[Cite as *State v. Rivera*, 2024-Ohio-4896.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 113150
v.	:	
JAVIER RIVERA,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 10, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-21-661526-A

Appearances:

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

Robert A. Dixon, *for appellant*.

EILEEN A. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Javier Rivera, appeals his convictions for gross sexual imposition. For the reasons that follow, we affirm.

{¶ 2} On August 13, 2021, a Cuyahoga County Grand Jury returned an indictment charging Rivera with six counts of gross sexual imposition. The charges

stemmed from allegations made by the same minor victim — H.B. — the daughter of Rivera's girlfriend, S.B.

{¶ 3} Rivera elected to try the charges to the bench.

{¶ 4} Richard Jones testified that he is employed as a patrol officer with the Cleveland Police Department. On July 16, 2021, S.B. brought H.B. to the police department to file a police report. Both women were "emotional" — S.B. was pacing and appeared angry at times and H.B. was crying.

{¶ 5} M.S. testified that she is H.B.'s maternal grandmother. In 2020, Rivera was in a relationship with M.S.'s daughter, S.B. Rivera and S.B. were living together at a residence on West 53rd Street in Cleveland and H.B., who was ten years old at the time, lived there as well.

{¶ 6} M.S. noticed that H.B. became withdrawn that year and did not go outside as much as she used to do. H.B. would routinely spend the night with M.S. and there came a time that it seemed to M.S. that H.B. did not want to go home.

{¶ 7} On approximately July 16, 2021, M.S. learned from S.B. that H.B. and H.B.'s friend had been caught inappropriately touching each other. M.S., believing that the girls were perhaps exposed to inappropriate touching and were mirroring that behavior, asked H.B. if anyone had inappropriately touched her as they were riding in M.S.'s car with S.B. After initially denying anything inappropriate, H.B. admitted to inappropriate touching and was "screaming and crying" and S.B. was "screaming and crying."

{¶ 8} M.S. encouraged S.B. to file a police report. S.B. initially stated, "He couldn't do that. He couldn't do that" but she ultimately acquiesced to being driven to the police station.

{¶ 9} According to M.S., S.B. and H.B. were inconsolable at the police station and, after S.B. and H.B. spoke with a police officer, M.S. drove them home. M.S. testified that H.B.'s anxiety has been high since that day and that H.B. has been staying with M.S. and often just wants to stay in her room. H.B. began treating with two counselors after the disclosure.

{¶ 10} M.S. testified that since the disclosure, S.B. has continued calling H.B. a "liar" and stating that she does not believe H.B. and that H.B. has been staying with her.

{¶ 11} On cross-examination, M.S. admitted that before H.B.'s disclosure, M.S. had attempted to get custody of H.B. and her siblings because of her concerns with S.B.'s alcohol use. Moreover, M.S. knew that S.B. would "spank" H.B. when disciplining her. M.S. was aware that H.B. was "in trouble" with S.B. for the inappropriate touching that occurred between H.B. and H.B.'s friend.

{¶ 12} At trial, H.B. testified that, in 2020, when she was ten years old, Rivera began touching her inappropriately at home. H.B. stated that Rivera started caressing her body over her clothing and later began touched her breasts over her clothes when they were alone. Rivera later touched H.B. on her buttocks and vagina. At least once, Rivera lifted her shirt and bra and touched her breasts with his hands and mouth. Rivera asked H.B. if she "liked it." Rivera once put his hands on her

chest, butt and vagina and told H.B. that "it belongs to me" and that he could "make it feel better."

{¶ 13} H.B. stated that she did not disclose the incidents to anyone because she was scared and thought someone might take Rivera's kids from him if she told anyone and she did not want to "ruin his life." She was also concerned that S.B. may not believe her because S.B. "loved" Rivera. Rivera had also made H.B. "pinky promise" not tell anyone.

{¶ 14} On cross-examination, H.B. admitted to the inappropriate touching between her and her friend. She also admitted that her mother punished her for the incident and because she had received explicit photos from boys online and then lied about it. Her mother "grounded" her "until I learned how to act right." She admitted that this punishment ended when she disclosed the allegations against Rivera.

{¶ 15} S.B. testified that Rivera lived in the West 53rd Street apartment with her and her children in 2020. S.B. trusted Rivera to watch the children, take them to eat and otherwise be with them while she was at work. He became like a stepfather to them. Rivera would discipline them if they did not listen to him, such as by making them stand in a corner.

{¶ 16} In July 2021, S.B. learned from the friend's mother that H.B. and her friend were sending photos to "I guess grown people" through an online application known as Monkey. S.B. understood that the photos were "inappropriate" so she "whooped her." Rivera stopped S.B. and suggested that he talk to her instead. Rivera spoke to H.B., who admitted that she had been using the application.

{¶ 17} According to S.B. it was the next day that M.S. asked H.B. if anyone had touched her inappropriately. H.B. said that Rivera had. S.B. began crying and told H.B. that she did not believe her. S.B. went with H.B. to the police station but had a hard time understanding what H.B. was saying because S.B. was so upset.

{¶ 18} There came a time later that S.B. went with H.B. to speak to a social worker about the allegations. S.B. still did not believe that H.B. was telling the truth. S.B. called H.B. a "liar." S.B. believed that H.B. was lying to avoid punishment for her interactions with her friend and for using the online application.

{¶ 19} H.B. engaged in counseling after speaking with a social worker.

{¶ 20} On cross-examination, S.B. admitted that her disbelief stems from the fact that she never saw any sign or indication that anything was happening to H.B. up until the moment of the disclosure. None of her other children reported inappropriate behavior with Rivera. H.B. acted normally and seemed happy until the day of the disclosure.

{¶ 21} She further admitted that H.B.'s friend's mother told S.B. that the girls had been exchanging naked pictures of themselves and receiving nude pictures from men over the online application for a year and had been having sexual conversations. The mother further told S.B. that the girls had been experimenting with each other, including kissing and touching each other. S.B. never saw any photographs or conversations and does not know what happened to H.B.'s phone.

{¶ 22} S.B. told H.B. that she would be grounded, but "all that went away" after H.B. disclosed that Rivera had touched her inappropriately.

{¶ 23} Shannon Hanrahan testified that she is employed as a child protection specialist in the sex-abuse unit with the Cuyahoga County Division of Children and Family Services ("CCDCFS"). In that position, Hanrahan conducts forensic interviews with children and conducts other investigative steps with the ultimate task of referring children and families for needed services; she makes a departmental determination whether allegations are unsubstantiated, indicated or substantiated as part of her work.

{¶ 24} Hanrahan interviewed H.B. on July 22, 2021, about the allegations against Rivera.

{¶ 25} Over a defense objection, Hanrahan testified that H.B. told her that "Rivera inappropriately touched her the previous year in their old home." Hanrahan related that H.B. described Rivera touching her breasts, vagina and butt on several occasions over her clothing and, on one occasion, he lifted her shirt and put his mouth on her breasts. H.B. told Hanrahan that these encounters occurred in her bedroom and in the living room. H.B. told Hanrahan that she did not report the abuse sooner because she was scared and Rivera made her "pinky promise" not to tell anyone.

{¶ 26} Hanrahan determined that the allegations were "indicated," meaning that CCDCFS believed the abuse occurred but no witness or physical evidence corroborated the allegations.

{¶ 27} Daniel Johnson testified that, in 2021, he was employed as a detective with the Cleveland Police Department. He investigated the allegations against Rivera.

{¶ 28} During his investigation, Johnson interviewed S.B., H.B. and M.S. He also interviewed Rivera. S.B. was "very emotional" throughout the interview, crying and "visibly upset." S.B. told him that she did not believe H.B. and that H.B. had lied in the past.

{¶ 29} H.B. was also "visibly upset" and appeared scared during the interview.

{¶ 30} On cross-examination, Johnson admitted that no one except H.B. reported suspecting any inappropriate behavior between Rivera and H.B. Johnson further admitted that he did not reach out to H.B.'s friend's mother to try to obtain more evidence related to the alleged inappropriate online interactions between H.B. and others.

{¶ 31} The State rested and Rivera moved for a judgment of acquittal pursuant to Crim.R. 29. The trial court denied the motion.

{¶ 32} Rivera testified on his own behalf. Rivera admitted that, in 2021, he was in a relationship with S.B. and lived with her and her children, including H.B.

{¶ 33} On July 16, 2021, Rivera learned that H.B. was in some trouble with S.B. Rivera saw S.B. hitting H.B. with a plastic spatula. Rivera told S.B. to stop and asked her to let him talk to H.B. Rivera talked to H.B. and relayed what was said to

S.B. The next day, Rivera was arrested. He voluntarily spoke with both a police officer and a social worker about H.B.'s allegations.

{¶ 34} Rivera testified that he has never touched H.B. or her brother, who also lives in the home, inappropriately. He has disciplined the children, but this discipline has been limited to yelling or making the children stand in a corner. He has never put his hands on them to discipline them.

{¶ 35} On cross-examination, Rivera admitted that during the school year Rivera would often be home alone with the children during school hours while S.B. was working. H.B. would be home some days but was with M.S. most days. He further admitted that he considered himself H.B.'s stepfather and described himself as "[v]ery strict, loving, caring, [and] honest."

{¶ 36} Rivera was adamant that he never took H.B. out for ice cream. The State impeached this testimony by playing a portion of Rivera's interview with law enforcement in which Rivera said that he took the children out for ice cream. Rivera testified that by "ice cream," he meant that he allowed them to eat popsicles.

{¶ 37} Rivera admitted that he was surprised and upset when he learned from S.B. about H.B. sending inappropriate pictures to boys. The State attempted to impeach this testimony by playing a portion of Rivera's interview with law enforcement in which Rivera said that H.B. had been caught messaging with men before. Rivera testified that he had been talking about the same incident.

{¶ 38} The defense then rested and renewed its motion for judgment of acquittal. The trial court denied the motion.

{¶ 39} The trial court found Rivera guilty of each of the six counts of third degree-felony gross sexual imposition. The court set the matter for sentencing and ordered a presentence investigation.

{¶ 40} At the sentencing hearing, the court indicated that it had reviewed the presentence-investigation report. The victim and a relative of the victim submitted victim-impact letters to the court. The State addressed the court. The defense addressed the court. Rivera addressed the court.

{¶ 41} The trial court then imposed a sentence of two years of community-control sanctions and declared Rivera to be a Tier II sex offender.

{¶ 42} Rivera filed an appeal which court dismissed as untimely. *State v. Rivera*, 2023-Ohio-3053 (8th Dist.). Rivera thereafter filed a motion for leave to file a delayed appeal, which this court has granted.

{¶ 43} In this delayed appeal, Rivera raises the following assignments of error for review:

> First Assignment of Error: The lower court erred in admitting testimony of a Children and Family Services employee which contained hearsay and improper expert opinion in violation of the Appellant's right to due process of law and a fair trial pursuant to the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution.
>
> Second Assignment of Error: The verdict and judgment below finding the Appellant guilty of six counts of gross sexual imposition was against the manifest weight of the evidence.

{¶ 44} Rivera contends that Hanrahan was permitted to provide improper expert testimony and, further, that her testimony included inadmissible hearsay.

{¶ 45} The decision to admit or exclude evidence is left to the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *See, e.g.*, *In re C.A.*, 2015-Ohio-4768, ¶ 59 (8th Dist.).

{¶ 46} A court abuses its discretion "when a legal rule entrusts a decision to a judge's discretion and the judge's exercise of that discretion is outside of the legally permissible range of choices." *State v. Hackett* 2020-Ohio-6699, ¶ 19; *see also Johnson v. Abdullah*, 2021-Ohio-3304, ¶ 35 (describing the "common understanding of what constitutes an abuse of discretion" as "a court exercising its judgment, in an unwarranted way, in regard to a matter over which it has discretionary authority"). A decision is an abuse of discretion when it is unreasonable, arbitrary or unconscionable. *See, e.g.*, *State v. Brusiter*, 2023-Ohio-3794, ¶ 10 (8th Dist.); *State v. McAlpin*, 2023-Ohio-4794, at ¶ 30 (8th Dist.); *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). A decision is "unreasonable" "'if there is no sound reasoning process that would support that decision.'" *State v. Ford*, 2019-Ohio-4539, ¶ 106, quoting *AAAA Ents. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161 (1990). An "arbitrary" decision is "made 'without consideration of or regard for facts [or] circumstances.'" *State v. Beasley*, 2018-Ohio-16, ¶ 12, quoting *Black's Law Dictionary* (10th Ed. 2014). When applying an abuse-of-discretion standard, this court may not substitute its judgment for that of the trial court. *State v. McFarland*, 2022-Ohio-4638, ¶ 21 (8th Dist.).

{¶ 47} Hearsay is "a statement, other than one made by the declarant while testifying . . . offered in evidence to prove the truth of the matter asserted." Evid.R.

801(C). But if a statement is offered for another purpose, then it is not hearsay and is admissible. *E.g.*, *State v. Osie*, 2014-Ohio-2966, ¶ 118.

{¶ 48} Rivera complains that the social worker who interviewed the victim testified about what the victim told her happened to her. The social worker's description was consistent with what the victim herself testified to at trial. Rivera contends that the social worker was acting purely in an investigative role and that the victim's statements to her would, therefore, not fall under the hearsay exception for statements made for purposes of medical diagnosis or treatment. Evid.R. 803(4). We disagree.

{¶ 49} A social worker interviewing a child who may be a victim of sexual abuse serves in a "dual role" involving both medical diagnosis and treatment and the investigation and gathering of evidence. *See, e.g.*, *State v. Arnold*, 2010-Ohio-2742, ¶ 33. As this court has recognized:

> Only those statements made for the purpose of diagnosis and treatment are admissible under Evid.R. 803(4). *See Arnold* at ¶ 28; *State v. Muttart*, 2007-Ohio-5267, ¶ 47. Accordingly, the salient inquiry when determining whether a hearsay statement is admissible under Evid.R. 803(4), is whether the statement was made for purposes of diagnosis or treatment rather than for some other purpose. *See Muttart* at ¶ 47. One such "other purpose" is the gathering of forensic information to investigate and potentially prosecute a defendant. *Arnold* at ¶ 33.

State v. Ceron, 2013-Ohio-5241, ¶ 56–60 (8th Dist.); *see also In re M.P.*, 2023-Ohio-925, ¶ 28 (8th Dist.).

{¶ 50} In cases of sexual assault, "a description of the encounter and identification of the perpetrator are within the scope of statements for medical

treatment and diagnosis." *In re D.L.*, 2005-Ohio-2320, ¶ 21 (8th Dist.); *see also, e.g.*, *State v. Clinton*, 2017-Ohio-9423, ¶ 143 (7th Dist.) (noting that "the identity of the perpetrator, the age of the perpetrator, the type of abuse alleged, and the time frame of the abuse" are within the realm of "medical diagnosis"). Among other reasons, social workers help to determine the proper treatment for the minor, which necessarily includes a determination of whether the minor's home is safe for the child. *See State v. Durham*, 2005-Ohio-202, ¶ 33 (8th Dist.).

{¶ 51} Here, the statements H.B. made to Hanrahan are consistent with the kind of statements that are routinely allowed into evidence through a social worker under Evid.R. 803(4). The fact that H.B. entered into counseling after meeting with Hanrahan further supports the conclusion that Hanrahan's interview was for the purpose of medical diagnosis and treatment.

{¶ 52} Furthermore, even if the statement had not been admissible, any error would be harmless in this instance. First, this case was tried to the bench. Second, H.B. testified at trial about the assaults. When a hearsay declarant is examined at trial "on the same matters as contained in impermissible hearsay statements and where admission is essentially cumulative, such admission is harmless." *State v. Tucker*, 2004-Ohio-5380, ¶ 78 (8th Dist.), citing *State v. Tomlinson*, 33 Ohio App.3d 278, 281 (12th Dist. 1986); *State v. Shropshire*, 2017-Ohio-8308, ¶ 26 (8th Dist.).

{¶ 53} Rivera contends that Hanrahan improperly offered expert testimony. He complains that Hanrahan testified (1) that in her experience, victims present

with various demeanors from comfortable to withdrawn; (2) that in her experience victims can cite a myriad of reasons for not disclosing an assault immediately; (3) what she has seen in her experience as "grooming" behaviors and (4) that in her experience most instances of sexual assault are committed within the home of a family member, as opposed to by a stranger. He contends that this was expert testimony under Evid.R. 702 and that the defense was not provided an expert report in the matter.

{¶ 54} The State responds that Hanrahan's testimony was lay testimony admissible under Evid.R. 701.

{¶ 55} After a careful review, we conclude that the trial court did not abuse its discretion in permitting Hanrahan's testimony.

{¶ 56} Hanrahan's testimony does not offer any opinion as to who committed the abuse against H.B. At no point did she testify that she believed Rivera was the perpetrator. She similarly did not testify as to her opinion on the veracity of H.B's allegations. Instead, she testified about the interdepartmental determination regarding the allegations. And, in doing so, she readily acknowledged that, here, she did not find the allegations "substantiated." She testified that her purpose in interviewing the victim was to assess her safety.

{¶ 57} While Hanrahan testified that CCDCFS determined that H.B.'s allegations were "indicated" — which she explained meant that the agency believed the abuse occurred but that the abuse was not corroborated independently — this court has repeatedly recognized "that a social worker's interdepartmental

determination of an allegation of abuse — such as, unsubstantiated, substantiated, or indicated — is acceptable, provided the social worker does not testify as to the truthfulness or credibility of the alleged victim." *State v. Jackson*, 2010-Ohio-3080, ¶ 17 (8th Dist.), citing *State v. Smelcer*, 89 Ohio App.3d 115 (8th Dist. 1993); *State v. Sopko*, 2009-Ohio-140 (8th Dist.); *State v. Whitfield*, 2008-Ohio-1090 (8th Dist.); *State v. Simpson*, 2007-Ohio-4301 (8th Dist.).

{¶ 58} Moreover, while Hanrahan testified about what she has seen generally in her years dealing with victims of sexual assault, she offered no opinion about whether the circumstances of H.B.'s allegations were consistent or credible with other victims. Her testimony was based on her own perceptions and experience and would assist the factfinder in the determination of disputed issues of fact; thus, it was analogous to other testimony which courts have allowed within the ambit of Evid.R. 701. *See, e.g.*, *State v. Marshall*, 2022-Ohio-2666 (8th Dist.) (describing experience with delayed reporting and victims' demeanor); *State v. Mathis*, 2019-Ohio-3654, ¶ 62–63 (8th Dist.).

{¶ 59} Because there was no abuse of discretion in permitting Hanrahan's testimony in this bench trial, Rivera's first assignment of error is overruled.

{¶ 60} In his second assignment of error, Rivera contends that the trial court's verdict of guilt was against the manifest weight of the evidence.

{¶ 61} A manifest-weight challenge attacks the credibility of the evidence presented and questions whether the State met its burden of persuasion at trial. *See*

State v. Whitsett, 2014-Ohio-4933, ¶ 26 (8th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997); *State v. Bowden*, 2009-Ohio-3598, ¶ 13 (8th Dist.).

{¶ 62} When considering an appellant's claim that a conviction is against the manifest weight of the evidence, the court of appeals sits as a "'thirteenth juror'" and may disagree with "the factfinder's resolution of the conflicting testimony." *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). The reviewing court must examine the entire record, weigh the evidence and all reasonable inferences, consider the witness' credibility and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice such that the conviction must be reversed and a new trial ordered. *Thompkins* at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983). Reversal on manifest weight grounds is reserved for the "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins* at 387, quoting *Martin*, *supra*.

{¶ 63} The elements of an offense may be proven by direct evidence, circumstantial evidence, or both. *See, e.g.*, *State v. Wells*, 2021-Ohio-2585, ¶ 25 (8th Dist.), citing *State v. Durr*, 58 Ohio St.3d 86 (1991). Circumstantial evidence and direct evidence have "equal evidentiary value." *Wells* at ¶ 26, citing *State v. Santiago*, 2011-Ohio-1691, ¶ 12 (8th Dist.).

{¶ 64} Moreover, a conviction may rest solely on the testimony of a single witness, including the alleged victim, if believed, and there is no requirement that a witness' testimony be corroborated to be believed. *See, e.g.*, *Washington*, 2023-

Ohio-1667, at ¶ 119 (8th Dist.); *Williams*, 2023-Ohio-2296, at ¶ 87 (8th Dist.); *State v. Nicholson*, 2022-Ohio-2037, ¶ 180 (8th Dist.); *State v. Jones*, 2020-Ohio-3367, ¶ 71 (8th Dist.); *State v. Flores-Santiago*, 2020-Ohio-1274, ¶ 38 (8th Dist.). This includes cases that involve allegations of sexual assault. *See, e.g.*, *State v. Williams*, 2023-Ohio-1748, ¶ 35–36 (8th Dist.); *State v. Black*, 2019-Ohio-4977, ¶ 43 (8th Dist.); *State v. Schroeder*, 2019-Ohio-4136, ¶ 84 (4th Dist.).

{¶ 65} Rivera's argument about the weight of the evidence is limited to pointing out that the State's case "rested completely on the testimony of" H.B., because no witnesses or physical evidence corroborated H.B.'s allegations. He notes that S.B. did not believe H.B. and that no other family members suspected abuse before H.B.'s disclosure.

{¶ 66} The trier of fact heard from both H.B. and Rivera; it chose to believe H.B. There was no requirement that H.B.'s testimony be corroborated to be believed. Moreover, we note that S.B. and Rivera confirmed that Rivera was frequently home alone with H.B. While S.B. did not believe H.B., she also admitted that she did not allow herself to really listen to the substance of H.B.'s allegations. Finally, Rivera's adamant testimony that he never took H.B. for ice cream — which H.B. confidently testified he did after one of the incidents — was meaningfully impeached by a prior inconsistent statement Rivera made to police. After a careful review of the record, we do not find that this is an exceptional case where the evidence weighed heavily against conviction.

{¶ 67} We, therefore, overrule Rivera's second assignment of error.

{¶ 68} Having overruled Rivera's assignments of error for the reasons stated above, we affirm.

The court finds there were reasonable grounds for this appeal.

It is ordered that the appellee recover from the appellant the costs herein taxed.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated.

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

EILEEN A. GALLAGHER, PRESIDING JUDGE

ANITA LASTER MAYS, J., CONCURS;
FRANK DANIEL CELEBREZZE, III, J., CONCURS (WITH SEPARATE OPINION)

FRANK DANIEL CELEBREZZE, III, J., CONCURRING:

{¶ 69} I agree entirely with the resolution of the assignments of error. I write separately because I profoundly disagree with the trial court's decision to impose a community-control sanction rather than a prison term in this matter.

{¶ 70} Following a bench trial, the court found appellant guilty of *all* six counts of gross sexual imposition, felonies of the third degree, in violation of R.C.

2907.05(A)(4), where the victim was under thirteen years of age. In rendering its decision, the court specifically stated that the State had proven beyond a reasonable doubt that appellant had had sexual contact with the victim's breasts, vagina, and buttocks. The court made this determination after hearing testimony from the victim, her grandmother, her mother, a social worker, the police officer and detective who investigated the case, and appellant himself.

{¶ 71} R.C. 2907.05(C)(2) provides that there is a presumption that a prison term shall be imposed for gross sexual imposition committed in violation of division (A)(4). At sentencing, the State noted that the trial court could depart from the presumption of prison only if it made certain findings under R.C. 2929.13(D)(2). Under this statute, the court must find (1) that the applicable factors under R.C. 2929.12 indicate a lesser likelihood of recidivism outweigh the applicable factors indicating a greater likelihood of recidivism; *and* (2) that the factors under R.C. 2929.12 indicating that the offender's conduct was less serious than conduct normally constituting the offense outweigh the factors under the same statute that indicate that the conduct was more serious than conduct normally constituting the offense.

{¶ 72} However, R.C. 2929.13(D)(1) expressly states that the provisions in R.C. 2929.13(D)(2) do not apply to the presumption of prison for a violation of R.C. 2907.05(A)(4). It is not clear how the legislature intended for the presumption of prison to be overcome for violations of R.C. 2907.05(A)(4) since 2929.13 does not indicate any other method. It appears that the court in this case examined the

seriousness and recidivism factors as they related to the purposes and principles of sentencing.

{¶ 73} At the sentencing hearing, the court stated as follows:

> The [c]ourt has reviewed the record, presentence investigation report, the oral statements made here today, as well as the two letters addressing the [c]ourt.
>
> I've considered this [sic] seriousness and recidivism factors pursuant to 2929.12 relevant to the offense of the offender as well as the need for deterrence, incapacitation, rehabilitation and restitution. Any sentence the [c]ourt imposes must use the minimum sanction that the [c]ourt determines accomplish these purposes without imposing an unnecessary burden on state or local government resources. As the State did address, there is a presumption that a prison term be imposed pursuant to 2907.05(A)(4) of the Revised Code.
>
> However, I do find that a prison term is not consistent with the purposes and principles of sentencing. Specifically[,] the recidivism factors and seriousness of the crime; therefore, I do find you amenable to community control sanctions.

(Tr. 251-252.)

{¶ 74} R.C. 2929.12(C) provides the following factors that may render the offender's conduct *less* serious than conduct normally constituting the offense:

> (1) The victim induced or facilitated the offense.
>
> (2) In committing the offense, the offender acted under strong provocation.
>
> (3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.
>
> (4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

{¶ 75} There was no argument or evidence presented that would support a finding of *any* of these factors.

{¶ 76} In determining whether an offender's conduct is *more* serious than conduct normally constituting the offense, R.C. 2929.12(B) provides the following factors:

> (1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.
>
> (2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.
>
> (3) The offender held a public office or position of trust in the community, and the offense related to that office or position.
>
> (4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.
>
> (5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.
>
> (6) The offender's relationship with the victim facilitated the offense.
>
> (7) The offender committed the offense for hire or as a part of an organized criminal activity.
>
> (8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.
>
> (9) If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

{¶ 77} The "more serious" factors of R.C. 2929.12(B)(1) and (2), physical or mental injuries suffered by the victim and the physical or mental condition or age of

the victim, as well as the physical or psychological harm suffered as a result of the offense, were present. At trial, the victim's grandmother testified that after the abuse occurred, the victim was no longer her "fun-loving self" and "started to distance herself and not want to be around people." (Tr. 34.)

{¶ 78} The victim herself testified that after appellant had touched her buttocks and vagina and told her that "it" was "his," she was unable to sleep that night, could not focus the next day during school, and wore baggy clothes. (Tr. 71-72.) She stated that she did not tell anyone because she was scared. She did not want her mother or brother to get hurt, and she did not want appellant's children to be taken from him or to ruin his life.

{¶ 79} In addition, when testifying about her interview with the police, the victim stated that she was sad and disappointed in herself because she felt that it was her fault that it had happened to her and that maybe she deserved it.

{¶ 80} At the sentencing hearing, the prosecutor noted that the victim and her grandmother had both written victim-impact letters, asking that appellant be sentenced to prison for his crimes. The victim's letter detailed the psychological effects that the crimes had on her, stating that she has nightmares, that she feels disgusted with herself because of what appellant did to her. She revealed that when she showers, she scrubs her skin to the point of redness because she is trying to wash off the feeling of his hands on her.

{¶ 81} In addition, the factor in R.C. 2929.13(B)(6) was present — appellant's relationship with the victim clearly facilitated the offense. Appellant was home with

the victim while her mother was at work in the evening, which was when the abuse occurred. The victim's mother testified that she trusted appellant to watch the children, take them to eat, and otherwise be with them while she was at work. Appellant became like a stepfather to the victim and her brother and would discipline them if they did not listen to him.

{¶ 82} In reviewing both the "more" and "less" seriousness factors, it is impossible to say that the factors indicating that the conduct constituting the offense was *less* serious — of which there were none — outweighed the three factors demonstrating that the conduct was *more* serious than conduct normally constituting the offense. It is incomprehensible to me that the trial court could have listened to the victim's testimony recounting the sexual abuse, find appellant guilty on all counts, consider the victim-impact letters, analyze the seriousness factors, and still determine that the presumption of prison had been overcome.

{¶ 83} I am a father and a grandfather and have been a jurist at both the trial court and appellate levels. In my lengthy career, I have seen far too many of these offenses. Thankfully, in many cases, the offenders are properly sentenced to prison, which should have happened here since the presumption of prison had not been rebutted. What message does the community-control sentence in this case send to victims of these perpetrators, particularly younger ones who have a family-like relationship with their abusers? I commend this victim for her bravery throughout this matter and hope she is able to overcome her experiences and move forward with her life.