[Cite as *State v. Jones*, 2024-Ohio-2562.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DAVID MICHAEL KOA JONES,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 23 CO 0031

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2022 CR 473

BEFORE:
Carol Ann Robb, Cheryl L. Waite, Katelyn Dickey, Judges.

JUDGMENT:
Affirmed.

Atty. Vito J. Abruzzino, Prosecuting Attorney, *Atty. Steven V. Yacovone*, *Atty. Shelley M. Pratt,* Assistant Prosecuting Attorney, Columbiana County Prosecutor's Office, for Plaintiff-Appellee and

Atty. James R. Wise, for Defendant-Appellant.

Dated: July 1, 2024

Robb, P.J.

{¶1} Defendant-Appellant David Michael Koa Jones appeals after being convicted of rape and gross sexual imposition in the Columbiana County Common Pleas Court. He contends the admission of the Child Advocacy Center's video of the child's interview violated his confrontation rights under the Sixth Amendment. He also claims defense counsel rendered ineffective assistance of counsel by ineffectively cross-examining the child on inconsistencies in her statements. He concludes by raising a cumulative error argument. For the following reasons, Appellant's convictions are upheld, and the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On August 10, 2022, Appellant was indicted on three counts of rape for engaging in sexual conduct with a child under age 10 in violation of R.C. 2907.02(A)(1)(b) (child under 13) and R.C. 2971.03 (A)(2) (higher sentence for child under 10). Appellant was also charged with sexual battery in violation of R.C. 2907.03(A) (5) (sexual conduct by a parent or person in loco parentis, a second-degree felony when the child is under 13) and gross sexual imposition in violation of R.C. 2907.02(A) (4) (sexual contact with a child under 13, a fourth-degree felony).

{¶3} The victim was Appellant's daughter. When she was 10 years old, she disclosed that he sexually assaulted her on multiple occasions when she was very young. The offenses were alleged to have occurred between January 1, 2014 (when the victim was approximately four years old) through December 31, 2016 (when the victim was six years old).

{¶4} At the jury trial, the testimony established the child lived with her father during this date range. The victim's paternal grandmother testified the child visited her and the paternal grandfather in the summer of 2016. At this time, the six-year-old victim indicated Appellant regularly bathed her and wiped her when she used the bathroom. The child also said Appellant "had a snake between his legs" and "when it stands up, it really scares me." (Tr. 226). The grandparents' concern for the child's welfare was further exacerbated after making a surprise visit while Appellant was out of town in October 2016.

{¶5} The grandparents filed a motion in juvenile court seeking custody of the child. (Tr. 257). The court denied emergency custody but set an expedited hearing. The hearing did not occur until February 17, 2017, after being continued twice on Appellant's request. (Tr. 231). The hearing apparently focused on neglect rather than the grandparents' suspicions about their son's inappropriate conduct with the child.

{¶6} The court awarded the grandparents legal custody of the child, who was seven years old at the time. The father was granted long-distance companionship, as the grandparents lived out of state. However, the father failed to maintain communication, and the child never saw her father again. (Tr. 264, 277).

{¶7} Soon after receiving custody, a military assignment resulted in the grandparents moving out of the country with the child. Near the end of 2020, when the child was ten years old, she made a disclosure to her counselor that Appellant made her perform oral sex in the bedroom of their house when she was four years old. (Tr. 239). On further inquiry, she disclosed that Appellant tried to put his penis in her anus. (Tr. 241, 255). She also spoke of an incident where Appellant held her down in the bathroom and urinated in her mouth; she drew a picture of the event. (Tr. 242, 256); (St.Ex. 5). Military investigators instructed the family to file a report in Ohio, and they did so. (Tr. 247).

{¶8} A detective in Columbiana County started investigating the report. (Tr. 289). He spoke on the phone to Appellant, who lived out of state. Appellant told the detective he had already been cleared of the allegations. (Tr. 299). This was apparently a reference to a report the child made at school in 2014 (in Columbiana County) "that her peep hurt and that dad had put his butt in her butt." (Tr. 583). When she was interviewed in 2014, she was viewed as too young to provide a narrative or to distinguish reality from fantasy, and the case was closed as unsubstantiated. (Tr. 369, 508, 583-587).

{¶9} Appellant then told the detective he believed the sexual abuse was perpetrated on the victim by his roommate, who had been convicted (in 2019) of raping a child. The detective learned this individual did not move to the house where Appellant stayed until 2017, which was after the relevant time period. (Tr. 299-300).

{¶10} The detective also learned the victim's older stepsister witnessed an event corroborating the victim's report. (Tr. 301). The stepsister's mother (the victim's

stepmother) died in 2015. At trial, the stepsister described the blue house in Columbiana County where she lived with her mother, Appellant, and the victim. (Tr. 378-379). The stepsister testified that she looked through a crack in Appellant's bedroom door one day while her mother was at work and saw Appellant "having sex" with the victim. (Tr. 382). She further explained, "They were both unclothed. He was on top of her, and he had his private inside of her private." (Tr. 383). The stepsister said she was terrified Appellant would find out she saw the event. (Tr. 385).

{¶11} Months after the detective was notified about the victim's disclosures to her counselor abroad, the grandparents and the victim moved back to the United States. The victim experienced great distress due to their return to an active investigation of Appellant. (Tr. 250-251).

{¶12} On October 12, 2021, the victim was interviewed by a social worker at the Child Advocacy Center (CAC), which is part of Akron Children's Hospital (in Boardman). The social worker said the victim was very intelligent and articulate. (Tr. 349). It was opined the victim did not display indicia of being coached. (Tr. 351). The nurse practitioner watched the interview through one-way glass before conducting the medical examination. (Tr. 472-473). The detective watched a live video feed and then collected a recording of the interview, which was played for the jury at trial. (Tr. 292, 357); (St.Ex. 7).

{¶13} The social worker and the nurse practitioner testified about delayed and incremental disclosure, composite memory, suppression, recantation, and post-traumatic stress disorder. (Tr. 338-342, 476-485). They also provided testimony on the "experiential details" the victim was able to provide about the assaults.

{¶14} For instance, the victim reported that when Appellant spread her butt cheeks and put his penis between them, she felt a sensation like a bowel movement "going back" inside of her. (Tr. 350, 494-495). When describing the act of oral sex, the victim told the social worker Appellant put the tip of penis in her mouth and it was dry, tasted like urine, and was disgusting. (Tr. 350-351). She additionally reported Appellant painfully inserted his fingers into her vagina, attempted to put his "slimy" penis inside of her vagina, and got angry when he was unable to get it inside of her. (Tr. 349-350, 498-499). The victim also told the social worker that when Appellant urinated on her face and

mouth, it was yellow, smelled strongly of urine, and burned and gagged her. (Tr. 351, 500).

{¶15} The victim testified at trial. She was 13 years old and said it was difficult to remember Appellant's actions because she was approximately four years old when they occurred. (Tr. 409, 460). She testified to three specific instances of sexual conduct "in no certain order" with two occurring in the bedroom and one occurring in the bathroom. (Tr. 409). Regarding oral sex, she testified Appellant put his penis in her mouth while they were in his bedroom. (Tr. 410).

{¶16} The victim also testified Appellant tried to penetrate her "vaginal area" with his penis. When asked to further explain her reference to "vaginal area," she said he tried to penetrate her "urethra." (Tr. 414). She explained: "It was very uncomfortable. It was like sticking a -- putting a fat stick in a very small hole in the grass [a]nd it got stuck." (Tr. 415).

{¶17} The victim testified she told CAC, "he tried to put his penis in my butt." When the prosecutor asked if this occurred, the victim answered, "No ma'am. Not to what I can recall right now." Instead, she believed Appellant touched her buttocks with his penis. (Tr. 419).

{¶18} The victim also remembered the instance when Appellant urinated in her mouth while holding her down on the bathroom floor. (Tr. 412, 418). She identified her sketch depicting this incident; her label on the sketch said it happened in 2014 and described the blue house where Appellant lived at that time. (Tr. 411-413). The victim believed all the incidents occurred in the blue house in the named town in Columbiana County. (Tr. 413).

{¶19} The victim acknowledged she informed the prosecution a week before trial that two other acts mentioned in grand jury testimony did not occur or she could not remember the acts. (Tr. 417). On cross-examination, the victim was asked if she recently told the prosecution Appellant did not put his penis in her mouth, and she answered, "Correct." (Tr. 423). She agreed she told the grand jury Appellant forced her to engage in oral sex three times and used his hand to touch the "outside" of her vaginal area. (Tr. 429-442).

{¶20} In other trial testimony, the prosecution elicited that Appellant's wife (the victim's stepmother) died in June 2015. A police report made at the time of her death listed her address as one corresponding to the description of the blue house remembered by the victim and the stepsister. (Tr. 304). The defense elicited information about Appellant's various residences. The victim's stepsister and the victim's grandmother spoke about the victim moving into the house of her stepmother's parents at some point before the stepmother died. (Tr. 254). An eviction judgment entry showed Appellant and the victim's stepmother had been ordered to vacate the blue house by November 1, 2014 (if the plaintiff complied with certain requirements). (Tr. 305-309); (Def. Ex. B, D).

{¶21} Appellant testified he initially lived in the blue house with his wife (the victim's stepmother) and her daughter (the victim's stepsister). Later, the victim moved in with them. Specifically, in September 2012, he received physical custody of the victim after her mother told Appellant to come get their child before she was taken by Children Services. (Tr. 622).

{¶22} Appellant said the aforementioned eviction order prompted him to vacate the blue house on October 31, 2014 and move into a relative's apartment. (Tr. 625). He claimed he left his family at the apartment and moved to another state for two months (to consider relocating the family). (Tr. 626-628). Appellant said the family moved in with his wife's parents after he returned in January 2015. When his wife died, he and the victim remained at that house until August 2015, when they moved in with a female friend at a house in a nearby town; this was where they were living when his parents made the surprise visits in April and October 2016. (Tr. 630-632). These residences were all located in Columbiana County.

{¶23} The defense subpoenaed the guardian ad litem in a 2014 custody dispute between Appellant and the victim's mother. This witness testified he was unaware of any allegations of sexual assault at the time. (Tr. 572). As can be seen by the testimony of a Children Services caseworker called by the defense, the 2014 referral from the victim's school (due to her comment about Appellant putting "his butt in her butt") occurred after the guardian ad litem's report was filed in the parental custody case; the caseworker closed the Children Services case approximately a month after the school's referral. (Tr. 583-587).

{¶24} Appellant pointed out the custody case he lost to his parents related to allegations that the child was underfed (as opposed to the 2014 sexual abuse allegation, which were labeled "unsubstantiated" by Children Services). (Tr. 635-637, 640-642). When speaking to a counselor after the 2014 allegation, Appellant opined the victim was sexually assaulted at a homeless shelter before he retrieved her from her mother. (Tr. 600-604). Regarding the current allegations, Appellant's testimony opined his former roommate (a convicted child rapist) was the perpetrator. (Tr. 690-691). Appellant testified he did not rape, fondle, or inappropriately touch the victim. (Tr. 643-644).

{¶25} The jury found Appellant guilty of one of the three counts of rape of a child under 10 years of age. The jury also found Appellant guilty of sexual battery and gross sexual imposition. After merging the sexual battery count with the rape count, the court sentenced Appellant to life without parole for rape of a child under 10 and a consecutive prison term of 60 months for gross sexual imposition. (4/24/23 J.E.). The within appeal followed.

ASSIGNMENT OF ERROR ONE

{¶26} Appellant sets forth three assignments of error, the first of which contends:

"The trial court erred in allowing and admitting the CAC video statement of the victim into evidence and showing it to the jury."

{¶27} Appellant argues the trial court erred in admitting the video of the child's interview at the Child Advocacy Center (CAC), alleging it contained testimonial evidence and thus violated his confrontation clause rights under the Sixth Amendment. Appellant does not specify which statements he believes were primarily for investigative purposes rather than for medical purposes. Instead, he suggests the primary purpose of the entire interview was to assist the law enforcement investigation rather than for medical diagnosis and treatment. He relies on the following observations: officials abroad had already interviewed the child about the offenses after her disclosures at the end of 2020 (and they eventually sent a DVD of the interview to the detective)[1]; the child received counseling while living abroad; the child did not return to the United States until mid-2021;

[1] The social worker interviewing the child at CAC was not aware the child was previously interviewed in another country. (Tr. 362).

and the October 12, 2021 CAC interview occurred four or more years after the alleged offenses. From this, Appellant concludes no medical diagnosis or treatment was needed at the time of the CAC interview.

{¶28} The confrontation clause in the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." Ohio's constitution provides no greater confrontation rights than the Sixth Amendment. *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, fn. 8. Unlike the deference we give to the trial court's discretion in applying hearsay exceptions,[2] "we review de novo evidentiary rulings that implicate the Confrontation Clause." *Id.* at ¶ 97.

{¶29} The confrontation clause does not apply to non-testimonial statements. *Ohio v. Clark*, 576 U.S. 237, 245, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015); *Michigan v. Bryant*, 562 U.S. 344, 358-359, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011). Therefore, a statement will not be evaluated under the confrontation clause unless its primary purpose was testimonial. *Clark*, 576 U.S. at 246-247 (even then, "the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause"). In determining whether a statement was testimonial, the court considers whether the primary purpose of the conversation was to create an out-of-court substitute for trial testimony. *Id.* at 245 (extending the primary purpose test to statements made to individuals who are not law enforcement agents).

{¶30} Appellant points to case law speaking of the dual capacity of the social worker conducting the CAC interview, which has both forensic and medical goals. The social worker, nurse practitioner, and detective acknowledged their multi-disciplinary approach, explaining the avoidance of multiple interviews served a child's best interest. The social worker conducted the diagnostic medical interview immediately before the nurse practitioner conducted the head-to-toe medical examination. The nurse practitioner watched the interview live and used the information learned from the interview to guide

[2] *See State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, ¶ 48-49, 56 (in determining whether a child-victim's statements fall under the hearsay exception for statements "made for purposes of medical diagnosis or treatment," the trial court exercises discretion while considering the totality of the circumstances including the child's age, consistency, motive to lie, understanding of the need to tell the truth, and exposure to leading or suggestive questioning).

her exam and her decisions on diagnosis and treatment, including decisions regarding counseling and sexually transmitted disease risks.

{¶31} In *Arnold*, the Court held the portions of a CAC interview containing a child's statements relevant to medical diagnosis and treatment are nontestimonial and thus admissible without violating confrontation rights. *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, ¶ 44 (affirming in part). But, the portions of the CAC interview containing statements serving "primarily a forensic or investigative purpose are testimonial and are inadmissible pursuant to the Confrontation Clause when the declarant is unavailable for cross-examination at trial." *Id.* (reversing in part). The *Arnold* decision relied on the underlying premise that even when out-of-court statements are admissible under state hearsay rules of evidence, the statements violate a defendant's Sixth Amendment right to confront witnesses if the statements "are testimonial and the defendant has had no opportunity to cross-examine the declarant." *Id.* at ¶ 13, citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) ("the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination").

{¶32} As noted above, Appellant does not specify portions of the interview that violate the confrontation clause but contends the whole interview was an inadmissible confrontation clause violation. However, the case law does not indicate prior law enforcement interviews or counseling sessions would eliminate the purpose of conducting a CAC interview for medical diagnosis or treatment; nor is there any indication such purpose should be ignored if the sexual abuse being disclosed by the child occurred many years prior.

{¶33} In any event, Appellant's argument bypasses dispositive portions of the law he quotes. Importantly, the confrontation clause law on excluding testimonial evidence is qualified by the phrase: "when the declarant is unavailable for cross-examination at trial" or "when the defendant has had no opportunity to cross-examine the declarant." *Arnold*, 126 Ohio St.3d 290 at ¶ 13, 44.

{¶34} As the state points out, *the child-victim testified at trial*. "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. * * * The Clause does not

bar admission of a statement so long as the declarant is present at trial to defend or explain it." *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 127, quoting *Crawford*, 541 U.S. 36 at fn. 9. The Ohio Supreme Court thus held the use of an out-of-court statement did not implicate the confrontation clause where the declarant was called to testify at trial. *Id.* (even if the statement was offered during the testimony of a different witness).

{¶35} Moreover, in a subsequent case, a defendant argued the trial court violated the confrontation clause by admitting a statement to police because the defense did not have an earlier opportunity to cross-examine the witness about the statement. The Supreme Court rejected this argument because the witness testified at trial and was subject to cross-examination *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 113. *See also State v. Palmer*, 7th Dist. Mahoning No. 19 MA 108, 2022-Ohio-2643, ¶ 8-9 (the failure to raise a Sixth Amendment violation was not ineffective assistance of counsel because the confrontation clause does not preclude the admission of a declarant's out-of-court statements when the declarant testified as a witness subject to cross-examination).

{¶36} In accordance, Appellant's argument under the Sixth Amendment's confrontation clause is without merit. Appellant had the opportunity to confront the victim while she testified at trial. This assignment of error is overruled.

ASSIGNMENT OF ERROR TWO

{¶37} Appellant's second assignment of error provides:

"Defendant was denied a fair trial as a result of the ineffective assistance of counsel."

{¶38} A claim of ineffective assistance of counsel requires a showing of both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If the performance was not deficient, then there is no need to review for prejudice and vice versa. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000).

{¶39} In evaluating an alleged deficiency in performance, the court asks whether there was "a substantial violation of any of defense counsel's essential duties to his client" so that "counsel's representation fell below an objective standard of reasonableness."

State v. Bradley, 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373 (1989), citing *Strickland*, 466 U.S. at 687-688. Our review is highly deferential to counsel's decisions as there are "countless ways to provide effective assistance in any given case" and there is a strong presumption counsel's conduct was within the wide range of reasonable professional assistance. *Id.* at 142, citing *Strickland*, 466 U.S. at 689. A reviewing court should refrain from second-guessing the strategic decisions of counsel. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

{¶40} On the prejudice prong, the reviewing court finding must conclude there is a reasonable probability the result of the proceedings would have been different but for the serious errors committed by counsel. *Id.* at 557-558. Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding was fundamentally unfair due to the performance of trial counsel. *Id.*, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). Lesser tests of prejudice have been rejected: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d at 142, fn. 1, 538 N.E.2d 373, quoting *Strickland*, 466 U.S. at 693.

{¶41} In alleging ineffective assistance of counsel, Appellant points to the state's objections to defense counsel's attempt to refresh the victim's recollection and to the trial court's observations on the attempt. Appellant argues defense counsel was deficient in eliciting inconsistencies in the victim's various statements and this prejudiced him because the cross-examination of the victim to attack her credibility was crucial to his defense.

{¶42} Specifically, Appellant points to the prosecutor's redirect examination where the child testified she was "very certain" the events in her trial testimony really happened and were not a dream. (Tr. 465). Appellant complains defense counsel did not exercise his opportunity to recross-examine the victim to develop a theory positing the child merely dreamed the events. Notably, defense counsel had already asked the victim on initial cross-examination about her counseling sessions when she lived abroad and broached the subject of the dream theory. When he sought to refresh the victim's recollection with notes from a counselor, the state objected and the court agreed the notes were not made

by the victim and thus could not be used to refresh her recollection. (Tr. 424-425).[3] Defense counsel then asked the child if she recalled telling the counselor she had a nightmare, and the victim said she did not recall. Without objection, defense counsel read from a counseling note, "child thinks it really happened." (Tr. 426). He then specifically asked if the victim recalled telling her counselor "that you had a nightmare about your father peeing in your mouth?" The victim said she did not recall telling her counselor this. (Tr. 427). Defense counsel then proceeded to discuss the victim's grand jury testimony.

{¶43} As to the cross-examination about the victim's grand jury testimony, Appellant emphasizes his attorney's question as to whether the victim remembered the three incidents she related to the grand jury. The victim answered, "I remember where they happened, I just don't remember what I specifically said." (Tr. 428). Defense counsel then handed the victim her grand jury testimony, and the prosecutor objected to the foundation for refreshing recollection. Appellant complains counsel should have asked her to read a portion of her prior testimony and then should have asked if it differed from her current testimony. However, counsel soon elicited the victim's acknowledgement that she told the grand jury about three instances of oral sex. (Tr. 429-430, 441-442).

{¶44} Defense counsel also asked the victim if she told the grand jury that Appellant attempted to penetrate her vaginal area with his penis. The victim said she could not remember. (Tr. 432-433). Appellant says counsel should have then asked her to read the grand jury transcript to prompt her to agree she did not tell the grand jury Appellant attempted to penetrate her vaginal area with his penis. Instead, counsel asked the victim if it would help her memory if she reviewed the testimony, and she responded that it would not help her. (Tr. 434-435). Nevertheless, counsel did thereafter point her to a certain page to elicit that she told the grand jury he only touched the outside of her genital area and that he did not touch her with his penis. (Tr. 438-442).

{¶45} As the state points out, defense counsel was clearly prepared for trial and for cross-examination of the victim, and despite the difficulties experienced while refreshing the victim's recollection, the cross-examination was effective. Notably, the jury

[3] Defense counsel had previously asked the grandmother if she was aware the child told her counselor she had a nightmare about Appellant "peeing in her mouth" and the counselor wrote in a note, "the child thinks it really happened." (Tr. 254-255).

found Appellant not guilty of two of the three counts of rape. Various inconsistencies in the victim's statements were explored, and her credibility was attacked in a strategic manner. As the state emphasizes, a defense attorney's cross-examination strategy must take into account numerous factors, especially in a case like this where counsel seeks to avoid the appearance of bullying a child or disparaging a victim of sexual abuse.

{¶46} Moreover, it is noted different attorneys have different personal styles, and questioning may depend on the flow of the testimony and the demeanor of the witness at each moment on the stand. "The scope of cross-examination clearly falls within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel." *State v. Boyd*, 2022-Ohio-3523, 198 N.E.3d 514, ¶ 120 (7th Dist.) (finding it was a strategic decision to avoid further questioning of the rape victim, who was viewed as having the jury's sympathy and who was starting to get emotional), quoting *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 45.

{¶47} In sum, there is no reason to second-guess defense counsel's cross-examination decisions made during the victim's emotional testimony. A serious error is not evident, and counsel did not render deficient performance. Moreover, there is no reasonable probability the result would have been different if the questioning of the victim continued on the cited subjects. From our review of the entire transcript, there is no indication the results were unreliable or the proceeding was "fundamentally unfair" due to the performance of trial counsel on this issue. *See Carter*, 72 Ohio St.3d at 558. Accordingly, Appellant's defense was not prejudiced by the assertions he sets forth here. This assignment of error is overruled.

ASSIGNMENT OF ERROR THREE

{¶48} Appellant's final assignment of error contends:

"Defendant was denied a fair trial due to the cumulative errors in the allowance of inadmissible evidence and the ineffective assistance of counsel."

{¶49} Appellant contends the combined errors regarding the confrontation clause and the cross-examination of the victim cumulatively denied him a fair trial. This assignment of error relies on the allegation in assignment of error one, where Appellant argued the child's interview was inadmissible under the confrontation clause, and the

allegations in assignment of error two, where Appellant argued defense counsel ineffectively cross-examined the victim on certain subjects.

{¶50} Under the cumulative error doctrine, a conviction is reversible when the cumulative effect of errors in a trial deprived the defendant of a fair trial, even though each instance of error did not individually warrant reversal (i.e., each error was found harmless). *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 321-322 (yet, errors do not become prejudicial by sheer weight of numbers). If there were not multiple instances of error, individually harmless, then cumulative error cannot be evaluated. *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 132.

{¶51} As set forth above, the confrontation clause was not violated where the victim testified, and counsel's performance in cross-examining the victim was not deficient or prejudicial. Because there was no error under the confrontation clause as alleged in assignment of error one and no ineffective assistance of counsel as alleged in assignment of error two, the cumulative error doctrine is inapplicable. *Hunter*, 131 Ohio St.3d 67 at ¶ 132 (in the absence of multiple errors, the cumulative error doctrine does not apply). In accordance, this assignment of error is without merit.

{¶52} For the foregoing reasons, Appellant's convictions are upheld, and the trial court's judgment is affirmed.

Waite, J., concurs.

Dickey, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.