[Cite as *State v. Slusarczyk*, 2024-Ohio-4790.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 113459
v.	:	
ROBERT SLUSARCZYK, JR.,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 3, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-23-677887-A

Appearances:

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

Edward M. Heindel, *for appellant*.

MARY J. BOYLE, P.J.:

{¶ 1} Defendant-appellant, Robert Slusarczyk, Jr. ("Slusarczyk"), appeals his gross sexual imposition ("GSI") conviction and 36-month sentence, raising the following six assignments of error for review:

Assignment of Error I: The trial court erred when it admitted evidence of Slusarczyk's post-arrest silence and allowed the jury to hear evidence that Slusarczyk declined to make a statement while at the police station.

Assignment of Error II: The trial court erred when it admitted improper 404(B) evidence that Slusarczyk had engaged in other conduct that was neither charged, nor allegedly criminal.

Assignment of Error III: The trial court imposed an impermissible trial tax when it sentenced Slusarczyk to 36 months in prison, when he was previously offered credit for time served before trial.

Assignment of Error IV: The conviction was not supported by sufficient evidence.

Assignment of Error V: The conviction was against the manifest weight of the evidence.

Assignment of Error VI: Slusarczyk was denied his right to the effective assistance of counsel.

{¶ 2} For the reasons set forth below, we affirm Slusarczyk's conviction and sentence.

I. Facts and Procedural History

{¶ 3} In January 2023, Slusarczyk was charged with GSI in violation of R.C. 2907.05(A)(4) (a third-degree felony), for allegedly having sexual contact by touching the breast of the victim, A.V., who was less than 13 years old at the time. The incident was alleged to occurred at a New Year's Eve party hosted by A.V.'s great aunt, J.M., on December 31, 2022.

{¶ 4} Prior to the start of trial, the court held a hearing on a motion filed by plaintiff-appellee, the State of Ohio, on May 16, 2023, seeking to have other acts (Evid.R. 404(B)) evidence admitted at trial regarding some of Slusarczyk's

interactions with A.V. leading up to the incident, including Slusarczyk massaging or touching A.V.'s hand, thigh, and back; taking unsolicited photos of A.V.; putting his arm around A.V. at the mall; attempting to pick her up by the waist; and various comments that he made to A.V. regarding her appearance, that his girlfriend was jealous of their relationship, and how Slusarczyk wished he was 12 again. The State's motion also mentioned other acts by Slusarczyk, including Slusarczyk calling himself A.V.'s boyfriend; putting his hand on G.Y.'s thigh (A.V.'s cousin); stating to G.Y., "you better not be cheating on me"; and brushing G.Y.'s thigh with his hand when he walked by her. (State's Motion, 05/16/23.) Slusarczyk filed his brief in opposition on May 19, 2023.

{¶ 5} At the hearing, the State argued that the above evidence should be admitted because it is evidence of "grooming" and "it goes to [Slusarczyk's] specific intent in the [GSI], specifically the fact where it mentions sexual gratification and/or arousal." (Tr. 16.) According to the State, the grooming tactics are indicative that Slusarczyk's touching of A.V. was not an accident and demonstrate how Slusarczyk did these acts for the purpose of sexually arousing or gratifying either person.

{¶ 6} In response, Slusarczyk argued that these alleged acts are not evidence of grooming; the acts demonstrate propensity, which is forbidden by Evid.R. 404(B); the acts do not have a specific date and are outside the indictment date; and there is no substantiation that these acts actually occurred. At the conclusion of the hearing, the trial court determined that these acts are admissible because it found that this evidence "is relevant, it is part of the story, it's part of the

[State's] burden[.]" (Tr. 29.) The matter then proceeded to a jury trial, at which the following evidence was adduced.

{¶ 7} A.V., who was 13 years old at the time of trial, testified that Slusarczyk is J.M.'s boyfriend. A.V. stated that she was very close with J.M. and would frequently visit her home. According to A.V., she has known Slusarczyk for approximately two years. Initially, their interactions were conversational. Slusarczyk would ask, "[H]ow are you, how is school[?]" (Tr. 207.) According to A.V., Slusarczyk started to make her feel uncomfortable and make "weird comments" about a year after meeting him. (Tr. 207.) He would say things like, "those pants make you look sexy or you look so good," and "do you want me to hold down your shirt while you take your hoody off[.]" (Tr. 207.)

{¶ 8} When asked by the State if Slusarczyk ever touched her before the incident in question, A.V. replied, "small things. Like me and [J.M.] and him were watching a movie, he would like massage my hand or something like that." (Tr. 208.) He also asked A.V. questions about her personal life, including whether A.V. liked any boys and if any boys liked A.V. A.V. testified that Slusarczyk's questions and the massaging of her hand made her feel "awkward. [She] didn't realize anything was wrong with it because [J.M.] was there, so [she] thought if something was off, [J.M.] would say something because she is [A.V.'s] aunt." (Tr. 208.) At other times, Slusarczyk would twirl A.V.'s hair when she walked past him.

{¶ 9} The State then presented evidence of pictures Slusarczyk took of A.V., including her at Cedar Point, Edgewater Park, and Walmart, and in some family

photos. A.V. testified that some of these pictures were taken with her knowledge and some were taken without her knowledge. One of the pictures taken without her knowledge was of A.V.'s lower half while they were at Edgewater Park. A.V. was wearing a dress so the picture is of A.V.'s bare legs from the thighs to her feet. A.V. testified that this picture made her feel weird. At Walmart, Slusarczyk took more pictures of A.V., without her knowledge, of A.V. standing behind a shopping cart with her hands on her waist and another picture of A.V. from her backside.

{¶ 10} With regard to New Year's Eve, A.V. testified to the events preceding the incident. Earlier in the day, A.V., who was 12 years old at the time, was at J.M.'s house with her brother and Slusarczyk. A.V. wanted to go shopping so Slusarczyk "said that [J.M.] and [A.V.'s brother] could stay home" and he took A.V. to Kohl's and the mall. (Tr. 222.) While at the mall, Slusarczyk put his arm around A.V., and they tried each other's boba drink. Upon returning to J.M.'s house, A.V. put on her new leggings and Slusarczyk said, "[T]hose make you look sexy." (Tr. 226.) Sometime thereafter, Slusarczyk, J.M., A.V., her cousin G.Y., and two other children left J.M.'s house to attend a birthday party. J.M. told A.V. and G.Y. to sit in the front passenger seat of the car that Slusarczyk was driving so A.V. sat on G.Y.'s lap. They all attended the party and during the car ride back to J.M.'s house, A.V. and G.Y. again sat in the front passenger seat. A.V. testified that Slusarczyk was looking at G.Y.'s phone as she was texting someone and then stroked the back of A.V.'s neck. G.Y. asked Slusarczyk why he tapped A.V., and Slusarczyk replied he "didn't mean to." (Tr. 230.) Additionally, during the car ride, Slusarczyk placed his hand on G.Y.'s

hand, which was on A.V. thigh, and slid it down, stroking A.V.'s thigh. According to A.V., neither A.V. or G.Y. said anything after that, instead they were texting back and forth "all the weird stuff [Slusarczyk] had been saying or doing." (Tr. 231.)

{¶ 11} When they were back at J.M.'s house for the New Year's Eve party, Slusarczyk engaged in "play fighting" with the children there. (Tr. 232.) A.V. testified that her and G.Y. were on their phones while sitting on the couch. One of the children began to cry after Slusarczyk hit her too hard with a pillow. G.Y. and A.V. stood up and told Slusarczyk to stop. Slusarczyk then wanted to play fight with A.V. She described it as Slusarczyk "grabb[ing] [her] breast and turn[ing] [her] to the side and kind of [laying] [her] on the floor. [Slusarczyk] had like one hand on one [her] waist and one on [her] breast." (Tr. 233.) The following exchange took place when A.V. was asked by the State to describe the incident in more detail:

> [STATE]: So what hand does he put on your breast, do you remember?
>
> [A.V.]: Right hand, I think.
>
> [STATE]: So he puts his right hand on your breast and where is his left hand?
>
> [A.V.]: Like you want me stand up and —
>
> [STATE]: Yeah.
>
> [A.V.]: I was facing this way, and he turned me like this (indicating).
>
> [STATE]: So he kind of grabbed your lower back and then grabbed your right breast with his right hand — I mean your left breast with his right hand?
>
> [A.V.]: Yes.
>
> [STATE]: And then twists you?

[A.V.]: Uh-huh, and then puts me on the floor.

[STATE]: Okay. And when he grabbed your breast, do you think it's for seconds or less than seconds?

[A.V.]: I don't know how long it was, because it was long enough to turn me and put me on the ground, so probably a few seconds, yeah.

. . .

[STATE]: What did he do with his hand when he put it on your left breast, with his hand?

[A.V.]: He put his hand over my breast but cupped it a little bit on this side (indicating).

[STATE]: Okay.

(Tr. 233-235.)

{¶ 12} After the incident, A.V. and G.Y. went into J.M.'s bedroom. Minutes later, Slusarczyk entered the room, sat next to A.V. on the bed, and said to A.V., "J.M. is so jealous of our relationship; she hates when we hang out or if I do stuff for us guys." (Tr. 236.) At that point, A.V. and G.Y. left J.M.'s room and went into the living room. Later on, Slusarczyk said to A.V., "[O]h, I wish I were 12 again." (Tr. 236.)

{¶ 13} According to A.V., Slusarczyk left J.M.'s house with his brother after the ball dropped at midnight. After that, A.V. and G.Y. then went back into J.M.'s bedroom and G.Y. called her mother because she was not allowed to stay the night. G.Y.'s mother picked up G.Y. and A.V. from J.M.'s house. Then they picked up A.V.'s mother and proceeded to the Parma Police Department to file a report. On cross-

examination, A.V. testified that because of the other things that had happened with Slusarczyk, his touching her breast was not an accident.

{¶ 14} A.V.'s mother testified next. She testified that J.M. hosted a New Year's Eve Party for the kids. According to A.V.'s mother, J.M. "set up a like a balloon drop and everything. She is big into decorating. She used to be a cake decorator, and she had her house all done up, so all of the kids were going to be there, which is my cousin's children including mine." (Tr. 281.) A.V.'s mother did not attend J.M.'s party because she was celebrating at a cousin's house. After midnight, she received a call from G.Y.'s mother informing her that she was on her way to pick up A.V. and G.Y. because Slusarczyk "was being really creepy towards them." (Tr. 282.) According to A.V.'s mother, A.V. and G.Y. gave statements to the police while at the station.

{¶ 15} G.Y. testified to the events on New Year's Eve. Her testimony regarding the events preceding the incident was relatively consistent with A.V.'s. She testified that her and A.V. were sitting in the front passenger seat during the car ride back from the birthday party. G.Y. had her hand next to A.V.'s leg because A.V. was sitting on her lap. Slusarczyk held G.Y.'s hand at one point and she pulled her hand away. Later on, Slusarczyk touched A.V.'s neck and A.V. "kind of got a little scared, but [Slusarczyk] said he was just trying to mess with me, but he was like more messing with [A.V.]" (Tr. 309.) G.Y. also testified that Slusarczyk said to A.V., "[O]h, how I wish to be 12 again." (Tr. 311.) He also observed G.Y. texting at one

point and told her, "[A]re you texting your boyfriend, you better not be cheating on me." (Tr. 315.)

{¶ 16} According to G.Y., only the kids were in the room when they were play fighting. She recalled observing A.V. and Slusarczyk "fighting around." (Tr. 313.) G.Y. testified that she called her mother after A.V. told her what happened with Slusarczyk. Her mother picked them up, and they proceeded to the police station with A.V.'s mother. G.Y. admitted that she originally told the police that Slusarczyk touched A.V.'s breast even though she did not witness it. She explained that at that time she felt "a lot of pressure," was "flustered," and "everyone was asking the same questions[.]" (Tr. 315.) She clarified at trial that she was testifying honestly and from her memory. On cross-examination, G.Y. testified that the one thing she did not witness was "if [Slusarczyk] had touched [A.V.'s] breast. [G.Y.] just saw [A.V.] on the floor." (Tr. 322.)

{¶ 17} J.M. testified that she still was in a relationship with Slusarczyk at the time of trial. She acknowledged that she previously made a statement for Slusarczyk to give her a thumbs up or a thumbs down while testifying. (Tr.370.) The State then played for the jury a recorded phone calls between J.M. and Slusarczyk where Slusarczyk stated to her that "the b***h doesn't even have anything in the form of a breast" and J.M. stated she "wanted copies of the report to show everyone that [A.V.] is infatuated and she wishes that she had a boyfriend[.]" (Tr. 371-372.)

{¶ 18} Parma Police Detective Christy Cappelli ("Det. Cappelli") testified that she investigated the case and has been a juvenile and sexual assault detective

for approximately 11 months. Det. Cappelli described, in her training and experience, sexual grooming as "when a perpetrator will gain the trust of a victim, usually a child, could also be a teenager or vulnerable adult, will gain their trust in order to sexually abuse them later on." (Tr. 378-379.) Det. Cappelli testified that as part of her investigation she interviewed A.V. and G.Y., and based on her conversations, she obtained a search warrant for Slusarczyk's cell phone. She further testified that she reviewed the surveillance camera video from the front desk area of the police station, which was played for the jury and admitted into evidence. In the video, Slusarczyk and J.M. can be observed at the police station around 2:20 a.m. on January 1, 2023. Slusarczyk sat down at a table and appeared to be filling out a general statement form. Slusarczyk then crumpled up the statement and walked out of the police station. (State's exhibit No. 34.) Det. Cappelli testified that Slusarczyk was not arrested and was not in custody at this point in time and that she never received a statement from Slusarczyk.

{¶ 19} Slusarczyk presented four witnesses on his behalf. His brother, Theodore Slusarczyk ("Theodore"), testified that he was at J.M.'s house on New Year's Eve from approximately 11:30 p.m. to 12:15 a.m. Theodore stated that J.M. was dancing with some of her nieces by the television. "Other than that, there was nothing like going on or anything, just playful activity as far as [he was] concerned, but it was mainly kids playing with kids[.]" (Tr. 426.) Slusarczyk told Theodore what others had been testifying to the day before during a phone call, which was played for the jury.

{¶ 20} J.M. testified that Slusarczyk left the party around 8:30 p.m. to get Theodore and did not return until approximately 11:40 p.m. According to J.M. neither A.V. nor G.Y. indicated to her that something was bothering them. Rather, they sat on the couch together. A.V. told J.M. about school and shared pictures of the boys she likes. When Slusarczyk returned, he sat on the one couch and his brother was on the other couch. All the kids got up and starting to pop the balloons as they were doing the countdown to midnight. Afterwards, Slusarczyk gave J.M. a hug and told her that he was taking his brother home. At some point after that, she got a call from her sister that "[t]hey're on the next street making a police report something about [Slusarczyk] did something to one of the kids, and right away I hung up, and then that's when I called [Slusarczyk] and I explained exactly what my sister called and said[.]" (Tr. 446.) Slusarczyk then came back to her house and "[was] like, let's go, let's go, let's go to the police station, and it's like, calm down." (Tr. 446.)

{¶ 21} On cross-examination, J.M. stated that "there is no way in the world" that Slusarczyk touched A.V. on her breast that night. (Tr. 452.) J.M. then admitted to stating that A.V. is "a little teenage whore" who has feelings for Slusarczyk. (Tr. 452.) J.M. explained that she said that because the A.V. she knows, even though she loves her, "is also a bad person." (Tr. 453.)

{¶ 22} J.M.'s son and his girlfriend also testified. They live in J.M.'s basement. The girlfriend was upstairs for part of the night and went back downstairs around 11:00 p.m. with J.M.'s son when he got home from work. She was not

upstairs when the kids were play wrestling and did not observe Slusarczyk interact with the kids. J.M.'s son testified that he got home from work around 11:10 p.m. He also did not see Slusarczyk interact with any of the kids.

{¶ 23} Following the conclusion of trial, the jury found Slusarczyk guilty of GSI in violation of R.C. 2907.05(A)(4), which provides in relevant part: "[n]o person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender . . . when . . . [t]he other person . . . is less than thirteen years of age[.]" The trial court imposed a prison sentence of 36 months and ordered that

> **********This sentence to run concurrent to parole sanction********** Defendant is determined to be a Tier II sex offender/child offender registrant. . . . [Defendant] must personally register his residence, employment or school (or institution of higher education) addresses with the county sheriff of the county containing these addresses and verify same for a period of 25 years with in person verification every 180 days by personally appearing at the sheriff's office.
>
> . . .
>
> [P]ursuant to R.C. 2967.28(F)(4)(c), the defendant will be subject to a period of post-release control of: a mandatory 5 years.
>
> . . .
>
> Defendant to receive jail time credit for 136 day(s), to date.
>
> Defendant declared indigent.
>
> Costs waived.
>
> Fine(s) waived.

(Journal Entry, Nov. 21, 2023.)[1]

{¶ 24} It is from this order that Slusarczyk appeals.

II. Law and Analysis

A. Evidentiary Issues

1. Prearrest Silence

{¶ 25} In the first assignment of error, Slusarczyk argues the trial court erred when it allowed the jury to hear evidence of his prearrest silence, referring to his actions of going to the police station after the incident, beginning to complete a statement form, and moments later, crumpling up the statement form and walking out of the station. He contends that the use of this evidence prejudicially impacted him because it permitted an inference of guilt from his "failure to deny [the] accusation[.]" The State, however, points out that we should review for plain error because defense counsel did not object to this testimony. We agree.

{¶ 26} Plain error is an obvious error or defect in the trial court proceedings that affects a defendant's substantial rights and the outcome of the trial. Crim.R. 52(B); *State v. Rogers*, 2015-Ohio-2459, ¶ 22. The Ohio Supreme Court, however, has admonished appellate courts to "notice plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest

[1] A Tier II sex offender includes a sex offender who has been convicted of GSI in violation of R.C. 2907.05(A)(4). R.C. 2950.01(F)(1)(c). Under Tier II, Slusarczyk is required to complete an in-person verification every 180 days for 25 years. R.C. 2950.06 and 2950.07.

miscarriage of justice.'" *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002), quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶ 27} The State maintains that there is no deviation from a legal rule or "obvious" defect in the trial proceedings. Alternatively, the State argues that should we find error, that error did not affect the outcome of trial because the State did not comment on Slusarczyk throwing away a general statement form during its opening or closing arguments; defense counsel cross-examined Det. Cappelli about various explanations regarding Slusarczyk's demeanor with the statement form; and there was an overwhelming amount of evidence against Slusarczyk.

{¶ 28} In *Jenkins v. Anderson*, 447 U.S. 231 (1980), the United States Supreme Court addressed the interplay of an accused's constitutional rights and the prosecution's use of the accused's prearrest silence. In *Jenkins*, the accused was on trial for murder and testified on his own behalf. The accused maintained that the killing was in self-defense. During cross-examination, the accused was questioned about the fact that he was not apprehended until he surrendered to the authorities about two weeks after the murder. The prosecutor also alluded to the accused's prearrest silence during closing argument attempting to impeach the accused's credibility by suggesting that he would have spoken out if he had killed in self-defense and contended that the accused committed murder in retaliation for the robbery from the night before. The *Jenkins* Court found that

> [t]he Fifth Amendment, as applied to the States through the Fourteenth Amendment, is not violated by the use of prearrest silence to impeach a criminal defendant's credibility. While the Fifth Amendment

> prevents the prosecution from commenting on the silence of a defendant who asserts the right to remain silent during his criminal trial, it is not violated when a defendant who testifies in his own defense is impeached with his prior silence. Impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truthfinding function of the criminal trial.

Id. at paragraph one of the syllabus, citing *Raffel v. United States*, 271 U.S. 494 (1926); *Harris v. New York*, 401 U.S. 222 (1971); *Brown v. United States*, 356 U.S. 148 (1958). The *Jenkins* Court further held that

> the use of prearrest silence to impeach a defendant's credibility [does not] deny him the fundamental fairness guaranteed by the Fourteenth Amendment. Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. And each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative. In this case, in which no governmental action induced petitioner to remain silent before arrest, *Doyle v. Ohio*, 426 U.S. 610, is inapplicable. Pp. 238-240.

Id. at paragraph two of syllabus.

{¶ 29} In *State v. Leach*, 2004-Ohio-2147, the Ohio Supreme Court also addressed the State's use of a defendant's prearrest silence at trial. In *Leach*, the victims accused defendant of committing a sexual offense against them. One of the victims gave the police the defendant's phone number. At trial, the detective testified that the defendant initially agreed to speak to with him, but he did not keep the arranged appointment and stated he wanted an attorney. *Id.* at ¶ 4-5. Additionally, after the defendant was arrested and Mirandized, the State indicated that the defendant invoked his right to counsel and introduced the *Miranda* form into evidence. *Id.* at ¶ 7.

{¶ 30} The *Leach* Court found that the testimony by the State regarding the defendant "who had not yet been arrested or Mirandized, remained silent and/or asserted his right to counsel in the face of questioning by law enforcement," was clearly meant to allow the jury to infer the defendant's guilt. *Id.* at ¶ 25. The Court concluded that "allowing the use of pre-arrest silence . . . as substantive evidence of guilt in the state's case-in-chief undermines the very protections the Fifth Amendment was designed to provide." *Id.* at ¶ 31. The Court explained that "[u]se of pre-arrest silence in the state's case-in-chief would force defendants either to permit the jury to infer guilt from their silence or surrender their rights not to testify and take the stand to explain their prior silence." *Id.* The Court found, however, that the "use of pre-arrest silence for impeachment is distinguishable." *Id.* at ¶ 33.

> When a defendant testifies at trial, the defendant has "cast aside his cloak of silence." *Jenkins*, 447 U.S. at 238, 100 S.Ct. 2124, 65 L.Ed. 2d 86. Thus, use of pre-arrest silence as impeachment evidence is permitted because it furthers the truth-seeking process. Otherwise, a criminal defendant would be provided an opportunity to perjure himself at trial, and the state would be powerless to correct the record. But using a defendant's prior silence as substantive evidence of guilt actually lessens the prosecution's burden of proving each element of the crime and impairs the "sense of fair play" underlying the privilege. *See* [*Combs v. Coyle*, 205 F.3d 269, 285 (6th Cir. 2000)].

Id.

{¶ 31} In the instant matter, the State played a video and elicited testimony from Det. Cappelli that Slusarczyk voluntarily came into the police station, began to fill out a general statement form, crumpled up the form, and then left. Whether intended by the State or not, this evidence was a comment on Slusarczyk's prearrest

silence. It was elicited during the State's during case in chief. It could not have been used to impeach Slusarczyk's testimony because he had not yet testified, which is in violation of the standards for the proper use of a defendant's prearrest silence announced in *Leach* and *Jenkins*. The State's use of Slusarczyk's prearrest silence as substantive evidence of guilt in this case undermines the very protections the Fifth Amendment was designed to provide. *Leach* at ¶ 31.

{¶ 32} Nonetheless, we find that this error did not affect the outcome of trial. In making this determination, "we consider the extent of the comments, whether an inference of guilt from silence was stressed to the jury, and the extent of other evidence regarding the defendant's guilt." *State v. Wiley*, 2022-Ohio-2131, ¶ 45 (8th Dist.), citing *State v. West*, 2008-Ohio-2190, ¶ 13 (8th Dist.).[2] A review of the record reveals that the State's questions about Slusarczyk's visit to the police station and the act of crumpling up the form were not extensive. Additionally, the State did not comment on Slusarczyk throwing away the general statement form during opening or closing arguments, nor did it stress to the jury that Slusarczyk's prearrest actions demonstrated guilt. Furthermore, defense counsel cross-examined Det. Cappelli regarding various explanations about why a suspect may come into the police station

[2] We note that Wiley's prearrest silence was challenged on ineffective assistance of counsel grounds for defense counsel's failure to object to the State's elicitation of testimony from the police regarding Wiley's prearrest silence. This court found the error to be harmless and concluded that defense counsel was not ineffective. *Id.* at ¶ 45, 50. While *Wiley* was decided under the context of ineffective assistance of counsel, we still find its analysis applicable to the instant case.

to voluntarily complete a statement. And finally, and for reasons set forth in more detail below, there is sufficient evidence to sustain his conviction.

{¶ 33} Thus, based on the foregoing, we do not find plain error, and the first assignment of error is overruled.

2. Other-Acts Evidence

{¶ 34} In the second assignment of error, Slusarczyk argues the court improperly admitted evidence that he engaged in other conduct that was neither charged, nor allegedly criminal, in violation of Evid.R. 404(B)(1), which provides that "[e]vidence of any other crime, wrong or act is not admissible to prove the person's character in order to show that on a particular occasion the person acted in accordance with the character." This type of evidence is commonly referred to as "propensity evidence" because its purpose is to demonstrate that the accused has a propensity to commit the crime in question. *State v. Curry*, 43 Ohio St.2d 66, 68, (1975), citing 1 *Underhill's Criminal Evidence*, Section 205, at 595 (6 Ed. 1973).

{¶ 35} While Evid.R. 404(B)(1) bars the use of other-acts evidence to show propensity, Evid.R. 404(B)(2) does, however, allow evidence of the accused's other crimes, wrongs, or acts to be admitted for other purposes, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The evidence must prove something other than the accused's disposition to commit certain acts.

{¶ 36} Slusarczyk contends that he was prejudiced by the following inadmissible evidence: (1) the massage of A.V.'s hand, which did not happen on the

day of the incident; (2) pictures of A.V. that Slusarczyk took at Cedar Point, which was not on the day of the incident; (3) pictures of A.V. while at the grocery store; (4) pictures of A.V. in a dress at the beach and pictures of just her lower half as well, which was not on the day of the incident. Slusarczyk contends that none of this evidence "rose to the level of a crime or even a bad act. It just made him appear to be inappropriate with A.V.," and this case "appears to be a battle of whether Slusarczyk engaged in behavior that [is] merely 'creepy' by modern standards, or criminal." In support of his argument, Slusarczyk relies on two Ohio Supreme Court cases — *State v. Hartman*, 2020-Ohio-4440, and *State v. Smith*, 2020-Ohio-4441 — for the proposition that the other acts evidence must be relevant to the charge at hand, but not violate Evid.R. 403(B) in being unduly prejudicial.

{¶ 37} In *Hartman*, the Ohio Supreme Court reiterated the three-part guide set forth in *State v. Williams*, 2012-Ohio-5695, for determining the admissibility of other-acts evidence. The *Hartman* Court stated that for other-acts evidence to be admissible: (1) the evidence must be relevant as set forth in Evid.R. 401; (2) the evidence cannot be presented to prove a person's character to show conduct in conformity therewith, but must instead be presented for a legitimate other purpose as set forth in Evid.R. 404(B); and (3) the probative value of the evidence cannot be substantially outweighed by the danger of unfair prejudice as set forth in Evid.R. 403. *Id.* at ¶ 20-33. We note that "whether the other-acts evidence is relevant under the first step of *Williams* is dependent upon whether the evidence is offered for a nonpropensity purpose as set forth in the second step of *Williams*, i.e., a legitimate

purpose for which the evidence is offered, and whether the nonpropensity purpose goes to a material issue in the case." *State v. Hale*, 2024-Ohio-1587, ¶ 65 (8th Dist.).

{¶ 38} The *Hartman* Court also stated that "[t]he admissibility of other-acts evidence pursuant to Evid.R. 404(B) is a question of law." *Id.* at ¶ 22, citing Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events*, Section 4.10 (2d Ed. 2019) and *Williams* at ¶ 17 (the trial court is precluded by Evid.R. 404(B) from admitting improper character evidence, but it has discretion whether to allow other-acts evidence that is admissible for a permissible purpose). The trial court's weighing of the probative value of admissible evidence against the danger of unfair prejudice to the defendant pursuant to Evid.R. 403(A) involves an exercise of judgment and is reviewed for an abuse of discretion. *Id.* at ¶ 30. An abuse of discretion occurs when a court exercises "its judgment, in an unwarranted way, in regard to a matter over which it has discretionary authority." *Johnson v. Abdullah*, 2021-Ohio-3304, ¶ 35.

{¶ 39} In *Smith*, the defendant was charged with sexually abusing his granddaughter. At his trial, the State "introduced 'other acts' evidence that he had molested his daughter under similar circumstances decades earlier — allegations that Smith had been put on trial for but ultimately acquitted of." *Id.*, 2020-Ohio-4441 at ¶ 1. The *Smith* Court found that the defendant's acquitted-act evidence was "admitted for a proper purpose under Evid.R. 404(B) . . . [and] was relevant and not unduly prejudicial. Because [the defendant] claimed as part of his defense that if he touched his granddaughter inappropriately, it was an accident and not done with

sexual intent, the State could permissibly refute that claim by presenting evidence that he had molested his daughter under similar circumstances." *Id.* at ¶ 3.

{¶ 40} In reaching this determination, the Ohio Supreme Court relied on *Hartman* and concluded that

> courts should begin by evaluating whether the evidence is relevant to a non-character-based issue that is material to the case. If the evidence is not premised on improper character inferences and is probative of an issue in the case, the court must then consider whether the evidence's value "is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A); *Hartman* at ¶ 29. Because other-acts evidence "'almost always carries some risk that the jury will draw the forbidden propensity inference,'" courts should be vigilant in balancing the prejudicial impact of the evidence against its probative value. *Id.* at ¶ 33, quoting *United States v. Gomez*, 763 F.3d 845, 857 (7th Cir.2014) (en banc).

Id. at ¶ 38.

{¶ 41} With these principles in mind, we now turn to the admissibility of the evidence Slusarczyk challenges. At trial, the defense's general theory was that there was no "grooming," and any touching of A.V. was accidental and without any sexual intent. [3]

{¶ 42} The State counters that the evidence in question was admissible to demonstrate that Slusarczyk was grooming A.V. because "it paints a complete picture" and context of how Slusarczyk was committing "these other acts for the purpose of sexually arousing or gratifying either person." The State further counters

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[3] In *Williams*, the Ohio Supreme Court defined "grooming" as "'deliberate actions taken by a defendant to expose a child to sexual material; the ultimate goal of grooming is the formation of an emotional connection with the child and a reduction of the child's inhibitions in order to prepare the child for sexual activity.'" *Id.* at ¶ 21, quoting *United States v. Chambers*, 642 F.3d 588, 593 (7th Cir. 2011).

that these grooming tactics demonstrate Slusarczyk's ongoing plan and scheme and are indicative that his touching of A.V.'s breast was intentional, not an accident or mistake.

{¶ 43} In *State v. Kohler*, 2024-Ohio-3302 (8th Dist.), a recent decision by this court, the defendant raised a similar other-acts evidence challenge and the State countered that the other-acts evidence was offered to provide context, background information, and the setting of the case. *Id.* at ¶ 39. We found that the disputed evidence was admissible because it provided the jury with insight as to the defendant's relationship with the victims and explained the circumstances of the case. *Id.* at ¶ 43. We concluded that the evidence was not subject to Evid.R. 404(B) and was properly admitted by the trial court. *Id.* In reaching this conclusion, we acknowledged as follows:

> Relevant to the State's arguments, this court has found that
>
> > Evid.R. 404(B) only applies to limit the admission of so-called "other acts" evidence that is "extrinsic" to the crime charged. *State v. Stallworth*, 11th Dist. Lake No. 2013-L-122, 2014-Ohio-4297, ¶ 37. In other words, "Evid.R. 404(B) does not apply when the acts are intrinsic as opposed to extrinsic, i.e., the acts are part of the events in question or form part of the immediate background of the alleged act which forms the basis for the crime charged." *State v. Crew*, 2d Dist. Clark No. 2009 CA 45, 2010-Ohio-3110, ¶ 99. Thus, "evidence of other crimes or wrongs may be admitted when such acts are so inextricably intertwined with the crime as charged that proof of one involves the other, explains the circumstances thereof, or tends logically to prove any element of the crime charged." *State v. Davis*, 64 Ohio App.3d 334, 341, 581 N.E.2d 604 (12th Dist.1989), citing *State v. Wilkinson*, 64 Ohio St.2d 308, 415 N.E.2d 261 (1980); *State v. Long*, 64 Ohio App.3d 615, 582 N.E.2d 626 (9th Dist.1989).

> *State v. Jones*, 2018-Ohio-498, ¶ 140 (8th Dist.), *rev'd on other grounds*. *See also State v. Baird*, 2023-Ohio-303, ¶ 61 (cleaned up) (S. Gallagher, J., concurring in judgment only) ("'[E]vidence of other crimes may be presented when "they are so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof; or tends logically to prove any element of the crime charged."'")
>
> In *State v. Bogan*, 1998 Ohio App. LEXIS 3633 (8th Dist. Aug. 6, 1998), the appellant argued the trial court improperly allowed witness testimony that he promoted prostitution prior to the date when appellant was arrested for the offense. This court found the prior bad-acts testimony was not introduced as propensity evidence but to demonstrate a continuing course of action. In other words, "the evidence was part of the events in question or form[ed] part of the immediate background of the alleged act which form[ed] the basis for the crime charged." *Bogan* at * 6. Thus, Evid.R. 404(B) did not apply to the intrinsic evidence, and the evidence was properly admitted.
>
> Similarly, in *State v. Crew*, 2010-Ohio-3110 (2d Dist.), the Second District Court of Appeals found testimony that Crew acted previously as a pimp for Hanson was intrinsic evidence showing the nature of Crew and Hanson's relationship at the time of the offense. The testimony was part of the immediate background of the alleged act and was not subject to Evid.R. 404(B). The admissible testimony in both *Bogan* and *Crew* did not occur contemporaneously with the alleged offenses.
>
> The jury is entitled to hear evidence that allows them to gather "'a complete picture of what occurred'" and "fully comprehend the acts that formed the immediate background of the charged crimes." *State v. Miller*, 2023-Ohio-1141, ¶ 92 (8th Dist.).

Id. at ¶ 40-43.

{¶ 44} Here, Slusarczyk took pictures of A.V. without her knowledge, including a picture of A.V.'s lower half when she was wearing a dress (her bare legs and feet) and a picture of A.V., including just her backside when she was shopping at Walmart. He also massaged her hand while they were watching a movie. On New Year's Eve, Slusarczyk told J.M. and A.V.'s brother to stay home so that he could

take A.V. shopping. While shopping, he put his arm around A.V. and they shared each other's drinks. When they returned to J.M.'s house, he told A.V. that she looked sexy in the leggings she bought with him. Later on, when they were driving home from another party, Slusarczyk stroked A.V. on her thigh and the back of her neck while they were in the car. Slusarczyk also told A.V. that J.M. was jealous of his relationship with A.V. These incidents made her uncomfortable and her and G.Y. texted back and forth on New Year's Eve about Slusarczyk's "creepy" behavior.

{¶ 45} Just as in *Kohler*, in the instant case, we find that this testimony provided insight to the jury and gave the jury the complete picture of what occurred. A.V.'s testimony of how it all began and how it progressed was critical and intertwined to the events leading up to the GSI charge. It explained the background into Slusarczyk's relationship with A.V., the setting for the New Year's Eve party, and provided meaning to A.V.'s testimony. Thus, the testimony in dispute was not subject to Evid.R. 404(B) and was properly admitted by the trial court.

{¶ 46} Even assuming the testimony in question constituted other-acts evidence subject to Evid.R. 404(B), we find the evidence would have been admissible as to negate his claim of accident or mistake. *See Kohler* at ¶ 44. In *Smith*, the Ohio Supreme Court noted that

> [e]vidence of a defendant's other acts may be admissible to negate his claim of accident or mistake with respect to the crime for which the defendant is on trial. *Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, at ¶ 52. Such evidence demonstrates, '"by similar acts or incidents, that the act in question was not performed inadvertently, accidentally, involuntarily, or without guilty knowledge.'" *Id.*, quoting McCormick, Evidence, Section 190, at 804 (4th Ed.1994). Thus,

> absence-of-mistake evidence is often closely linked to intent; to be probative of intent, such evidence must be sufficiently similar to the crime charged. *See id.* at ¶ 53. The logical theory on which such evidence is premised is that when circumstances arise often enough, it becomes substantially less likely that they have arisen by chance." *Id.*, citing *Hartman* at ¶ 53, 56; *State v. Evers*, 139 Wis.2d 424, 437, 407 N.W.2d 256 (1987), quoting 2 Weinstein & Berger, *Weinstein's Evidence*, Section 404[12], at 404-84 to 404-87 (1985) "("'the oftener a like act has been done, the less probable it is that it could have been done innocently'" [emphasis deleted]).

Id. at ¶ 45.

{¶ 47} The *Smith* Court found that the detailed facts of the defendant's molestation of both his daughter and granddaughter, "the manner in which he touched them, the location and environment in which the abuse occurred, and his priming of the children by showing them pornography depicting oral sex — were so similar as to "'strongly suggest that an innocent explanation is implausible.'"'" *Id.*, at ¶ 49, quoting *Hartman* at ¶ 58, quoting Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events*, Section 7.5.2 (2d Ed. 2019).

{¶ 48} Similarly, the evidence in question was relevant to show that Slusarczyk's grabbing of A.V.'s breast did not occur spontaneously one day, nor was it accidental. In fact, A.V. testified that because of the other things that had happened with Slusarczyk, his grabbing her breast was not an accident. When asked by defense counsel if it was possible that Slusarczyk accidentally touched her chest, A.V. replied,

> [A.V.]: It could be possible, but that' s not what happened. All the other stuff happened too, what he was saying, the pictures. It's not just the chest.

> [DEFENSE COUNSEL]: I understand that, but — is it your conclusion that because of the other things that that could not have been just an accident?
>
> [A.V.]: Yes.

(Tr. 273.)

{¶ 49} We find that the challenged evidence provides background information which demonstrates that the act in question was not performed inadvertently or accidentally by explaining the circumstances of the crimes and falls under an exception to the admission of evidence under Evid.R. 404(B). Furthermore, the probative value of the evidence — to provide background and explain the circumstances — was not substantially outweighed by the danger of unfair prejudice.

{¶ 50} In light of the foregoing, we cannot conclude that the admission of the disputed testimony was an abuse of discretion. Therefore, the second assignment of error is overruled.

B. Sentence

{¶ 51} In the third assignment of error, Slusarczyk contends that the trial court punished him with a 36-month prison sentence ("trial tax") because he declined to plead guilty to the State's third-degree misdemeanor offer prior to trial, which would carry a jail term of not more than 60 days. R.C. 2907.06; R.C. 2929.24. The State's pretrial offer consisted of Slusarczyk being credited for time served and classified as a Tier I offender if he agreed to plead guilty to a third-degree misdemeanor GSI in violation of R.C. 2907.06(A)(1).

{¶ 52} In *State v. Rahab*, 2017-Ohio-1401, the Ohio Supreme Court addressed vindictiveness in sentencing after the trial court sentenced a defendant to a longer prison term than was offered by the State in plea negotiations, and stated that our review of the defendant's sentence begins as "we do in any other appeal — with the presumption that the trial court considered the appropriate sentencing criteria." *Id.* at ¶ 19, citing *State v. O'Dell*, 45 Ohio St.3d 140, 147 (1989). We then review

> the entire record — the trial court's statements, the evidence adduced at trial, and the information presented during the sentencing hearing — to determine whether there is evidence of actual vindictiveness. We will reverse the sentence only if we clearly and convincingly find the sentence is contrary to law because it was imposed as a result of actual vindictiveness on the part of the trial court. *See* R.C. 2953.08(G)(2); *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1.

Id.

{¶ 53} As Slusarczyk sees it, the conduct in the instant case, "at best, is a glancing touch of a breast thru clothing that might have been accidental" and falls "on the low end of the spectrum" because "there is no prolonged groping of any of [A.V'.s] erogenous zones. It occurred one time." Other than Slusarczyk's assertions, however, there is nothing in the record demonstrating that the court acted in a vindictive way when imposing his sentence.

{¶ 54} At the sentencing hearing, the trial court heard that Slusarczyk, who has a lengthy criminal history, was out of prison for less than two or three years when this offense occurred. He was on parole and the parole board imposed a four-

year prison sentence for the violation. Slusarczyk asked for a concurrent sentence or to be sentenced to time served.

{¶ 55} Before imposing its sentence, the court stated:

> I have considered all of the information that's been presented here today, I've reviewed the purposes and principles of sentencing pursuant to Revised Code 2929.11, the serious and recidivism factors relevant to this offense and yourself, Mr. Slusarczyk, pursuant to 2929.12, and the need for deterrence, incapacitation, rehabilitation and restitution.
>
> . . .
>
> On count one, the sentence is three years in prison. I'll order it to run concurrent with the parole sanction you are serving.

(Tr. 586-587.) The trial court then advised Slusarczyk that he is subject to mandatory five years of postrelease control and classified him as a Tier II sex offender.

{¶ 56} We note that for a third-degree felony, Slusarczyk faced a statutory range of 12, 18, 24, 30, 36, 42, 48, 54, or 60 months in prison. R.C. 2907.05(A)(4); R.C. 2929.14(A)(3). Thus, the trial court's 36-month sentence was in the statutory range. The trial court could have imposed a greater sentence or ran his sentence consecutive to his four-year prison sentence imposed by the parole board, but did not do so. Additionally, the court considered all factors required by law. Furthermore, the trial court did not comment on Slusarczyk exercising his constitutional right to a jury trial, nor did it chide him for not taking the plea offer. Rather, the court's statements indicate that its sentence was based on the evidence adduced at trial and the above-information presented during the sentencing

hearing. After reviewing the entire record, we do not find any evidence indicating that the trial court acted in a vindictive manner. Thus, we decline to find that the trial court imposed the 36-month sentence as a form of "trial tax."

{¶ 57} Accordingly, the third assignment of error is overruled.

C. Sufficiency and Manifest Weight of the Evidence

{¶ 58} We note that Slusarczyk's sufficiency and manifest weight assignments of error are interrelated, in that Slusarczyk relies on his sufficiency argument in his manifest weight challenge, and we address them together. Slusarczyk contends, in the fourth assignment of error, that there is insufficient evidence to sustain his GSI conviction because there is no evidence that he engaged in any conduct for the purpose of sexual gratification. In the fifth assignment of error, Slusarczyk contends that his conviction is against the manifest weight of the evidence for the same reasons set forth in his sufficiency argument. We find both of Slusarczyk's contentions unpersuasive.

{¶ 59} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 2009-Ohio-3598, ¶ 12 (8th Dist.). An appellate court's function when reviewing sufficiency is to determine "'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.'" *State v. Leonard*, 2004-Ohio-6235, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 60} With a sufficiency inquiry, an appellate court does not review whether the State's evidence is to be believed but whether, if believed, the evidence admitted at trial supported the conviction. *State v. Starks*, 2009-Ohio-3375, ¶ 25 (8th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). A sufficiency of the evidence argument is not a factual determination, but a question of law. *Thompkins* at 386.

{¶ 61} In *State v. Jones*, 2021-Ohio-3311, the Ohio Supreme Court cautioned:

> But it is worth remembering what is not part of the court's role when conducting a sufficiency review. It falls to the trier of fact to "'resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" [*State v. McFarland*, 162 Ohio St.3d 36, 2020-Ohio-3343, 164 N.E.3d 316, ¶ 24], quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Thus, an appellate court's role is limited. It does not ask whether the evidence should be believed or assess the evidence's "credibility or effect in inducing belief." *State v. Richardson*, 150 Ohio St.3d 554, 2016-Ohio-8448, 84 N.E.3d 993, ¶ 13, citing *Thompkins*, 78 Ohio St.3d at 386, 678 N.E.2d 541. Instead, it asks whether the evidence against a defendant, if believed, supports the conviction. *Thompkins* at 390 (Cook, J., concurring).

Id. at ¶ 16.

{¶ 62} Comparatively, "a manifest weight challenge questions whether the prosecution has met its burden of persuasion." *Bowden* at ¶ 13, citing *Thompkins* at 390. When reviewing a manifest weight challenge, an appellate court, "'weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the 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. Virostek*, 2022-Ohio-1397, ¶ 54, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983). A reversal on the basis that a verdict is against the manifest weight of the evidence is granted "'only in the exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins*, 78 Ohio St.3d at 387, quoting *Martin* at 175.

{¶ 63} As this court has previously stated:

> The criminal manifest weight of-the-evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *Thompkins*, 78 Ohio St.3d at 386, 678 N.E.2d 541 (1997). Under the manifest weight-of-the-evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive — the state's or the defendant's? *Wilson* at *id.* Although there may be legally sufficient evidence to support a judgment, it may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276, 723 N.E.2d 1054 (2000).
>
> When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the fact finder's resolution of the conflicting testimony. *Wilson* at *id.*, quoting *Thompkins* at *id.*

State v. Williams, 2020-Ohio-269, ¶ 86-87 (8th Dist.).

{¶ 64} Here, Slusarczyk was convicted of GSI in violation of R.C. 2907.05(A)(4), which provides in relevant part: "No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender . . . when . . . [t]he other person . . . is less than thirteen years of age[.]" "Sexual contact" is defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose

of sexually arousing or gratifying either person." R.C. 2907.01(B). "Sexual contact" includes "any nonconsensual physical touching, even through clothing, of the body of another." *State v. Jones*, 2006-Ohio-5249, ¶ 15 (8th Dist.), citing *State v. Ackley*, 2002-Ohio-6002 (C.P.); *State v. Solomon*, 2021-Ohio-940, ¶ 47 (8th Dist.).

{¶ 65} In his challenge to the sufficiency of the evidence, Slusarczyk contends that based on this definition of "sexual contact," there was no evidence that either party engaged in conduct for the purpose of sexual gratification. He relies on the fact that "[t]here was no witness who said that [he] had an erection or that he said anything sexual to A.V. during the incident."

{¶ 66} This court, however, has held that "sexual contact within the meaning of gross sexual imposition only requires proof of 'the purpose of sexually arousing or gratifying, it does not require proof of actual arousal or gratification.'" *State v. Edwards*, 2003-Ohio-998, ¶ 24 (8th Dist.), quoting *State v. Maybury*, 1994 Ohio App. LEXIS 3497 (8th Dist. Aug. 11, 1994). Moreover, in *Solomon*, this court held that the State is "not required to present direct evidence proving the element of sexual arousal or gratification." *Solomon* at ¶ 48, citing *State v. Kalka*, 2018-Ohio-5030, ¶ 31 (8th Dist.). Rather, "the jury 'may infer that a defendant was motivated by a desire for sexual arousal or gratification from the totality of the circumstances.'" *Id.*, quoting *Edwards* at ¶ 22, citing *State v. Oddi*, 2002-Ohio-5926 (5th Dist.). Indeed,

> "Whether the touching or contact was performed for the purpose of sexual arousal or gratification is a question of fact to be inferred from the type, nature, and circumstances of the contact. [*State v. Meredith*,

> 12th Dist. Warren No. CA2004-06-062, 2005-Ohio-2664, ¶ 13], citing [*In re Anderson*, 116 Ohio.App.3d 441, 443, 688 N.E.2d 545 (12th Dist.1996)], and *State v. Mundy*, 99 Ohio App.3d 275, 289, 650 N.E.2d 502 [(2d Dist.1994)]. In determining the defendant's purpose, the trier of fact may infer what the defendant's motivation was in making physical contact with the victim. *Meredith*, citing *Mundy* and [*State v. Cobb*, 81 Ohio App.3d 179, 185, 610 N.E.2d 1009 (9th Dist.1991)]. 'If the trier of fact determines that the defendant was motivated by desires of sexual arousal or gratification, and that the contact occurred, then the trier of fact may conclude that the object of the defendant's motivation was achieved.' *Cobb* [at 185]."

Id., quoting *In re A.L.*, 2006-Ohio-4329, ¶ 20 (12th Dist.).

{¶ 67} In this matter, A.V. testified that Slusarczyk grabbed her breast when he grabbed her while he was "play fighting" with the other kids. She described it as him grabbing her lower back and her left breast by grabbing it with his right hand, then twisting A.V.'s body and placing her on the floor. Prior to this incident, A.V. testified that Slusarczyk took her shopping; put his arm around her and swapped drinks with her; told her that she looks sexy in the leggings she was wearing; touched A.V. on the neck and thigh while they were in the car; asked A.V. if she liked boys; stated that he wished he was 12 again; took unsolicited photos of A.V.'s lower half on the beach; massaged A.V.'s hand; and twirled her hair. A.V. testified that Slusarczyk's prior actions made her uncomfortable and, on the date of the incident, her and G.Y. were texting back and forth "all the weird stuff [Slusarczyk] had been saying or doing." (Tr. 231.) Because of Slusarczyk's comments about A.V.'s appearance and personal life coupled with the escalation of his physical contact with A.V. from the touching of her hair, to the touching of her hand, neck, and thigh, the

jury reasonably inferred from the totality of these circumstances that Slusarczyk grabbed A.V.'s breast for the purpose of sexual arousal or gratification.

{¶ 68} Thus, when viewing this testimony in a light most favorable to the State, we find that a rational trier of fact could have reasonably inferred that Slusarczyk grabbed A.V.'s breast for the purpose of sexual arousal or gratification. Therefore, we hold that Slusarczyk's GSI conviction is supported by sufficient evidence.

{¶ 69} The manifest weight of the evidence also supports Slusarczyk's GSI conviction. Slusarczyk argues his conviction is against the manifest weight of the evidence for the reasons he stated in his sufficiency assignment of error. He contends the jury lost its way because no reasonable factfinder could find that he "did any of this for the purpose of sexually gratifying either person."

{¶ 70} We note that "'a conviction is not against the manifest weight of the evidence simply because the jury rejected the defendant's version of the facts and believed the testimony presented by the state.'" *State v. Jallah*, 2015-Ohio-1950, ¶ 71 (8th Dist.), quoting *State v. Hall*, 2014-Ohio-2959, ¶ 2 (4th Dist.). Here, the jury found that Slusarczyk engaged in sexual contact with A.V. when he grabbed her breast (an erogenous zone) for the purpose of sexual arousal or gratification. In making that determination, the jury, as the trier of fact, was entirely free to believe A.V., G.Y., and Det. Cappelli, and disbelieve Theodore and J.M., her son, and his girlfriend. Slusarczyk's conviction is not against the manifest weight of the evidence merely because the jury chose to believe the State's version of the facts and rejected

Slusarczyk's. Thus, when all the evidence is weighed, we cannot say the jury clearly lost its way and created such a manifest miscarriage of justice that Slusarczyk's GSI conviction must be reversed and a new trial ordered.

{¶ 71} Therefore, the fourth and fifth assignments of error are overruled.

D. Ineffective Assistance of Counsel

{¶ 72} In the sixth and final assignment of error, Slusarczyk argues defense counsel was ineffective for failing to subpoena the witnesses and records he requested, relying on the following statement Slusarczyk made at sentencing:

> [My attorney] was ineffective. Not once have I met with him until the start of my trial on November 14th, 2023. I called him and gave him a list of people, witnesses, store camera footage, cell phone video and pictures, victims' phones, reports from Child Family Services. I asked him over and over to subpoena all of these things into evidence to be used at trial to prove my innocence. He did nothing.

(Tr. 583.)

{¶ 73} To establish ineffective assistance of counsel, Slusarczyk must demonstrate that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *State v. Trimble*, 2009-Ohio-2961, ¶ 98, citing *Strickland v. Washington*, 466 U.S. 668, 687, (1984). The failure to prove either prong of this two-part test makes it unnecessary for a court to consider the other prong. *State v. Madrigal*, 87 Ohio St.3d 378, 389, (2000), citing *Strickland* at 697. Furthermore, in Ohio, every properly licensed attorney is presumed to be competent, and a defendant claiming ineffective assistance of counsel bears the burden of proof. *State v. Davis*, 2021-Ohio-4015,

¶ 25 (8th Dist.), citing, *State v. Black*, 2019-Ohio-4977, ¶ 35 (8th Dist.), citing *State v. Smith*, 17 Ohio St.3d 98, 100 (1985). When evaluating counsel's performance on an ineffective assistance of counsel claim, the court "must indulge a strong presumption" that counsel's performance "falls within the wide range of reasonable professional assistance." *Strickland* at 689; *see State v. Powell*, 2019-Ohio-4345, ¶ 69 (8th Dist.), quoting *State v. Pawlak*, 2014-Ohio-2175, ¶ 69 (8th Dist.) ("'A reviewing court will strongly presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'").

{¶ 74} Slusarczyk contends that had defense counsel subpoenaed the witnesses and records he requested, the outcome of the trial would have been different. Defense counsel, however, cross-examined each of the State's witnesses; objected throughout trial; and put on a case in which multiple defense witnesses testified and physical evidence was presented. The trial court noted this on the record, stating at sentencing: "[d]uring the trial, defense counsel conducted voir dire, he examined witnesses, he made objections at appropriate times and preserved the record of your defense for any future appeal. . . . [Defense Counsel] subpoenaed four witnesses who all came in to court to testify[.] . . . The testimony was clear during trial that there were multiple people in the house, they were all in this residence, the jury found you guilty." (Tr. 585-586.)

{¶ 75} Moreover, we note that when the alleged error concerns what could be viewed as trial strategy, courts must be "highly deferential" to the attorney's

strategic decisions. *Strickland* at 689. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.*, citing *Engle v. Isaac*, 456 U.S. 107, 133-134 (1982).

{¶ 76} Thus, based on the foregoing, we find that Slusarczyk failed to demonstrate that defense counsel's performance was deficient and that he was deprived of a fair trial. The sixth assignment of error is overruled.

{¶ 77} Accordingly, judgment is 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 appellant's conviction 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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MARY J. BOYLE, PRESIDING JUDGE

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