[Cite as *State v. Gibbs*, 2024-Ohio-6125.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- MATTHEW GIBBS Defendant-Appellant	JUDGES: Hon. Patricia A. Delaney, P.J. Hon. William B. Hoffman, J. Hon. Andrew J. King, J. Case No. 2023CA00155 O P I N I O N
CHARACTER OF PROCEEDINGS:	Appeal from the Stark County Court of Common Pleas, Case No. 2023CR1658
JUDGMENT:	Affirmed in part, reversed in part, remanded for new trial
DATE OF JUDGMENT ENTRY:	December 30, 2024
APPEARANCES:	
For Plaintiff-Appellee KYLE L. STONE Prosecuting Attorney Stark County, Ohio CHRISTOPHER A. PIEKARSKI Assistant Prosecuting Attorney Appellate Division 110 Central Plaza, South, Suite 510 Canton, Ohio 44702	For Defendant-Appellant GEORGE URBAN 116 Cleveland Avenue, N.W., Suite 808 Canton, Ohio 44702

Hoffman, J.

{¶1} Defendant-appellant Matthew Gibbs appeals the judgment entered by the Stark County Common Pleas Court convicting him following jury trial of rape (R.C. 2907.02(A)(2)) and unlawful sexual conduct with a minor (R.C. 2907.04(A)) and sentencing him to ten years in prison. Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} In the summer of 2021, the victim in this matter, M.B., was 13 years-old. M.B.'s mother struggles with addiction and had relapsed that summer. M.B. therefore spent most of the summer at the home of her friend Kourtnie. Kourtnie lived in Stark County, Ohio with her mother, her mother's boyfriend, her older sister Makenzie, Makenzie's boyfriend Appellant, and Mackenzie and Appellant's infant daughter. During the summer, M.B. only went home to get clothing as needed. At Kourtnie's home, M.B. and Kourtnie shared a bedroom.

{¶3} One evening in June of 2021, Kourtnie's boyfriend was spending the night and did not want M.B. staying in the same room. M.B. did not want to sleep on the sofa because the family's dogs had been sick with vomiting and diarrhea in the room. She also had no blanket or pillow. Makenzie therefore told M.B. she could sleep with her and Appellant. M.B. and Makenzie were close, and M.B. thought of Makenzie as an older sister.

{¶4} Makenzie and Appellant shared a king-size bed. Makenzie slept on the side of the bed closest to her infant daughter's crib, Appellant slept on the other side of the bed, and M.B. slept at the foot of the bed, perpendicular to Appellant and Makenzie. The three were watching television when M.B. fell asleep.

{¶5} M.B. partially woke because she felt something touch the lower part of her leg. She awoke fully because Appellant was unbuckling her pants. She "kind of freaked out" but did not know what to do. M.B. "laid there for a minute" and "was saying no, mumbling under [her] breath" because she was scared and unsure of what was going on. She then got up, left the room and fixed her pants. Appellant also got up. M.B. returned to the foot of the bed and eventually fell back to sleep.

{¶6} M.B. woke a second time to Appellant unbuckling her pants and pulling them down. She was "frozen," scared, and did not know what to do. Tr. 227-228. Appellant put his hand on M.B.'s vagina and then forced his penis into her vagina. M.B. told Appellant "no" but he continued anyway and without saying anything.

{¶7} M.B. did not immediately tell anyone about the assault, but eventually told Kourtnie. In December of 2022, Canton Police Officers responded to Appellant's home on an unrelated matter. While there, officers were advised of the 2021 assault on M.B. Officers located and met with M.B the same day.

{¶8} Canton Police Detective Vincent Romanin investigated the matter. During an interview with Romanin, Appellant confessed to engaging in sexual conduct with M.B. and further admitted he was aware she was 13-years old at the time. Detective Romanin also obtained text messages sent to M.B. from an unknown sender asking if what happened between the two was done "willingly" on her part. M.B. messaged back she did not willingly have sex with Appellant. In these messages, the sender admits to knowing M.B. was under 16 years of age. During his interview with Det. Romanin, Appellant admitted he sent the text messages.

{¶9} M.B. refused a sexual assault examination, but did participate in a forensic interview with Ashlee Beaver, a specialized case worker from the Stark County Department of Job and Family Services Children's Network. M.B. provided Beaver with the above outlined details regarding the assault.

{¶10} On July 27, 2023, the Stark County Grand Jury returned an indictment charging Appellant with one count of rape, a felony of the first degree, and one count of unlawful sexual conduct with a minor, a felony of the fourth degree.

{¶11} The case proceeded to jury trial in the Stark County Common Pleas Court. The jury found Appellant guilty as charged. The trial court convicted Appellant in accordance with the jury's verdict and merged the offenses for purposes of sentencing. The trial court sentenced Appellant to ten years incarceration on the rape conviction. Appellant was further classified as a Tier III sex offender.

{¶12} It is from the October 30, 2023 judgment of the trial court Appellant prosecutes his appeal, assigning as error:

I. APPELLANT'S CONVICTION WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE.

II. APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN DENYING APPELLANT'S REQUEST FOR JURY INSTRUCTIONS.

IV. THE TRIAL COURT ERRED BY IMPROPERLY ADMITTING HEARSAY EVIDENCE UNDER AN INAPPLICABLE EXCEPTION TO RULE 802.

V. THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S CRIMINAL RULE 29 MOTION FOR ACQUITTAL.

I., V.

{¶13} Because they are interrelated, we address Appellant's first and fifth assignments of error together. In these assignments of error, Appellant argues the State failed to produce sufficient evidence to support his rape conviction.

{¶14} A Crim. R. 29(A) motion for acquittal tests the sufficiency of the evidence presented at trial. *State v. Blue*, 2002-Ohio-351 (5th Dist.), *citing State v. Williams*, 1996-Ohio-91; *State v. Miley*, 114 Ohio App.3d 738, 742 (4th Dist. 1996). Crim. R. 29(A) allows a trial court to enter a judgment of acquittal when the State's evidence is insufficient to sustain a conviction. A trial court should not sustain a Crim. R. 29 motion for acquittal unless, after viewing the evidence in a light most favorable to the State, the court finds no rational finder of fact could find the essential elements of the charge proven beyond a reasonable doubt. *State v. Franklin*, 2007-Ohio-4649 at ¶12 (5th Dist.), *citing State v. Dennis*, 1997-Ohio-372.

{¶15} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks*, 61 Ohio St.3d 259 (1991). "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have

found the essential elements of the crime proven beyond a reasonable doubt." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 30(1979).

{¶16} Appellant was convicted of rape pursuant to R.C. 2907.02(A)(2), which provides, “No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.” Sexual conduct includes the insertion, however slight, of any body part into the vaginal opening of another. R.C. 2907.01(A).

{¶17} Force is defined as "any violence, compulsion or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1). Force or threat of force can be inferred from the circumstances involving the sexual conduct. "[T]he use of the word 'any' in the definition recognizes there are different degrees of force." *State v. Clark*, 2008-Ohio-3358, ¶ 17 (8th Dist.). " '[S]ome amount of force must be proven beyond that force inherent in the crime itself.' " *State v. Zimpfer*, 2014-Ohio-4401, ¶ 46 (2d Dist.), *citing State v. Dye*, 82 Ohio St.3d 323, 327 (1998).

{¶18} In *State v. Eskridge*, 38 Ohio St.3d 56, 58-59 (1988), the Supreme Court of Ohio found the amount of force required to meet this requirement varies depending on the age of the victim and the relationship between the victim and the defendant. *Id.* at ¶ 58. In *State v. Dye*, 82 Ohio St.3d 323 (1998), the Supreme Court of Ohio stated:

> We recognize that it is nearly impossible to imagine the rape of a child without force involved. Clearly, a child cannot be found to have consented to rape. However, in order to prove the element of force necessary to sentence the defendant to life imprisonment, the statute

> requires that some amount of force must be proven beyond that force inherent in the crime itself. Yet " '[f]orce need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established.' " *Eskridge*, 38 Ohio St.3d at 58-59, 526 N.E.2d at 306, citing *State v. Fowler* (1985), 27 Ohio App.3d 149, 154, 27 OBR 182, 187, 500 N.E.2d 390, 395. In fact, R.C. 2907.02(B) requires only that minimal force or threat of force be used in the commission of the rape. *Id*., 38 Ohio St.3d at 58, 526 N.E.2d at 306.

{¶19} *Id*. 327-328.

{¶20} *Dye* and *Eskridge* involved the rape of children under the age of 10. *Eskridge* involved the recognition of the amount of control that parents have over their children as it relates to force, and found the "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." *Id.*, at syllabus, 55. The court has limited the application of *Eskridge's* reduced levels of force to situations where the offender is either victim's parent or holds a similar position of authority over a child-victim. *State v. Schaim*, 1992-Ohio-31 at 55; *Dye*, at 329.

{¶21} In a factually comparable case, *State v. Johnson*, 2010-Ohio-2920, (2d Dist.), the 16-year-old victim awoke positioned on her stomach with Johnson on top of her and holding her down. He had pulled her shorts and underwear aside, and was engaging in vaginal intercourse with her. The victim told Johnson to stop, but he did not.

She briefly struggled to get away from Johnson and was eventually able to elbow him off of her. *Id*. ¶ 4. On appeal, Johnson argued the State had failed to prove the element of force. The Second District Court of Appeals disagreed, finding Johnson had moved the victim's underwear and shorts aside, then held her down with a hand on her back, failed to stop when the victim asked him to, and did not stop until the victim elbowed him off of her and onto the floor, evidence sufficient to prove force. *Id.* ¶ 19.

{¶22} The victim testified as follows in the instant case:

> [The State]: Okay. So you lay back down. Do you fall back asleep eventually?
>
> [M.B.]: Yes.
>
> [The State]: Okay. And what wakes you up the next time?
>
> [M.B.]: My pants being down and him touching me.
>
> [The State]: So after your pants were kind of pulled down the first time, you got up?
>
> [M.B.] (Nods head up and down.)
>
> [The State]: Did you pull them back up?
>
> [M.B.]: Yes.
>
> [The State]: Okay. So when you go lay back down and fall back asleep, you wake a second time to your pants having been unbuckled and pulled down?
>
> [M.B.]: Yes.
>
> [The State]: Okay. And what's going through your mind at that time?

[M.B.]: I was frozen, I was scared and I did not know what to do at all.

[The State]: Is his body touching you in any way?

[M.B]: His hand.

[The State]: Where is his hand touching you at? Your vagina?

[M.B.]: Yes.

[The State]: Did he put his penis in your vagina?

[M.B.]: Yeah. It was a little bit after that, like he kind of left me alone. I turned back over and I was kind of just sitting there frozen, didn't know what to do and then…

[The State]: While this is happening, are you saying anything to him?

[M.B.]: No – I was saying no.

[The State]: Okay. This is what I want to be clear about. You are telling him no?

[M.B.]: Yes.

{¶23} T. 227-228.

{¶24} M.B. was a 13-year-old minor and still considered a child. She testified she was awakened from sleep when Appellant, a twenty-three-year-old man, had unbuckled and removed her pants, and placed his hand on and eventually his penis in her vagina, while she told him no. The victim testified she was "frozen, I was scared and I did not know what to do at all." Appellant was behind her in a king-sized bed M.B. shared with Appellant's girlfriend, who was the sister of M.B.'s best friend, with the two-month-old

infant child of Appellant his girlfriend sleeping in a crib next to the bed. Further, the trial judge and jury had the opportunity to view the physical stature of Appellant, and to observe the demeanor and physical stature of M.B. in comparison. We find a rational trier of fact could have found the element of force proven beyond a reasonable doubt, as the physical removing of M.B.'s clothing while she slept and his persistence in engaging in sexual conduct over her verbal protest, after M.B. previously rebuffed his attempt to engage in sexual behavior with her, is not force inherent in the crime itself.

{¶25} Further, as noted in *Dye*, *supra*, the force need not be physical, but can be subtle and psychological. The victim testified she was frozen, afraid, and did not know what to do in the situation. While Appellant was not M.B.'s parent, M.B. was staying with the family while her mother was unable to take care of her and she could not stay in her own home, and her only viable sleeping arrangement on the night in question was with Mackenzie and Appellant. We find the circumstances of the case and the victim's testimony about her feelings of fear provided evidence of subtle psychological force from which a rational trier of fact could find the element of force proven beyond a reasonable doubt.

{¶26} We find the State presented sufficient evidence to establish the element of force, and the trial court did not err in overruling Appellant's Crim. R. 29(A) motion for acquittal.

{¶27} The first and fifth assignments of error are overruled.

II.

{¶28} In his second assignment of error, Appellant argues the judgment of conviction is against the manifest weight of the evidence.

{¶29} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in evidence the jury 'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins*, 1997-Ohio-52, *quoting State v. Martin*, 20 Ohio App. 3d 172, 175 (1st Dist. 1983).

{¶30} Appellant restates his argument raised in his first and fifth assignments of error, arguing the State failed to prove the element of "force" beyond the degree of force inherent in the crime of rape itself. For the reasons stated earlier in this opinion, we find the State presented sufficient evidence of force, and we find the jury did not lose its way in finding the element of force proven beyond a reasonable doubt.

{¶31} Appellant also argues the jury's verdict is against the manifest weight of the evidence because Appellant's girlfriend was sleeping in the same bed, yet never woke up during the time he removed the victim's clothing. He argues if any degree of force was used in committing the crime, his girlfriend would have awakened. We find the jury could have concluded either Appellant's girlfriend remained asleep despite the use of force, or she simply pretended to remain asleep. Further, as discussed earlier in this opinion, the force need not be physical, but can be subtle and psychological. We find the verdict is not against the manifest weight of the evidence.

{¶32} The second assignment of error is overruled.

III.

{¶33} In his third assignment of error, Appellant argues the trial court erred in failing to instruct the jury some degree of force beyond that inherent in the crime itself is required to convict him of rape.

{¶34} Appellant's counsel requested the trial court instruct the jury "[s]ome amount of force must be proven beyond the force inherent in the crime itself." Tr. 302.[1] Appellant's requested instruction finds its source from the Ohio Supreme Court's opinion in *Dye, supra*, 82 Ohio St. 3d at 327-28.

{¶35} Requested jury instructions should be given if they are correct statements of law, if they are applicable to the case, and if reasonable minds might reach the conclusion sought by the instruction. *State v. Peters,* 2023-Ohio-4362, ¶41 (3d Dist.), *quoting State v. Adams,* 2015-Ohio-3954, ¶240. We find Appellant's requested instruction was a correct statement of law, applicable to the facts, and reasonable minds "might" find its application results in finding Appellant did not use force. Whether sufficient evidence of force was presented was contested in the trial court and in this Court, as evidenced by Appellant's first, second, and fifth assignments of error. We find the trial court's failure to instruct the jury as requested by Appellant was an abuse of discretion in this case, and was not harmless error.

{¶36} The third assignment of error is sustained.

[1] The State asserts because Appellant did not renew his request after the jury was instructed and never submitted a written request, he has forfeited all but plain error. We disagree. In *State v. Wolons,* 44 Ohio St. 3d 64, 67 (1989), the Ohio Supreme Court held "in a criminal case, where the record affirmatively shows that a trial court has been fully apprised of the correct law governing a material issue in dispute, and the requesting party has been unsuccessful in obtaining the inclusion of that law in the trial court's charge to the jury, such party does not waive his objections to the court's charge by failing to formally object thereto."

IV.

{¶37} In his fourth assignment of error, Appellant argues the trial court erred in permitting testimony from nurse practitioner Alissa Edgein regarding notes she received from M.B.'s forensic interview. According to Appellant, the testimony should have been excluded because the forensic interview was unrelated to medical diagnosis and treatment. We disagree.

{¶38} At the outset we note Appellant's argument does not provide a transcript cite for the testimony he challenges, nor does he specifically identify what part of the notes he believes were inadmissible hearsay. App.R. 16(A)(7) requires an appellant to include in his brief "an argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." "It is the duty of the appellant, not this court, to demonstrate his assigned error through an argument that is supported by citations to legal authority and facts in the record." *State v. Untied*, 2007-Ohio-1804 (5th Dist.), ¶141. Per the Appellate Rules, we could decline to address this assignment of error for failure to include appropriate citations to the record. App.R. 16(A)(7), App.R. 12(A)(2). In the interest of justice, however, we elect to address his argument on the merits.

{¶39} This Court's review of Edgein's testimony regarding the notes from the forensic interview revels the following:

> [The State]: What were the specific concerns that were presented as the reason for [M.B.'s] referral to the Children's Network?

> [Edgein]: So it was reported that [M.B] had disclosed while staying at friend's house that she had fallen asleep, and that she woke up to [Appellant] lying in bed next to her. He had touched her inner thigh. She had told him no several times, and that he pulled her pants down and put his penis inside of her and it hurt. It lasted for about a minute. He did not wear a condom and she said that she was a virgin and that it was painful.
>
> And that's the information I was provided.

{¶40} T. 277.

{¶41} Evid.R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

{¶42} Evid. R. 803(4) provides an exception to the hearsay rule for "statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

{¶43} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *State v. Larr*, 2023-Ohio-2128 (5th Dist.) ¶ 47 quoting *Rigby v. Lake Cty*., 58 Ohio St.3d 269, 271 (1991). "However, we review de novo evidentiary rulings that implicate the Confrontation Clause. *United States v. Henderson*,

626 F.3d 326, 333 (6th Cir. 2010)." *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 97.

{¶44} In *State v. Arnold*, 2010-Ohio-2742, the Supreme Court of Ohio applied the "primary purpose" test in a case involving victim statements made to a social worker at a child-advocacy center. The Court concluded that statements made primarily for forensic or investigative purposes are testimonial and thus inadmissible under the Confrontation Clause when the declarant is unavailable; but statements made for diagnosis and treatment are nontestimonial and thus admissible without offending the confrontation clause. *Id*. at paragraphs one and two of the syllabus.

{¶45} But here, the declarant testified and was available for cross-examination concerning statements she made during the forensic interview, rendering the *Arnold* primary purpose test inapplicable. Accordingly, Appellant was not denied his right to confrontation. *Crawford v. Washington*, 541 U.S. 36, at 59, fn. 9, (2004); *California v. Green*, 399 U.S. 149, 162 (1970); *State v. Perez*, 2009-Ohio-6179, ¶124; *State v. Leonard*, 2004-Ohio-6235 ¶109.

{¶46} Appellant additionally argues that because M.B.'s forensic interview did not take place at the children's advocacy center, the interview was a criminal rather than a medical investigation. But simply because the interview took place in the field does not transform the interview into a purely criminal investigation. The social worker who conducted the interview testified the interview took place at M.B.'s home because M.B. had a panic attack at the children's advocacy center. T. 190-193.

{¶47} Finally, even if we were to assume arguendo that the admission of the hearsay testimony was error, it would be harmless error. Appellant confessed to engaging

in sexual conduct with M.B, when he was 23-years-old and he was aware M.B. was 13-years-old. T. 344. "Where other admissible evidence mirrors improper hearsay, the error in allowing the hearsay is generally deemed harmless, since it would not have changed the outcome of the trial." *State v. Williams*, 2017-Ohio-8898 ¶17 (1st Dist.), *citing State v. Richcreek*, 2011-Ohio-4686, ¶ 43 (6th Dist.), *citing State v. Byrd*, 2003-Ohio-3958, ¶39 (8th Dist.); *State v. Paskins*, 2022-Ohio-3810, ¶ 44 (5th Dist.) Therefore, assuming, arguendo that hearsay evidence was admitted in error, such error would be harmless beyond a reasonable doubt.

{¶48} The fourth assignment of error is overruled.

{¶49} The judgment of the Stark County Court of Common Pleas is reversed as to Appellant's conviction and sentence for rape, and remanded for new trial. Appellant's conviction of unlawful sexual conduct with a minor is affirmed.

By: Hoffman, J.
Delaney, P.J. concurs in part and dissents in part and
King, J. concurs in judgment only

Delaney, P.J., dissents in part & concurs in part,

{¶50} I dissent from the majority opinion sustaining Appellant's third assignment of error and would overrule it. I concur in the majority's disposition of Appellant's other assignments of error. Therefore, I would affirm both of Appellant's convictions.

{¶51} In Appellant's third assignment of error, he argues the trial court should have given his requested jury instruction. The instruction requested by Appellant was, "Some amount of force must be proven beyond the force inherent in the act itself."

{¶52} When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. Ellis*, 2004-Ohio-610, ¶ 19 (5th Dist.), citing *State v. Wolons*, 44 Ohio St.3d 64, 68 (1989). The term "abuse of discretion" implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). Jury instructions must be reviewed as a whole. *State v. Rengert*, 2021-Ohio-2561, ¶ 19 (5th Dist.), citing *State v. Coleman,* 37 Ohio St.3d 286 (1988).

{¶53} In the instant case, the trial court declined Appellant's requested instruction and chose to follow O.J.I. instead. While the requested instruction appears to be an accurate statement of the law, as we have reviewed, I cannot find the trial court abused its discretion in declining the instruction in the context of the jury instructions as a whole and in light of the evidence. " . . . [A]n abuse of discretion means that the result is so palpably and grossly violative of fact or logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance of judgment, not the exercise of reason but, instead, passion or bias." *Nakoff v.*

Fairview Gen. Hosp., 75 Ohio St.3d 254, 256 (1996). Appellate courts should not substitute their own judgment for that of trial courts in matters that involve the exercise of discretion. *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 732 (1995); *In re Jane Doe 1*, 57 Ohio St.3d 135, 137–

138 (1991); *Berk v. Matthews*, 53 Ohio St.3d 161, 169 (1990).

{¶54} I find no such perversity of will, defiance of judgment, or passion or bias in the instant case and decline to reverse appellant's conviction on this basis. A decision is unreasonable if there is no sound reasoning process that can support the decision. *State v. McManes*, 2024-Ohio-438, ¶ 51 (5th Dist.). It is not enough that the reviewing court, were it deciding the issue *de novo,* would not have found that reasoning process persuasive. *AAAA Enterprises Inc. v. River Place Comm. Redevelopment,* 50 Ohio St. 3d, 157, 161 (1990). "A decision may also be arbitrary if it is [w]ithout [an] adequate determining principle; * * * not governed by any fixed rules or standard." *State v. Hickman*, 2024-Ohio-5747, ¶ 32, citing *State v. Hill*, 2022-Ohio-4544, ¶ 9, internal citations omitted. The trial court's decision to follow O.J.I. is not arbitrary. Appellant has failed to demonstrate neither an abuse of discretion nor harmful error as the majority has found the use of force was sufficient and not against the manifest weight of the evidence.

{¶55} Therefore, I would overrule appellant's third assignment of error.