowledge of the potential father of a potential fetus might be considered reasonably pertinent to a medical diagnosis of paternity.)

¶{57} Yet, *Reynolds* and *Dever* would seem to preclude application of this line of reasoning regarding the identification. Still, any error in admission of the victim's identification of appellant to the nurse does not require reversal here. See Evid.R. 103(A)(1) (error may not be predicated upon a ruling which admits evidence unless a substantial right of the party is affected and a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context).

¶{58} First, although appellant filed a motion in limine and placed his arguments in the record sometime before the nurse's testimony, he did not renew his objection during the nurse's testimony, specifically when the state asked the nurse if the victim said who did it. (Tr. 339 {arguments on motion in limine}, 396 {nurse's testimony on identity}). Thus, as found by the Supreme Court in *Reynolds*, the specific error could be considered to have been waived. *Reynolds*, 80 Ohio St.3d at 678 (finding no plain error). See, also, *State v. Hill* (1996), 75 Ohio St.3d 195, 202-203, citing *State v. Brown* (1988), 38 Ohio St.3d 305 (any objection to the denial of a motion in limine must be renewed once the evidentiary issue is presented during trial in order to properly preserve the question for appeal).

¶{59} Moreover, the nurse was indisputably permitted to testify that she was called into the hospital at 10:48 p.m. on New Years Eve to treat this victim for a claim of sexual assault and that she first met with the victim at midnight. She could testify to her acts of performing the rape kit. Other witnesses testified that this rape kit came back positive for appellant's semen. As set forth above, the nurse could also testify under Evid.R. 803(4) that the victim said: her attacker physically fought with her for

thirty minutes by hitting and choking her; he then raped her in multiple acts of penetration; and, the incident lasted well over an hour.

¶{60} Felicia had disclosed that the victim said "Chucky" raped her. The victim more specifically named "Charles Menton" to police. Most notable, a*ppellant admitted that he had an altercation with the victim on New Years Eve near midnight, he admitted that he choked her, and he admitted that he had sexual intercourse with her*. Appellant's admissions combined with this other testimony demonstrates that appellant was the person whom the victim claimed raped her, as the same person who choked her also raped her. For all of these reasons, we find no prejudice in the nurse's relation of the victim's identification of appellant.

¶{61} Finally, we have relocated an argument from appellant's third assignment here. That is, appellant briefly argues that without the victim's statements, the state failed to establish all of the essential elements of the offenses. However, even if there were reversible confrontation or hearsay issues under this assignment, we would not reverse and discharge for insufficient evidence. *State v. Peeples*, 7th Dist. No. 07MA212, 2009-Ohio-1198, ¶16-17. Rather, we would reverse and remand for a new trial. Id. This is because a sufficiency review entails a view of all of the state's evidence, not just the admissible evidence. Id. at ¶17, citing *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶80 (the appellate court is to consider *all* of the testimony before the jury, *whether or not it was properly admitted*), citing *Lockhart v. Nelson* (1988), 488 U.S. 40-42.

ASSIGNMENT OF ERROR NUMBER TWO

¶{62} Appellant's second assignment of error alleges:

¶{63} "APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF SECTION 3(b)3, ARTICLE IV OF THE OHIO CONSTITUTION, THUS CREATING A MANIFEST MISCARRIAGE OF JUSTICE BECAUSE THE GREATER WEIGHT OF THE EVIDENCE DEMONSTRATED APPELLANT DID NOT COMMIT THE OFFENSES BEYOND A REASONABLE DOUBT."

¶{64} Although the text of this assignment argues only weight of the evidence, the arguments under this assignment mention both weight and sufficiency of the

evidence. As we have stated multiple times, *State v. Thompkins* (1997), 78 Ohio St.3d 380 clearly established that sufficiency of the evidence and weight of the evidence are distinct concepts with different definitions and different tests. See, e.g., *State v. Alicea*, 7th Dist. No. 99CA36, 2002-Ohio-6907, ¶26; *State v. Griffin*, 7th Dist. No. 01CA151, 2002-Ohio-6900, ¶18.

¶{65} Sufficiency of the evidence is a question of law that deals with adequacy rather than the more discretionary concept of weight of the evidence. *Thompkins*, 78 Ohio St.3d at 386. In viewing a sufficiency of the evidence argument, a conviction will not be reversed unless the reviewing court determines that no rational fact-finder could have found that the elements of the offense were proven beyond a reasonable doubt. *State v. Goff* (1998), 82 Ohio St.3d 123, 138. In conducting this review, we evaluate the evidence in the light most favorable to the prosecution. Id. As appellant only briefly mentions the concept, we only briefly review it.

¶{66} The elements of rape are: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." R.C. 2907.02(A)(2). Sexual conduct means vaginal intercourse between a male and female, anal intercourse, fellatio, and cunnilingus between persons regardless of sex, and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. R.C. 2907.01(A). This statute reiterates that penetration, however slight, is sufficient to complete vaginal or anal intercourse. Id. Here, viewed in the light most favorable to the state, a reasonable person could find that the evidence admitted at trial showed beyond a reasonable doubt that appellant purposely penetrated the victim's vagina and mouth without her consent after physically fighting with her and threatening her. This is sufficient evidence for two rape convictions.

¶{67} The kidnapping with which appellant was charged has the following elements: "No person, by force, threat, or deception * * * shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes: * * * To engage in sexual activity, as defined in section

2907.01 of the Revised Code, with the victim against the victim's will". R.C. 2905.01(A)(4).

¶{68} Viewed in the light most favorable to the state, a reasonable person could find that the evidence showed beyond a reasonable doubt that appellant restrained the victim by both force and threat of force for the purpose of engaging in sexual activity against the victim's will. Specifically, appellant physically fought with the victim prior to and during the rape, he choked her, and he pressed her down with his arms and legs. In addition, the restraint was prolonged, over one hour. In fact, implicit in every forcible rape is a kidnapping. *State v. Powell* (1990), 49 Ohio St.3d 255, 262. This constitutes sufficient evidence of kidnapping.

¶{69} The elements of aggravated burglary are:

¶{70} "No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

¶{71} "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another." R.C. 2911.11(A)(1).

¶{72} According to the state's evidence, appellant kicked in the front door to the victim's residence knowing that he was not welcome as he was expressly being denied entry. He immediately and purposely began to assault the victim, and he also had the purpose to rape her. Viewed in the light most favorable to the prosecution, a reasonable juror could find that the elements of aggravated burglary were established beyond a reasonable doubt.

¶{73} We move to weight of the evidence, which is the focus of this assignment of error. Weight of the evidence concerns "the inclination of the greater amount of credible evidence" and involves the evidence's effect in inducing belief after reviewing the entire record and weighing evidence. Id. The discretionary power to grant a new trial by disagreeing with the fact-finder's resolution of conflicting testimony should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. Id. Thus, where there are two reasonable versions of events or views

of the evidence, we do not sit as the "thirteenth juror" and override the jury's decision on which version or view is more credible. Unless the fact-finder clearly lost its way and created a manifest miscarriage of justice, we do not reverse based upon weight of the evidence. Id. This is partly because the jury occupied the best position to evaluate appellant's credibility as it heard his voice inflection and observed his demeanor and gestures. See *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

¶{74} Appellant initially takes issue with what he characterizes as a two hour unaccounted for time frame between Felicia arriving and the police arriving. However, there is a more reasonable view of the evidence concerning the timeline. Officer Jankowski specified that the 911 call came in around 9:45 p.m. during roll call and that they responded immediately upon entering their vehicles, arriving at the scene at 10:01 p.m. (Tr. 375). The victim told the officers that the encounter began around 8:00 p.m. and that the rape and restraint lasted one and one-half hours. (Tr. 269, 277 376).

¶{75} Felicia testified that she was expected around 7:00 p.m. but she was running late; she estimated that she arrived between 7:30 and 8:00 p.m. (Tr. 225). After arriving, she knocked on the door for some minutes. After the victim exited, Felicia stood in the yard and yelled at the man on the victim's porch. (Tr. 228). After he spoke to her, she watched him reenter the residence and then retreat. (Tr. 229-230). She then conferred with the victim about finding a telephone to call the police and about the fact that the door was wide open. (Tr. 229-231). The victim then drove in search of a telephone while Felicia tried to explain to a neighbor, who would not open the door, that she needed the police. (Tr. 231). Felicia then stood in the street to watch the open house and wait for police, who arrived within minutes. (Tr. 247). According to the police, the victim returned within moments of their arrival. (Tr. 265). A juror could rationally find that Felicia was merely mistaken as to her time of arrival and was truthful as to the short period between the victim exiting her residence and the police being called.

¶{76} Appellant also believes that the versions related by the victim to Felicia, Officer Giovanni and the nurse were inconsistent and thus unreliable. However, this is

not so. All versions stated that appellant kicked in the door, that he would not let her leave, and that the restraint and rape was prolonged. Felicia testified that the victim told her he would not let her leave until Felicia came to the door and the victim kept repeating, "he just kept fucking me". (Tr. 228). This is consistent with the victim's statement to police that the encounter lasted one and a half hours. (Tr. 269). It is also consistent with the victim's statement to the nurse that they fought for a long time, he penetrated her vaginally, then he took a break, then it would not work, then he forced her to perform oral sex, then he vaginally penetrated her, then he took a half-hour break, and then he vaginally penetrated her again. (Tr. 398-399).

¶{77} Felicia also heard the victim say, "he tried to fuck me in the ass." (Tr. 233). Merely because the officer and nurse did not relate this incomplete act does not mean that the witnesses' testimony or the victim statements to them were incredible. Similarly, the victim's statements were not unworthy of belief merely because Felicia only heard the victim say that "Chucky" was the perpetrator but Officer Giovanni and the nurse were told by the victim that Charles Mention was the perpetrator. (Tr. 254, 267, 396).

¶{78} Appellant also believes the victim's statements lacked credibility because she told Officer Giovanni that appellant ejaculated inside of her and on the couch where he was raping her. (Tr. 270). He points out that the sexual assault investigator recalled that the crime lab investigator used an alternative light source on the couch with negative results for bodily fluids. (Tr. 315-316). The crime lab investigator could not recall whether he used the light at all but agreed that he would only have included positive results in his report. (Tr. 292).

¶{79} However, the lack of bodily fluids on a couch does not make the victim's accusations unworthy of belief. The victim may have mistakenly thought that appellant ejaculated onto the couch. She was certainly not mistaken that he ejaculated as his semen was found on her vaginal swab. Alternatively, Felicia was under the impression that the rape took place on the living room floor. The police noted that cushions were all over the room. The officer's impression that the victim said that appellant had ejaculated on the couch may have derived from the victim's reference to the cushions spread all over the floor, and there is no indication that the light was

applied to the entire room and its contents. Either way, the lack of bodily fluids on the couch does not make the verdict a manifest miscarriage of justice.

¶{80} Appellant next complains that the fingernail scrapings from the victim were not tested. However, he could have asked to have these samples tested. Moreover, where the state has semen containing appellant's DNA and appellant's admission that he choked the victim during an altercation, it is wholly reasonable to decline further testing of samples.

¶{81} Finally, appellant suggests that the jury verdicts are inconsistent because he was found guilty on two counts of rape but not guilty on the three other counts of rape. He believes that this had something to do with the jury believing certain portions of the victim's statement and not others. However, inconsistent verdicts on different counts of a multi-count indictment do not justify overturning a verdict. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6549, ¶137. "The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count." Id., quoting *State v. Adams* (1978), 53 Ohio St.2d 223, ¶2 of syllabus.

¶{82} Regardless, the verdicts here are not inconsistent. Nor do they necessarily reflect a discounting of any portion of the victim's statement. For instance, the jury may have found him guilty of only two counts representing the vaginal rape and the oral rape as they concluded that stopping and restarting vaginal intercourse should not result in separate counts.

¶{83} In conclusion, the jury heard that appellant admitted using crack cocaine, marijuana and alcohol prior to the incident. They heard that he admitted that he had an altercation with the victim during which he choked her. They also heard him admit that he had intercourse with the victim. The jury heard the victim's statements through others. They heard the first-hand observation of a witness who watched the victim escape from the house in a hysterical state and who saw appellant pull up his pants on the front porch and heard him seem to threaten to rape her as well. They heard the observations of witnesses who saw the condition of the victim's house. The jury saw photographs of the house. The fact that the door had been kicked open from the

outside was clear. The jury heard testimony of witnesses who had observed the condition of the victim's body, including an open bite mark on her hand and scratches and strangulation marks on her neck. The jury saw photographs of her body, including pictures of the injury to her cervix and her vagina, allowing them to infer rape rather than consensual sex. For all of these reasons, the jury verdicts were not contrary to the manifest weight of the evidence.

ASSIGNMENT OF ERROR NUMBER THREE

¶{84} Appellant's third assignment of error states:

¶{85} "THE DEFENDANT-APPELLANT'S STATE CONSTITUTIONAL RIGHT TO A GRAND JURY INDICTMENT AND STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS WERE VIOLATED WHEN HIS INDICTMENT FOR AGGRAVATED BURGLARY PURSUANT TO R.C. 2911.11(A)(1)(B) AND KIDNAPPING PURSUANT TO R.C. 2905.01(A)(4)(C) FAILED TO EXPRESSLY CHARGE THE MENS REA ELEMENT OF THE CRIMES."

¶{86} Pursuant to *Colon*, the failure to include a mens rea element in the indictment can constitute structural error if the problem permeates the entire trial. *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, ¶19, 23, 32 (*Colon I*). *Colon I* found structural error where the facts showed not only a defective indictment but also a prosecutor who proceeded as if the mens rea were strict liability when it was in fact recklessness and a trial court who did not instruct the jury as to the proper mental state. Id. at ¶30-31. If the defective indictment issue does not permeate the entire trial, then the appellate court can only apply a plain error analysis when no objection to the indictment is made at a time it could have been corrected. *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, ¶6-7 (*Colon II*, noting that in most defective indictment cases, plain error is the proper test).

¶{87} Appellant relies on *Colon* to argue structural error due to the failure to specifically charge the mens rea for the trespass element of aggravated burglary and the restrain element of kidnapping. The kidnapping offense with which appellant was charged is defined as follows:

¶{88} "No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove

another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes: * * * To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will". R.C. 2905.01(A)(4).

¶{89} The court instructed the jury accordingly. Appellant argues there is no mens rea listed for the element remove or restrain, thus recklessness is the default element. R.C. 2901.21(B) provides that when the statute does not specify any degree of culpability and plainly indicates a purpose to impose strict liability for the conduct described, then culpability is not required, otherwise recklessness is the default mental state.

¶{90} Here, it is clear from the plain language of the statute that in order to remove or restrain for a listed purpose, the removal or restraint must be purposeful. In addition, it is well-established through case law that the removal or restraint element requires a purposeful act. *State v. Hartman* (2001), 93 Ohio St.3d 274, 289; *State v. Maurer* (1984), 15 Ohio St.3d 239, 270. See, also, *State v. Riddle*, 8th Dist. No. 90999, 2009-Ohio-348, ¶19; *State v. Carver*, 2d Dist. No. 21328, 2008-Ohio-4631, ¶11; *State v. Turner* (Dec. 12, 1985), 8th Dist. No. 49866. The Supreme Court thus agrees that "for the purpose of" or "with purpose to" is the same as "purposely". See id. As such, neither the kidnapping indictment nor the kidnapping jury instructions were faulty in this case.

¶{91} The pertinent aggravated burglary offense is defined as follows:

¶{92} "No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply: * * * The offender inflicts, or attempts or threatens to inflict physical harm on another". R.C. 2911.11(A)(1).

¶{93} The element of trespass in this offense requires referral to R.C. 2911.21, which defines the elements of trespass as an offense. See R.C. 2911.10. The trespassing statute provides:

¶{94} "No person, without privilege to do so, shall do any of the following:

¶{95} "(1) Knowingly enter or remain on the land or premises of another;

¶{96} "(2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows the offender is in violation of any such restriction or is reckless in that regard;

¶{97} "(3) Recklessly enter or remain on the land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclosure manifestly designed to restrict access;

¶{98} "(4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified by signage posted in a conspicuous place or otherwise being notified to do so by the owner or occupant, or the agent or servant of either." R.C. 2911.21(A).

¶{99} The court instructed the jury in accordance with division (A)(1): without privilege to do so, knowingly enter or remain on the land or premises of another. Appellant believes that the aggravated burglary indictment should have stated the mental state for trespassing.

¶{100} First, we note that due to the trial court's instruction on knowingly as to trespass, any insufficiency in the indictment would not permeate the entire trial as required under *Colon* as neither of the parties nor the trial court proceeded as if strict liability was required for trespass. *State v. Jones*, 7th Dist. No. 07MA200, 2008-Ohio-6971, ¶59-67. See, also, *Starcher v. Eberlin*, 7th Dist. No. 08BE19, 2008-Ohio-5042, ¶15 (where trial court proceeds as if purposely is mens rea and defendant contends recklessness is mental state, there is no structural error due to lack of permeation and there is no plain error due to lack of prejudice). Thus, there would be no structural error. Id. Nor would there exist plain error as any error lacked prejudice. Id.

¶{101} Regardless, it has been recognized that when an offense contains as its element another offense, the elements of that other offense need not be placed in the indictment. In *Buehner*, the Supreme Court was faced with an indictment that merely

mirrored R.C. 2927.12(A), the ethnic intimidation statute, by stating that the defendant violated R.C. 2903.21 by reason of the race, color, religion or national origin of another person. *State v. Buehne*r, 110 Ohio St.3d 403, 2006-Ohio-4707. The statute cited in the indictment, R.C. 2903.21, is the aggravated menacing statute and is one of various offenses that can be inserted into the ethnic intimidation statute. The defendant argued that the indictment, which did not even mention aggravated menacing but merely cited the statute coinciding with such offense, should have contained the elements of aggravated menacing.

¶{102} The Supreme Court disagreed, holding that it is the underlying offense itself, not the elements of the underlying offense, that is an essential element of the charged offense. Id. at ¶12. See, also, *State v. Murphy* (1992), 68 Ohio St.3d 554, 583 (rejecting argument that indictment should list elements of aggravated burglary where such offense is an element of aggravated murder); *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶31 (failure to charge the elements of the felony underlying the kidnapping is not error).

¶{103} We also note that despite the *Colon* defendant's contention that the mens rea "elements" (plural) were missing from the single count robbery indictment, the *Colon* Court gave no indication that the indictment for aggravated robbery should have contained the knowingly mens rea element for theft, which was an element of the robbery offense the court was evaluating. See *State v. Colon*, 8th Dist. No. 87499, 2006-Ohio-5335, ¶19-20. See, also, *Colon*, 118 Ohio St.3d 26. Moreover, other courts have similarly concluded that a burglary indictment need not contain the mens rea for the trespassing element. *State v. Moore* 10th Dist. No. 07AP-914, 2008-Ohio-4546, ¶55-56; *State v. Davis*, 8th Dist. No. 90050, 2008-Ohio-3452, ¶18, 21. For all of these reasons, we hold that a burglary indictment is not deficient by failing to list the elements of trespass, including the mens rea for trespass. Accordingly, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FOUR

¶{104} Appellant's fourth assignment of error contends:

¶{105} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY PROHIBITING TRIAL COUNSEL FROM ENTERING INTO EVIDENCE FOR

IMPEACHMENT PURPOSES A PRIOR FELONY DRUG CONVICTION OF THE VICTIM DURING HIS PRESENTATION OF EVIDENCE."

¶{106} Appellant argues that the trial court abused its discretion in prohibiting him from entering the victim's conviction into evidence in order to attack her credibility. The state argues that Evid.R. 609 is inapplicable because the victim did not testify and that Evid.R. 403(A) would prohibit the conviction due to the danger of unfair prejudice.

¶{107} Pursuant to Evid.R. 609(A)(1), the credibility of a witness can be attacked by a prior conviction punishable by over one year in prison if Evid.R. 403 is also satisfied. Evid.R. 403(A) provides a mandatory exclusion for relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. Evid.R. 403(B) provides a discretionary exclusion for relevant evidence if its probative value is substantially outweighed by undue delay or needless presentation of cumulative evidence. Evid.R. 609(F) then provides the following method of proving the conviction:

¶{108} "When evidence of a witness's conviction of a crime is admissible under this rule, the fact of the conviction may be proved only by the testimony of the witness on direct or cross-examination, or by public record shown to the witness during his or her examination. If the witness denies that he or she is the person to whom the public record refers, the court may permit the introduction of additional evidence tending to establish that the witness is or is not the person to whom the public record refers."

¶{109} Appellant's argument is contrary to the plain language of Evid.R. 609. That is, the use of "witness" in Evid.R. 609(A) refers to one who is testifying, and the methods in division (F) bolster this conclusion as the latter division requires the witness to be testifying during the impeachment. See *State v. Bryan*, 101 Ohio St.3d 291, 2004-Ohio-971, ¶132 (defendant who testifies can be impeached by a prior conviction).

¶{110} However, so as not to make precedent that a hearsay declarant cannot be impeached, we must sua sponte take notice of a more pertinent rule regarding impeachment of a hearsay declarant. Neither appellant nor the state cite to Evid.R. 806, which specifically addresses this situation and which provides in pertinent part:

¶{111} "(A) When a hearsay statement, or a statement defined in Evid.R. 801(D)(2), (c), (d), or (e), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence that would be admissible for those purposes if declarant had testified as a witness. * * *

¶{112} "(C) Evidence of a declarant's prior conviction is not subject to any requirement that the declarant be shown a public record."

¶{113} Evid.R. 809(A) thus allows the use of Evid.R. 609 prior convictions to impeach a hearsay declarant even if that declarant does not testify. Moreover, division (C) of Evid.R. 809 was specifically added in 1998 to dispose of any contention that Evid.R. 806 conflicted with the methods of impeachment provided in Evid.R. 609(F). See 1998 Staff Note, citing *State v. Hatcher* (1996), 108 Ohio App.3d 628, 632 (where the First District noted the arguable conflict but held that a hearsay declarant's criminal conviction could be admitted under Evid.R. 806 even though she did not testify).

¶{114} The admission of the prior conviction is still subject to Evid.R. 609 (A) through (E). See 1998 Staff Note. A trial court has broad discretion in determining whether the prior conviction admissible under Evid.R. 609 must be excluded under Evid.R. 403(A). See *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶171. Where the crime is of dishonesty, remand has been imposed to remedy the refusal to admit the defendant's evidence of the declarant's prior conviction. See *State v. Cornell* (1998), 129 Ohio App.3d 106 (10th Dist.). We note that there is no allegation that the victim had been convicted of a crime of dishonesty here. Defense counsel only generally argued that the victim had a prior felony drug conviction.

¶{115} As appellant recognizes, trial counsel should have proffered in the trial court the public record of the victim's conviction for our review (or at least placed the details of that conviction into the record below). Without knowledge of the specific conviction, we cannot discern if the victim was released from the offense more than ten years ago. See Evid.R. 609(B) (which requires prior written notice to the state of convictions older than ten years and requires the court to determine, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect).

¶{116} Maybe even more importantly, we cannot discern if the felony drug conviction was punishable in excess of one year in prison, which is a mandatory requirement of Evid.R. 609(A)(1). Many felony drug offenses are considered fifth degree felonies. See R.C. 2925.03(C) (various trafficking offenses); 2925.11(C) (various possession offenses). A fifth degree felony has a maximum sentence of exactly one year, which is not in excess of one year as required for Evid.R. 609(A). See R.C. 2929.14(A)(5). Thus, contrary to appellant's suggestion, not all felony drugs crimes carry a maximum sentence of more than one year in prison. If the victim's conviction were for a fifth degree felony drug conviction, then Evid.R. 609 would prohibit its admission.

¶{117} Since the conviction is not in the record, we cannot we review this argument. Similarly, we cannot review any claim of ineffective assistance of counsel on this ground (raised in the next assignment of error) as any evidence to support a finding of prejudice is outside the record. See *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, ¶62.

ASSIGNMENT OF ERROR NUMBER FIVE

¶{118} Appellant's fifth assignment of error alleges:

¶{119} "THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTY [SIC] AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN APPELLANT'S TRIAL COUNSEL FAILED TO FILE A MOTION FOR A NEW TRIAL PURSUANT TO CRIMINAL RULE 33 AND FAILED TO ARGUE APPELLANT'S CONVICTIONS FOR RAPE AND KIDNAPPING WERE ALLIED OFFENSES OF SIMILAR IMPORT."

¶{120} In seeking reversal for alleged ineffective assistance of trial counsel, the defendant must establish deficient performance which caused prejudice to the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, 142. This statement breaks down into a two-pronged test: deficiency and prejudice.

¶{121} In order to establish that counsel's performance was deficient, the defendant must demonstrate that the performance fell below an objective standard of reasonable representation by the commission of a serious error. *State v. Keith* (1997),

79 Ohio St.3d 514, 534. Counsel is presumed competent. *State v. Thompson* (1987), 33 Ohio St.3d 1, 10. We do not use hindsight to second-guess instances of trial strategy that backfire as there is a wide range of professional competence and of appropriate trial tactics. *State v. Carter* (1995), 72 Ohio St.3d 545, 558.

¶{122} To then demonstrate that he was prejudiced by the deficient performance, the defendant must prove that there exists a reasonable probability that were it not for counsel's errors, the outcome of the proceedings would have been different. *Keith*, 79 Ohio St.3d at 534. In evaluating prejudice, we thus consider whether our confidence in the outcome is undermined. *Bradley*, 42 Ohio St.3d at 142.

¶{123} Initially, appellant claims that counsel was ineffective by failing to move for a new trial on the grounds of irregularity or abuse of discretion which prevented a fair trial, insufficient evidence, and error of law occurring at trial. See Crim.R. 33(A)(1), (4), (5). Appellant merely directs us to refer back to his prior assignments of error as the basis for the new trial motion. We likewise refer back to our resolution of the previous assignments to determine deficiency, prejudice, and/or reviewability.

¶{124} In addition, we note that where counsel objects at trial and is overruled, counsel is not deficient by failing to seek new trial on the same basis. Likewise, counsel is not deficient for failing to file a new trial motion based upon sufficiency or weight of the evidence. In other words, counsel may attempt the new trial procedure on these grounds but is not required to do so as it is not a device necessary to preserve these types of errors.

¶{125} Appellant's remaining argument here is that counsel was ineffective by failing to argue at sentencing that rape and kidnapping are allied offenses of similar import which should be merged here due to separate animus. Thus, we address whether merger would have been appropriate had counsel raised it. Ohio's multiple count statute provides:

¶{126} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

¶{127} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them." R.C. 2941.25.

¶{128} This statute encompasses two steps. The first step involves a comparison of the elements in the abstract without regard to the facts of the case. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶14. See, also, *State v. Harris*, __ Ohio St.3d __, 2009-Ohio-3323, ¶12. The court must determine if the elements of one crime correspond to such a degree that the commission of one will necessarily result in commission of the other. Id. at ¶14-15, 22, citing *State v. Rance* (1999), 85 Ohio St.3d 632, 636. This test does not require exact alignment of elements or a strict textual comparison. Id. at ¶23-27. If the elements do not sufficiently coincide, then the inquiry ends and the defendant can be convicted of (i.e. punished after a finding of guilt) both crimes as the offenses are of dissimilar import. *Rance*, 85 Ohio St.3d at 636. If the elements do correspond to the required degree, then the offenses are allied offenses of similar import and the court proceeds to the second stage. Id. at ¶14, 30-31.

¶{129} The state makes no argument regarding the first step but moves right to the second step and thus concedes that the elements of kidnapping correspond to such a degree with forcible rape that the rape could not be committed without committing kidnapping. This is likely because the Supreme Court has stated that implicit in every forcible rape is a kidnapping and that such offenses are allied offenses of similar import. See *State v. Powell* (1990), 49 Ohio St.3d 255, 262. See, also, *State v. Taylor*, 7th Dist. No. 07MA15, 2009-Ohio-3334, ¶25. Thus, we move to the second step. See *State v. Parker*, 7th Dist. No. 03MA190, 2005-Ohio-4888, ¶24, citing *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845.

¶{130} Even if the offenses are found to be allied offenses of similar import, the defendant can still be convicted of both offenses if they were committed separately or with separate animus to each. See *Parker*, 7th Dist. No. 03MA190 at ¶14, 31. Animus here has been defined as purpose or immediate motive. *State v. Logan* (1979), 60

Ohio St.2d 126, 130. The defendant's conduct must be reviewed in order to evaluate separate animus. *State v. Jones* (1997), 78 Ohio St.3d 12, 14.

¶{131} When a kidnapping is committed during another crime, there exists no separate animus where the restraint or movement of the victim is merely incidental to the underlying crime. *State v. Fears* (1999), 86 Ohio St.3d 329, 344, citing *Logan*, 60 Ohio St.2d 126. The kidnapping must have a significance independent from the rape. *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, ¶117. "Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions." Id. Moreover, where the restraint was prolonged, the confinement was secretive, or the movement was substantial, a separate animus exists. *Fears*, 86 Ohio St.3d at 344, citing *Logan*, 60 Ohio St.2d at syllabus.

¶{132} Here, appellant's restraint of the victim was not merely incidental to the rape. The restraint by hitting, biting, choking and suffocating subjected the victim to a substantial increase in risk of harm separate and apart from that involved in rape. The restraint was prolonged as appellant restrained her for one and one-half hours. He even took a half hour break while restraining her with his body. In addition, the confinement was secretive, especially considering that he originally kidnapped her in her car, let her go on a public street and then restarted the kidnapping after she retreated to her house. Appellant's actions fit the Supreme Court's separate animus test and thus convictions of both rape and kidnapping were appropriate. As such, counsel did not render deficient performance or cause prejudice by failing to seek merger of rape and kidnapping.

ASSIGNMENT OF ERROR NUMBER SIX

¶{133} Appellant's sixth assignment of error argues:

¶{134} "THE TRIAL COURT'S DETERMINATION THAT APPELLANT BE DEEMED A SEXUAL PREDATOR PURSUANT TO R.C. [2]905.09(B) IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AS THE TRIAL COURT FAILED TO STATE ANY FINDINGS TO DEMONSTRATE APPELLANT'S LIKELIHOOD OF RECIDIVISM."

¶{135} The state placed all the statutory sexual predator factors on the record and argued why certain ones applied. (Sent. Tr. 11-14). The state pointed to the presentence investigation and emphasized that appellant had a lengthy criminal record. For instance, he had a prior conviction for gross sexual imposition which had been reduced from a rape charge. He had prior arrests for sexual imposition and felonious sexual penetration. He had a prior assault conviction where he punched a woman in the head and bit her back. Yet, another assault conviction was based upon his punching, biting and choking another woman. His record contained numerous other offenses as well. He used marijuana and cocaine every day until his arrest for these crimes. The state noted that the defendant was thirty-six and the victim was fifty-two. The state pointed out that he displayed cruelty during the offense and showed a lack of remorse.

¶{136} Considering the facts of this case presented at trial, the relevant information presented by the state at the sexual predator hearing and the contents of the presentence investigation report, parts of which the trial court read onto the record, a sexual predator label would be supported by clear and convincing evidence and would not be contrary to the manifest weight of the evidence. However, appellant preliminarily alleges that the court found appellant to be a sexual predator without any explanation at the sexual predator hearing or in the judgment entry. Thus, appellant argues that the trial court erred in failing to make any findings regarding its decision to label him a sexual predator.

¶{137} The Supreme Court set forth "suggestions" for how to conduct a "model" sexual predator hearing. *State v. Eppinger* (2001), 91 Ohio St.3d 158, 166-167. One of these suggestions was that "the trial court should consider the statutory factors listed in R.C. 2950.09(B)(2), and should discuss on the record the particular evidence and factors upon which it relies in making its determination regarding likelihood of recidivism." Id. at 166. The Court was expressly concerned that appellate review would be confounded by the lack of an adequate record. Id. Although this language was not mandatory, many courts have remanded where neither the oral record nor the judgment entry contain the factors relied upon by the trial court. See *State v. Baird*, 7th Dist. No. 06CO4, 2007-Ohio-3400, ¶34-41.

¶{138} Before the state placed its review of the sexual predator factors into the record, the trial court read from the presentence investigation report regarding prior offenses, specifically mentioning the prior gross sexual imposition offense. (Sent. Tr. 7-8). The court also mentioned appellant's threats to police officers. The court found that appellant failed to take advantage of all these opportunities to change his life. (Sent. Tr. 8). However, these statements by the court were made in conjunction with the court's announcement of sentence rather than the sexual predator finding.

¶{139} In any event, as the state argues, this issue is moot. Under the new tiered sexual offender classification statutes, appellant would automatically be reclassified as a Tier III sex offender, the highest level. See R.C. 2950.01(G)(1)(a) (listing rape under R.C. 2907.05 as one of the offenses requiring Tier III designation).

¶{140} This court has mooted sexual predator issues in other cases based upon this rationale. *State v. Peterson*, 7th Dist. No. 07MA59, 2008-Ohio-6636, ¶9-10 (the retroactively-applied sexual offender classification system automatically designates a status based solely on the type of conviction, thus sexual predator classification arguments are moot); *State v. Jones*, 7th Dist. No. 07MA58, 2008-Ohio-6078, ¶3, 11-14 (holding any issues with weight of the evidence for sexual predator designation to be moot because defendant would have been reclassified under new law).

¶{141} Other districts have mooted the issue as well. *State v. Graves*, 179 Ohio App.3d 107, 2008-Ohio-5763 (4th Dist.); *State v. Luks*, 8th Dist. No. 89869, 2008-Ohio-3974, ¶32, appeal not accepted 120 Ohio St.3d 1505, 2009-Ohio-361. But, see, *State v. Clay*, 177 Ohio App.3d 78, 2008-Ohio-2980, ¶9, 22, citing R.C. 2950.11(F)(2) and (H)(1) (containing community notification procedures which do not appear to support the *Clay* court's decision as the defendant can object and obtain a hearing after reclassification under R.C. 2950.031(E) where he can ask for deletion of community notification under R.C. 2950.11).

¶{142} We maintain our position and find that any insufficiency in the sexual predator designation is moot due to the new automatic designations. In accordance, this assignment of error is overruled.

¶{143} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
DeGenaro, J., concurs.