

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, :  
 : No. 113318  
 v. :  
 :  
 ROBERT WINSTON, :  
 :  
 Defendant-Appellant. :  
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JOURNAL ENTRY AND OPINION

**JUDGMENT: AFFIRMED**  
**RELEASED AND JOURNALIZED: September 19, 2024**

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Criminal Appeal from the Cuyahoga County Court of Common Pleas  
Case No. CR-22-673461-A

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***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Karen Greene, Assistant Prosecuting Attorney, *for appellee*.

Cullen Sweeney, Cuyahoga County Public Defender, and Jennifer Pritchard, Assistant Public Defender, *for appellant*.

LISA B. FORBES, P.J.:

{¶ 1} Robert Winston (“Winston”) appeals his convictions for rape of a victim under the age of ten, gross sexual imposition, attempted gross sexual imposition, kidnapping, and importuning with sexually violent predator and sexual

motivation specifications. After reviewing the facts of the case and pertinent law, we affirm the trial court's decision.

## **I. Facts and Procedural History**

{¶ 2} From 2014 to 2016, when the crimes at issue in this appeal took place, Winston was dating Conchetta Johnson ("Johnson") and living with her and her three children. One of Johnson's children, S.B., who was born in 2009, is the victim in this case. In 2021, when S.B. was 11 years old, she disclosed to Johnson that Winston had sexually abused her multiple times when she was four to seven years old. At the heart of this appeal is S.B.'s credibility and the prosecutor's remarks during closing arguments regarding S.B.'s credibility.

{¶ 3} On October 3, 2022, Winston was indicted for two counts of rape (digital and oral penetration) in violation of R.C. 2907.02(A)(1)(b), gross sexual imposition (touching of vagina) in violation of R.C. 2907.05(A)(4), kidnapping (for the purpose of engaging in sexual activity) in violation of R.C. 2905.01(A)(4), importuning in violation of R.C. 2907.07(A), and attempted gross sexual imposition (attempted touching of penis) in violation of R.C. 2923.02 and 2907.05(A)(4). Winston's indictment included furthermore clauses indicating that the victim was under ten years old, sexually violent predator specifications, and a sexual motivation specification.

{¶ 4} This case went to trial, and on September 1, 2023, a jury found Winston guilty as indicted with the exception of the sexually violent predator specifications, which were tried to the bench. The court found Winston guilty of the

sexually violent predator specifications and sentenced him to life in prison without the possibility of parole. Winston now appeals raising three assignments of error for our review:

I. Robert Winston's convictions are against the manifest weight of the evidence.

II. Robert Winston's rights to due process and a fundamentally fair trial were violated by the prosecutor's misconduct during closing argument.

III. Robert Winston's constitutional right to effective counsel was violated when trial counsel failed to object to the prosecutor's misconduct during closing argument.

## **II. Trial Testimony**

### **A. S.B.**

{¶ 5} S.B. testified that she was 13 years old on the first day of Winston's trial, which was August 30, 2023. According to S.B., she knew Winston because he used to be her mom's boyfriend. S.B. testified that she thought her mom and Winston broke up in 2018. Sometime after the breakup, although S.B. could not recall exactly when, S.B. told her mom that Winston "did something to me." According to S.B., she told this to her mom because she "wasn't scared anymore."

{¶ 6} Asked "what happened with . . . Winston," S.B. testified as follows:

So, my mom would be at work, and me and my brothers, we shared a room, and I be laying down and my bed is like closer — my bed was closer to the door. He'll come pick me up off my bed, carry me to my mom and his room at the time, and he'll lay me at the edge of the bed and he'll get on his knees, take my pants and my underwear off, and he'll put his mouth and fingers on my private area.

{¶ 7} At the time of the abuse, S.B., her family, and Winston were living on Lee Road in “a big brown building. I believe it was on the third floor.” S.B testified that she would be “like half [a]sleep” when Winston would take her from her bed. Winston would take her underwear and “bottoms” off and “put his “[m]outh and fingers” on the inside of S.B.’s “vaginal lips.” She knew this because she could feel it, including Winston’s tongue. S.B. testified that Winston’s fingers and mouth were “moving” when he touched her “inside the [vaginal] lips.”

{¶ 8} When this happened, S.B.’s mother was at work and her brothers were asleep. Winston would ask S.B. if she was going to tell her mom, and he would say, “Do you like that?” According to S.B., she did not respond to Winston, and she “didn’t really know how to feel.” Asked how many times Winston took her to the bedroom and “did what you just described to us,” S.B. answered, “I can’t count, like, how many.”

{¶ 9} S.B. testified about one incident that occurred when they lived with her cousin, which was before they moved to the Lee Road apartment. Her brothers and her cousin were in school, and her mom was at work. “And this one time I was in the back playing with, like, my toys or something, and he called me into the living room, and he set me down and he pulled down his pants and underwear and told me to touch his private area.” S.B. testified that she saw Winston’s penis, but she did not touch it and she did not say anything to Winston. According to S.B., she was “scared.”

**{¶ 10}** S.B. testified that they moved to another building and then to her grandma’s house, but Winston “never did anything after we moved from the building.” Asked if she felt like she could leave the bedroom when Winston brought her there, S.B. answered, “No.” According to S.B., “[a]fter he got done doing what he did to me, he would tell me to use the bathroom and go lay down.”

**{¶ 11}** S.B. testified that she was “seven or eight” years old when Winston “was doing these things” in the bedroom at the Lee Road apartment, and she could not stop him from doing them. Winston and S.B.’s mom broke up when they were living with S.B.’s grandma, and S.B. never saw Winston after that. S.B. testified that she “used to call him dad. . . . He was like a father to us.”

**{¶ 12}** S.B. testified as to why she told her mom about Winston sexually abusing her when she did. They were at a family gathering, and she overheard her mom saying how close she and S.B. were and that S.B. would tell her mom everything. “And I remembered I never told her that, and that made me want to tell her when we come home.”

**{¶ 13}** On cross-examination, defense counsel asked S.B. if she remembered telling “the story” to people other than Johnson. S.B. replied, “No. She — I think she told people — I think she told people what happened to me, but not, like, in detail. But I didn’t tell nobody but my mom.” Defense counsel asked S.B. if she went “to a building and [was] interviewed by Children and Family Services.” S.B. replied, “Oh, yeah.” Defense counsel asked if this happened “on multiple occasions, right, more than one time.” S.B. answered, “Yeah.”

{¶ 14} Defense counsel began questioning S.B. about the “first interview you gave, which was dated March 21st of 2021. . . . Do you recall that in the interview that you first gave that you said something different” than what you testified to in trial. S.B. answered, “No.” Defense counsel asked again, “In that first interview, you stated that he went inside of you with his private part. Do you remember saying that?” S.B. again answered, “No.”

{¶ 15} Defense counsel then played a video of this interview, in the presence of the jury, to “refresh [S.B.’s] memory.” S.B. identified herself in the video but testified that it did not refresh her recollection of the interview. S.B.’s testimony continued:

Q: It doesn’t remind [you] what you said during that interview?

A: No.

...

Q: Well, you — do you agree that those are your words?

A: I said it, but I don’t remember it.

Q: Okay. Fair enough. Do you remember saying that he touched your behind, your private part, and your butt?

A: Watching that, yeah.

Q: Okay. And in court today you said something different, correct?

A: Yeah.

Q: In court today what did you say?

A: That he didn’t touch my behind.

**{¶ 16}** Asked if she could explain the inconsistency in her statements, S.B. replied, “No.” S.B. admitted that the statement she made in the interview was a lie. Asked if she had a reason for lying, S.B. replied, “No. . . . Maybe I was speaking too fast.” S.B. then clarified that, in her mind, there are “two private areas,” one where you urinate and one “where you go number two.” Furthermore, S.B. agreed with the interviewer that the bedroom incidents happened “more than 20 times.”

**{¶ 17}** Defense counsel played a video of a second interview that S.B. gave on April 14, 2021.<sup>1</sup> According to defense counsel, the video was played to refresh S.B.’s memory. S.B. testified that she did not recall making the statement that “Winston would take the clothes off of your body, close the door and rape me.”

**{¶ 18}** A third video was played to refresh S.B.’s memory. This video was of a May 4, 2022 interview S.B. gave to another unknown person, in which S.B. stated that Winston would put his hands under her underwear. According to Winston’s defense counsel, this statement was inconsistent with S.B.’s testimony that Winston would take her underwear off. S.B. testified that her “bottoms would be off.”

**{¶ 19}** S.B. testified as follows about how often the abuse would occur:

A: Every night when my mom used to be at work.

Q: Monday through Friday?

A: Yeah.

Q: For two years?

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<sup>1</sup> Defense counsel stated on the record that he did not know where this interview took place or who the interviewer was. Defense counsel explained, “Again, I don’t know who it was. I believe it was a lady associated with one of the government agencies.”

A: Yeah.

Q: So that's like hundreds of times he did this to you?

A: I would — yeah.

{¶ 20} The three videos were not introduced into evidence, and they are not part of the record on appeal.

{¶ 21} On redirect examination, the prosecutor asked S.B., “Why is it important for you to tell us all today what the correct information is?” S.B. answered, “So there will be no misunderstanding.” S.B. also testified that she “was tired of talking about it.”

### **B. Conchetta Johnson**

{¶ 22} Johnson testified that she is S.B.'s mother, and she was in a relationship with Winston for three-and-a-half years, from sometime in 2013 to April 2017. Johnson and her three children lived with Winston in various places throughout the duration of their relationship. According to Johnson, Winston “never really left my side.” From June 2014 to March 2015, they lived in an apartment on Kinsman, and at one point, her cousin LaCara stayed with them. In October 2015, they moved into an apartment on Lee Avenue and “stayed there for a year.”

{¶ 23} Johnson testified as follows about her employment history during her relationship with Winston: “I had employment on and off, but it lasted different time frames, you know, within that, but I definitely was employed. I was always employed.” Johnson testified that when they lived in the apartment on Kinsman



and the apartment on Lee Avenue, she had a job that required her to work in the evening and night.

{¶ 24} According to Johnson “[t]here was no bad blood or anything” when she and Winston broke up. “It was pretty much mutual.”

{¶ 25} Johnson testified that in March 2021, S.B. told her “what happened to her. . . . She looked scared. She looked terrified. Shaking. She was crying. She could barely talk. She was hurt. She looked disappointed.” According to Johnson, S.B. was 11 or 12 years old when she told Johnson what happened. It was the first time that Johnson “heard anything about this.” Johnson and Winston had been broken up “[a]bout four years” at that point. S.B. was “four to seven or eight” years old when Johnson and Winston dated. Asked if she trusted Winston “enough to be alone with your kids,” Johnson answered, “Yes.” Asked if Winston was “permitted to give any discipline or punishment or reprimand to” S.B., Johnson answered as follows: “He was allowed to, but he never disciplined [S.B.]. [S.B.] was the flower to be protected, his words.” S.B. called Winston “Bobby or Daddy.”

{¶ 26} Johnson told the police what S.B. told her, and ultimately, S.B. spoke with “several” police officers or detectives. Johnson confirmed that S.B. “still receives therapy” and that at one point, S.B. had a medical exam.

{¶ 27} On cross-examination, Winston’s defense counsel asked Johnson the following question: “Isn’t it true that these allegations originated because you found out that [Winston] had sex with your cousin?” Johnson replied, “No, that is not true. I don’t even know anything about that until you just said that.” Defense counsel

asked Johnson where S.B. told her the rapes took place. Johnson answered that S.B. described it as a brown brick building, and they lived in two brown brick buildings. Johnson further testified that the rapes took place in “the room that [Winston] and I shared together.”

**{¶ 28}** Defense counsel asked Johnson if she recalled speaking to the police on March 21, 2021. Johnson replied that she did not recall “verbatim,” and a video of this interview was played. According to the transcript, in this interview Johnson told the police that “when [S.B.] originally told me that [Winston had] done anything to her, she said that he took her in the bathroom, he did whatever he did, exactly what I said there. That was all that I knew at the time.” Johnson’s testimony continued: “As time went on and we learned more, other than just the initial information given to me by my daughter, that it was going on for a very long time, so that it was not just the bathroom.” Asked if Johnson thought S.B. “was telling the truth,” given the inconsistencies between S.B.’s testimony and what S.B. initially disclosed to Johnson and others, Johnson answered, “I do believe she’s telling the truth. . . . I don’t know what my daughter said yesterday [on the witness stand] but I do know that when that interview took place, I was not in full knowledge of everything that had happened.”

**{¶ 29}** Defense counsel asked Johnson where she worked from October 2015 to November 2016, which is when the rapes at the Lee Avenue address took place. According to Johnson, she was unemployed in October 2015, and did not get a job until the spring of 2016, when she was hired by Kelly Services to work at Case

Western Reserve University. Johnson testified that she worked for Kelly Services “until about June, 2016.” Johnson then testified that she worked between October 2015 and the spring of 2016, but she could not recall where she worked in that time frame. Johnson added, “I was always working.” Johnson worked for RWK Services starting at the end of August 2016.

**{¶ 30}** On redirect examination, Johnson testified that she recalled during the 2015 and 2016 timeframe when she, her three children, and Winston lived at the Lee Avenue apartment, she “believed” that she “may have been . . . employed at Angel’s Child Care alongside . . . Winston’s sister, Clara.”

**{¶ 31}** Johnson further testified that, during the timeframe in question, she left Winston “alone as the only adult” with her children when she was working or looking for work. According to Johnson, there were other times when her children were left alone with Winston, such as when she “maybe went with a friend somewhere . . . . He was completely trusted.” Johnson testified that she “was never present for any of the incidents” S.B. told her about. Additionally, Johnson clarified that she took the bus, and sometimes more than one bus, to get to work, and this commute took up to one-and-a-half hours depending on which job she was traveling to. Johnson testified that she worked nights for Kelly Services

### **C. Marie Clark**

**{¶ 32}** Cleveland Police Detective Marie Clark (“Det. Clark”) testified that she is assigned to the sex crimes and child abuse unit. Det. Clark testified that she was assigned S.B.’s case on March 17, 2021, which is one day after Johnson reported

to the police that Winston sexually abused S.B. On March 21, 2021, Det. Clark spoke with Johnson again and with S.B., who was 11 years old at the time.

**{¶ 33}** According to Det. Clark, the “reported crime happened several years prior . . . . However, the victim was a juvenile, and she had just disclosed a few days prior to this.” Det. Clark testified that she has “training on interviewing alleged victims of sexual assaults.” According to Det. Clark, the locations involved in the allegations against Winston were “two addresses . . . , the one on Kinsman and the one on Lee Avenue . . . .” Det. Clark testified that, after “I had interviewed everybody that I thought I could get an interview from and obtain[ed] any evidence that I could,” she sent the case to be reviewed by the prosecutor’s office.

**{¶ 34}** On cross-examination, Det. Clark testified that she heard S.B.’s testimony in this case where S.B. stated that she lied during her interview with Det. Clark. The following colloquy ensued:

Q: If you would have known at the time that she was lying about those parts of the allegations, would that have changed the way you went . . . with this investigation?

A: No.

Q: Tell me about that.

A: Well, I believe yesterday she testified that she lied about one part of it.

Q: Okay. Well, I think she testified about him putting his penis in her private part. She said that she lied about that, right?

A: Correct.

Q: And she said that she lied about him putting his penis in her butt, correct?

A: Correct.

Q: Okay. So if you would have known that those two elements were lies during your initial interview with her, would you have changed anything about your investigation here?

A: I would have asked her more questions.

**{¶ 35}** Det. Clark explained that “more questions” would be asking the victim to describe the incidents further, such as whether S.B. saw Winston’s “penis go in her vagina.” According to Det. Clark, she did not ask these types of follow-up questions of S.B. Det. Clark testified that “it is important to ask all the questions I can to establish the truth . . . [w]hile keeping in mind trauma of a juvenile victim.” Asked whether S.B. demonstrated trauma when Det. Clark interviewed her, Det. Clark testified, “Yes. . . . [A]s soon as I started asking questions about the incident, she started crying. We had to pause before she could answer, while she was using tissues to wipe her tears.”

**{¶ 36}** Det. Clark testified that she did not uncover any physical evidence in this case, including any evidence of physical trauma to S.B. However, she observed “non-physical trauma” with S.B. According to Det. Clark, the “interviews” were the only component in this investigation.

#### **D. Clara Winston**

**{¶ 37}** Clara Winston (“Clara”) testified on behalf of Winston, who is her younger brother. Clara testified that she worked with Johnson at Angel’s Day care “right around October” of 2015. According to Clara, Johnson worked there for only three weeks, and she never worked past 5:00 p.m.

### III. Law and Analysis

#### A. Manifest Weight of the Evidence

{¶ 38} A manifest-weight-of-the-evidence challenge “addresses the evidence’s effect of inducing belief . . . . In other words, a reviewing court asks whose evidence is more persuasive — the state’s or the defendant’s?” *State v. Wilson*, 2007-Ohio-2202, ¶ 25. “When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as the ‘thirteenth juror’ and disagrees with the factfinder’s resolution of the conflicting testimony.” *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). Reversing a conviction under a manifest-weight theory “should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983).

{¶ 39} In conducting a manifest-weight-of-the-evidence review, “this court remains mindful that the credibility of the witnesses is primarily for the trier of fact to assess.” *State v. Rudd*, 2016-Ohio-106, ¶ 62 (8th Dist.). The factfinder “is in the best position to take into account inconsistencies, along with the witness’s manner, demeanor, gestures, and voice inflections, in determining whether the proffered testimony is credible.” *State v. Holloway*, 2015-Ohio-1015, ¶ 42 (8th Dist.). Furthermore, this court has held that “[p]hysical evidence is not required to sustain a conviction against a manifest weight challenge.” *State v. Flores-Santiago*, 2020-Ohio-1274, ¶ 37 (8th Dist.) “A conviction may rest solely on the testimony of a single witness, including the victim, if believed, and there is no requirement that a victim’s

testimony be corroborated to be believed.” *Id.* at ¶ 38. This court has also held that “a defendant is not entitled to reversal on manifest weight grounds merely because certain aspects of a witness’s testimony are not credible or were inconsistent or contradictory.” *State v. Nitsche*, 2016-Ohio-3170, ¶ 45 (8th Dist.). “[T]he decision whether, and to what extent, to credit the testimony of a particular witness is within the peculiar competence of the factfinder, who has seen and heard the witness.” *State v. Johnson*, 2014-Ohio-494, ¶ 52 (8th Dist.).

{¶ 40} On appeal, Winston argues that the “State’s entire case rests on the credibility of S.B.’s testimony,” and “the believability of this testimony is questionable and was unsupported by any physical evidence, uncorroborated and inconsistent.” Specifically, Winston argues that S.B.’s testimony on the stand was inconsistent with her “recorded interview” in four areas. As to the “recorded interview,” we note that defense counsel played three videos during S.B.’s and Johnson’s cross-examinations. These videos were not introduced into evidence and are not part of the record on appeal.

{¶ 41} According to the transcript, S.B. stated in one of the videos that Winston touched her “behind,” and S.B. testified that she only remembered saying that by watching the video. On cross-examination, S.B. agreed that during her testimony on direct examination, she stated that Winston did not touch her behind. Asked if she had any explanation as “the change in that thought process by you,” S.B. answered, “No.” S.B. agreed that her statement in the interview was “a lie.” Similar testimony was elicited about an apparent comment S.B. made in one of the videos

that Winston “touched [her] private with his private part.” During trial, S.B. admitted that this was not true and that it did not occur. Asked why she lied to the interviewer, S.B. stated, “I don’t know.” Asked if someone told her to lie, S.B. stated, “No.” Asked if she “just made it up,” S.B. answered, “Sure.”

{¶ 42} According to the transcript, S.B. was asked during one of the video interviews “what part of his went into your private area,” and S.B. answered, “His private area.” S.B. clarified that this referred to Winston’s penis and her vagina. Again, S.B. admitted during her testimony that this statement was not true. According to the transcript, S.B. was asked during the interview if Winston “put it anywhere else,” and she replied, “Behind.” However, S.B. testified that Winston did not put his penis in her behind.

{¶ 43} Defense counsel asked S.B. if she recalled making a statement in one of the videos “to whoever the person was that . . . Winston would take the clothes off of your body, close the door and rape me.” S.B. answered, “No.” Winston argues that S.B. testified that Winston would take her pants and underwear off, and this testimony is inconsistent with S.B.’s statement in one of the interviews that Winston would take her “clothes” off. Winston further argues about other inconsistencies S.B.’s trial testimony and the statements that S.B. made in the interviews. For example, Winston argues that “S.B. testified that . . . the incidents alleged occurred more than once, then more than 20 times, then every weeknight, then mostly every night . . . .”



{¶ 44} Winston also argues that S.B. testified the sexual abuse took place “while her mother was at work, however her mother was unemployed for a substantial period of this time.” Another example of an inconsistency argued by Winston is that, according to the transcript, Johnson stated in one of the interviews that the abuse “happened in multiple areas of the apartment, but S.B.’s testimony at trial was that they only occurred in the bedroom shared by . . . Winston and her mother.”

{¶ 45} According to Winston, the case at hand, “shares the hallmark evidentiary shortcomings of [one] case[] that was reversed on manifest weight grounds.” The case that Winston cites to support this argument is *State v. C.M.*, 2018-Ohio-1825 (8th Dist.). In *C.M.*, this court reversed the defendant’s conviction for sexual battery, finding that “the victim’s testimony regarding the entire evening was inconsistent and contradictory.” *Id.* at ¶ 43. Upon review, we find that the facts of *C.M.* and the facts of the instant case are markedly different, and we decline to follow *C.M.*’s reversal on manifest weight.

{¶ 46} In *C.M.*, the victim was an adult, the victim and the defendant had recently met when the incident at issue took place, the victim testified that she did not consent to the sexual conduct, the victim reported the incident to police, and she went to the hospital where a rape kit was performed the next day. *Id.* In *C.M.*, the SANE nurse testified that the victim’s physical examination showed “friction” to her vaginal area, although “the injury does not reveal when it occurred or whether it was caused by a consensual or nonconsensual act.” *Id.* at ¶ 23. Additionally, a forensic

scientist testified that no semen or “DNA profiles foreign to the victim were detected from the samples that were submitted for DNA testing.” *Id.* at ¶ 24. A police detective testified that “the victim showed ‘significant reluctance to participate in this investigation’ . . . .” *Id.* at ¶ 26.

{¶ 47} In the case at hand, S.B. was a young child at the time of the sexual abuse, and Winston was dating S.B.’s mother and living with S.B. and her family at the time of the sexual abuse. Furthermore, it is axiomatic that a child cannot legally consent to sex. *State v. Eskridge*, 38 Ohio St.3d 56, 58 (1988) (“A four-year-old child cannot consent to sexual conduct. The victim here did not and could not have participated in the sexual conduct of her own free will.”). Years after the alleged abuse, S.B. had a rape kit performed but the results of the exam were not introduced into evidence, and the SANE nurse did not testify. Notably, S.B. did not disclose the sexual abuse and the police did not get involved until years later.

{¶ 48} In addition to these factual differences, the *C.M.* Court found that the victim’s trial testimony about what occurred on the night in question was internally inconsistent. *Id.* at ¶ 43. Furthermore, the court found that “the victim’s testimony was vastly different than the details she provided to the SANE nurse a day after the alleged rape.” *Id.* at ¶ 44. In the case at hand, there was nothing inconsistent about S.B.’s trial testimony. However, our review shows that S.B.’s trial testimony was inconsistent with some of the prior statements she made when she disclosed the abuse. Ohio courts have held that “inconsistencies in the statements of children regarding sexual conduct do not render judgments against the manifest weight of

the evidence; jurors may simply take note of such inconsistencies and resolve or discount them accordingly.” *State v. Steible*, 2023-Ohio-281, ¶ 20 (9th Dist.). “It is not inconceivable for a young child to not recall every specific detail of a sexual assault that occurred years ago with one hundred percent accuracy.” *Id.* See also *State v. Stratford*, 2022-Ohio-1497, ¶ 28 (8th Dist.) (“There is no playbook for how a child would react to sexual assault or the way in which the assault ‘typically’ occurs. We cannot say the [the victim’s] reaction to and description of what occurred is not out of the realm of possibility that it lacks credibility.”).

**{¶ 49}** In the case at hand, the jury listened to S.B.’s testimony, watched the videos of her prior statements, and found her credible. As we stated earlier in this opinion, determining the credibility of witnesses is best left to the trier of fact. See, e.g., *Holloway*, 2015-Ohio-1015 (8th Dist.). This court has held that “the jury can believe all, part, or none of the testimony of each witness who appears at trial.” *State v. Ayers*, 2020-Ohio-2943, ¶ 6 (8th Dist.). We cannot say that this is the exceptional case in which the evidence weighs heavily against Winston’s convictions. Accordingly, his first assignment of error is overruled.

## **B. Prosecutorial Misconduct**

**{¶ 50}** “The test for prosecutorial misconduct is whether the prosecutor’s remarks were improper and, if so, whether they prejudicially affected the substantial rights of the accused. The touchstone of analysis is the fairness of the trial, not the culpability of the prosecutor.” (Citations omitted.) *State v. Eisermann*, 2015-Ohio-591, ¶ 43 (8th Dist.). Prosecutorial misconduct constitutes reversible error only in

rare cases. *State v. Keenan*, 66 Ohio St.3d 402, 405 (1993). When there was no objection, “the prosecutor’s remarks cannot be grounds for error unless they served to deny appellant a fair trial.” *State v. Jackson*, 2005-Ohio-5981, ¶ 112.

{¶ 51} On appeal, Winston challenges the following statements made by the prosecutor during the State’s closing argument. For context, this opinion includes the prosecutor’s remarks surrounding the statements at issue. Additionally, Winston groups the statements into two categories. First are statements that Winston argues improperly comment on S.B.’s credibility, and second are statements that Winston argues improperly allude to evidence not admitted at trial.

#### **1. Comments on S.B.’s Credibility**

{¶ 52} First, the prosecutor said that when S.B. admitted to lying in her initial interview, she was “taking her oath seriously, taking her oath seriously and admitting readily, immediately to that. Okay? I want you to think about how that boosts her credibility. . . . She just admitted that the anal penetration and the vaginal penetration with his penis isn’t [true]. Why would she then back down? She’s credible. She took her oath seriously.”

{¶ 53} Second, the prosecutor spoke about Johnson’s testimony as follows:

[W]hat stuck out to me about [Johnson] and what I believe boosts her credibility, is her description as to how the defendant was in the home during this three-and-a-half year period as an authority figure within the house. She had the opportunity to try to bash him. How was he? He was with me all the time. He was there through thick and thin. I thought he was a great father. He was instructing my son and children to protect their daughter, the flower. She had no reason at that time to believe that he was bad. She didn’t take the opportunity to make him look like a bad person. Does that sound like somebody who is trying to tear down a man or trying to protect her daughter and trying to ensure

that what she experienced has come out? I want you to think about that when you're determining [Johnson's] credibility as well.

**{¶ 54}** Third, the prosecutor spoke about the importuning count of the indictment, which related to the 2014 incident where Winston “recklessly asked [S.B.] to engage in sexual activity with him . . . .” The challenged statements follow. “And what I would like to say here is that at no point in time is there any inconsistency as to that incident. The defense had the opportunity to cross-examine her; didn’t go into it much, because there is no inconsistency, because the victim is credible, has been consistent with that statement constantly.”

**{¶ 55}** The fourth statement by the prosecutor during closing arguments that Winston takes issue with is the following:

I do believe that most of your deliberations are going to be Counts 1 through 4, those bedroom incidents. And you will have to make the determination how much of [S.B.'s] testimony was credible. She was upfront and honest with us. She tried to correct any misunderstanding. She told us what she felt and what she remembered, and the State believes that her testimony is credible and that you will be able to find that . . . Winston raped [S.B.]

**{¶ 56}** The Ohio Supreme Court has held that an “attorney may not express a personal belief or opinion as to the credibility of a witness.” *State v. Davis*, 2008-Ohio-2, ¶ 232. This misconduct is referred to as “vouching.” *Id.* “Vouching occurs when the prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue.” *Id.* One of the statements the prosecutor made in closing argument during the *Davis* trial was “Do these [witnesses] appear to you to be people that would come in here and identify the person as a murderer unless they were certain? You answer that.” *Id.* at ¶ 234. The Court held that no improper

vouching occurred. The “prosecutor did not express an opinion about the witnesses’ credibility because he asked the jurors to decide for themselves whether these witnesses were being truthful.” *Id.* at ¶ 235.

{¶ 57} In the case at hand, we find that the prosecutor’s first and third remarks at issue concerned how the jury should determine credibility by identifying factors the jury should consider. To this extent, these remarks were properly made. To the extent that the prosecutor expressly or implicitly said that he or the State believed that S.B.’s testimony was credible, as shown in the second and fourth statements at issue, we find this to be improper vouching. We turn to whether the improper remarks prejudicially affected Winston’s right to a fair trial. Winston argues on appeal that “the misconduct in this case was designed specifically to bolster the most glaring weakness of the State’s case — the questionable credibility of S.B. In so doing, the State affected . . . Winston’s substantial rights to a fair trial.”

{¶ 58} In overruling Winston’s first assignment of error, we determined that the jury’s finding that S.B.’s testimony was credible, which it necessarily did because it convicted Winston as indicted, was not against the manifest weight of the evidence. Upon review of the prosecutor’s remarks that amount to improper vouching, we cannot say that these isolated comments influenced the jury’s decision to convict Winston or that it prejudicially affected his right to a fair trial. “A conviction can only be reversed on the grounds of prosecutorial misconduct if the effect of the misconduct permeated the entire trial . . . .” *Parma v. Perotti*, 2024-Ohio-1359, ¶ 8 (8th Dist.).

## 2. Comments Regarding Evidence Not Admitted at Trial

{¶ 59} Winston next argues that the prosecutor “improperly relied on ‘evidence’ outside the record to bolster [S.B.’s] credibility . . . in two ways.”

{¶ 60} First, according to Winston, the State “[a]rgued that . . . Winston broke up with S.B.’s mother because they moved to a residence with more people and Winston had less ‘access’ to the victim.” Winston argues that “there was no evidence in the record to support this assertion.” The State’s closing argument on this point was as follows:

Something I really want you to focus on is then they moved to grandma’s house. And we heard testimony that at grandma’s house they have about six people living there. Both [S.B.] and [Johnson] said that. And the reason I think it kind of stuck out to me in the middle of the trial, that the victim said that no sexual assaults or any allegations of anything like that occurred there. And then the mom said: Yeah, we broke up a few months after that. Now, I want to know, is it because more people are in the house? Is that something that you would like to infer?

{¶ 61} Our review of the record shows that S.B. testified that her “papa,” grandma, mother, two brothers, Winston, and she were living together at one point in her grandma’s house. Johnson consistently testified that she, Winston, her mom, her stepfather, and her three children all lived together in her mom’s house at one point. Furthermore, S.B. testified that the abuse stopped when they moved out of the Lee apartment. Upon review of Winston’s argument, we do not find that the prosecutor made any comments regarding evidence not admitted at trial. In other words, the prosecutor’s comments at issue accurately reflected S.B. and Johnson’s testimony.

{¶ 62} Second, according to Winston, the State argued that “S.B. was more credible because [she] was not hesitant to admit her lies like ‘most 13-year-olds.’” Winston argues that “there was no evidence in this case about how 13-year-olds respond to being confronted with their lies” and by saying this in closing argument, the State implied that “S.B. was more credible than most 13-year-olds.”

{¶ 63} Our review of the transcript shows that the prosecutor “reminded” the jury during closing argument that the State did not indict Winston for “penile penetration, anally and vaginally.” The State’s argument continued:

Why is that? That’s because she admitted that was untrue. She didn’t hesitate, like most 13 year olds would. Okay? She didn’t back down from it. She didn’t say I guess, I kind of, maybe I misremembered. No. That’s untrue. Why? She’s taking her oath seriously, taking her oath seriously and admitting readily, immediately to that. Okay? I want you to think about how that boosts her credibility.

{¶ 64} Once again, upon review, we do not find that the prosecutor made any comments regarding “evidence” not admitted at trial. Furthermore, as stated earlier, prosecutorial misconduct must permeate the entire trial for it to be reversible error. One comment during closing argument suggesting that “most” 13-year-olds would “hesitate” if they were being untruthful does not amount to misconduct permeating the entire trial.

{¶ 65} Accordingly, Winston’s second assignment of error is overruled.

### **C. Ineffective Assistance of Counsel**

{¶ 66} In Winston’s third and final assignment of error, he argues that his “right to effective counsel was violated when trial counsel failed to object to the prosecutor’s misconduct during closing argument.”



**{¶ 67}** To succeed on a claim of ineffective assistance of counsel, a defendant must establish that his or her attorney's performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984). However, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance." *Id.* at 697. *See also State v. Bradley*, 42 Ohio St.3d 136 (1989). "To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Conway*, 2006-Ohio-2815, ¶ 95.

**{¶ 68}** In Winston's second assignment of error, we found that some of the prosecutor's comments being challenged did not amount to misconduct, and the isolated comments that were inappropriate did not permeate the trial. Therefore, Winston has not established reversible error. In other words, Winston failed to demonstrate prejudice or that the result of the proceeding would have been different but for the State's closing argument. Therefore, we can conclude that Winston's trial counsel was not deficient by not objecting to the prosecutor's closing argument. *See Conway* at ¶ 103 ("[T]he failure to make objections alone is not enough to sustain a claim of ineffective assistance of counsel.").

**{¶ 69}** Accordingly, Winston's third assignment of error is overruled.

**{¶ 70}** Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

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LISA B. FORBES, PRESIDING JUDGE

MICHAEL JOHN RYAN, J., and  
FRANK DANIEL CELEBREZZE, III, J., CONCUR