[Cite as *State v. Nickell*, 2025-Ohio-1232.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. 23CA10
v.	:	
ROBERT NICKELL,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

L. Scott Petroff, Athens, Ohio, for appellant[1].

Randy Dupree, Jackson County Prosecuting Attorney, Jackson, Ohio, and Isaac Beller, Gallia County Assistant Prosecuting Attorney, Gallipolis, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:3-28-25
ABELE, J.

{¶1} This is an appeal from a Jackson County Common Pleas Court judgment of conviction and sentence. Robert Nickell, defendant below and appellant herein, assigns six errors for review:

FIRST ASSIGNMENT OF ERROR:

"THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION OF APPELLANT IN VIOLATION OF HIS DUE

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[1] Different counsel represented appellant during the trial court proceedings.

PROCESS RIGHTS AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."

SECOND ASSIGNMENT OF ERROR:

"THE CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."

THIRD ASSIGNMENT OF ERROR:

"THE SENTENCE WAS CONTRARY TO LAW BECAUSE THE TRIAL COURT FAILED TO MAKE THE REQUISITE FINDINGS THAT WOULD ALLOW FOR CONSECUTIVE SENTENCES."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURTS (SIC.) FAILURE TO ABIDE BY CERTAIN REQUIREMENTS SET FORTH IN R.C. 2945.481 RESULTED IN A DEPRIVATION OF APPELLANT'S RIGHT TO CONFRONTATION AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."

FIFTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT IMPROPERLY ALLOWED THE INTRODUCTION OF EXPERT TESTIMONY WHEN THE TESTIMONY WAS BASED ON INFORMATION THAT WAS NEITHER ADMITTED AT TRIAL NOR OBSERVED BY THE EXPERT."

SIXTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT IMPOSED A NO-CONTACT ORDER

AND A PRISON TERM FOR THE SAME OFFENSE."

{¶2} A jury found appellant guilty of multiple counts of sexual abuse of his three adopted children, A.N. (born 11/10/06), H.N. (born 12/6/05), and S.N. (born 12/12/12).

{¶3} In February 2023, a Jackson County Grand Jury returned an indictment that charged appellant with: (1) rape in violation of R.C. 2907.02(A)(2), a first-degree felony, (2) sexual battery in violation of R.C. 2907.03(A)(5), a third-degree felony, (3) rape in violation of R.C. 2907.02(A)(2), a first-degree felony, (4) sexual battery in violation of R.C. 2907.03(A)(5), a third-degree felony, (5) gross sexual imposition in violation of R.C. 2907.05(A)(4), a third-degree felony, and (6) rape in violation of R.C. 2907.02(A)(2), a first-degree felony. Counts 1 and 2 related to appellant's 15-year-old daughter (A.N.), Counts 3, 4, and 6 related appellant's 16-year-old daughter (H.N.), and Count 5 related to appellant's 9-year-old daughter (S.N.). Appellant entered not guilty pleas.

{¶4} At appellant's three-day 2023 jury trial, Tina Adkins testified that in the late evening of January 22, 2023, she and her husband watched television in their living room when they heard a knock at their door during a storm. Adkins found a "soaking wet"

shivering teenage girl, A.N., on their porch and invited her into their home. "My thought was she was in shock. Her voice was trembling. She was very distraught, emotionally and physically, she was obviously very wet and cold." A.N. told the Adkins "she was afraid and she was being chased and that her stepfather had raped her. And this was not the first time." Tina's husband, David, called 911.

{¶5} Jackson County Sheriff's Lieutenant Rick Zinn responded to the Adkins' home along with Deputy Hutchison. Zinn spoke with A.N., who said "she had been raped by her father and that she had given birth to . . . a child that she identified as [L.N.]. She stated that she had been in the . . . home for a while and the child . . . was approximately two months old and that she had lied to all of her friends and told them that the father [was someone else]."

{¶6} Lieutenant Zinn transported A.N. to the Sheriff's Department, where A.N.'s mother arrived with A.N.'s infant child. With permission, Zinn obtained DNA samples from A.N. and the infant. Appellant arrived at the Sheriff's Department voluntarily, where Zinn informed him of the accusations and advised him of his *Miranda* rights. Appellant denied the allegations, and, when Zinn asked appellant if he could be the infant's father, appellant

stated "he should not be," which Zinn found unusual.

{¶7} Lieutenant Zinn also obtained appellant's DNA sample with consent. Zinn submitted the DNA samples to Deputy Urias Hall the following morning, and Deputy Nicholas Spangler drove them to the Bureau of Criminal Investigations (BCI) lab. Later, the results revealed that appellant is the biological father of A.N.'s infant child. After receiving the results, Zinn arrested appellant.

{¶8} Lieutenant Zinn testified that a couple of months after his office incarcerated appellant, appellant asked to speak with him. Appellant told Zinn that he "had provided the DNA and that the young girl had used it to become pregnant." Zinn testified that this later explanation differed significantly from appellant's initial complete denial. Zinn also testified that two other daughters, H.N. and S.N., later made similar sexual abuse allegations against appellant.

{¶9} Jackson County Sheriff's Deputy Urias Hall, Jr. testified that he manages, stores, and tracks evidence at the Sheriff's Office. Hall placed the DNA samples in sealed, initialed envelopes and kept them in his office until Deputy Nicholas Spangler transported them to BCI. Hall acknowledged that the results indicated that appellant is the biological father of A.N.'s infant child.

{¶10} A.N. testified that appellant is her adoptive father. Prior to January, A.N. lived with appellant, his wife, and A.N.'s ten siblings. The Nickells adopted A.N. in 2020 after the foster care system placed her with them about six years ago. A.N.'s child, born December 5, 2022, also lives with them, and appellant is the baby's biological father.

{¶11} A.N. explained that when her mother visited California, in possibly March 2022, appellant vaginally raped her in his bedroom. A.N. then showered and went to her bedroom when appellant told her, "don't tell mom." A.N. feared "that my mom would get hurt, that they would take my siblings." A.N. stated that previously she had been separated from her siblings during foster care placements.

{¶12} A.N. stated that another time in February or March 2022, while her mother slept in another room, appellant raped her a second time in her room. During this incident, appellant told her again, "don't tell mom." A.N. testified that she did not have sexual relations with anyone beyond the abuse.

{¶13} When A.N. later began to be nauseous, appellant drove her to a pharmacy to purchase a pregnancy test. The test yielded a positive result. Appellant also "bought a Plan B Pill" and forced A.N. to take the pill. When A.N.'s mother joked that A.N. might be

pregnant, A.N. told her mother to "get a pregnancy test." Her mother purchased a test that also gave a positive result. Appellant "acted shocked" at the second test result, even though he knew about A.N.'s pregnancy. Appellant told A.N. to tell others that her boyfriend fathered the child. A.N. also spoke to her mother about terminating the pregnancy, but her mother refused. A.N. testified that she had no desire to have children.

{¶14} At some point the household held a "family meeting" about the assaults, which included appellant. Appellant denied wrongdoing, but the family decided that the children should not "go anywhere with him and not to be in a room alone with him." Later, when appellant "touched me again that day, two months after I had [the baby]," A.N. ran to the Adkins' home and asked them to call the police. In addition, A.N. stated that "other siblings in my family kept saying they were being touched as well."

A.N. also left a note for her mother when she ran away:

> Today I realized I can't keep what happened to me a secret. I've been raped three times. I can say because I didn't know what he would do to me. [The baby] isn't [A.N.'s boyfriend's]. I've been playing along so people don't notice I actually don't have attachment issues. I'm just afraid. Then yesterday when someone was walking waking me up, he touched my butt underneath my pants.

{¶15} A.N. ran away during a cold rain, and explained that she "hid in tunnels, I ran behind houses, I went through bushes," and

kicked off her shoes "because they were slowing me down." Lieutenant Zinn drove A.N. to the sheriff's department, spoke with her, and took DNA samples. Later, appellant sent her letters from jail.

{¶16} On cross-examination, A.N. acknowledged that at the family meeting she initially denied that appellant touched her. She also acknowledged that on the day she ran away she argued with appellant about Snapchat, but claimed she did not make that accusations because of the argument.

{¶17} The foster care system placed H.N, appellant's 17-year-old adoptive daughter, with the Nickells on March 2, 2018, and they adopted her in 2020. H.N. testified that in March 2022, she needed stomach surgery. When her mother was not at home, appellant entered the master bathroom while H.N. was naked and prepared to shower. Appellant "put his penis inside my butt and told me it would help me with all of my stomach problems I was having." When H.N.'s brother tried to walk into the bathroom, appellant told him H.N. "was getting her butt busted," [being disciplined] to stay out, and appellant then shut the door. After the assault, appellant told H.N. that "if [she] ever said anything that no one would believe [her] because he was the adult."

{¶18} On another occasion, H.N. rode in a car with appellant on

the way to sell trailer hitches. During the return trip, appellant pulled over on "some random back road," and inserted his fingers in H.N.'s vagina. The assault ended when appellant's mother called. H.N. also recalled that A.N. told her before she became pregnant that she did not want to have children. H.N. further testified that she found it peculiar that when A.N. gave birth appellant "wanted to sign the birth certificate."

{¶19} H.N. stated that a couple of months before the child's birth, H.N., A.N., Au.N., S.N., appellant, and his wife held a family meeting when H.N. and S.N. made claims of sexual assault. Appellant denied the sexual accusations. H.N. acknowledged that during the meeting, A.N. accused H.N. and S.N. of lying. H.N. speculated it was "because she [A.N.] didn't want to accept the fact that it happened to us." H.N. stated that appellant then "acted fine until a couple of weeks before [the baby] was born." Appellant "had been out of the home," but sent letters and tried to call.

{¶20} Michelle Nickell, appellant's wife of nine years, testified that she, appellant, H.N., A.N., Au.N., S.N., D.J., B., A., A.J., and the baby lived in the home. Michelle explained that she and her husband have had A.N. in their care for over five years and adopted her in 2020. They have had S.N. in their care since

2021 and adopted her in 2022. Michelle has one biological child, a 21-year-old son who lives in California.

{¶21} Michelle testified that in late January 2023, A.N. ran away. Michelle learned of this when she found a note in her van. Michelle searched for A.N. and spoke with her by phone at the sheriff's department. A.N. asked Michelle to bring the baby to the station for a DNA sample and Michelle consented to DNA tests for A.N. and the baby. Also, appellant moved out of the home that night. Afterward, Michelle talked to appellant a few times by phone and met once to retrieve her debit card. After the DNA results, appellant sent Michelle two letters that she brought to the prosecutor.

{¶22} Michelle stated that the family meeting occurred in late August or early September 2022. Michelle's daughter S.N. told her that appellant "touched her. . . and [S.N.] thought that it happened to [H.N.]," so they had a discussion and "took precautions to make sure that no one was alone . . . anymore with him." Michelle said her California trip occurred "around March, like late February, early March." Michelle recalled H.N.'s surgery date as sometime in late May. Michelle recalled the time frame of H.N.'s car ride with appellant when he sold trailer hitches mid to late summer, "around the summer like or around like, maybe like June,

July."

{¶23} Michelle testified that when A.N. learned about her pregnancy, she was

> very upset. She did not . . . um. . . she had asked me . . . she got very upset and went outside and asked me if she could get an abortion. Um, unfortunately, I've . . . I've been in a family . . . I've been in church all my life and we just didn't believe in abortion. At that time, I didn't know . . . the reasoning for . . . why she wanted the abortion. And so I was . . . very adamant about us trying to, you know, make it work for her to have the baby.

Michelle continued:

> While we were all together in the room, we were kind of talking about the baby and . . . he said well, maybe I could sign . . . the birth certificate as the father so that way that [H.N.'s boyfriend] can't . . . take custody of him. And I thought that was very odd.

{¶24} Michelle acknowledged on cross-examination that A.N. initially stated at the family meeting that "she didn't feel like that it was true that he had done that to them," but after the meeting she "made sure that no one was, like, alone anymore" for the children's safety because "at that time, I wasn't positive. If I was positive, he wouldn't have been in my home." Michelle also clarified that the girls expressed a desire to ride with appellant "because I always have the little ones and my little ones are loud and crazy sometimes so, the big kids like to ride in the vehicle the little ones aren't in."

{¶25} S.N., then ten years old, testified remotely and stated that appellant is her father and she lived with her parents for three and a half years at the time of the trial. She stated that appellant touched her "private area" in their backyard hot tub while she sat on his lap. S.N. wore a one-piece swimsuit, and appellant touched her "inside" her swimsuit. Afterward, appellant "told [her] not to tell anybody." S.N. testified that a month and a half later at a family meeting, appellant denied that he touched her.

{¶26} Ohio Bureau of Criminal Investigation DNA Forensic Scientist Devonie Herdemen performed the testing, explained the process, authenticated the profiles, and testified that appellant "cannot be excluded as the biological father of [L.N.]. . . [and] the probability that [appellant] is the biological father of [L.N.] is 99.9999%."

{¶27} At the close of the State's case, appellant made a Crim.R. 29 motion for judgment of acquittal and argued that witness testimony conflicted with the time frames set forth in the indictment. The trial court denied the motion and determined that (1) conflicts about dates are a matter of credibility for the jury, and (2) an exact date is not an essential element of any of the offenses.

{¶28} Appellant testified that he possesses an associate's degree in criminal justice, has worked with children through his church, and participated in church mission trips to India and Haiti. Appellant stated that the ten children who reside in his 4-bedroom home range from 4 to 17 years old. When asked whether he is often alone in the home, appellant stated, "no, we're never alone in the home" and appellant specified that he has never been alone in the hot tub with any of his children. Appellant explained that three male children slept in one bedroom, H.N. and S.N. slept in one room, A.N. and Au.N. slept in the third bedroom, and their youngest son, four-year-old A.J., slept with him and his wife.

{¶29} When appellant's wife visited her older son in California, he started a bedroom renovation. He removed all the furniture and flooring, redid the drywall, and painted the room. During that week, appellant slept on the couch with A.J. Appellant stated that he never changed clothes in front of the children and never walked in on H.N. in the bathroom.

{¶30} On January 22, 2022, appellant asked A.N., Au N., and their brother to go with him to Chillicothe to get groceries. On the return trip, A.N. and appellant argued because A.N. "wanted Snapchat on her phone. I had told her that she knew we weren't going to allow that. And then we also got into an argument about

her current boyfriend at that time, and she became very irate with me on the way home and stopped talking to me." Two or three hours after they returned home, appellant realized A.N. left the house. Later, Michelle called and told him that she "was at the Sheriff's Office with [A.N.]."

{¶31} Appellant testified that he learned of the allegations when an officer summoned him to the sheriff's department to make a statement. Appellant said he felt "hurt. I was upset. I was surprised." However, appellant also acknowledged that he read A.N.'s note before he arrived at the sheriff's department.

{¶32} According to appellant, the "family meeting had occurred. . . several months before." He sent both H.N. and S.N. to their rooms for fighting with A.N. and, about 20 to 30 minutes later, he told them to stay in their room and clean when his wife told him about their allegations. At the family meeting, his wife "confronted them" and "told them that they were lying, that she did not believe them. She knew that I wouldn't do that." After the meeting, "[w]e took precautions so that I wouldn't be alone with the children." Before that, A.N. had accompanied him on a couple of jobs he did for friends, but appellant's relationship with A.N. changed "after she became pregnant."

{¶33} Appellant explained A.N.'s pregnancy:

> A.N. approached me and she asked me if . . . um. . . she could give her mom a gift. She wanted to do something for her mom and me because she knew that we were not able to have kids. So, she asked me to . . . um. . . help her with that. . . [by] providing my semen. . . I left it on the bathroom sink and walked out of the bathroom and [A.N.] walked in behind me.

{¶34} Appellant and his wife discussed that A.N. was sick, and his wife suspected A.N. was pregnant, so he took A.N. to purchase a pregnancy test. Appellant denied that A.N. stayed in his bed, that he stayed in A.N.'s bed, that he purchased a Plan B pill, that A.N. wanted to terminate the pregnancy, and that he had sex with, or touched, any of the children. Appellant added:

> I feel like they were coached. Me and my wife were having problems. I thought she was cheating on me because of some facts that I saw. She accused me of cheating on her. We were arguing constantly. And I honestly feel like they were coached.

{¶35} On cross-examination, appellant claimed Michelle lied when she said the renovations did not happen during her California trip. Appellant also acknowledged that, although A.N. always made it clear that she did not want to have children, he stated that A.N. asked him to impregnate her to give a gift to her mother. When asked why he would participate in the alleged voluntary impregnation, appellant replied, "Honestly, looking back, I don't

know." Appellant did acknowledge that he did not initially explain this explanation for A.N.'s pregnancy to law enforcement. When asked if he was the biological father of A.N.'s baby, appellant replied, "the DNA evidence says I am." When asked if he believed he is the father, appellant responded, "no," but added that if he is, it is because he provided semen to his then 15-year-old daughter.

{¶36} After he moved out of the house, appellant spoke with Michelle several times a day. Appellant said he did not believe he is capable of having children, but nevertheless agreed to provide semen to his daughter to impregnate her so she could have a better relationship with her mother. Once again, appellant denied any sexual conduct with all three daughters.

{¶37} After deliberation, the jury found appellant guilty of (1) rape in violation of R.C. 2907.02(A)(2), a first-degree felony (A.N.), (2) sexual battery in violation of R.C. 2907.03(A)(5), a third-degree felony (A.N.), (3) rape in violation of R.C. 2907.02(A), a first-degree felony (H.N.), (4) gross sexual imposition in violation of R.C. 2907.05(A)(4), a third-degree felony (S.N.), and (5) rape in violation of R.C. 2907.02(A)(2), a first-degree felony (H.N.).

{¶38} After the trial court considered the pertinent sentencing

statutes and factors, the trial court sentenced appellant to (1) serve an 11-year prison sentence on Count 1, (2) serve a 5-year prison sentence on Count 2, (3) serve an 11-year prison sentence on Count 3, (4) serve a 5-year prison sentence on Count 5, (5) serve an 11-year prison sentence on Count 6, (6) serve all terms consecutively for an aggregate minimum of 43 years and a maximum of 48.5 years, (7) serve up to five-years post-release control, (8) register as a Tier III sex offender, and (9) have no contact with the three victims. This appeal followed.

Standard of Review

{¶39} As a threshold matter, because appellant challenges both the sufficiency of the evidence and the manifest weight of the evidence, we initially address both standards of review.

{¶40} A claim of insufficient evidence invokes a due process concern and raises the question of whether the evidence is legally sufficient to support the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997), syllabus; *State v. Blevins*, 2019-Ohio-2744, ¶ 18 (4th Dist.). When reviewing the sufficiency of the evidence, an appellate court's inquiry focuses primarily on the adequacy of the evidence; that is, whether the evidence if believed, could reasonably support a finding of guilt beyond a reasonable doubt. *Id.* at syllabus. The standard of

review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *E.g., Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Jenks*, 61 Ohio St.3d 259, 273 (1991).

{¶41} Furthermore, under the sufficiency of the evidence standard, a reviewing court does not assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). Therefore, when reviewing a sufficiency of the evidence claim, an appellate court must construe the evidence in a light most favorable to the prosecution. *See, e.g., State v. Hill*, 75 Ohio St.3d 195, 205 (1996); *State v. Grant*, 67 Ohio St.3d 465, 477 (1993). A reviewing court will not overturn a conviction on a sufficiency of the evidence claim unless reasonable minds could not reach the conclusion the trier of fact did. *State v. Tibbetts*, 92 Ohio St.3d 146, 162 (2001); *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001).

{¶42} "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins*, 78 Ohio St.3d at 387. "The

question to be answered when a manifest weight issue is raised is whether 'there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt.' " *State v. Leonard*, 2004-Ohio-6235, ¶ 81, quoting *State v. Getsy*, 84 Ohio St.3d 180, 193–194 (1998), citing *State v. Eley*, 56 Ohio St.2d 169 (1978), syllabus. A court that considers a manifest weight challenge must " 'review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses.' " *State v. Beasley*, 2018-Ohio-493, ¶ 208, quoting *State v. McKelton*, 2016-Ohio-5735, ¶ 328. However, the reviewing court must bear in mind that credibility generally is an issue for the trier of fact to resolve. *State v. Issa*, 93 Ohio St.3d 49, 67 (2001); *State v. Murphy*, 2008-Ohio-1744, ¶ 31 (4th Dist.). " 'Because the trier of fact sees and hears the witnesses and is particularly competent to decide "whether, and to what extent, to credit the testimony of particular witnesses," we must afford substantial deference to its determinations of credibility.' " *Barberton v. Jenney*, 2010-Ohio-2420, ¶ 20, quoting *State v. Konya*, 2006-Ohio-6312, ¶ 6 (2d Dist.), quoting *State v. Lawson*, 1997 WL 476684 (2d Dist. Aug. 22, 1997).

{¶43} Thus, an appellate court will generally defer to the trier of fact on evidence weight and credibility issues, as long as a rational basis exists in the record for the fact-finder's

determination. *State v. Picklesimer*, 2012-Ohio-1282, ¶ 24 (4th Dist.); *accord State v. Howard*, 2007-Ohio-6331, ¶ 6 (4th Dist.) ("We will not intercede as long as the trier of fact has some factual and rational basis for its determination of credibility and weight."). Accordingly, if the prosecution presented substantial credible evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. *Accord Eastley v. Volkman*, 2012-Ohio-2179, ¶ 12, quoting *Thompkins*, 78 Ohio St.3d at 387, quoting Black's Law Dictionary 1594 (6th Ed.1990) (a judgment is not against the manifest weight of the evidence when " ' "the greater amount of credible evidence" ' " supports it).

{¶44} Consequently, when a court reviews a manifest weight of the evidence claim, a court may reverse a judgment of conviction only if it appears that the fact-finder, when it resolved the conflicts in evidence, " 'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983); *accord McKelton* at ¶ 328. Finally, a reviewing court should find a conviction against the manifest weight of the evidence only in the " 'exceptional case in which the evidence weighs heavily

against the conviction.' " *Thompkins*, 78 Ohio St.3d at 387, quoting *Martin*, 20 Ohio App.3d at 175; *accord State v. Clinton*, 2017-Ohio-9423, ¶ 166; *State v. Lindsey*, 87 Ohio St.3d 479, 483 (2000).

I.

{¶45} In his first assignment of error, appellant asserts that sufficient evidence does not support his convictions because appellee failed to prove that (1) appellant applied force in Counts 1, 3, and 6, and (2) the offenses charged in Counts 2-6 occurred within the stated time frames in the indictment because the evidence is either nonexistent or inconsistent with the alleged time frames. Appellee, however, contends that (1) appellee adduced sufficient evidence to prove the element of force in each count, and (2) appellee proved beyond a reasonable doubt the offenses occurred within the alleged time frames.

A. Force

{¶46} In the case sub judice, the jury found appellant guilty of three counts of rape pursuant to R.C. 2907.02(A)(2), which provides: "[N]o 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. 2901.01(A)(1) defines "force" as any "violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." However, in cases that

involve sexual contact or conduct between a minor child and a parent or parental authority figure, the Supreme Court of Ohio held that force can be subtle and psychological and, thus, proven without a showing of physical force. *State v. George*, 2024-Ohio-471, ¶ 33 (8th Dist.), citing *State v. Eskridge*, 38 Ohio St.3d 56 (1988). *Eskridge* held:

> [t]he force and violence necessary to commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other. With the filial obligation of obedience to a parent, the same degree of force and violence may not be required upon a person of tender years, as would be required were the parties more nearly equal in age, size and strength.

Id. at paragraph one of the syllabus. The court recognized "the coercion inherent in parental authority when a father sexually abuses his child." *Id.* at 59. In this context, "[f]orce need not be overt and physically brutal, but can be subtle and psychological" and the forcible element of rape can be established "[a]s long as it can be shown that the rape victim's will was overcome by fear or duress[.]" *Id.* at 58-59. In *Eskridge*, the court concluded that the defendant father "held a position of authority over [the child] which did not require any explicit threats or displays of force." *Id.* at 59.

{¶47} In *State v. Dye*, 82 Ohio St.3d 323 (1998), the Supreme

Court of Ohio extended the *Eskridge* holding to a person who was not a parent, but held a position of authority over a child's life. In *Dye,* the Court allowed "subtle and psychological" evidence of force when a nine-year-old victim was abused by a family friend when in his care. *Id.* Further, while *Eskridge*, 38 Ohio St.3d 56, involved a child victim of tender years, courts have extended its holding to minor victims as old as 17. *George* at ¶ 38, citing *State v. Dippel*, 2004-Ohio-4649 (10th Dist.) (defendant was father of 14-year-old victim); *State v. Kudla*, 2016-Ohio-5215, (9th Dist.) (father raped victim between ages of 14 and 17); and *State v. Clay*, 2005-Ohio-6, ¶ 16 (9th Dist.)(defendant was stepfather of 16-year-old victim).

{¶48} Although in the case sub judice appellant acknowledges that in a case that involved a parent and child force need not be openly displayed, he contends that appellee presented no evidence of physical, psychological, or emotional force, and, therefore, presented insufficient evidence of force for Counts 1, 3, and 6.

{¶49} Here, the trial court gave the following instruction regarding the element of force:

> FORCE OF A PARENT OR OTHER AUTHORITY FIGURE. When the relationship between the victim and the defendant is one of child and parent, the element of force need not be openly displayed or physically brutal. It can be subtle or slight, and psychological or emotionally powerful. Evidence of an express threat of harm or evidence of significant physical restraint is not required. If you

> find beyond a reasonable doubt that under the circumstances in evidence the victim's will was overcome by fear, duress, or intimidation, the element of force has been proved.

{¶50} Because A.N. and H.N. were 15 and 16 years old respectively, and appellant their adoptive father who lived in the home, the victims fell within the age range that courts have applied the *Eskridge* reduced-force requirement. Thus, any evidence of subtle and psychological force is sufficient. *See State v. Stegner*, 2024-Ohio-4750, ¶ 34 (5th Dist.). Moreover, various courts have found actual force in various fact patterns, such as when a defendant manipulated clothing or moved or positioned a victim's body, *State v. Byrd*, 2003-Ohio-3958 (8th Dist.), or when a defendant pushed a victim's head towards him. *In the Matter of K.S.*, 2014-Ohio-188 (5th Dist.), (defendant grabbed victim's hand and placed it on his penis), *State v. Steele*, 2012-Ohio-3777 (5th Dist.), (defendant compelled a young boy to kneel in front of him). *Dye*, 82 Ohio St.3d 323.

{¶51} A.N. testified that appellant first raped her when her mother took a trip to California and appellant "told [A.N.] to sleep in the same bed with him." After appellant raped her, he told her, "Don't tell Mom." A.N., who has faced sibling separation in the foster care system, testified that she was afraid "that my Mom would get hurt, that they would take my siblings." The second

time appellant raped A.N. in her bedroom, appellant again warned her, "Don't tell Mom." After A.N. became pregnant and delivered her son, appellant again began to touch her inappropriately and caused her to run away. Here, the testimony adduced at trial, if believed, provided sufficient evidence of force regarding Counts 1 and 2.

{¶52} H.N. testified that appellant first raped her while her mother was away when she prepared to take a shower in the home's master bathroom. Appellant entered the bathroom and told H.N. that he planned to change his clothes and leave, but then anally raped her and told her, "it would help me with all of my stomach problems I was having." Afterward, appellant instructed H.N. to tell her siblings that she "was getting [her] butt busted [being punished] so they didn't think anything." Appellant "always said if I ever said anything that no one would believe me because he . . . was the adult." The second time appellant assaulted H.N., she "told him no because it was disgusting and I was his daughter." However, appellant inserted his fingers in her vagina. Thus, we believe that appellee adduced sufficient evidence of force concerning Counts 3 and 6, rape of H.N.

B. Time Frame

{¶53} Appellant also contends that appellee failed to prove that the crimes occurred within the time frame set forth in the

indictment.

{¶54} This court in *State v. Neal*, 2016-Ohio-64 (4th Dist.), wrote

> Ohio courts have repeatedly recognized that the time and date of an offense is ordinarily not required in an indictment, but the state must still establish that the offense charged occurred within a reasonable time in relation to the dates fixed in the indictment. *State v. McIntire*, 6th Dist. Huron No. H-13-018, 2015-Ohio-1057, 2015 WL 1278645, ¶ 42, citing *State v. Dodson*, 12th Dist. Butler No. CA2010-08-191, 2011-Ohio-6222, 2011 WL 6017950, ¶ 40.

Id. at ¶ 24. In *Neal*, one count charged Neal with unlawful sexual conduct with a minor "on or about the 10th day of June, 2013." However, the victim testified that she thought the incident occurred sometime in 2013 before the final two incidents, which occurred on June 13, 2013, and that she thought it snowed at the beginning of the day. *Id.* at ¶ 25. This court concluded that the state failed to establish by sufficient evidence that the charged offense occurred within the alleged period. *Id.*

{¶55} The Twelfth District explained further in *State v. Scott*, 2020-Ohio-3230 (12th Dist.):

> Ordinarily, precise times and dates are not essential elements of offenses. *State v. Sellards*, 17 Ohio St. 3d 169, 171, 478 N.E.2d 781 (1985). Thus, "[t]he failure to provide dates and times in an indictment will not alone provide a basis for dismissal of the charges." *Id.* "A certain degree of inexactitude of averments, where they relate to matters other than the elements of the offense,

> is not per se impermissible or necessarily fatal to a prosecution." *Id.; see also State v. Hoyt*, 12th Dist. Warren No. CA2015-10-089, 2016-Ohio-642, 2016 WL 698101, ¶ 16. Additionally, it is sufficient if it can be understood that the offense was committed at some time prior to the time of the filing of the indictment. *State v. Collinsworth*, 12th Dist. Brown No. CA2003-10-012, 2004-Ohio-5902, 2004 WL 2504485, ¶ 22, citing *Sellards* at 171, 478 N.E.2d 781. Some Ohio courts have also recognized that "[t]he State is not required to prove that an offense occurred on any specific date, but rather may prove that the offense occurred on a date reasonably near that charged in the indictment." *State v. Miller*, 5th Dist. Licking No. 2006CA00030, 2006-Ohio-6236, 2006 WL 3423404, ¶ 22 (upholding appellant's conviction where the victim's testimony provided competent, credible evidence from which the jury could find appellant raped the victim on a date reasonably near the date claimed in the indictment); *Tesca v. State*, 108 Ohio St. 287, 140 N.E. 629 (1923), paragraph one of the syllabus ("It is sufficient to prove the alleged offense at or about the time charged").

Id. at ¶ 39.

{¶56} Children may be unable to remember specific dates, particularly with ongoing abuse over an extended time period. *See State v. Thompson*, 2006-Ohio-1836, ¶ 19 (8th Dist.), citing State *v. Mundy*, 99 Ohio App.3d 275 (1994). For example, the First Appellate District considered a case in which the State alleged that the defendant committed three acts of rape against his eight-year-old step-daughter over fourteen months. *State v. Gingell*, 7 Ohio App.3d 364 (1st Dist. 1982). The court coined the phrase "unavoidable inexactitude" and concluded that exact dates are not critical to a defendant's defense if the sexual abuse is repeated

and the defendant had frequent access to the victim. *Id.* at 368. *See also State v. Oddi*, 2002-Ohio-5926, ¶ 57 (5th Dist.)("while an adult might have managed the situation differently, society does not generally expect a 15-year-old to have the emotional or practical experience necessary to face such a situation.").

{¶57} As noted above, because specific dates and times are not elements of the offenses charged, indictments that charge sexual offenses against children do not need to specify the exact date of the alleged abuse if the State establishes that a defendant committed the offense within the time frame alleged. *State v. Mahoning*, 2021-Ohio-4639, ¶ 19 (7th Dist.). Further, the problem is compounded when the accused and the victim are related or reside in the same household, situations that often facilitate an extended period of abuse. *Scott*, *supra,* 2020-Ohio-3230 at ¶ 40. *See also State v. Carter*, 2022-Ohio-3787, ¶ 13 (7th Dist.)(no issue with provision of date range when rape victim is a child, especially when the victim lives with the perpetrator.); *State v. Honeycutt,* 2024-Ohio-2507, ¶ 25 (11th Dist.)(an "indictment ... using the words of the statute, the victim's initials, years of birth, and estimated time frame of the charges was sufficient to notify [the defendant] of the offenses to enable him to defend against the allegations and to protect himself from future prosecution for the

same offense.").

{¶58} We, of course, recognize that, under certain circumstances, indictments must set forth specific dates and times, and the failure to provide these specific dates and times may indeed prejudice an accused. However, in cases "[w]here the defendant does not present an alibi defense, where he concedes being alone with the victims of the alleged sex offenses at various times throughout the relevant time frame, and where his defense is that the alleged touchings never happened, the inexactitude of dates or times in the indictment is not prejudicial error." *State v. Mundy*, 90 Ohio App.3d 275, 297 (2nd Dist. Dec. 16, 1994), citing *State v. Barnecut,* 44 Ohio App.3d 149 (5th Dist. Apr. 1, 1988), paragraph one of the syllabus.

{¶59} In the case sub judice, appellant did not raise an alibi defense. Instead, appellant conceded that he lived in the home during the time frames listed in the indictment, acknowledged that he had access to all three victims at times when no other adults were present, and presented a defense that invoked issues of credibility unrelated to the lack of exact dates or times set forth in the indictment. *See State v. Buckland*, 2023-Ohio-2095, ¶ 17-18 (12th Dist.) (defendant did not file alibi defense and conceded to living in home during general times of alleged offenses).

A.N. (Counts 1 and 2)

{¶60} In the case sub judice, relevant to this assignment of error, a grand jury returned an indictment that charged appellant with rape (Count 1) and sexual battery (Count 2) with respect to A.N. Counts 1 and 2 alleged that the offenses occurred "on, about, or between February 1, 2022 through March 15, 2022." A.N. testified with respect to the first rape that it occurred in her parents' bedroom during her mother's visit to California. A.N. testified that she thought this rape occurred in March 2022.

{¶61} Concerning Count 2, (second incident), appellee asked A.N., "Thinking back to that time as well, February, March . . . do you remember another incident that occurred with your father?" Initially, A.N. said, "No, I don't." The prosecutor then asked, "Okay. You don't remember a time when it happened in your bedroom?" A.N. replied, "Yes," and then testified about the second incident in A.N.'s bedroom while her mother slept in her parents' room. A.N. did not specify an exact date, but gave her account of the second assault in response to the question about a second incident in February or March 2022.

{¶62} Further, Michelle Nickell testified that she traveled to

California "around March, like late February, early March." In addition, as appellee points out, A.N. testified that the second assault occurred early in the morning while her sister prepared for school, which narrows the time frame as well. Importantly, in addition to A.N.'s testimony, appellee points out that A.N.'s full-term pregnancy resulted in the baby's birth on December 5, 2022, which places the conception the end of February or early March 2022. Thus, we believe that A.N.'s testimony regarding the assaults alleged in Counts 1 and 2 placed both assaults within the February-March 2022 time frame charged in the indictment.

H.N. (Counts 3, 4, and 6)

{¶63} Counts 3, 4, and 6 all relate to victim H.N. Count 3 charged rape and Count 4 charged sexual battery, both "on or between March 1, 2022 through March 15, 2022." Appellee asked H.N., "Do you remember a time back in March of last year when you were requiring surgery for something?" H.N. replied, "For my stomach." Appellee asked, "Okay. Do you remember when that might have occurred?" H.N. replied, "around like the end of March." H.N. proceeded to testify regarding the anal rape.

{¶64} Appellant points out that Michelle Nickell testified that H.N.'s surgery occurred in May. However, Nickell stated, "I'm

thinking it was in May." Further, appellant alleges that, if the surgery occurred at the end of March, appellee was required to introduce evidence that the incident occurred before the surgery, or amend the indictment to expand the time frame to include the time after the surgery, but did not.

{¶65} Here, we believe that H.N.'s testimony that her surgery and rape occurred "around" late March is sufficient to meet the *Neal* standard of a child victim testifying that an offense occurred "within a reasonable time in relation to the dates fixed in the indictment." *Neal* at ¶ 24.

{¶66} For Count 6, the indictment charged rape that occurred, "on, about or between August 1, 2022 and September 19, 2022." H.N. testified about a second incident in which she rode in a vehicle with appellant to sell hitches. H.N. testified that appellant pulled over on "some random back road" and put his fingers inside of her vagina. When asked on cross-examination, "[t]his other incident in the vehicle, do you recall was . . . what season it was when this happened?," H.N. replied, "It was early morning and it was kind of chilly." The prosecutor asked, "were you still in school at the time?" H.N. answered, "Yes, I was off because I was getting ready to have surgery."

{¶67} Here, we believe that H.N.'s testimony regarding the assault alleged in Counts 3, 4, and 6 placed the assaults within the time frame alleged in the indictment.

S.N. (Count 5)

{¶68} Finally, appellant argues that no evidence exists as to the time, date, or season of the offense in Count 5, gross sexual imposition against S.N. The indictment charged appellant with gross sexual imposition that occurred, "on or about the month of July 2022" when S.N. was nine years old. S.N. testified remotely that appellant put his hands on and in her "private area" under her swimsuit while S.N. sat on appellant's lap in their backyard hot tub. Although S.N. did not testify specifically about the time frame in which this assault occurred, S.N. testified that she told her mother about a month and a half after the assault, and her mother then held a family meeting before the baby's birth. Michelle Nickell testified that the family meeting was "somewhere around late August, early September, I think." This corresponds with S.N.'s testimony and establishes that the Count 5 offense occurred within a reasonable time in relationship to the dates set forth in the indictment. *Neal* at ¶ 24.

{¶69} Appellant cites *State v. Yaacov*, 2006-Ohio-5321 (8th Dist.) to argue that insufficient evidence exists to prove Counts

2-6. Yaacov faced 42 counts of rape, 40 counts of gross sexual imposition, 42 counts of sexual battery, and one count of tampering with evidence relating to his minor daughter. *Id.* at ¶ 2. In *Yaacov*, the 15-year-old victim could not provide specific dates of abuse over the three-year window charged in the indictment, but testified where each offense occurred, the home she lived in at that time, where she worked, and who employed the defendant at the various times of offenses. In addition, the victim's sister substantiated the victim's claims. *Id.* at ¶ 21.

{¶70} The court pointed out that the failure to allege specific dates did not prejudice the defendant's ability to defend himself because his defense strategy centered on his claim that he did not engage in sexual conduct with his daughter, regardless of the date or location the alleged abuse occurred. *Id.* at ¶ 24. Similarly, in the case at bar, appellant also denies all allegations, regardless of date. Thus, we do not believe *Yaacov* supports appellant's argument.

{¶71} Taking all of the testimony together, and construing it in favor of appellee, we believe that the evidence demonstrates that the incidents described in Counts 2-6 of the indictment occurred within a reasonable time in relation to the time frames set forth in the indictment. *Neal* at ¶ 24. Thus, in the case sub

judice, the State adduced sufficient evidence that appellant used force to commit the offenses in Counts 1, 3, and 6 and committed the offenses of rape, sexual battery, and gross sexual imposition in Counts 2-6 during the time frames in the indictment.

{¶72} Accordingly, we overrule appellant's first assignment of error.

II.

{¶73} In his second assignment of error, appellant asserts that his convictions in Counts 2-6 are against the manifest weight of the evidence. Specifically, appellant challenges the weight of the evidence surrounding the time frame of Counts 2-6, including the contradictory and uncertain testimony about the precise time frame the assaults occurred. Further, appellant challenges the convictions for rape because, he asserts, appellee introduced no evidence of force. Appellee, however, contends that while some testimony conflicted, the jury "was free to believe all, part, or none of the testimony of each witness," *State v. Hall*, 2014-Ohio-2959, ¶ 2 (4th Dist.), and this court should defer to the jury on these evidentiary weight and credibility issues.

{¶74} To decide whether the case sub judice is an exceptional case in which the evidence weighs heavily against conviction, this court must review the record, weigh the evidence and all reasonable

inferences, and consider witness credibility. *State v. Martin*, 20 Ohio App.3d 172, 175, (1st Dist. 1983). However, a reviewing court must bear in mind that credibility generally is an issue for the trier of fact to resolve. *State v. Schroeder,* 2019-Ohio-4136, ¶ 61 (4th Dist.); *State v. Dunn,* 2012-Ohio-518, ¶ 16 (4th Dist.); *State v. Wickersham,* 2015-Ohio-2756, ¶ 25 (4th Dist.). Because the trier of fact sees and hears the witnesses, an appellate court will afford substantial deference to a trier of fact's credibility determinations. *Schroeder* at ¶ 62. The jury has the benefit of seeing witnesses testify, observing facial expressions and body language, hearing voice inflections, and discerning qualities such as hesitancy, equivocation, and candor. *State v. Fell*, 2012-Ohio-616, ¶ 14 (6th Dist.); *State v. Pinkerman,* 2024-Ohio-1150, ¶ 26 (4th Dist.). Thus, an appellate court may reverse a conviction if the trier of fact clearly lost its way in resolving conflicts in the evidence and created a manifest miscarriage of justice. *State v. Benge*, 2021-Ohio-152, ¶ 28 (4th Dist.).

{¶75} As appellee points out, a jury, sitting as the trier of fact, may choose to believe all or part or none of the testimony of any witness who appears before it. *State v. Daniels,* 2011-Ohio-5603, ¶ 23 (4th Dist.); *State v. Abudu,* 2023-Ohio-2294, ¶ 65 (8th Dist.). Accordingly, the jury may assess what weight, if any, to

attribute to the testimony of each witness. Although conflicting testimony may have been adduced during a trial, an appellate court will defer to the jury on these issues because the jury is "free to believe all, part or none of the testimony of any witness." *Hall*, *supra*, at ¶ 2. Thus, inconsistent testimony will not necessarily render a conviction against the manifest weight of the evidence. A defendant is not entitled to reversal on manifest weight grounds merely because certain aspects of a witness's testimony are inconsistent or contradictory. *See State v. Ferguson*, 2024-Ohio-576, ¶ 29 (8th Dist.), citing *State v. Flores-Santiago*, 2020-Ohio-1274, ¶ 40 (8th Dist.). " ' "While [a factfinder] may take note of the inconsistencies and resolve or discount them accordingly, * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." ' " *Id.*, quoting *State v. Mann*, 2011-Ohio-5286, ¶ 37 (10th Dist.), quoting *State v. Nivens*, 1996 WL 284714, * 3 (10th Dist. May 28, 1996). Consequently, in the case sub judice, even if we assume that inconsistencies in testimony may constitute more than minor contradictions, which we do not believe, once again the trier of fact must assess witness credibility, including appellant's credibility.

{¶76} As appellee points out, incredulously, appellant

testified that A.N. asked him to "provide [his] semen" so that she could "give her Mom a gift." Appellant testified that he left his semen "on the bathroom sink and walked out of the bathroom and [A.N.] walked in behind me." When asked if he wanted the jury to believe "that three kids decide to lie and make sexual allegations against you, while at the same time, you worked out a deal to impregnate your 16-year-old with your semen," appellant replied, "Yes."

{¶77} As we noted above, only in extraordinary circumstances when evidence presented at trial weighs heavily in favor of acquittal, will an appellate court overturn a conviction on the manifest weight of the evidence grounds. *State v. Ridenour*, 2023-Ohio-2713, ¶ 50 (12th Dist.). The case at bar is not one of those extraordinary cases. Here, the evidence presented at trial does not weigh heavily in favor of acquittal.

{¶78} Consequently, after our review of the record, we conclude that ample competent, credible evidence supports appellant's convictions for Counts 2-6. Thus, appellant's convictions are not against the manifest weight of the evidence. We believe appellee also satisfied its burden of persuasion.

{¶79} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error.

III.

{¶80} In his third assignment of error, appellant asserts that the trial court erred when it sentenced him to serve consecutive sentences. Appellant contends that the presumption of concurrent sentences requires this court to amend appellant's sentence to comport with that presumption. Appellee, however, argues that the trial court correctly followed sentencing procedures under R.C. 2929.14(C)(4), both at sentencing and in the sentencing entry.

{¶81} An appellate court should give broad deference to a trial court's sentencing decision and not serve as a "second-tier sentencing court." *State v. Blanton*, 2025-Ohio-237, ¶ 30 (4th Dist.), citing State *v. Glover*, 2024-Ohio-5195, ¶ 39.

{¶82} Ordinarily, appellate courts defer to the broad discretion trial courts have in making sentencing decisions, and R.C. 2953.08(G) also reflects that deference. A trial judge has the opportunity to preside over the trial, hear witnesses testify, hear the defendant make his allocution directly to the sentencing judge, and hear from the victims at sentencing. Blanton at ¶ 30. Thus, appellate courts should possess no inherent right to second guess a felony sentence. Indeed, "[e]xcept to the extent specifically directed by statute, 'it is not the role of an

appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.' " (Citations omitted.) *Id.* citing State *v. Glover*, 2024-Ohio-5195, ¶ 39.

{¶83} R.C. 2953.08(G)(2) provides the sole basis for the appellate court's review of consecutive sentences:

> The court hearing an appeal [of a felony sentence that includes consecutive sentences] ... shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
>
> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under ... (C)(4) of section 2929.14 ... ;
>
> (b) That the sentence is otherwise contrary to law.

{¶84} This statute does not allow an appellate court to reverse or modify a sentence on the basis that the trial court abused its discretion. *Glover* at ¶ 45; *Blanton* at ¶ 31.

{¶85} An appellate court can increase, decrease, or otherwise modify consecutive sentences only if it clearly and convincingly finds that the record does not support the trial court's findings

or it clearly and convincingly finds that the sentence is contrary to law. *Glover* at ¶ 42. " '[C]lear and convincing evidence' is a degree of proof that is greater than preponderance of the evidence but less than the beyond-a-reasonable-doubt standard used in criminal cases." *Id.* at ¶ 46. "Nowhere does the appellate-review statute direct an appellate court to consider the defendant's aggregate sentence." Instead, we limit our review to the trial court's consecutive-sentencing findings under R.C. 2929.14(C). *Id.* at ¶ 43. Nor does the statute allow an appellate court to reverse or modify a sentence on the basis that the trial court abused its discretion. *Id.* at ¶ 45; *Blanton* at ¶ 32.

{¶86} In the case sub judice, our review of the sentencing transcript reveals that the trial court made the appropriate R.C. 2929.11 and 2929.12 findings. As we recently held in *State v. Nolan*, 2024-Ohio-1245 (4th Dist.), R.C. 2953.08(G)(2) does not permit an appellate court to simply conduct an independent review of a trial court's sentencing findings under R.C. 2929.12 or its adherence to the purposes of felony sentencing under R.C. 2929.11. *Nolan* at ¶ 44, citing *State v. Bryant*, 2022-Ohio-1878, ¶ 21, citing *State v. Jones*, 2020-Ohio-6729, ¶ 41-42. Moreover, R.C. 2953.08(G)(2) does not allow an appellate court to modify or vacate

a sentence based on its view that the record does not support the sentence under R.C. 2929.11 and 2929.12. *Bryant* at ¶ 22, citing *Jones* at ¶ 31, 39.

{¶87} Appellant contends that the sentencing entry does not include any necessary findings. In particular, appellant asserts that, although the sentencing entry language indicates that the trial court considered certain statutory factors, those factors are the general sentencing factors and not the factors required for consecutive sentences. Further, appellant argues that, although the trial court addressed some of these issues on the record, the colloquy was insufficient.

{¶88} Appellee, however, argues that the trial court met its R.C. 2929.14(C)(4) burden at sentencing and in the entry. At the hearing, the trial court noted that it had reviewed letters in support of appellant as well as victim impact letters and stated:

> The Court has considered all the sentencing factors in Revised Code Sections 2929.11 and 2929.12. In my opinion, this is about the worst crime anyone can commit. It's against children. I find this horrendous. There's nothing worse to me. And you're . . . this is the worst version of the offense, in my opinion. These children's injuries have been exacerbated by their age. They've clearly suffered . . . uh . . . harm from this, serious harm, and it's your relationship with them as their father that facilitated this crime. Shame on you.
>
> . . .

> Therefore, the court is going to pass down the following sentence . . . Count One, 11 to 16 ½ years, Count Two, five years, Count Three, 11 years, Count 5, five years, Count Six, 11 years. By my math, that is a 43 to 48 ½ year sentence, these will run consecutively. It's necessary to protect the public. Punishment is not disproportionate. The court finds the harm is so great or unusual that a single term does not adequately punish this . . . these offenses. You're entitled any jail time credit as provided under Ohio law . . .

Moreover, a review of the sentencing entry provides:

> Having considered all statements in mitigation as well as the statements of the parties, any presentence investigation, any victim impact statement and/or other statement from the victim or victim's representative, as well as the principles and purposes of sentencing in R.C. 2929.11, the seriousness and recidivism factors in R.C. 2929.12, and all other relevant sentencing statutes. . .
>
> . . .
>
> In fashioning the sentence(s) in this case, the Court has considered the need to protect the public from future crime by the defendant and others, to punish the defendant, and to promote the defendant's effective rehabilitation while using the minimum sanctions to accomplish those purposes without imposing an unnecessary burden on state or local government resources. This includes the need for incapacitation, deterrence, rehabilitation of the defendant, and restitution to the victim and/or the public. The sentence is commensurate with, and not demeaning to, the seriousness of the defendant's conduct and its impact on the victim, consistent with sentences for similar crimes by similar offenders, and is in no way based on the defendant's race, ethnicity, gender, or religion.
>
> The Court has considered R.C. 2929.12 and has weighed the factors which indicate the defendant's conduct is more or less serious than that normally constituting the offenses charged as well as the factors that would indicate that the defendant is more or less likely to commit future

> crimes.
>
> The Court has weighed the following R.C. 2929.12 seriousness and recidivism factors in imposing the sentence in this case:
>
> The Court believes this conduct is more serious than that normally constituting the offense because:
>
> * The injury(ies) caused in this case were exacerbated by victim's physical or mental condition or their age.
>
> * The victim(s) suffered serious physical, psychological, or economic harm.
>
> * The defendant's relationship with the victim facilitated the offense.
>
> The Court believes the defendant is more likely to commit future crimes as:
>
> * The defendant shows no genuine remorse.

{¶89} In the case sub judice, we believe that the trial court correctly concluded that the record reveals that appellant committed the worst form of the offenses. Appellant broke the fragile trust of three children who had already been victimized before appellant adopted them. Although appellant made a short statement, he did not appear to take genuine responsibility for his actions. Further, the trial court found that consecutive sentences are (1) necessary to protect the public, (2) not disproportionate to the seriousness of the offenses, and (3) the harm these offenses caused is so great or unusual that a single term would not

adequately reflect the seriousness of appellant's conduct. Moreover, the sentence the trial court imposed is within the statutory range.

{¶90} In the case sub judice, the trial court found that consecutive sentences were necessary to punish appellant, are not disproportionate to the seriousness of appellant's conduct or the danger he poses to the public, and appellant's criminal history demonstrates that consecutive sentences are necessary to protect the public from future crimes. Consequently, we believe that the record in this case does not clearly and convincingly fail to support the trial court's imposition of consecutive sentences. R.C. 2953.08(G)(2)(a) allows for modification or vacation only when the appellate court "clearly and convincingly finds" that the evidence does not support the trial court's findings. *Glover* at ¶ 46. Thus, in light of the foregoing, we do not clearly and convincingly find that appellant's sentence is contrary to law.

{¶91} Accordingly, for all of the foregoing reasons, we overrule appellant's third assignment of error.

IV.

{¶92} In his fourth assignment of error, appellant asserts that the introduction of remote testimony during his jury trial violated

his right to confrontation under the United States Constitution Sixth and Fourteenth Amendment and Section 10, Article I of the Ohio Constitution. Appellee, however, alleges that initially, appellant's trial counsel informed appellee that appellant agreed to allow S.N., the youngest victim, to testify remotely because he feared that her in-person testimony might harm his case. Appellee contends that the parties informed the trial court of their remote testimony agreement, but failed to place the agreement on the record. Nevertheless, as appellee points out, appellant did not object at trial to S.N.'s remote testimony, either orally or in writing.

{¶93} The Sixth Amendment to the United States Constitution affords a criminal defendant "the right * * * to be confronted with the witnesses against him." The right to confrontation is " 'not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.' " *State v. Self*, 56 Ohio St.3d 73, 76, quoting 5 Wigmore on Evidence (Chadbourn Rev. 1974) 150, Section 1395.

{¶94} The Sixth Amendment does not prohibit remote witness testimony, but " 'reflects a preference for face-to-face

confrontation at trial.' " (Emphasis in sic.) *Maryland v. Craig*, 497 U.S. 836, 849 (1990), quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). Face-to-face confrontation, however, " 'must occasionally give way to considerations of public policy and the necessities of the case.' " *Id.*, quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895). Thus, a defendant's right to confront a witness "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850, citing *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988).

{¶95} In *Craig*, *supra,* 497 U.S. 836, the United States Supreme Court held that the Confrontation Clause does not guarantee "criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." (Emphasis in original.) *Craig* at 844. *Craig* involved a procedure that permitted a child victim to testify against the accused via one-way closed-circuit television. *Id.* at 840. The court approved the procedure and held that, although the Confrontation Clause reflected a preference for face-to-face confrontation, it must occasionally give way to public policy considerations and the necessities of the case. *Id.* Therefore, the court held that trial courts can dispense with face-

to-face confrontation in limited circumstances "where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850.

{¶96} The Supreme Court of Ohio in *State v. Self*, 56 Ohio St.3d 73 (1990) determined that R.C. 2907.41, which permits the use of a child sexual abuse victim's videotaped deposition at trial in place of live testimony, does not violate the Ohio or federal confrontation clauses. The court stated that "literal face-to-face confrontation is not the sine qua non of the confrontation requirement." *Id.* at 77. The court reasoned:

> Though our Constitution uses the specific phrase 'face to face,' that phrase has not been judicially interpreted at its literal extreme. This is because the purpose of the 'face to face' clause of the Ohio Constitution (as well as the parallel provision of the Sixth Amendment) is to guarantee the opportunity to cross-examine and the right to observe the proceeding. Taking the phrase 'face to face' to its outer limits, one could argue that a witness who looks away from the defendant while testifying is not meeting the defendant 'face to face.' As we have indicated, a criminal defendant is ordinarily entitled to a physical confrontation with the accusing witnesses in the courtroom. Yet, the value which lies at the core of the Confrontation Clauses does not depend on an 'eyeball to eyeball' stare-down. Rather, the underlying value is grounded upon the opportunity to observe and to cross-examine. The physical distance between the witness and the accused, and the particular seating arrangement of the courtroom, are not at the heart of the confrontation right.

Id. at 79. The court concluded that:

> While closed-circuit television and videotape recording did not exist when the Ohio (or federal) Constitution was written and adopted, these new technologies, when employed in accord with R.C. 2907.41, provide a means for the defendant to exercise the right of cross-examination and to observe the proceedings against him with the same particularity as if he and the witness were in the same room.

Id.

{¶97} Thus, Ohio has established a two-part test to determine whether an alternative to face-to-face confrontation qualifies as an exception to the Confrontation Clause:

> the procedure must (1) be justified, on a case-specific finding, based on important state interests, public policies, or necessities of the case and (2) must satisfy the other three elements of confrontation - oath, cross-examination, and observation of the witness's demeanor.

State v. Banks, 2021-Ohio-4330, ¶ 22 (1st Dist.), citing *State v. Howard,* 2020-Ohio-3819, ¶ 53 (2d Dist.); *State v. Marcinick*, 2008-Ohio-3553, ¶ 14 (8th Dist.).

{¶98} The Tenth District recently addressed a similar issue in *State v. Foster*, 2024-Ohio-2924, ¶ 50 (10th Dist.). The defendant argued that the trial court should not have permitted a 15-year-old to testify remotely because it was not necessary to further an important public policy and because the court could not otherwise assure the reliability of the witness's remote testimony. *Id.* at ¶ 52. The court observed that a failure to object to remote witness

testimony waives all but plain error. *Id.*, citing *State v. McKelton*, 2016-Ohio-5735, ¶ 191. The court noted that not only did the defendant fail to object, but both he and his attorney expressly agreed to the remote testimony. Thus, the court concluded that the invited-error doctrine precluded Foster's claim of even plain error. *Id.* at ¶ 53, citing *State v. Bogovich*, 2008-Ohio-3100, ¶ 10 (10th Dist.).

{¶99} Even assuming arguendo that a defendant did not invite the alleged error:

> Under these circumstances, we believe appellant forfeited the right to raise the arguments he now raises for the first time on appeal. *Independence v. Office of the Cuyahoga Cty. Executive*, 142 Ohio St.3d 125, 2014-Ohio-4650, 28 N.E.3d 1182, ¶ 30 (stating that "an appellant generally may not raise an argument on appeal that the appellant has not raised in the lower courts"); *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 21 (explaining that defendant forfeited his constitutional challenge by failing to raise it during trial court proceedings); *Gibson v. Meadow Gold Dairy*, 88 Ohio St.3d 201, 204, 724 N.E.2d 787 (2000) (concluding that party waived constitutional arguments for purposes of appeal when party failed to raise those arguments during trial court proceedings); *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177, 602 N.E.2d 622 (1992) (explaining that an appellant cannot "present * * * new arguments for the first time on appeal"); *accord State ex rel. Jeffers v. Athens Cty. Commrs.*, 4th Dist. Athens No. 15CA27, 2016-Ohio-8119, 2016 WL 7230928, fn.3 (stating that "[i]t is well-settled that failure to raise an argument in the trial court results in waiver of the argument for purposes of appeal"); *State v. Anderson*, 4th Dist. Washington No. 15CA28, 2016-Ohio-2704, 2016 WL

> 1643247, ¶ 24 (explaining that "constitutional arguments not presented in the trial court are deemed to be waived and may not be raised for the first time on appeal"). We may, however, consider appellant's arguments using a plain-error analysis. *See Risner v. Ohio Dept. of Nat. Resources, Ohio Div. of Wildlife*, 144 Ohio St.3d 278, 42 N.E.3d 718, ¶ 27, 2015-Ohio-3731 (stating that reviewing court has discretion to consider forfeited constitutional challenges); *see also Hill v. Urbana*, 79 Ohio St.3d 130, 133–34, 679 N.E.2d 1109 (1997), citing *In re M.D.*, 38 Ohio St.3d 149, 527 N.E.2d 286 (1988), syllabus (stating that "[e]ven where [forfeiture] is clear, [appellate] court[s] reserve[ ] the right to consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it' "); *State v. Pyles*, 7th Dist. Mahoning No. 13-MA-22, 2015-Ohio-5594, ¶ 82, quoting *State v. Jones*, 7th Dist. No. 06-MA-109, 2008-Ohio-1541, ¶ 65 (explaining that the plain error doctrine " 'is a wholly discretionary doctrine' "); *DeVan v. Cuyahoga Cty. Bd. of Revision*, 8th Dist. Cuyahoga No. 102945, 45 N.E.3d 661, 2015-Ohio-4279, ¶ 9 (noting that appellate court retains discretion to consider forfeited argument).

Matter of J.M.P., 2017-Ohio-8126, ¶ 7 (4th Dist.).

{¶100} Finally, in *State v. Carter*, 2024-Ohio-1247, the Supreme Court of Ohio addressed the protection of vulnerable child victims concerning remote testimony. During the defendant's trial for two counts of sexual battery, the prosecution moved to allow video testimony from the CEO of the defendant's school. *Id.* at ¶ 12. The trial court granted the motion over the defendant's objection and observed that the "COVID-19 pandemic and labor shortages at airlines resulting from the pandemic" had made "travel by air uncertain on a daily basis" and observed that the weather was

unpredictable. *Id.* at ¶ 13. The Supreme Court of Ohio disagreed and held, "In *Craig* and *Self*, the important state interest at stake was protecting a vulnerable child victim from severe emotional trauma . . . Quite simply, avoiding travel delays and inconvenience does not constitute a state interest of anywhere near the same magnitude as that involved in *Craig* and *Self.*" *Id.* at ¶ 39. Nonetheless, in light of the other evidence presented against Carter at trial, the court found the error harmless and affirmed his convictions. *Id.* at ¶ 54.

{¶101} Thus, even if, for purposes of argument, the trial court erred by allowing the witness to testify remotely because appellee did not sufficiently justify the witness's unavailability, a confrontation clause error does not require an automatic reversal. "A constitutional error can be held harmless if we determine that it was harmless beyond a reasonable doubt." *State v. Conway*, 2006-Ohio-791, ¶ 78, citing *Chapman v. California*, 386 U.S. 18, 24 (1967). *See State v. Castonguay,* 2021-Ohio-3116, ¶ 41 (2d Dist.)(no confrontation clause violation by use of remote trial testimony of three witnesses in grand theft trial); *State v. Durst*, 2020-Ohio-607, (6th Dist.) (although trial court should not have permitted witness to testify remotely because prosecution did not establish witness unavailable to appear in person, admission of

remote testimony without preliminary showing of unavailability constituted harmless error); *State v. Marcinick*, 2008-Ohio-3553, (8th Dist.)(use of live video link to allow key prosecution witness to testify from Belgium did not violate defendant's confrontation right); *State v. Johnson*, 2011-Ohio-3143, ¶ 58-67 (1st Dist.)(no confrontation clause violation when witnesses testified under oath via two-way closed circuit television, were subject to live cross-examination, and were visible in the courtroom during their testimony).

{¶102} Therefore, even if appellant did not waive or forfeit his right to raise this issue, here we do not believe that the trial court erred when it permitted the ten-year-old victim to testify remotely. When we apply the first prong of the test, we observe that the trial court acted to protect the young, vulnerable ten-year-old child victim. *Craig, Self, supra.* Furthermore, the child testified under oath, defense counsel cross-examined her testimony, and appellant and counsel and the trier of fact observed the child victim witness's demeanor during her testimony. *Id.*

{¶103} Accordingly, based upon the foregoing reasons, we overrule appellant's fourth assignment of error.

V.

{¶104} In his fifth assignment of error, appellant asserts that

the trial court improperly allowed the introduction of expert testimony based on information neither admitted at trial, nor observed by the expert. Appellant argues that, although appellee's BCI Forensic Scientist, Devonie Herdeman, did not observe the DNA extraction process, she testified about the DNA extraction process.

{¶105} In general, courts apply an abuse-of-discretion standard in reviewing a trial court's decision to admit or exclude expert testimony. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 144-146 (1997); *State v. Williams*, 4 Ohio St.3d 53, 58 (1983). Pursuant to *Daubert v. Merrell Dow Pharmaceuticals*, Inc., 509 U.S. 579, 589 (1993), the trial judge must perform a "gate-keeping" role to ensure expert testimony is sufficiently relevant and reliable to justify its submission to the trier of fact. *State v. Butler*, 2013-Ohio-4451, ¶ 17 (5th Dist.). Generally, the reliability of an expert's opinion depends upon (1) the validity of the underlying theory, (2) the validity of the technique used to apply that theory, and (3) the proper application of the technique on a particular occasion. *Id.*

{¶106} In *State v. Robinson*, 2017-Ohio-8273 (4th Dist.), we observed that in its most recent case, the United States Supreme Court held that the Confrontation Clause does not bar an expert from expressing an opinion based on a DNA profile that the testifying expert did not prepare. *Id.* at ¶ 47, citing *Williams v.*

Illinois, 567 U.S. 50 (2012). In *Robinson*, the defendant argued that the trial court erred when it denied his motion to strike the testimony of a BCI forensic scientist who testified that she compared a DNA profile prepared by another BCI employee, who did not testify, with a DNA profile she created. Robinson claimed that the expert's testimony violated his constitutional right to confront the other BCI employee. *Id.* at ¶ 5. This court disagreed:

> [T]he Confrontation Clause does not prevent one expert from expressing an opinion based upon a DNA profile that was prepared by a nontestifying expert. Here the contested DNA profile was not offered to prove the truth of the matter asserted; rather forensic scientist DeVine referred to it solely for the purpose of explaining the assumptions upon which her opinion rested. Robinson was able to cross-examine DeVine, including the underlying assumptions for her opinion and conclusions. Moreover, DNA profiles are not inherently inculpatory—they are prepared by technicians who generally have no way of knowing whether they will be incriminating or exonerating. The trial court did not violate Robinson's right to confrontation by denying his motion to strike DeVine's testimony.

Id.

{¶107} Similar to *Robinson*, in the case sub judice BCI Forensic Scientist Herdeman testified that in her role, she compared appellant, A.N., and the infant's DNA profiles to determine if the DNA could exclude appellant as the infant's father. Herdeman explained that BCI protocol provides that after one employee retrieves the evidence from the secure vault and prepares the

samples for the DNA analysis., a robot then completes the rest of the process, i.e., "the counting the DNA, preparing it for a picture, and generating that DNA profile." Herdeman testified that her responsibility in this case "was to look at the data that was generated, so those DNA profiles, make sure that all of the controls worked properly, perform the comparison, generate the statistic and then report that has my findings on it."

{¶108} Appellee points out that (1) the trial court admitted Herdeman's report, Exhibit 11, without objection, (2) Herdeman used the profiles to explain the assumptions upon which her report is based, (3) appellant cross-examined Herdeman, and (4) Herdeman's testimony aligned with the court's reasoning in *Robinson* which observed that, "DNA profiles are not inherently inculpatory—they are prepared by technicians who generally have no way of knowing whether they will be incriminating or exonerating." *Id.* at ¶ 5. We agree.

{¶109} Accordingly, we overrule appellant's fifth assignment of error.

VI.

{¶110} In his final assignment of error, appellant asserts that the trial court erred when it imposed both a no-contact order and a

prison term for the same offense. Appellee agrees and requests this court to vacate the no-contact order.

{¶111} In *State v. Trimble*, 2021-Ohio-2609, (4th Dist.), we pointed out that the Supreme Court of Ohio stated in *State v. Anderson*, 2015-Ohio-2089, that the trial court imposed both prison terms and a no-contact order. The court explained that a trial court may only impose a sentence provided for by statute, that "Ohio courts have recognized that a no-contact order is a community-control sanction," and the felony-sentencing statutes "reflect that the General Assembly intended prison terms and community-control sanctions to be alternative sanctions" for a felony offense. *Id.* at ¶ 12, 17, 28; *State v. Conant*, 2020-Ohio-4319, (4th Dist.). Thus, *Anderson* held that "as a general rule, when a prison term and community control are possible sentences for a particular felony offense, absent an express exception, the court must impose either a prison term or a community-control sanction or sanctions." *Id.* at ¶ 31. Consequently, "[a] trial court cannot impose a prison term and a no-contact order for the same felony offense." *Id.* at ¶ 1.

{¶112} Once again, the members of this court certainly acknowledge that advances in technology now permit even imprisoned defendants to contact their victims in new ways, including

electronic communications. Apparently, the Ohio Department of Rehabilitation and Correction issues electronic tablets to certain inmates through which they could attempt to contact victims. However, as we concluded in *Conant*, *Behrle*, and *State v. Jordan*, 2020-Ohio-3928[2], (4th Dist.), imposing a no-contact order in addition to a prison term is currently contrary to law. "Trial courts and intermediate courts of appeals are bound by and must follow decisions of the Ohio Supreme Court." *State v. Cox*, 4th Dist. Adams No. 02CA751, 2003-Ohio-1935, ¶ 12.

{¶113} Recently, in *State v. Rowland,* 2024-Ohio-1660 (4th Dist.), this court concluded that because the trial court improperly sentenced Rowland to a prison term and a community control sanction (i.e., the no-contact order), we sustained the error and pursuant to *Anderson* and remanded the case to vacate the

[2] The Ohio Supreme Court initially accepted jurisdiction in *State v. Jordan* over the proposition of law: "A recent Amendment to Ohio's Constitution guarantees victims the right to privacy and protection from the accused. Those new Constitutional rights require this Court to reverse its holding in Anderson and allow a trial court to impose a prison sentence and a no-contact order simultaneously." See *State v. Jordan*, 160 Ohio St.3d 1459, 2020-Ohio-5332, 157 N.E.3d 791. Specifically, the jurisdictional memoranda cited the Marsy's Law Amendment to the Ohio Constitution, which includes "reasonable protection from the accused." The court, however, later vacated its earlier decision and declined jurisdiction. *See State v. Jordan*, 160 Ohio St.3d 1518, 2020-Ohio-6985, 159 N.E.3d 1188.

no-contact order. *Id.* at ¶ 157.

{¶114} Therefore, pursuant to *Anderson*, *supra*, we reluctantly agree with appellant that in the case sub judice the trial court lacked the authority to impose both a prison term and community-control sanction for the same felony offense, unless an express exception applies. No such exception, however, has been identified. Therefore, we sustain appellant's assignment of error, vacate the no-contact order, and remand this matter to correct the sentencing entry and remove reference to that order.

{¶115} Accordingly, for all of the foregoing reasons, we overrule appellant's first, second, third, fourth, and fifth assignments of error, but sustain his sixth assignment of error.

{¶116} Therefore, we affirm appellant's judgment of conviction and sentence, except that we remand the matter to the trial court to vacate the no-contact order.

JUDGMENT AFFIRMED,
IN PART, REVERSED IN PART,
AND CAUSE REMANDED TO VACATE THE
NO-CONTACT ORDER PORTION OF THE
SENTENCE.

[Cite as *State v. Nickell*, 2025-Ohio-1232.]

JUDGMENT ENTRY

It is ordered that the judgment be affirmed, in part, reversed, in part, and this cause remanded to vacate the no-contact order in the appellant's sentence. Appellee shall recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Wilkin, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal

commences from the date of filing with the clerk.