[Cite as *State v. Pyles*, 2015-Ohio-5594.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	
	)	
PLAINTIFF-APPELLEE	)	
	)	CASE NO. 13 MA 22
VS.	)	
	)	OPINION
RONALD PYLES, JR.	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 12 CR 570
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellee	Paul Gains Mahoning County Prosecuting Attorney Ralph Rivera Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant	Attorney Paul Hoffer P.O. Box 83 Clinton, Ohio 44216

JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: December 30, 2015

[Cite as *State v. Pyles*, 2015-Ohio-5594.]
DeGENARO, J.

{¶1} Defendant-Appellant, Ronald L. Pyles, Jr. appeals the January 30, 2013 judgment of the Mahoning County Court of Common Pleas convicting him of one count each of gross sexual imposition and rape and sentencing him accordingly, following a bench trial.

{¶2} On appeal, Pyles raises a speedy trial violation and argues that his convictions are not supported by sufficient evidence or are against the manifest weight of the evidence. He claims that several evidentiary rulings by the trial court were erroneous and deprived him of a fair trial, either independently or when taken together as cumulative error. Finally, he argues that trial counsel was constitutionally ineffective. For the following reasons, Pyles' assignments of error are meritless, and accordingly, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶3} Since 1994, Pyles was the pastor at Victory Harvest Ministries, a church he founded in North Jackson. From October 2010 to February 2011, O.H., a developmentally disabled young woman, came to live at a homeless shelter attached to the church. At the time O.H. moved into the church she was 19 years old. Subsequently, she disclosed to a teacher, and then to Mahoning County Board of Developmental Disabilities authorities and to police that Pyles had sexually abused her.

{¶4} On May 31, 2012, the Mahoning County Grand Jury secretly indicted Pyles on two counts of gross sexual imposition, R.C. 2907.05(A)(1), third-degree felonies and two counts of rape, R.C. 2907.02(A)(1)(c), first-degree felonies. On June 1, 2012, a warrant on the indictment was issued and Pyles was arrested on these charges June 13, 2012.

{¶5} Pyles was arraigned on June 19, 2012, and pled not guilty to the charges. He retained counsel; no bond was set. Two days later, Pyles filed a motion for bail. On June 26, 2012, Pyles also filed a motion for due process material, a motion to inspect grand jury proceedings and a request for discovery.

{¶6} On June 26, 2012, the case was called for pretrial; in an entry the trial

court stated that defense counsel was to get discovery material from the prosecutor's office. The court set the bond matter for hearing and ordered that the State respond to the other two pending motions within 30 days. Further noting that Pyles had failed to file a speedy trial waiver, the trial court ruled that the pending motions tolled the time.

{¶7} After a hearing, bond was set at $150,000.00 cash or surety on July 9, 2012. There is no indication from the record that Pyles ever posted bond. On July 23, 2012, the trial court ordered disclosure of due process materials.

{¶8} Although trial had been set for August 6, 2012, the trial court issued an entry on August 10, 2012, stating, inter alia, that the State and Pyles had jointly moved to continue the trial thereby tolling the speedy trial time. That entry did not specify a new trial date, though it reset the next pretrial for August 28, 2012. On August 30, 2012, the trial court ruled on Pyles' June 26, 2012 motion to inspect grand jury proceedings; it ordered the State to notify Pyles of whether the victim or her guardian testified before the grand jury, and if they did, to provide Pyles with a transcript of their testimony.

{¶9} On November 29, 2012, Pyles filed a motion for discharge on speedy trial grounds. The trial court permitted the State until December 27, 2012, to respond to that motion. The State filed its response on December 12, 2012 and on January 3, 2013, Pyles replied. On January 4, 2013, the trial court summarily denied the motion.

{¶10} A bench trial commenced on January 7, 2013; Pyles had entered into a written waiver of his right to a jury trial that same day. The trial court questioned Pyles regarding waiver of his rights as required by R.C. 2945.05.

{¶11} At the beginning of the trial, an interview of the victim was conducted by the trial court to determine her competency to testify. The prosecutor and the trial court questioned the victim, but defense counsel declined to ask any questions and did not object to any inquiries made.

{¶12} The following evidence was adduced at trial. O.H. testified she met Pyles when she was 7 years old, when he was the pastor at Victory Harvest

Ministries. O.H. went to Victory Harvest with her father, although she was living with her mother at the time. O.H. lived with her mother until she was 14; she then moved in with her grandfather. After her grandfather passed away, when O.H. was 18 years old, she moved in with Jason and Sarah LeMasters, fellow parishioners, and lived there for about 18 months.

{¶13} In October 2010, O.H. moved into the Victory Harvest Ministries complex; she was 19 years old at the time. The church building had several rooms and O.H. lived on the second floor near the gym area. Pyles and his wife, along with several others lived at the church. Pyles lived in his own room off the church's sanctuary; he did not share a bedroom with his wife.

{¶14} O.H. testified that when she lived at Victory Harvest, Pyles began to abuse her. The sexual abuse would only occur in Pyles' room, which he occupied alone. O.H. explained that Pyles would ask her to come into his room after everyone else fell asleep. O.H. could not remember the exact dates when this occurred. O.H. stated that she did not want Pyles to touch her, and that Pyles told O.H. more than once not to tell anyone. Pyles told her that she would have to move out of the church if anyone found out what happened.

{¶15} O.H. testified that Pyles touched her vagina with his hand. She agreed that he touched her more than once. O.H. also said that Pyles stuck his fingers inside of her vagina. Pyles also put his mouth on her vagina. O.H. agreed that this happened more than twice but could not remember how many times. She said Pyles touched O.H.'s bare breasts with his hands. She also testified that Pyles would make her touch his penis, which she described as "soft" and "mushy." O.H. stated that Pyles never inserted his penis into her mouth, vagina, or anus.

{¶16} Although O.H. was 20 years old, she attended special education classes at Mahoning County Career and Technical Center in Canfield. In early 2011, O.H. began to disclose to Mary Beth White, her special education teacher at MCCTC, what Pyles did to her. Initially, O.H. disclosed she had a "bad secret" with Pyles, but eventually gave more detail, which was consistent with her trial testimony.

{¶17} In February 2011, O.H. was removed from the church. In the days following her removal, O.H. communicated with Pyles through her cell phone.

{¶18} While still on direct examination, O.H. was questioned about the fact that during a prior civil protection order hearing involving Pyles she testified that nothing happened between her and Pyles. She explained that Pyles told her to say that and to explain that Pyles was merely counseling her about her masturbation problem.

{¶19} On cross-examination, defense counsel marked the April 2011 CPO hearing transcript as an exhibit, but did not introduce it as evidence. He questioned O.H. about it extensively in an attempt to impeach her credibility. O.H. conceded that she had promised to tell the truth during that hearing and that she had stated that her relationship with Pyles was nonsexual. She agreed that she said that Pyles was counseling her about her chronic masturbation problem and that was the "bad secret" she had disclosed to her teacher. At several points, O.H. appeared confused by defense counsel's questions and hesitated to admit that she had lied at the CPO hearing.

{¶20} For example:

> **Q:** The question I asked you on April 20th, when I asked you the question, Did you and Pastor engage in any sexual relations, and you said no, was that the truth or was that a lie?
>
> **A:** Mmm, true.
>
> **Q.** You said the truth?
>
> **A.** I did.

{¶21} On redirect, however, O.H. confirmed that Pyles told her to say that nothing had happened between them and that he was counseling her for her masturbation issue. She agreed some of defense counsel's questions were confusing. She admitted she had lied at the CPO hearing because Pyles told her to do so. She reaffirmed that Pyles did in fact sexually abuse her.

{¶22} Dorothy Morton is O.H.'s legal guardian. Morton is employed with Help Hotline Crisis Center, which provides guardianships for those incapable of caring for themselves. Morton is responsible for taking care of O.H., and making sure that her needs are met. Morton became the legal guardian of O.H. in February 2011 after she left the church, because O.H. was "unable to take care of herself or protect herself."

{¶23} Morton works with the Mahoning County Board of Developmental Disabilities through her guardianships, and works with individuals suffering from mental illnesses who require the Board's services. Anna Robinson (with whom O.H. went to reside after she left the church) and Patti Amendolea are also part of the team that cares for O.H.

{¶24} In April 2011, Morton sought a civil protection order on behalf of O.H. after someone from the church came to Robinson's house and spoke to O.H. At the hearing, Morton stated that O.H. "was scared and visibly upset," and it did not surprise her that O.H. failed to disclose the abuse during that hearing. Morton has not talked to O.H. about what happened between Defendant and O.H. O.H. was later put in counseling.

{¶25} Patti Amendolea testified that she was employed with Mahoning County Board of Developmental Disabilities as a services support administrator (SSA) assigned to O.H. from March or April 2011 until March 2012. Amendolea was chosen as the SSA because she had a background working with sexual abuse victims and O.H. had begun to disclose the abuse during that time. Amendolea was responsible for managing many aspects of O.H.'s care, most notably her medical needs, including mental health needs.

{¶26} Pursuant to her treatment plan, Amendolea performed a forensic interview on March 12, 2012. She was trained to ask very simple, non-suggestive questions, so as not to be unduly suggestive or confuse the victim. It took O.H. a year to disclose the abuse. Amendolea explained that due to O.H.'s developmental disabilities, she is "slow to process information." She said the purpose of the interview was to allow O.H. to get the medical and mental health services she

needed.

{¶27} Over objections by the defense, Amendolea testified that O.H. disclosed to her that Pyles digitally penetrated her and performed oral sex on her; and the acts were nonconsensual. On several occasions, Pyles forcefully "grabbed her hand and forced it on his penis to stroke it." O.H. stated that these acts occurred in Pyles bedroom, but she could not remember the specific dates of when they occurred. Further, she opined O.H. was unable to resist due to her mental disabilities.

{¶28} On cross-examination, Amendolea admitted that Robinson had expressed concerns to her about O.H. masturbating in inappropriate areas of the home.

{¶29} Larry Lapidus, a licensed therapist with Compass Family and Community Services, who has a Master's degree in counseling, began treating O.H. in March 2011 to alleviate her depression. O.H. suffered from being torn away from living at the church; she considered the church people the only family she had left. He said O.H. trusted Pyles "because she has compromised intellect and she looked to the Pastor for guidance and for support." Lapidus conceded that O.H. did not disclose any abuse to him during the counseling. He opined that O.H. was not ready to discuss the incidents with Pyles at that time. ("When we discussed the incident, she became stressed out, and - - and I could tell that she was not ready to talk about it. So because my goal was to alleviate depression, I wanted to work with what she was giving me.") Lapidus felt it would not have been therapeutic to press O.H. for information.

{¶30} Lapidus stated that O.H., who was 19 at the time, had a full scale IQ of 58. He explained that O.H. was functioning at a second- or third-grade level, and required to have a legal guardian; meaning she was not competent to sign papers or to make decisions for herself. Lapidus diagnosed O.H. with depressive disorder and mild mental retardation. O.H.'s diagnoses affected her ability to say "no" to persons she trusted. O.H.'s mental retardation affected her judgment in making decisions, and could easily be persuaded.

{¶31} On cross-examination, Lapidus affirmed that O.H. told him that "she was never hurt [by Pyles]."

{¶32} Tony Rinaldi, an investigative agent with Mahoning County Board of Developmental Disabilities, testified he is responsible for investigating cases of abuse and neglect against individuals with disabilities. Rinaldi was assigned to investigate an incident involving O.H. in February 2011

{¶33} O.H. went with MCBDD personnel to look at new living arrangements but was unsatisfied with the first option they looked at. Rinaldi called Pyles to inform him they would be bringing O.H. back to the church that night and Pyles volunteered he was counseling O.H. "on the sexual issue of masturbation, that she had an issue with masturbation." A few days later, Rinaldi called Pyles to inform him that O.H. was being moved out of the church to live with Anna Robinson. He said Pyles, without provocation, offered that nothing happened between himself and O.H. because he is impotent. Rinaldi advised Pyles that nobody had made any accusations against him at that time.

{¶34} On cross-examination, Rinaldi said he was unsure whether Pyles knew about the "bad secret" statement O.H. had made to her teacher when Pyles made those remarks to him.

{¶35} In February 2011, North Jackson Detective Brian Newhard was assigned to investigate the allegations between O.H. and Pyles. At that time, O.H., however, would not say what happened. In March 2012, Newhart was contacted by Tony Rinaldi concerning the allegations between O.H. and Pyles. Newhart received an interview with Amendolea and O.H., in which O.H. discussed the sexual abuse that occurred.

{¶36} Newhart then made contact with and interviewed O.H. at Robinson's house on Judson. O.H. discussed the sexual abuse, which was consistent with her interview with Amendolea. Newhart also reviewed a statement from Robinson concerning what O.H. discussed with her concerning the sexual abuse. Newhart described O.H. as "frightened, scared, and traumatized" during the interview.

Newhart attempted to speak with the members of Pyles' church, but no one would agree to talk to him.

{¶37} At the conclusion of the State's case, Pyles made a Crim.R. 29 motion, which was denied by the trial court.

{¶38} The defense called three witnesses. Amanda Buck testified that she was O.H.'s friend for about six years, and met her at Victory Harvest Ministries through the youth group when she was 16 and the victim was 17. Buck described O.H. as "very friendly, sometimes overly friendly, [O.H. would] like push herself into situations where, obviously, it was kind of awkward for everyone involved. Like with guys, there would be, you know, talking in a group and she'd push herself into the group and want to be close to them, * * *." Buck also described O.H. as exaggerating a story when relaying it. Buck and O.H. had regular sleepovers. Buck stated that she stopped the sleepovers after she discovered O.H. masturbating during one of them.

{¶39} Pyles' wife Karen also testified that O.H. was inappropriately clingy towards men. She characterized O.H. as manipulative, with a temper. She said O.H. looked up to Pyles as a father figure and to her as a mother figure.

{¶40} On cross-examination, Karen conceded that during a guardianship hearing (where she was trying to retain custody of O.H.), she never described O.H. as manipulative and never described her as having issues with men. In fact, she had described O.H. as a "good girl." She agreed she loves her husband and did not believe he did anything wrong.

{¶41} Pyles testified in his own defense, and denied raping or improperly touching O.H. He also denied allegations that O.H. had touched his penis. He testified that he was in fact impotent. Pyles went into extensive testimony about his background as a licensed minister. He explained that he had experience counseling people with addictions. He maintained he was counseling O.H. about her obsessive masturbation problem. He denied any improper conduct with O.H., explaining "[s]he was just like a child to us." He said that O.H. had knowledge about the layout of his bedroom because she had cleaned it before while he was away. He denied being

alone with her in his bedroom, but said she would regularly come to watch television in the pastor's lounge.

{¶42} During cross-examination, Pyles admitted knowing that O.H. was "mentally disabled." Despite his assertions that he was counseling O.H. (and others regarding various addictions), Pyles admitted he only had a ninth grade education. Pyles also admitted that O.H. was not a liar. He was unable to explain the fact that O.H.'s description of his penis was consistent with his impotence.

{¶43} At the conclusion of all testimony, Pyles renewed his Crim.R. 29 motion, which was denied by the trial court. Defense counsel then moved to strike Amendolea's testimony (which he had objected to) about her interview of O.H., as hearsay. This was overruled by the trial court.

{¶44} Following closing arguments, the trial court also brought up the fact that defense counsel had marked as an exhibit the transcript of the CPO hearing but had failed to introduce it as evidence. Defense counsel belatedly moved to admit the exhibit, which the trial court denied due to the untimeliness and because it was used for impeachment purposes and would not come in as substantive evidence.

{¶45} After considering all of the evidence, the trial court found Pyles guilty of two of the four charges: one count of rape and one count of gross sexual imposition. The trial court acquitted Pyles on the remaining counts of rape and gross sexual imposition.

{¶46} On January 23, 2013, following the preparation of a PSI and a hearing, the trial court sentenced Pyles to 10 years in prison on the rape conviction and 3 years on the gross sexual imposition, to run concurrently, along with five years of mandatory post-release control. Pyles was given jail-time credit of 225 days plus any additional time awaiting conveyance to prison. The trial court imposed a $10,000.00 fine on Count One and a $20,000.00 fine on Count Three, which it suspended. Pyles stipulated to being a Tier III Sex Offender pursuant to R.C. Chapter 2950 and was notified of the corresponding registration and notification duties.

Speedy Trial

{¶47} In his first of five assignments of error, Pyles asserts:

> Defendant-appellant was denied his right to a speedy trial in violation of the Ohio speedy trial statute, the Ohio Constitution, Section 10, Article I, and the Sixth Amendment to the United States Constitution.

{¶48} Ohio recognizes both a constitutional and a statutory right to a speedy trial. *State v. King*, 70 Ohio St.3d 158, 161, 637 N.E.2d 903 (1994); *see also* Sixth Amendment, United States Constitution; Section 10, Article I, Ohio Constitution. The Sixth Amendment of the U.S. Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy [trial]." This fundamental right has been codified by the General Assembly as R.C. 2945.71 to 2945.73. The Supreme Court of Ohio has found the statutory speedy-trial provisions set forth in R.C. 2945.71 to be coextensive with constitutional speedy-trial provisions. *State v. O'Brien*, 34 Ohio St.3d 7, 9, 516 N.E.2d 218 (1987).

{¶49} R.C. 2945.71 provides the time-frame for a defendant's right to a speedy trial based on the level of offense. According to the Ohio Revised Code, "a person against whom a charge of felony is pending shall be brought to trial within two hundred seventy days after his arrest." R.C. 2945.71(C)(2). However, each day the defendant spends in jail in lieu of bail, solely on the pending criminal charge, counts as three days. R.C. 2945.71(E). *State v. Brown*, 64 Ohio St.3d 476, 479, 597 N.E.2d 97 (1992).

{¶50} Once the statutory limit for speedy trial has expired, the defendant has established a prima facie case for dismissal and the burden shifts to the State to demonstrate any tolling or extension of the time limit. *State v. Howard*, 7th Dist. No. 08 BE 6, 2009–Ohio–3251, ¶ 18, citing *State v. Price*, 122 Ohio App.3d 65, 68, 701 N.E.2d 41 (1997), citing *State v. Butcher,* 27 Ohio St.3d 28, 30–31, 500 N.E.2d 1368 (1996).

{¶51} R.C. 2945.72 provides a list of tolling events, relevant to this case are

sections: (E) "[a]ny period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;" and (H) "[t]he period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion". R.C. 2945.72(E), (H).

{¶52} When reviewing a speedy trial issue, this court must count the days of delay chargeable to either side and determine whether the case was tried within the time limits pursuant to R.C. 2945.71. *State v. Sanchez*, 110 Ohio St.3d 274, 2006–Ohio–4478, 853 N.E.2d 283, ¶ 8. Our review of a trial court's decision regarding a motion to dismiss for violation of the speedy trial provisions involves a mixed question of law and fact. *State v. Brown*, 131 Ohio App.3d 387, 391, 722 N.E.2d 594 (1998). We give due deference to the trial court's findings of fact if they are supported by competent, credible evidence. *Id*. However, we independently determine whether the trial court properly applied the law to the facts of the case. *Id*. When reviewing the legal issues in a speedy trial claim, we must strictly construe the statutes against the State. *See Brecksville v. Cook*, 75 Ohio St.3d 53, 57, 661 N.E.2d 706 (1996); *Brown* at 391.

{¶53} Here, Pyles was jailed while awaiting trial and did not post bond; thus, the triple-count provision applies. Pyles was arrested on June 13, 2012; thus, June 14, 2012, is the first day of his speedy trial clock. *See State v. Hart*, 7th Dist. No. 06 CO 62, 2007-Ohio-3404, ¶ 11; *State v. Matland*, 7th Dist. No. 09 MA 115, 2010-Ohio-6585, ¶ 28.

{¶54} Pyles has made his prima facie case because 208 days elapsed between June 14, 2012, and January 7, 2013, the day trial commenced. However, the State alleges that numerous tolling events occurred which prevented the expiration of Pyles' speedy trial clock before the 90th day. The State is correct.

{¶55} June 14, 2012, is the first day of his speedy trial clock. The first tolling event occurred on June 21, 2012, when Pyles filed a motion for bail. *See, e.g., State v. Findley*, 7th Dist. No. 07 MA 53, 2008-Ohio-1549, ¶11 (motion for bond reduction

tolls time until trial court rules on motion.) Before the trial court could rule on the bond issue, Pyles filed several motions which also tolled the time. Namely, on June 26, 2012, he filed a motion for grand jury transcripts. In his motion for discharge, Pyles conceded that his speedy trial clock had tolled from this date until August, 30, 2012, when the trial court addressed the grand jury transcripts. Thus, as of August 30, 2012, it appears that, at most, only 7 days had run on Pyles' speedy trial clock.

{¶56} On August 6, 2012, the State and Pyles jointly moved to continue the trial that had been set that same day. The trial court's August 10 entry memorializing the joint continuance ruled that the speedy trial time was tolled. That entry did not specify a new trial date, though it reset the next pretrial for August 28, 2012.

{¶57} It is well settled that joint continuances toll a defendant's speedy trial clock. *See State v. Brown*, 7th Dist. No. 03 MA 32, 2005-Ohio-2939, ¶ 44, citing *State v. Davis*, 7th Dist. No. 98 CA 97 (Jun. 30, 1999). It seems the issue here then centers on how long the time is tolled as a result of a joint continuance where no new trial date is set in the entry. There do not appear to be any cases on point to this specific issue. However, as the State correctly argues, R.C. 2945.72(H) does not even require that a continuance granted upon the defendant's own motion or a joint motion be reasonable for the time period to be tolled. *See State v. Glass*, 10th Dist. No. 10AP-558, 2011-Ohio-6287, ¶16, citing *State v. Kist*, 173 Ohio App.3d 158, 163, 877 N.E.2d 747 (11th Dist.2007).

{¶58} Further, insofar as the trial here took place on January 7, 2013 and there were no other continuances on record after the August 6, 2012 joint continuance, this court can presume that trial was continued by joint motion of the parties until January 7, 2013. The fact that a new trial date was not set in the August 10th entry or any other entry does not affect the outcome; in fact, the local rules state that for criminal cases, "the Court Administrator shall be responsible for notification of all hearings and trials to all parties concerned * * *." Criminal Local Rule 11(C).

{¶59} During the time period where the trial had been continued by joint motion of the parties—specifically on November 29, 2012—Pyles filed a motion for

discharge. This also tolled his speedy trial clock until January 4, 2013, when the trial court denied the motion.

{¶60} Pyles' trial commenced on January 7, 2013. Thus, at most, 10 days had run on his speedy trial clock. Accordingly, the trial court properly overruled the motion for discharge and Pyles' first assignment of error is meritless.

Sufficiency and Manifest Weight

{¶61} In his second assignment of error, Pyles asserts:

> The guilty verdict was based on insufficient evidence and was clearly against the manifest weight of the evidence.

{¶62} A challenge to the sufficiency of the evidence tests whether the state has properly discharged its burden to produce competent, probative, evidence on each element of the offense charged." *State v. Petefish*, 7th Dist. No. 10 MA 78, 2011–Ohio–6367, ¶ 16. Thus, sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id*. In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997).

{¶63} Conversely, "[w]eight of the evidence concerns the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other." (Emphasis sic.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A conviction will only be reversed as against the manifest weight of the evidence in exceptional circumstances. *Id*. This is so because the triers of fact are in a better position to determine credibility issues, since they personally viewed the demeanor, voice inflections and gestures of the witnesses. *State v. Hill*, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967).

{¶64} Thus, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins* at 387. However, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. No. 99 CA 149, 2002–Ohio–1152, *2, citing *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). Under these circumstances, the verdict is not against the manifest weight and should be affirmed.

{¶65} With regard to the rape conviction, R.C. 2907.02(A)(1)(c) states in part that no person shall engage in sexual conduct with another who is not the spouse of the offender * * * when:

> The other person's ability to resist or consent is substantially impaired because of a mental or physical condition * * * 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 * * *.

{¶66} With regard to gross sexual imposition, R.C. 2907.05(A)(5) similarly provides in pertinent part:

> No person shall have sexual contact with another, not the spouse of the offender; [or] cause another, not the spouse of the offender, to have sexual contact with the offender * * * when * * * the ability of the other person to resist or consent * * * is substantially impaired because of a mental or physical condition * * * and the offender knows or has reasonable cause to believe that the ability to resist or consent of the other person * * * is substantially impaired

because of a mental or physical condition.

{¶67} Pyles' sufficiency argument mainly centers on the substantial impairment element. He claims there was insufficient evidence presented to demonstrate that the victim's ability to resist or consent was substantially impaired because of a mental or physical condition, and/or that Pyles had reasonable cause to believe or had knowledge of O.H.'s impaired ability to resist or consent.

{¶68} 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*, 31 Ohio St.3d 99, 103, 509 N.E.2d 414 (1987). 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." *Id*. at 103–104. This court explained that " '[s]ubstantial impairment' need not be proven by expert medical testimony; it may be proven 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–CA-538, 2002–Ohio–6897, at ¶ 21.

{¶69} For example, in *Hillock*, this court found that the State presented sufficient evidence that the victim was "substantially impaired" by her mental condition where the victim had an I.Q. of 64, which qualified as "mentally retarded," and the victim was 14 years old but functioned at a third-grade level. *Id.* at ¶ 22-25.

{¶70} Similarly, in *State v. Novak,* 11th Dist. No. 2003-L-077, 2005-Ohio-563, ¶ 3, the Eleventh District concluded there was sufficient evidence that the victim's ability to consent was substantially impaired where the 32-year-old victim had been diagnosed with mild mental retardation, her I.Q. was tested at 59, she had very low adaptive behavior skills and was not capable of independent living and academically

functioned at a first-to-third grade level. *Id*. at ¶3, 22. The court in *Novak* also considered the victim's very limited understanding of sexual relations and her diminished decision-making ability in deciding there was sufficient evidence of substantial impairment. *Id*. at ¶20-21.

{¶71} Here, Lapidus, O.H.'s therapist, testified that when O.H. was 19 years old, she had a full scale I.Q. of 58, and explained that O.H. was functioning at a second- or third-grade level, which required her to have a legal guardian; meaning she was not competent to sign papers or to make decisions for herself. Morton testified that she had been O.H.'s legal guardian since 2011, when O.H. was 21 years old and said that O.H. was "unable to take care of herself or protect herself." Lapidus stated that O.H. trusted Pyles "because she has compromised intellect and she looked to the Pastor for guidance and for support." Lapidus diagnosed O.H. with depressive disorder and mild mental retardation, and explained that her diagnoses affected her ability to say "no" to persons she trusted.

{¶72} White, O.H.'s special needs teacher in 2011, testified that O.H.'s mental retardation affected her judgment in making decisions.

{¶73} Both Pyles and his wife testified that O.H. looked to them as parental figures.

{¶74} There is more than sufficient evidence that O.H. was "substantially impaired" due to her mental condition and could not resist or consent due to that mental condition.

{¶75} With regard to manifest weight, the trial court had to weigh O.H.'s testimony that Pyles raped and improperly touched her, with Pyles' testimony that O.H. had fabricated the story. O.H.'s testimony was corroborated by the fact that she had disclosed the abuse to a teacher and then to Amendolea and to police, and via the fact that her trial testimony herein was consistent with what she had related previously to those witnesses. In addition, Pyles' preemptive statement to Lapidus that he did not have sex with O.H., before he was even accused of doing so, supports his guilt. Pyles also admitted that he was impotent, which corresponds with

O.H.'s description of Pyles' penis as "mushy" and "soft".

{¶76} On the other hand, Pyles claims that the "bad secret" O.H. disclosed to her teacher actually related to her masturbation problem, for which he was supposedly "counseling" her. Buck did testify that she had caught O.H. masturbating during a slumber party, and Amendolea said Robinson had expressed concerns to her about O.H. masturbating in inappropriate areas of the home. There was also testimony from Buck and from Pyles' wife that O.H. was inappropriately clingy with men. In addition, Pyles makes much of the fact that O.H. sometimes gave inconsistent responses during cross-examination; however, it appears she may have been confused by the nature of defense counsel's compound questions. On redirect, O.H. reaffirmed that Pyles had sexually abused her.

{¶77} Pyles also attempts to undermine O.H.'s credibility by pointing to the fact that she testified in an earlier CPO proceeding that Pyles never engaged in any inappropriate sexual behavior with her. However, during trial in the present case, O.H. testified that Pyles was in phone contact with her after she left Victory Harvest and that Pyles coached her about what to say.

{¶78} In the end, the trial court as fact-finder was in the best position to judge the credibility of the witnesses. Importantly, the trial court was able to observe O.H. in the courtroom and view her testimony, including her credibility and her intelligence deficits, and these are considerations that do not always shine through well from the "cold" record before us. *See, e.g., Novak, supra* at ¶23. Based upon the totality of the evidence, the fact-finder did not lose its way in convicting Pyles of rape and gross sexual imposition. Accordingly, Pyles' second assignment of error is meritless.

Evidentiary Rulings/Cumulative Error

{¶79} Pyles' third and fourth assignments of error are related and will be discussed together:

> The trial court's evidentiary decisions denied Defendant-Appellant a fair trial warranting a reversal of the verdict of guilty.

The cumulative effect of the evidentiary errors occurring during the proceedings resulted in a fundamentally unfair trial.

{¶80} Pyles asserts the trial court abused its discretion by permitting the testimony of O.H. and Amendolea and by declining to admit as evidence the transcript from the prior civil protection order hearing. He claims these errors require reversal either individually or when taken together, as cumulative error.

{¶81} Evidentiary rulings at trial are typically reviewed on appeal for an abuse of discretion. *See State v. Beshara*, 7th Dist. No. 07 MA 37, 2009–Ohio–6529, ¶ 55, citing *State v. Bey*, 85 Ohio St.3d 487, 490, 709 N.E.2d 484 (1999). "Abuse of discretion means an error in judgment involving a decision that is unreasonable based upon the record; that the appellate court merely may have reached a different result is not enough." *State v. Dixon*, 7th Dist. No. 10 MA 185, 2013–Ohio–2951, ¶ 21.

{¶82} However, where no objection is made the issue on appeal is waived absent plain error. Crim.R. 52(B). *State v. Altman*, 7th Dist. No. 12 CO 42, 2013-Ohio-5883, ¶22. Plain error exists when but for the error the trial outcome would have been different. *State v. Issa*, 93 Ohio St.3d 49, 56, 752 N.E.2d 904 (2001). Plain error "is a wholly discretionary doctrine whereby the appellate court may, but need not, take notice of errors which are obvious and which affect substantial rights that are outcome determinative. * * * This elective tool is to be used with the utmost of care by the appellate court in only the most exceptional circumstances where it is necessary to avoid a manifest miscarriage of justice." (Internal citations omitted.) *State v. Jones*, 7th Dist. No. 06 MA 109, 2008–Ohio–1541, ¶ 65.

Competency of O.H.

{¶83} Pyles first asserts that the trial court erred by determining O.H. was competent to testify. Pyles concedes that defense counsel failed to object to the trial court's determination during trial and therefore this issue is subject to plain error review.

{¶84} Evid.R. 601(A) states that "[e]very person is competent to be a witness except: (A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." Evid.R. 601(A).

{¶85} In *State v. Bradley,* 42 Ohio St.3d 136, 140, 538 N.E.2d 373 (1989), the Court held that "[a] person, who is able to correctly state matters which have come within his perception with respect to the issues involved and appreciates and understands the nature and obligation of an oath, is a competent witness notwithstanding some unsoundness of mind." *Id*. at 140-141, quoting *State v. Wildman*, 145 Ohio St. 379, 61 N.E.2d 790, paragraph three of the syllabus (1945).

{¶86} Further, in *State v. Sanders*, 8th Dist. No. 86405, 2006-Ohio-809, the Eighth District recognized that a witness who had been diagnosed with "mild mental retardation" likewise did not automatically render him incompetent to testify. *Id.* at ¶ 12. In *Sanders*, the court concluded that the trial court did not abuse its discretion in finding that the 40-year-old victim was competent to testify after he was able to articulate and answer nearly every question, and could distinguish between the truth and a lie. *Id*. at ¶ 13.

{¶87} Similarly, in *State v. Hardie*, 2d Dist. No. 19954, 2004-Ohio-6783, the court held that a developmentally disabled 15-year-old was competent to testify based on the following facts:

> [T]he trial court conducted a hearing on H.'s competency to testify at trial. In her interview with the judge in chambers, H. demonstrated that she could accurately recall and report basic facts, such as her name, age, address, and teachers' names. Additionally, H. was able to correctly identify two statements as truthful and two statements as lies. Moreover, H. demonstrated that she knew the importance of telling the truth and that she could be punished for telling a lie, specifically H. stated that if you lie you could go to foster care or jail. (Tr. 9).

> Additionally, H. stated that she could get someone in trouble if she lied and that would make her sad and upset. (Tr. 9-10).

Hardie at ¶13.

{¶88} Here, O.H. was voir dired prior to her testimony and it was clear from her answers that she understood right from wrong. O.H. stated her name, age, date of birth, and her address. O.H. stated that she knew her parents' names, and knew what day of the week it was. O.H. stated that she knew why she was in court and had to testify. O.H. stated that she could not remember the specific day the alleged offenses occurred, but remembered that they took place in the church in North Jackson, and how long she lived there. O.H. was able to explain that someone who lies to a judge gets into trouble. O.H. then went through several examples demonstrating that she knew the difference between the truth and a lie.

{¶89} Thus, the trial court did not err, let alone committ plain error, in determining that O.H. was competent to testify.

Amendolea's Testimony

{¶90} Second, Pyles contends that the trial court erred by allowing Amendolea to testify about the statements O.H. made to her about the abuse. The State offered Amendolea's testimony about O.H.'s statements to her under the hearsay exception contained in Evid.R. 803(4), i.e., statements made for the purpose of medical treatment.

{¶91} Evid.R. 803(4) allows "[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).

{¶92} In *State v. Lukacs*, 188 Ohio App.3d 597, 605, 936 N.E.2d 506 (1st Dist.2010), the First District held that the trial court did not abuse its discretion in allowing the defendant's 4-year-old daughter's recorded interview with a social

worker after the court declared the child incompetent to testify. The court recognized that statements made to a treating physician, nurse, and/or social worker are admissible under this exception. *Lukacs* at 605, citing *State v. Walker*, 1st Dist. No. C-060910, 2007-Ohio 6337, ¶37.

{¶93} In *Lukacs*, the court reasoned that even the identity of the perpetrator of sexual abuse may be pertinent to diagnosis and treatment because it may assist medical personnel with assessing the emotional and psychological impact of the abuse on a child and in formulating a treatment plan." *Id*., citing *State v. Dever*, 64 Ohio St.3d 401, 413, 596 N.E.2d 436 (1992), *State v. McGovern*, 6th Dist. No. E-08-066, 2010 Ohio 1361, ¶ 37, and *State v. Jordan*, 10th Dist. No. 06AP-96, 2006 Ohio 6224, ¶ 20.

{¶94} However, as this court has explained in *State v. Wolff*, 7th Dist. No. 2009-Ohio-2897:

> In order for such hearsay to be admissible [under 803(4)], 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*.
>
> 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.

Wolff at ¶ 81-82.

{¶95} Although *Wolff* and the other cited cases involved child victims, the factors should apply equally to a mildly mentally retarded person, such as O.H., who has a full-scale I.Q. of 58 and functions at a second- or third-grade level.

{¶96} Analysis of the factors and considerations outlined above seems to support the trial court's decision to admit the Amendolea's testimony. Amendolea was employed as an SSA with the MCBDD when she interviewed O.H. Amendolea stated that she was assigned to O.H. from March or April 2011 until March 2012 due to the allegation of sexual abuse. Amendolea said she was responsible for O.H.'s medical needs, including her mental health needs. She said the purpose of the questioning was to allow O.H. to get the medical and mental health services she needed. Police were not present during the interview. It does not appear Amendolea's function was as "a subterfuge to gather information against the accused."

{¶97} Further, Amendolea had extensive training in specific interview techniques to utilize so as not to lead the victim. It does not appear O.H. had any motive to fabricate; in fact, she testified she was sad to leave Victory Harvest and missed her friends there. She had the cognitive functioning of a 7 or 8 year old child.

Once O.H. began to disclose the abuse fully, her story was consistent.

{¶98} Accordingly, the trial court's decision to admit Amendolea's testimony was not an abuse of discretion because her testimony about what O.H. recounted to her falls under the Evid.R. 803(4) hearsay exception.

Excluding CPO Transcript

{¶99} Pyles also asserts that the trial court erred by failing to admit the transcript of the prior CPO hearing into evidence. Again this is reviewed for plain error since defense counsel failed to move for the transcript to be admitted at the proper time during trial. Pyles used the transcript to impeach O.H. during cross-examination.

{¶100} As explained by the Second District in *Dayton v. Combs*, 94 Ohio App.3d 291, 640 N.E.2d 863 (2d Dist.1993):

> Prior written statements may be utilized during trial testimony to either "refresh" a witness's recollection of events or information of which the witness has no present recollection at trial, *or to impeach the testimony of a witness that is inconsistent with his prior statement*. Use of such statements during trial testimony is permitted in the first instance to "jog" the memory of the witness, and in the second instance to indicate that the witness is untrustworthy. *If used solely to refresh recollection or to impeach, the prior statement is of no substantive evidentiary value, and the hearsay rule and its exceptions are not implicated.* If the statement is used to establish the truth of the matter asserted, i.e., as substantive evidence, with or without an additional purpose to impeach, the hearsay rule and its exceptions are implicated.

(Emphasis added.) *Id.* at 296.

{¶101} Here the CPO transcript was offered solely to impeach O.H. and not as substantive evidence. Accordingly, it was proper for the trial court to decline to admit the transcript into evidence.

{¶102} And even assuming that the trial court did err by failing to admit the CPO transcript, it would not rise to the level of plain error. The fact that O.H. made inconsistent statements during the CPO hearing was sufficiently brought out during trial. When questioned, O.H. admitted she had lied during the earlier hearing when she said her relationship with Pyles was a nonsexual one. The trial court as fact-finder was well aware of that prior testimony and admitting the transcript in toto would not have necessarily added anything to the defense's case. Accordingly, the failure to admit the transcript was not plain error.

Cumulative Error

{¶103} Under the doctrine of cumulative error, a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of the errors does not individually constitute cause for reversal. *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995). However, the doctrine of cumulative error is inapplicable when the alleged errors are found to be harmless or nonexistent. *Id.*; *State v. Brown*, 100 Ohio St.3d 51, 2003–Ohio–5059, 796 N.E.2d 506, ¶ 48. Because Pyles' evidentiary arguments are meritless, the cumulative error doctrine does not apply.

{¶104} Accordingly, for all of the above reasons, Pyles' third and fourth assignments of error are meritless.

Ineffective Assistance of Counsel

{¶105} In his fifth and final assignment of error, Pyles asserts:

> Defendant-appellant was denied his constitutional guarantee of effective assistance of counsel.

{¶106} To establish ineffective assistance of counsel, a criminal defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). To demonstrate

prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694. The defendant bears the burden of proving counsel's alleged ineffectiveness, since Ohio law presumes a licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999). If a defendant cannot show how counsel's errors undermined the reliability of the court's decision, there is no basis for finding that his right to counsel has been violated. *State v. Hancock*, 108 Ohio St.3d 57, 2006–Ohio–160, 840 N.E.2d 1032, ¶ 109; *Strickland* at 693.

{¶107} First, Pyles asserts defense counsel was ineffective because he failed to rebut the issue of O.H.'s competency. That choice did not rise to the level of deficient performance. As discussed, the State and the trial court questioned O.H. prior to her testimony and it was clear she understood right from wrong and was competent to testify.

{¶108} Second, Pyles asserts counsel was ineffective for failing to offer expert testimony to rebut O.H.'s "substantial impairment." However, defense counsel did cross-examine O.H., along with the State witnesses who provided testimony about O.H.'s disability. "[C]ounsel's decision to rely on cross-examination instead of calling an expert witness does not constitute ineffective assistance." *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶118, citing *State v. Nicholas*, 66 Ohio St.3d 431, 436, 613 N.E.2d 225 (1993).

Third, Pyles asserts that "given the prior dealings between the trial court and the Defendant-appellant, he should have at least made a record showing that no bias was present." However, Pyles points to nothing in the record before us explaining the extent or nature of these "prior dealings." Thus, there is nothing to support the allegation that counsel was ineffective for failing to make a record of some alleged bias on the part of the court.

{¶109} Fourth, Pyles asserts that counsel was ineffective for failing to voir dire

the State's witnesses, presumably as to their qualifications. However, there is nothing in the record suggesting that any of witnesses were unqualified to testify.

{¶110} Finally, Pyles contends trial counsel was ineffective for permitting him to waive his right to a jury trial. Ultimately, this decision was up to Pyles though, not counsel, and Pyles entered into a written waiver of his right to jury trial and the trial court questioned Pyles regarding waiver of his rights as required by R.C. 2945.05.

{¶111} "[A] defendant may not claim that he was denied effective assistance of counsel if: 'the record clearly demonstrates that appellant knowingly and voluntarily waived his right to a trial by jury, he signed the form in open court, which was duly filed and an extensive colloquy was conducted with the court sufficient to demonstrate his understanding of his rights and the waiver of the right to a trial by jury. ' " *State v. Webb*, 10th Dist. No. 10AP-289, 2010-Ohio-6122, ¶ 71, citing *State v. Rippy*, 10th Dist. No. 08AP-248, 2008-Ohio-6680, ¶ 17. *See also* State v. Silverman, 10th Dist. No. 05AP-837, 2006-Ohio-3826 (defendant's signature on written jury waiver and verbal acknowledgement before trial court that he signed the jury waiver defeat ineffective assistance of counsel claim); *State v. Fazio*, 7th Dist. Belmont No. 93-B-10, 1994 WL 631654, *1 (Nov. 2, 1994) ("First, it is argued that waiving a jury trial prejudiced the appellant. The appellant herself waived her right to a jury. The waiver of a jury is not per se ineffective assistance of counsel.")

{¶112} Pyles has not proven that trial counsel was constitutionally ineffective, accordingly, his fifth assignment of error is meritless.

Conclusion

{¶113} All of Pyles' assignments of error are meritless. His speedy trial rights were not violated because various motions and a joint continuance tolled the speedy trial clock. Viewing the evidence in the light most favorable to the State, any reasonable fact-finder could have found the victim's substantial impairment proven beyond a reasonable doubt. The trial court as fact-finder did not lose its way so as to create a manifest miscarriage of justice in convicting Pyles of one count of rape and one count of GSI. Pyles' evidentiary arguments are meritless, either separately or

cumulatively. Finally, Pyles has not made out a colorable claim for ineffective assistance of counsel. Accordingly, the judgment of the trial court is affirmed.

Donofrio, P. J., concurs

Robb, J., concurs