[Cite as *State v. Rupert,* 2016-Ohio-1056.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 14 BE 0018
V.	)	
	)	OPINION
JOHN PATRICK RUPERT,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Belmont County, Ohio Case No. 12CR005
JUDGMENT:	Affirmed Remanded in part
APPEARANCES: For Plaintiff-Appellee	Daniel P. Fry Prosecutor Scott A. Lloyd Assistant Prosecutor 147-A West Main Street St. Clairsville, Ohio 43950
For Defendant-Appellant	Stephen A. Goldmeier Assistant State Public Defender 250 East Broad St., Suite 1400 Columbus, Ohio 43215

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Carol Ann Robb

Dated: March 8, 2016

[Cite as *State v. Rupert,* 2016-Ohio-1056.]
DONOFRIO, P.J.

{¶1} Defendant-appellant, John Rupert, appeals from a Belmont County Common Pleas Court judgment convicting him of two counts of gross sexual imposition on someone under the age of 13, one conviction after a jury trial and the other conviction after a guilty plea, and the resulting five year sentence.

{¶2} On December 11, 2010, D.S., who was 12 years old, spent the night at her friend B.R.'s house. Appellant is B.R.'s father. The two girls went to sleep in B.R.'s room around midnight.

{¶3} According to B.R., she woke up once and saw appellant in her room. He motioned for her to go back to sleep, which she did. D.S. then woke B.R. up telling her that she did not feel well and wanted to go home. D.S. and B.R. then went out into the living room where appellant was. Appellant offered to walk D.S. home, but she declined. D.S. left alone in the middle of the night and walked the two blocks to her house.

{¶4} According to D.S., she went to sleep in B.R.'s bedroom. She was awoken by appellant's hand down her pajama shirt. D.S. stated that appellant was fondling her breasts. She stated she moved his hand away and he left the bedroom. D.S. then woke B.R. up and told her she did not feel well and wanted to go home. She put her coat on over her pajamas and went into the living room with B.R. Appellant offered to walk her home, but she refused. She then ran home.

{¶5} D.S. lives with her aunt and her cousin Casey. Casey testified that she woke up in the middle of the night and heard a sound in D.S.'s bedroom. She went in the room to find D.S. sitting on her bed, wearing her coat, and crying. D.S. told Casey she woke up at B.R.'s house and appellant had his hand down her shirt. Casey told her mother, who called the police. But D.S. was unwilling to talk to the police at that time.

{¶6} According to appellant, when he came home on the evening of December 11, his wife was the only one awake. Appellant stated he went into B.R.'s bedroom to turn the heater on shortly after midnight. Then around 2:30 a.m., while he was watching television with his wife, B.R. and D.S. came out of B.R.'s bedroom

and B.R. told him that D.S. was not feeling well and wanted to go home. Appellant stated he did not even know D.S. was at his house until this time. He stated he offered the phone to D.S. to call her parents to come get her, but D.S. just left. Appellant stated that he never touched D.S.

{¶7} After the allegations by D.S., B.R. came forward with similar allegations. B.R. asserted that appellant had also touched her inappropriately on several different occasions while she was sleeping.

{¶8} On January 4, 2012, a Belmont County Grand Jury indicted appellant on two counts of gross sexual imposition of someone under age 13, third-degree felonies in violation of R.C. 2907.05(A)(4). The first count related to B.R. and the second count related to D.S. Appellant pleaded not guilty.

{¶9} Appellant subsequently filed a motion for relief from prejudicial joinder. He requested that the court sever the charges from each other, as each charge resulted from a separate alleged incident at different times and involved different victims. The trial court granted appellant's motion and severed the charges.

{¶10} The matter proceeded to a jury trial on the second count of the indictment involving D.S. In addition to testimony by D.S. and multiple other witnesses, plaintiff-appellee, the State of Ohio, introduced testimony from B.R. regarding her allegations against appellant. And it presented testimony from P.F., who also testified that appellant had inappropriately touched her in the past. The trial court admitted B.R.'s and P.F.'s testimony over appellant's objections. The jury found appellant guilty.

{¶11} Shortly thereafter, appellant entered into a plea agreement with the state on the charge involving B.R. Pursuant to the terms of the plea agreement, appellant entered a guilty plea to the charge involving B.R. In exchange, the state agreed to recommend a total sentence of four years in prison on the two counts, to be served concurrently, and to stand silent if appellant sought judicial release after two years. The trial court accepted appellant's plea and entered a finding of guilt as to the remaining count of gross sexual imposition.

{¶12} The trial court later held a sentencing hearing. It sentenced appellant to two years on the first count and three years on the second count. The court ordered appellant to serve the sentences consecutively for a total sentence of five years in prison. The court also classified appellant as a Tier II sexual offender.

{¶13} This court granted appellant's motion to file a delayed appeal. Appellant now raises four assignments of error.

{¶14} Appellant's first assignment of error states:

> THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ADMIT TESTIMONY [of] B.R. AND [P.F.] UNDER EVIDENCE RULE 404(B), BECAUSE THE EVIDENCE SHOWED PROPENSITY, NOT PLAN, SCHEME, MODUS OPERANDI, OR ANY OTHER EXCEPTION, IN VIOLATION OF MR. RUPERT'S DUE PROCESS RIGHTS.

{¶15} Prior to trial, the court held a hearing on the state's motion in limine. The state sought a ruling on whether it would be permitted to introduce testimony by B.R. that appellant touched her inappropriately on three occasions under circumstances similar to that of D.S. It also sought to introduce testimony by P.F. P.F. is the daughter of appellant's ex-girlfriend. The state sought to introduce P.F.'s testimony that appellant also touched her inappropriately in the same manner that he touched D.S. and B.R. when her mother was dating appellant years ago. The state argued it wanted to establish a common plan or scheme. (Motion in Limine Tr. 31). The court ruled that it would allow the testimony. It found that all three instances involved children under age 13 where the children were in the house with appellant and that all occurred at night while the children were sleeping and awoken by appellant fondling them. (Motion in Limine Tr. 36-37). The court found this evidence pertained to appellant's modus operandi and ruled that it would allow the evidence. (Motion in Limine Tr. 37).

{¶16} At trial, the court enforced its previous ruling over appellant's objection. It allowed B.R. to testify that on three occasions while she was under age 13 and

asleep in bed, appellant rubbed her private areas with his hand. (Tr. 230-236). And the court allowed P.F. to testify that while she was under age 13 and she and her mother were living with appellant, he frequently touched her private parts with his hand while she was sleeping. (Tr. 269-270).

{¶17} Appellant asserts here that the trial court abused its discretion in admitting evidence concerning B.R. He claims the reason the two counts were severed was so the jury would not hear evidence concerning the count involving B.R. Appellant argues the evidence was inadmissible under Evid.R. 404(B) because it did not demonstrate a plan or scheme but instead was meant to demonstrate his propensity to act a certain way. Appellant points to the prosecutor's statement during closing arguments that this crime, "it's what he does. It's who he is." (Tr. 373). Appellant also points out that the trial court noted how similar the prior acts were to the one he was accused of in this case. But he argues the court never stated what aspects of appellant's alleged plan the prior act evidence was meant to prove. Appellant states the jury heard evidence that purported to show his propensity to engage in this type of behavior and, therefore, they could not properly determine D.S.'s credibility. He contends that if the jury had only heard D.S.'s testimony, without hearing the other acts evidence, it may have found her testimony incredible.

{¶18} The admission or exclusion of evidence is within the trial court's broad discretion and this court will not reverse its decision absent an abuse of that discretion. *State v. Mays*, 108 Ohio App.3d 598, 617, 671 N.E.2d 553 (1996). Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's judgment was unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶19} Pursuant to Evid.R. 404(B), evidence of prior bad acts is inadmissible to prove the accused acted in conformity with his bad character. *State v. Treesh*, 90 Ohio St.3d 460, 482, 739 N.E.2d 749 (2001). But evidence of other crimes, wrongs, or acts can be admissible to demonstrate motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evid.R. 404(B).

{¶20} The Ohio Supreme Court has set out a three-step analysis for courts to use when determining whether other acts evidence is admissible. *State v. Williams*, 134 Ohio St. 3d 521, 2012-Ohio-5695, 983 N.E.2d 1278. First, the court must consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *Id*. at ¶20; Evid.R. 401. Second, the court must consider whether the other acts evidence is presented to prove the character of the accused in order to show activity in conformity therewith or whether it is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). *Id*. Finally, the court must consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *Id.*; Evid.R 403.

{¶21} The Ohio Supreme Court considered a similar case in *Williams*. In that case, Williams was accused of "grooming" J.H. for sexual contact over a period of time and eventually committing rape, gross sexual imposition, and unlawful sexual contact with a minor. Over Williams' objection, the trial court allowed the state to introduce testimony by A.B. that Williams had engaged in a similar pattern of conduct with him. Williams was convicted and appealed. The court of appeals reversed finding other-acts evidence was only admissible to show a defendant's scheme, plan, or system in order to show the background of the alleged crime or to show identity, which had not been at issue. *Id*. at ¶10. The state appealed.

{¶22} In reversing the court of appeals and finding A.B.'s testimony admissible, the Ohio Supreme Court applied its three-step analysis.

{¶23} As to the first step, the Court found A.B.'s testimony was relevant because it tended to show the motive Williams had and the preparation and plan he exhibited of targeting, mentoring, grooming, and abusing teenage boys. *Id*. at ¶22. The Court noted that, if believed by the jury, this testimony could corroborate J.H.'s testimony. *Id*. It also noted that A.B.'s testimony rebutted the suggestion offered by the defense during opening statements that J.H. had falsely accused Williams of abuse in hopes of getting out of trouble at school and the suggestion that Williams

was attracted to women. *Id*.

{¶24} As to the second step, the Court found the state did not offer the evidence of Williams's relationship with A.B. to show that abusing J.H. was in conformity with Williams's character. *Id*. at ¶23. The Court relied on the trial court's two limiting instructions that this evidence was not being offered to prove Williams's character. *Id*. The Court stated it presumed that the jury followed the limiting instructions. *Id*.

{¶25} As to the final step, the Court found the evidence was not unduly prejudicial, because the trial court instructed the jury that this evidence could not be considered to show that Williams had acted in conformity with a character trait. *Id*. at ¶24. The Court found the limiting instructions lessened the prejudicial effect of A.B.'s testimony. *Id*. And it found A.B. corroborated J.H.'s testimony about the sexual abuse, which had been denied by Williams. *Id*. Thus, the Court concluded Evid.R. 404(B) permitted the admission of evidence of Williams's prior crime because it helped to prove Williams's motive, preparation, and plan. *Id*. It found the prejudicial effect did not substantially outweigh the probative value of the evidence. *Id*.

{¶26} A fairly similar analysis applies in this case.

{¶27} First, the other acts evidence was relevant to making any fact that was of consequence to the determination of the action more probable than it would be without the evidence. B.R.'s and P.F.'s testimony was relevant because the testimony tended to show appellant's motive and his plan of touching young girls, who were under his care at the time, while they slept. Like the *Williams* Court pointed out, if believed, B.R.'s and P.F.'s testimony could corroborate D.S.'s testimony.

{¶28} Second, the other acts evidence was not presented to prove appellant's character in order to show he acted in conformity therewith, but was presented for a legitimate purpose, that being to present appellant's plan, scheme, or system of doing the act. As was the case in *Williams*, the trial court here gave two limiting instructions. After B.R,'s testimony, the court instructed the jury:

> The evidence which the jury has heard concerning details of other incidents where this last witness has accused defendant of unwanted touching of her private areas has been admitted only for the purpose of considering whether such action tended to show defendant's scheme, plan, or system of doing the act which has been charged in the Indictment. The jury is directed to consider such evidence only for the purpose contained in this instruction and in no event should such evidence be considered as proof of the crime charged in the Indictment.

(Tr. 266). The court gave this limiting instruction immediately after B.R.'s testimony. Immediately after P.F.'s testimony, the court gave the identical limiting instruction. (Tr. 279). As the *Williams* court indicated, absent evidence to the contrary, we are to presume the jury followed the court's instructions. See, *State v. Bey*, 85 Ohio St.3d 487, 491, 709 N.E.2d 484 (1999); *Pang v. Minch*, 53 Ohio St.3d 186, 559 N.E.2d 1313 (1990), at paragraph four of the syllabus.

{¶29} Third, the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice. In this step of the analysis, the *Williams* Court once again emphasized the trial court's limiting instructions. Likewise, here, the court twice specifically instructed the jury they were not to consider the other acts evidence as proof of the crime charged in the indictment. And it gave those instructions immediately after the other acts testimony. Thus, as in *Williams*, the limiting instructions lessened the prejudicial effect of B.R.'s and P.F.'s testimony. Additionally, the other acts evidence helped to prove appellant's motive, scheme, and plan. Thus, it had significant probative value.

{¶30} The admissibility of the other acts evidence in this case presents a close call. But based on the three-step analysis and the similarities this case shares with *Williams*, we cannot conclude that the trial court abused its discretion in allowing B.R.'s and P.F.'s testimony regarding alleged prior bad acts by appellant.

{¶31} We must also address a comment made by the prosecutor during closing arguments, which appellant calls to our attention. At the beginning of his

closing argument, the prosecutor asked the jury to remember appellant's actions regarding the other victims. He stated to the jury that, "it's what he does. It's who he is." (Tr. 373). Appellant did not object to this comment.

{¶32} The Ohio Supreme Court has instructed appellate courts to give prosecutors "a certain degree of latitude in summation" when reviewing statements made during closing arguments. *State v. Treesh*, 90 Ohio St.3d 460, 466, 2001-Ohio-4, 739 N.E.2d 749. We are to view the state's closing argument in its entirety in determining whether the allegedly improper remarks were prejudicial. *Id*.

{¶33} After making the above-quoted statement, the prosecutor continued his argument talking about appellant's testimony, the victim's testimony, and the other corroborating witnesses such as the victim's family members and the children's services worker. (Tr. 373-375). The prosecutor focused on how all of the testimony corroborated each other. (Tr. 374-375).

{¶34} In viewing the prosecutor's closing argument as a whole, we cannot conclude that the improper comment was prejudicial. While the comment was in error, it was not prejudicial. The comment was not the focus of the prosecutor's argument. Instead, the focus was on how all of the witnesses corroborated each other to establish appellant's guilt. Given the evidence against appellant and the fact that the rest of the prosecutor's closing argument was proper, we cannot conclude the improper comment was prejudicial.

{¶35} Accordingly, appellant's first assignment of error is without merit.

{¶36} Appellant's second assignment of error states:

> THE COURT ERRED IN ALLOWING THE STATE TO ADMIT THE TESTIMONY OF B.R. AND [P.F.] UNDER EVIDENCE RULE 403(A), BECAUSE THE EVIDENCE'S PROBATIVE VALUE WAS OUTWEIGHED BY ITS PREJUDICIAL EFFECT, IN VIOLATION OF MR. RUPERT'S DUE PROCESS RIGHTS.

{¶37} In this assignment of error, appellant argues the prior bad acts evidence

was inadmissible because the risk of prejudice outweighed the probative value. He points out that the trial court recognized the risk of unfair prejudice when it granted his motion for separate trials for the charges involving separate victims. However, appellant argues, the separate trials did not matter because the court allowed the state to introduce the evidence of alleged bad acts against B.R. in the trial on the charge stemming from the incident with D.S. Thus, the court's grant of separate trials was rendered irrelevant. Appellant contends there is no doubt that presenting detailed testimony about other incidents of alleged inappropriate touching in a case about inappropriate touching prejudices the results of the case.

{¶38} Generally, relevant evidence is admissible. Evid.R. 402. But relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid.R. 403(A).

{¶39} The third step of the three-step analysis set out in *Williams*, supra, specifically addresses whether the probative value of the other acts evidence was substantially outweighed by the danger of unfair prejudice. We addressed this issue in appellant's first assignment of error.

{¶40} Moreover, as to appellant's argument about the separate trials, the trial court addressed this at the hearing on the motion in limine. The court acknowledged that it had previously granted appellant's motion to sever the charges. (Motion in Limine Tr. 3). It pointed out that the state did not argue strenuously against severing the charges and it granted the motion to be cautious because it did not know what any prospective witnesses might testify to. (Motion in Limine Tr. 3). The court stated, however, that if the state presented other acts testimony that was appropriate, it would admit the testimony. (Motion in Limine Tr. 4). Thus, the court was cognizant of its prior ruling on the motion to sever and took it into account before ruling on the admissibility of the other acts evidence.

{¶41} Accordingly, appellant's second assignment of error is without merit.

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

> THE TRIAL COURT ERRED WHEN IT SENTENCED MR. RUPERT TO CONSECUTIVE SENTENCES WITHOUT MAKING FINDINGS IN COMPLIANCE WITH R.C. 2929.14, IN VIOLATION OF MR. RUPERT'S DUE PROCESS RIGHTS.

{¶43} Appellant argues the trial court failed to make the necessary findings in sentencing him to consecutive sentences. Specifically, appellant asserts the trial court failed to tie its factual findings to the proportionality between the sentence and the crime in accordance with R.C. 2929.14(C)(4). And he asserts the court did not determine whether his convictions fit any of the requirements in R.C. 2929.14(C)(4). Finally, appellant asserts the trial court failed to include its findings in its judgment entry of sentence.

{¶44} Appellant was convicted of two third-degree felonies in violation of R.C. 2907.05(A)(4). The possible prison sentences for a third-degree felony that is a violation of R.C. 2907.05 are 12, 18, 24, 30, 36, 42, 48, 54, or 60 months. R.C. 2929.14(A)(3). The trial court sentenced appellant to two years on one count and three years on the other count. Both sentences were within the statutory ranges.

{¶45} The trial court ordered appellant to serve his sentences consecutively. This is where appellant asserts the court erred.

{¶46} R.C. 2929.14(C)(4) requires a trial court to make specific findings when imposing consecutive sentences:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶47} It has been held that although the trial court is not required to recite the statute verbatim or utter "magic" or "talismanic" words, there must be an indication that the court found (1) that consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger posed to the public, and (3) one of the findings described in R.C. 2929.14(C)(4)(a), (b), or (c). *State v. Bellard*, 7th Dist. No. 12-MA-97, 2013-Ohio-2956, ¶17. The court need not give its reasons for making those findings however. *State v. Power*, 7th Dist. No. 12 CO 14, 2013-Ohio-4254, ¶38.

{¶48} The Ohio Supreme Court has held that the trial court must make its findings at the sentencing hearing and not simply in the sentencing judgment entry:

> In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings.

State v. Bonnell, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. The court stressed the importance of making the findings at the sentencing hearing, noting this gives notice to the offender and to defense counsel. *Id*. at ¶29. And while the trial court should also incorporate its statutory findings into the sentencing entry, the court's inadvertent failure to do so is merely a clerical mistake and does not render the sentence contrary to law. *Id*. at ¶30.

{¶49} The transcript of the sentencing hearing must make it "clear from the record that the trial court engaged in the appropriate analysis." *State v. Hill*, 7th Dist. No. 13 CA 82, 2014-Ohio-1965, ¶27.

{¶50} In the present case, the court specifically found that "consecutive sentences in prison are necessary to address the seriousness of his conduct and adequately protect the public from future crimes by this offender and others." (Sentencing Tr. 14). This finding demonstrates the court made the first two of the three required findings: (1) that consecutive sentences are necessary to protect the public from future crime or to punish the offender and (2) that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger posed to the public. *Bellard*, 2013-Ohio-2956, ¶17; R.C. 2929.14(C). Thus, as long as the court made one of the findings described in R.C. 2929.14(C)(4)(a), (b), or (c), it made all the necessary findings.

{¶51} The court made a finding consistent with R.C. 2929.14(C)(4)(b), which requires at least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses was so great or unusual that no single prison term adequately reflects the seriousness of the offender's conduct. In regard to this finding, the court stated:

> The Court finds that the defendant lacks genuine remorse and fails to understand and appreciate the serious nature of his pattern of a sexual relationship with the victims, i.e., at the time of the offense, a 41-year-old male engaging in sexual contact with two female children, age 12 years old.

> The Court specifically finds that this defendant has demonstrated an established pattern of sexual violations and that he demonstrates no remorse and/or concern for his victims.
>
> * * *
>
> The Court specifically finds that this defendant portrays himself as a good person, while perpetrating horrendous sexual violations upon children that society expects him to protect, and that he demonstrates absolutely no remorse or concern for his victims; instead, asserting abject denial after his conviction by a jury of his peers.

(Sentencing Tr. 12).

{¶52} While the trial court did not use the exact words of R.C. 2929.14(C)(4)(b), it was not required to do so. Its above-quoted finding is sufficient to indicate that it found at least two offenses were committed as part of a course of conduct, and the harm caused by the offenses was so great or unusual that no single prison term for any of the offenses committed adequately reflects the seriousness of the offender's conduct. The court twice referred to appellant's "pattern" of conduct. It also referenced the "serious" nature of appellant's pattern of conduct. And it found appellant's offenses to constitute "horrendous sexual violations upon children." These findings indicate that the court made the necessary finding under R.C. 2929.14(C)(4)(b).

{¶53} Thus, the court made all of the findings at the sentencing hearing required to impose consecutive sentences.

{¶54} Next, we must examine the sentencing judgment entry.

{¶55} In the sentencing entry, the court specifically found, "consecutive sentences in prison are necessary to address the seriousness of the offender's conduct and adequately protect the public from future crimes by this offender or others." Thus, the court made the first two required findings.

{¶56} The court then listed numerous findings in support of its sentence. But the court did not make a finding in the judgment entry indicating that at least two

offenses were committed as part of a course of conduct, and the harm caused by the offenses was so great or unusual that no single prison term adequately reflects the seriousness of the offender's conduct.

{¶57} Although the trial court should incorporate its statutory findings into the sentencing entry, its inadvertent failure to do so is a clerical error and does not render the sentence contrary to law. *Bonnell*, 140 Ohio St.3d at ¶30. The proper remedy is for the trial court to correct this clerical mistake through a nunc pro tunc entry to reflect what actually occurred in open court. *Id*. Therefore, this matter will be remanded so that the court can issue a nunc pro tunc entry reflecting the findings it made at the sentencing hearing.

{¶58} Accordingly, appellant's third assignment of error is without merit.

{¶59} Appellant's fourth assignment of error states:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ENTERED A JUDGMENT OF CONVICTION AGAINST MR. RUPERT FOR THIRD-DEGREE-FELONY GROSS SEXUAL IMPOSITION UNDER R.C. 2907.05(A)(4) IN VIOLATION OF MR. RUPERT'S DUE PROCESS RIGHTS.

{¶60} Pursuant to R.C. 2945.75(A)(2), when the presence of an additional element makes an offense one of a more serious degree, a guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that the additional element is present. "Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged." R.C. 2945.75(A)(2).

{¶61} The verdict form in this case simply states that the jury found appellant guilty of gross sexual imposition.

{¶62} In his final assignment of error, appellant contends the trial court erred in convicting him of a third-degree felony when the verdict form did not state the degree of gross sexual imposition or that the additional element of the victim's age being under 13 was present. Instead, the verdict form simply stated the jurors found

appellant guilty of gross sexual imposition. Therefore, appellant argues, the trial court was required to find him guilty of the least degree of sexual imposition, that being a fourth-degree felony. Appellant contends we must vacate his third-degree felony conviction.

{¶63} The Ohio Supreme Court has held that R.C. 2945.75 requires that a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found in order to justify convicting the defendant of a greater degree of a criminal offense. *State v. Pelfrey*, 112 Ohio St. 3d 422, 2007-Ohio-256, 860 N.E.2d 735, at the syllabus. This holding is also applicable to charging statutes that contain separate sub-parts with distinct offense levels. *State v. Sessler*, 119 Ohio St.3d 9, 2008-Ohio-3180, 891 N.E.2d 318.

{¶64} The gross sexual imposition statute provides:

> (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:
> (1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.
> (2) For the purpose of preventing resistance, the offender substantially impairs the judgment or control of the other person or of one of the other persons * * *.
> (3) The offender knows that the judgment or control of the other person or of one of the other persons is substantially impaired as a result of the influence of any drug or intoxicant administered to the other person with the other person's consent for the purpose of any kind of medical or dental examination, treatment, or surgery.
> (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

> (5) The ability of the other person to resist or consent or the ability of one of the other persons to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the ability to resist or consent of the other person or of one of the other persons is substantially impaired because of a mental or physical condition or because of advanced age.

R.C. 2907.05(A).

{¶65} Appellant was convicted of violating R.C. 2907.05(A)(4). Gross sexual imposition in violation of R.C. 2907.05(A)(1), (2), (3), or (5) is a fourth-degree felony. R.C. 2907.05(C)(1). Gross sexual imposition in violation of R.C. 2907.05(A)(4) or (B) is a third-degree felony. R.C. 2907.05(C)(2).

{¶66} In *State v. Edwards*, 9th Dist. No. 12CA010274, 2013-Ohio-3068, the appellant raised the identical argument as appellant does in this case. He argued on appeal that because the verdict forms did not include the degree of the offense or the aggravating element that the victim was under age 13, he could only be convicted of a fourth-degree felony, the least degree of the offense. *Id*. at ¶27. The Ninth District disagreed.

{¶67} The court found that *Pelfrey* is inapplicable with respect to violations of R.C. 2907.05(A)(4). *Id*. at ¶34. It held that *Pelfrey* applies when "the presence of one or more additional elements makes an offense one of more serious degree." *Id*., citing R.C. 2945.75(A). The court went on to reason:

> A violation of R.C. 2907.05(A)(4) is a felony of the third degree. R.C. 2907.05(C)(2). There are no additional elements that will enhance this offense to a higher degree. R.C. 2907.05 does contain other subsections, but each has their own separate elements. Here, as charged in the indictment, the State was required to prove that Edwards had sexual contact with J.S. for the purpose of sexual arousal or

> gratification and that J.S. was under the age of thirteen at the time of the offense. Failure to prove any of these elements would have resulted in an acquittal, not a conviction of a lesser degree of gross sexual imposition.

Id. at ¶35.

{¶68} The Fifth and Tenth Appellate Districts have also held that *Pelfrey* does not apply to gross sexual imposition in violation of R.C. 2907.05(A)(4), finding this offense to be its own offense without additional elements to enhance it. See, *State v. Crosky*, 10th Dist. No. 06AP-065, 2008-Ohio-145, ¶147-148; *State v. Nethers*, 5th Dist. No. 07 CA 78, 2008-Ohio-2679, ¶56-57.

{¶69} The reasoning of these courts of appeals is sound. The requirement that the victim of gross sexual imposition in violation of R.C. 2907.05(A)(4) is less than 13 years old is an element of the offense itself. It is not an aggravating element used to elevate the degree of the offense. Thus, the jury's verdict form was correct and appellant was properly convicted of third-degree-felony gross sexual imposition.

{¶70} Accordingly, appellant's fourth assignment of error is without merit.

{¶71} For the reasons stated above, the trial court's judgment is hereby affirmed. The matter is remanded solely for the trial court to issue a nunc pro tunc entry reflecting the consecutive sentence findings it made at the sentencing hearing.

Waite, J., concurs.

Robb, J., concurs.