APPENDIX A

Supreme Court of Ohio

The State of Ohio, Appellant,

v.

Jackson, Appellee.

No. 2017–0145

Submitted February 13, 2018

Decided June 7, 2018

APPEAL from the Court of Appeals for Cuyahoga County, No. 103957, 2016-Ohio-8144.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anthony T. Miranda, Assistant Prosecuting Attorney, for appellant.

Jonathan N. Garver, Cleveland, for appellee.

SYLLABUS OF THE COURT

A social worker's statutory duty to cooperate and share information with law enforcement with respect to a child abuse investigation does not render the social worker an agent of law enforcement for purposes of the Fifth and Sixth Amendments to the United States Constitution when the social worker interviews an alleged perpetrator unless other evidence demonstrates that the social worker acted at the direction or under the control of law enforcement.

O'Donnell, J.

{¶ 1} The state of Ohio appeals from a judgment of the Eighth District Court of Appeals reversing the convictions of Demetrius Jackson for kidnapping, gross sexual imposition, and two counts of rape. The issue presented on this appeal is whether a social worker's statutory duty to cooperate and share in-

formation with law enforcement regarding a child abuse investigation renders the social worker an agent of law enforcement for purposes of the Fifth and Sixth Amendments to the United States Constitution if the social worker interviews an alleged perpetrator.

Facts and Procedural History

{¶ 2} On August 5, 2015, C.H., who at the time was 14 years of age, went to the home of N.J. and joined her sister, S.H., and her sister's friend, Demetrius Jackson, who also were there. C.H. went to sleep in an upstairs bedroom, and when Jackson woke her up and tried to lay down with her, she pushed him out of the bed and he left the room. However, he later returned and offered C.H. $200 a week if she would allow him to perform oral sex on her and would keep it secret. She refused, and Jackson then ripped her underwear off, performed oral sex on her, and choked her when she resisted. He also digitally penetrated her and had vaginal sex with her. She escaped and ran to a family member's nearby home. The police were called, and she was taken to a hospital where she was examined and treated. Police arrested Jackson and attempted to interrogate him but he refused to speak after being advised of his *Miranda* rights.

{¶ 3} The incident was reported to the Cuyahoga County Division of Children and Family Services via a hotline phone call on the day of the incident, and the case was assigned to Tina Funfgeld, a sex abuse intake social worker assigned to the agency's sex abuse unit. Funfgeld contacted the police to conduct a joint interview with C.H., but police had already interviewed her, so Funfgeld conducted a separate

interview. Separately, CCDCFS social worker and child advocate Holly Mack, who was "assigned to the county jail," interviewed Jackson on August 11, 2015, at the request of Funfgeld. Mack works "directly with incarcerated parents as well as alleged perpetrators that are in the jail," and one of her "primary job duties" is to interview alleged perpetrators when the agency receives referrals for abuse and neglect. Mack stated that when she meets with suspects, she identifies herself and advises them of the allegations, that anything they say "can be subpoenaed by the [c]ourts," and that it is up to them whether to continue the interview. During his interview, Jackson told Mack that he had consensual oral sex with C.H., whom he believed was at least 21 years of age, and that afterwards she requested money, which he refused to give her. He denied having vaginal sex with her.

{¶ 4} A grand jury indicted him on three counts of rape and additional counts of gross sexual imposition, importuning, felonious assault, and kidnapping with a sexual motivation specification. Jackson waived the right to a jury trial, and at a bench trial, his counsel objected to Mack's testimony about the statements Jackson had made to her because she questioned him "as an agent of the State and law enforcement" and failed to notify him of his *Miranda* rights. The court overruled the objection and allowed Mack to testify. As a result of that ruling, Jackson testified on his own behalf and claimed he only had consensual oral sex with C.H.

{¶ 5} The court dismissed the importuning and felonious assault charges, found Jackson not guilty of one of the counts of rape, but found him guilty of the remaining two counts of rape, the gross sexual impo-

sition charge, and the kidnapping charge with a sexual motivation specification. For purposes of sentencing, the court merged the gross sexual imposition offense with the kidnapping offense and therefore sentenced Jackson on two counts of rape and one count of kidnapping with the specification. The court imposed an aggregate 11 year prison term.

{¶ 6} Jackson appealed, claiming that the trial court violated his constitutional rights by allowing Mack to testify about his statements to her, that the court violated his Sixth Amendment rights by admitting hearsay statements made by C.H. to a police officer, and that his convictions were against the manifest weight of the evidence. In a split decision authored by Judge Eileen A. Gallagher, the appellate court reversed his convictions. The majority explained that pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.E.2d 694 (1966), "statements stemming from custodial interrogation of the defendant must be suppressed unless the defendant has been informed of his Fifth and Sixth Amendment rights before being questioned." 2016-Ohio-8144, 75 N.E.3d 922, ¶ 15 (8th Dist. 2016). The majority further explained that *Miranda* only applies to admissions made to officers of the law or their agents, that a person must act "under the direction or control of a law enforcement agency" to qualify as an agent of law enforcement, and that based on the facts before it, Mack acted as an agent of law enforcement when she interrogated Jackson. *Id*. at ¶ 17–18. The majority concluded the direction or control element was

> satisfied in this instance due to the formal procedure established by CCDCFS and local law enforcement for routinely conducting interroga-

> tions of defendants without providing Miranda warnings. These interrogations are proceeding under the direction, and for the benefit, of law enforcement pursuant to a "memorandum of understanding" required by Ohio law.

Id. at ¶ 18, citing former R.C. 2151.421(F) and (J) (now R.C. 2151.421(G) and (K)). The majority further explained that former R.C. 2151.421(F) required a child advocate "not only to conduct an investigation in cooperation with law enforcement but also to submit a report of the advocate's investigation, in writing, to law enforcement." *Id.* at ¶ 20.

{¶ 7} The majority also noted that Mack was assigned to the jail and that one of her primary duties was to interview alleged perpetrators in abuse cases. *Id.* at ¶ 19. It could find "no legitimate purpose" for Mack's interview "other than to directly assist the investigation of law enforcement pursuant to [former] R.C. 2151.421(F)." *Id.* at ¶ 21. The majority acknowledged Mack "may have been performing her customary duties as an investigator for CCDCFS" but stated that it was "problematic" that her "customary duties are designed to routinely violate the constitutional rights of defendants." *Id.* at ¶ 22.

{¶ 8} The majority held Mack violated Jackson's Fifth Amendment rights by subjecting him to custodial interrogation without *Miranda* warnings and violated his Sixth Amendment right to counsel by conducting the interrogation outside the presence of his attorney. *Id.* at ¶ 28–29.

{¶ 9} Judge Sean C. Gallagher dissented. He opined that Mack was not an agent of law enforcement because the record did not demonstrate she acted at the direction, control, or behest of law en-

forcement and that the statutory duty "to cooperate with and submit a report to law enforcement does not, in itself, demonstrate that the child advocate acted as an agent of law enforcement." *Id.*, 2016-Ohio-8144, 75 N.E.3d 922, at ¶ 40, 43 (Gallagher, J., dissenting).

{¶ 10} The state appealed and presented one proposition of law:

> A social worker's duty to cooperate and share information with law enforcement does not render the social worker an agent of law enforcement, under the Fifth and Sixth Amendments of the U.S. Constitution, where the social worker does not act at the direction, control, or behest of law enforcement.

Positions of the Parties

{¶ 11} The state contends that *Miranda* applies only to law enforcement officers or their agents, that it is undisputed that a social worker is not a law enforcement officer, and that a social worker's statutory duty to cooperate and share information with law enforcement with respect to a child abuse investigation does not transform the social worker into an agent of law enforcement for purposes of the Fifth and Sixth Amendments to the United States Constitution. It argues that interviews of alleged perpetrators by social workers are "inherently less coercive than those addressed by *Miranda*" and "serve important interests related to the health and safety of children." It asserts that the proper inquiry for determining whether a social worker is an agent of law enforcement is whether the totality of the facts demonstrate the social worker acted at the direction,

control, or behest of law enforcement, and here, there is no evidence that Mack acted in such a manner when she interviewed Jackson.

{¶ 12} Jackson maintains that the state's "entire argument rests on the faulty premise" that the requirements of *Miranda* apply only to law enforcement officers or their agents, and he relies on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.E.2d 359 (1981), and *State v. Roberts*, 32 Ohio St.3d 225, 513 N.E.2d 720 (1987), for the proposition that *Miranda* applies when a state actor subjects a defendant to custodial interrogation and "the totality of the circumstances warran[t] use of the procedural safeguards required by *Miranda*." Jackson points out that courts in several jurisdictions have held *Miranda* applies to social workers employed by children services agencies, and he argues that social workers should be treated no differently from Internal Revenue Service agents, who must comply with *Miranda* pursuant to *Mathis v. United States*, 391 U.S. 1, 88 S.Ct. 1503, 20 L.E.2d 381 (1968). He claims it is "important to recognize" that Mack was a "member of a special unit" at CCDCFS that "collaborated with law enforcement," that she was "assigned to the county jail," and that her "only job-related duty was to interview 'alleged perpetrators' in the county jail," and that it is reasonable to assume that she possesses interrogation skills comparable to or exceeding those of most law enforcement officers. He also maintains that "there was both a formal and informal relationship between the agency and law enforcement which involved a significant level of coordination, cooperation, and sharing of information," and "the agency and law enforcement very much worked as a *team* in

the investigation and prosecution of crimes against children." (Emphasis sic.)

Issue

{¶ 13} The issue presented on this appeal is whether Mack's statutory duty to cooperate and share information with law enforcement resulting from her interview with Jackson rendered her an agent of law enforcement for purposes of the Fifth and Sixth Amendments to the United States Constitution.

Law and Analysis

{¶ 14} "The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, states that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." (Ellipsis sic and citation omitted.) *State v. Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, 991 N.E.2d 1116, ¶ 19. Pursuant to *Miranda*, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444, 86 S.Ct. 1602, 16 L.E.2d 694.

{¶ 15} In *State v. Watson*, 28 Ohio St.2d 15, 275 N.E.2d 153 (1971), this court stated, "Inasmuch as custodial interrogation, as defined in *Miranda* * * * means 'questioning initiated by law enforcement officers after a person has been taken into custody,' the *Miranda* requirements do not apply to admissions made to persons who are not officers of the law or their agents * * *." *Id.* at paragraph five of the syl-

labus, quoting *Miranda* at 444, 86 S.Ct. 1602; *see also State v. Bernard*, 31 So.3d 1025, 1029 (La.2010) (*Miranda* applies only if "the interrogation is conducted by a 'law enforcement officer' or someone acting as their agent"). And we have observed that other courts have recognized

> that the duty of giving "*Miranda* warnings" is limited to *employees of governmental agencies whose function is to enforce law, or to those acting for such law enforcement agencies by direction of the agencies*; * * * it does not include private citizens *not directed or controlled by a law enforcement agency, even though their efforts might aid in law enforcement*.

(Emphasis added.) *State v. Bolan*, 27 Ohio St.2d 15, 18, 271 N.E.2d 839 (1971).

{¶ 16} "The Sixth Amendment, applied to the States through the Fourteenth Amendment, guarantees that '[i]n all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defence.'" (Ellipsis sic.) *Kansas v. Ventris*, 556 U.S. 586, 590, 129 S.Ct. 1841, 173 L.Ed.2d 801 (2009). In *Ventris*, the United States Supreme Court explained:

> The core of this right has historically been, and remains today, "the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial." *Michigan v. Harvey*, 494 U.S. 344, 348, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990). We have held, however, that the right extends to having counsel present at various pretrial "critical" interactions between the defendant and the State, * * * including the deliberate elicita-

> tion *by law enforcement officers (and their agents)* of statements pertaining to the charge.

(Emphasis added.) *Id*.

{¶ 17} "[W]hether someone is acting as an agent of law enforcement is dependent upon the unique circumstances of each case." *Bernard* at 1033.

Child Services Agency

{¶ 18} R.C. 2151.421(G)(1)—formerly R.C. 2151.421(F)(1)—provides that generally, a public children services agency

> shall investigate, within twenty-four hours, each report of child abuse or child neglect that is known or reasonably suspected or believed to have occurred * * * that is referred to it under this section to determine the circumstances surrounding the injuries, abuse, or neglect * * *, the cause of the injuries, abuse, neglect, or threat, and the person or persons responsible. The investigation shall be made in cooperation with the law enforcement agency and in accordance with the memorandum of understanding prepared under division (K) of this section. A representative of the public children services agency shall, at the time of initial contact with the person subject to the investigation, inform the person of the specific complaints or allegations made against the person. * * *
>
> * * * The public children services agency shall submit a report of its investigation, in writing, to the law enforcement agency.

{¶ 19} R.C. 2151.421(K)—formerly R.C. 2151.421(J)—addresses memoranda of understanding. R.C. 2151.421(K)(1) directs that a public chil-

dren services agency "shall prepare a memorandum of understanding that is signed by" certain officials and organizations, such as the county juvenile court judge, law enforcement officers handling child abuse and neglect cases in the county, the county prosecutor, and the county humane society. The memorandum

> shall set forth the normal operating procedure to be employed by all concerned officials in the execution of their respective responsibilities under this section * * * and shall have as two of its primary goals the elimination of all unnecessary interviews of children who are the subject of reports made pursuant to division (A) or (B) of this section and, when feasible, providing for only one interview of a child who is the subject of any report.

R.C. 2151.421(K)(2).

{¶ 20} In addition, the memorandum "shall include all of the following":

> (a) The roles and responsibilities for handling emergency and nonemergency cases of abuse and neglect;
>
> (b) Standards and procedures to be used in handling and coordinating investigations of reported cases of child abuse and reported cases of child neglect, methods to be used in interviewing the child who is the subject of the report and who allegedly was abused or neglected, and standards and procedures addressing the categories of persons who may interview the child who is the subject of the report and who allegedly was abused or neglected.

R.C. 2151.421(K)(3).

{¶ 21} Although CCDCFS's memorandum of understanding is not part of the record in this case, nothing in R.C. 2151.421 or the record supports the conclusion that pursuant to it, Mack acted as an agent of law enforcement when she interviewed Jackson. Although R.C. 2151.421(G)(1) imposes a duty on a children services agency to cooperate with and provide information to law enforcement regarding child abuse investigations, it does not mandate that agency employees interview alleged perpetrators of child abuse at the direction or under the control of law enforcement. *See also Ohio v. Clark*, —— U.S. ——, 135 S.Ct. 2173, 2183, 192 L.E.2d 306 (2015) (mandatory child abuse reporting statutes "alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution" for purposes of the Confrontation Clause).

{¶ 22} Thus, a social worker's statutory duty to cooperate and share information with law enforcement with respect to a child abuse investigation does not render the social worker an agent of law enforcement for purposes of the Fifth and Sixth Amendments to the United States Constitution when the social worker interviews an alleged perpetrator unless other evidence demonstrates that the social worker acted at the direction or under the control of law enforcement.

{¶ 23} And here, the record contains no evidence that Mack acted as an agent of law enforcement when she interviewed Jackson. The only evidence of contact between CCDCFS and law enforcement about the investigation in this matter before Mack interviewed Jackson is Funfgeld's testimony that she

contacted law enforcement to coordinate a joint interview of C.H., which is consistent with the statutory goal of a memorandum of understanding of eliminating unnecessary interviews of child victims. *See* R.C. 2151.421(K)(2). There is no evidence that law enforcement asked Mack to interview Jackson before or after the detective's failed attempt to interview him or that law enforcement influenced Mack's interview of Jackson in any way.

{¶ 24} Accordingly, the appellate court erred when it concluded that Mack acted as an agent of law enforcement in conducting an interview of Jackson.

Inapposite Authority

{¶ 25} Jackson's reliance on *Mathis*, *Estelle*, and *Roberts* is misplaced. In *Mathis*, the United States Supreme Court considered whether an IRS agent who questioned an individual in connection with a tax investigation while he was serving a state prison sentence had to give the individual *Miranda* warnings. 391 U.S. at 3–4, 88 S.Ct. 1503, 20 L.E.2d 381, fn. 2. Mathis rejected the government's attempt "to escape application of" *Miranda* on the grounds that the interview occurred "as part of a routine tax investigation where no criminal proceedings might even be brought" and that the defendant was not "put in jail by the officers questioning him, but was there for an entirely separate offense." *Mathis* at 4, 88 S.Ct. 1503. As the Supreme Court of Louisiana has noted, in *Mathis*, the court "was *not* called upon to decide whether the IRS employee was a 'law enforcement agent,' as the government apparently ceded that point." (Emphasis sic.) *Bernard*, 31 So.3d at 1030.

{¶ 26} In *Estelle*, the United States Supreme Court held that a state court violated the Fifth and Sixth Amendment rights of a defendant in a capital case when it ordered a psychiatric examination to determine his competency to stand trial, the psychiatrist interviewed the defendant in jail without advising him of his *Miranda* rights, and during sentencing, the court allowed the state to question the psychiatrist about statements the defendant made during the interview in order to establish his future dangerousness even though defense counsel was not notified in advance that the psychiatric examination would encompass that issue. 451 U.S. at 456–458, 461, 467–468, 470–471, 101 S.Ct. 1866, 68 L.E.2d 359. The Supreme Court concluded the fact that the defendant "was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial" because when the psychiatrist testified at sentencing, "his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." *Id*. at 467, 101 S.Ct. 1866. This case is distinguishable because it does not involve a court ordered examination, and the Supreme Court has observed that the "opinion in *Estelle* suggested that [its] holding was limited to the 'distinct circumstances' presented there," *Penry v. Johnson*, 532 U.S. 782, 795, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001), quoting *Estelle* at 466, 101 S.Ct. 1866.

{¶ 27} In *Roberts*, this court considered whether statements a probationer made to his probation officer while in custody without prior *Miranda* warnings were admissible in a subsequent criminal trial.

32 Ohio St.3d at 227, 513 N.E.2d 720. Although we observed that decisions in other jurisdictions were in conflict on the issue, noted that "[m]ost of these cases turn on whether a probation officer is a 'law enforcement officer' under *Miranda*," *id.*, and concluded that the "better rule is followed in those jurisdictions which require a probation officer to give *Miranda* warnings prior to questioning" a probationer who is in custody, *Roberts* at 231, 513 N.E.2d 720, we did not specifically determine whether a probation officer is a law enforcement officer or agent. However, we noted that R.C. 2901.01(A)(11)—formerly R.C. 2901.01(K)—defines "law enforcement officer" to include an officer of the state with a statutory duty to enforce laws and authority to arrest violators and that R.C. 2951.08 gives probation officers the authority to arrest a defendant during a period of probation, *id*. at 228, fn. 7, 513 N.E.2d 720, and we emphasized that a probationer has an obligation "to '"report to"' and '"answer questions posed by a probation officer"'" and is under '"heav[y] psychological pressure to answer questions put by his probation officer, a figure of both authority and trust,"' *id*. at 230, 513 N.E.2d 720, quoting *Marrs v. State*, 53 Md.App. 230, 233, 452 A.2d 992 (1982), quoting *United States v. Rea*, 678 F.2d 382, 390 (2d Cir.1982). Here, there is no assertion that Mack possessed authority to make arrests, and the record does not demonstrate that Jackson and Mack had a relationship comparable to that of a probationer and probation officer.

{¶ 28} Accordingly, none of those cases support the position that Mack had an obligation to provide Jackson with *Miranda* warnings even though she was not an agent of law enforcement.

{¶ 29} And because Mack is not an agent of law enforcement, the appellate court also erred when it concluded the trial court violated the Fifth and Sixth Amendments, as applied to the states through the Fourteenth Amendment, in admitting her testimony.

Conclusion

{¶ 30} A social worker's statutory duty to cooperate and share information with law enforcement with respect to a child abuse investigation does not render the social worker an agent of law enforcement for purposes of the Fifth and Sixth Amendments to the United States Constitution when the social worker interviews an alleged perpetrator unless other evidence demonstrates that the social worker acted at the direction or under the control of law enforcement. In this case, no evidence indicates that Mack acted at the direction or under the control of law enforcement when she interviewed Jackson.

{¶ 31} Accordingly, we reverse the judgment of the appellate court, and we remand this case to that court to consider the assignments of error it did not address.

Judgment reversed and cause remanded.

O'Connor, C.J., and French, Fischer, and DeWine, JJ., concur.

Kennedy, J., concurs in judgment only.

DeGenaro, J., dissents, with an opinion.

DeGenaro, J., dissenting.

{¶ 32} I agree with the majority that a state-employed social worker's statutory duty to share with law enforcement information concerning a child-abuse investigation does not render the social

worker an agent of law enforcement in all cases—I would stop short of creating a bright-line rule. Although the statutory scheme and the way it operates clearly establish a cooperative relationship between children's services agencies and law enforcement, whether a social worker acted as an agent of law enforcement when interviewing an alleged perpetrator must ultimately be determined on a case-by-case basis. The proper analysis requires determining which of two distinct statutory duties the social worker was performing during the interview: the reporting duty under R.C. 2151.421(A)(1)(a) or the investigative duty under R.C. 2151.421(G)(1).

{¶ 33} Here, the effect of R.C. 2151.421, coupled with the evidence—that one of the primary job duties of Cuyahoga County Division of Children and Family Services ("CCDCFS") social worker and child advocate Holly Mack was to interview alleged perpetrators in jail—never child victims; her 17 years of experience; that she interrogated appellee, Demetrius Jackson, in jail after he had been arraigned on the charges she was investigating and after he had already invoked his *Miranda* rights when questioned by police—leads to the conclusion that when she interviewed Jackson, Mack was functioning as an agent of law enforcement for purposes of the Fifth and Sixth Amendments to the United States Constitution. Accordingly, I dissent from the court's judgment and would affirm the judgment of the court of appeals.

{¶ 34} Mack's interview of Jackson was undertaken pursuant to a statutory scheme that directs children's services agencies, law enforcement, and prosecutors to work collaboratively to investigate and prosecute crimes against children. R.C.

2151.421(G)(1) mandates that social workers employed by public children's services agencies *do more than merely report* instances of child abuse or neglect to law enforcement as required by R.C. 2151.421(A). Rather, they must "*investigate* * * * to determine the circumstances surrounding the injuries, abuse or neglect, * * * the cause of the injuries, abuse, neglect, or threat, *and the person or persons responsible*." (Emphasis added.) R.C. 2151.421(G)(1). That "investigation shall be made *in cooperation with* the law enforcement agency." (Emphasis added.) *Id*.

{¶ 35} In furtherance of this duty, a children's services agency is also required to "submit a report of its investigation, in writing, to the law enforcement agency" and to "make any recommendations to the county prosecuting attorney or city director of law that it considers necessary to protect any children that are brought to its attention." R.C. 2151.421(G)(1) and (2). As a corollary, R.C. 5101.13 provides for the establishment of a uniform statewide automated child-welfare information system ("SACWIS"), which, among other things, "shall contain records regarding * * * [i]nvestigations of children and families * * * in accordance with [R.C.] 2151.421." R.C. 5101.13(A)(1). Mack testified that she uploaded the results of her interview with Jackson into this database.

{¶ 36} Information contained in SACWIS may be accessed by, among others, a prosecuting attorney when the "access * * * is directly connected with assessment, investigation, or services regarding a child or family." R.C. 5101.132(A)(1)(a); *see also* Ohio Adm.Code 5101:2–33–21(F)(2) and (3) (providing that public children's service agencies "shall release" child-welfare information in SACWIS to "[l]aw en-

forcement officials who are investigating a report of child abuse or neglect" and the "county prosecutor who is investigating a report of child abuse or neglect").

{¶ 37} The statutory scheme formalizes cooperative investigations among children's services agencies, law enforcement, and prosecutors. Therefore, I agree, to a point, with Jackson's argument that it would be disingenuous for us to require that police specifically request that a social worker question an alleged perpetrator before the social worker may be considered an agent of law enforcement for purposes of the Fifth Amendment—indeed, the institutional arrangement provided by law obviates the need for such a request, in many cases. That said, the facts of each case must be examined to determine whether the social worker was acting as an agent of the police.

{¶ 38} I question the majority's reliance on *Ohio v. Clark*, ––– U.S. ––––, 135 S.Ct. 2173, 2183, 192 L.Ed.2d 306 (2015), as support for its conclusion that Mack was not acting as an agent of law enforcement when she interviewed Jackson. *Ohio v. Clark* involved a preschool teacher's statutory *duty to report* suspected abuse to law enforcement. At issue here is a state-employed social worker's statutory *duty to cooperatively investigate* suspected abuse with law enforcement. *Compare* R.C. 2151.421(A)(1)(a) and (b) *with* R.C. 2151.421(G)(1). *See Ohio v. Clark* at 2182–2183.

{¶ 39} As Chief Justice O'Connor explained in her dissent in *State v. Clark*, 137 Ohio St.3d 346, 2013-Ohio-4731, 999 N.E.2d 592, *rev'd and remanded*, ––– U.S. ––––, 135 S.Ct. 2173, 192 L.Ed.2d 306:

> What the [reporting] statute requires is actually quite minimal: when teachers, or others who are required to report, encounter suspected abuse or neglect in their official capacity, they must report it. In turn, *the children's services agency or the police—not the mandatory reporters—are responsible for investigating* the injury or condition "to determine the circumstances surrounding the injuries, abuse, or neglect or the threat of injury, abuse, or neglect, the cause of the injuries, abuse, neglect, or threat, and the person or persons responsible."

(Emphasis added.) *Id.* at ¶ 85 (O'Connor, C.J, dissenting), quoting former R.C. 2151.421(F)(1) (now R.C. 2151.421(G)(1)). *Ohio v. Clark* is therefore factually distinguishable from this case.

{¶ 40} Moreover, *Ohio v. Clark* involved a distinct constitutional issue: whether statements made by a minor victim of abuse to his teacher were testimonial and therefore barred under the Sixth Amendment's Confrontation Clause from admission at trial. For these reasons, *Ohio v. Clark* does not control the outcome of this case.

{¶ 41} That said, I agree with the majority that R.C. 2151.421(G) and related statutory provisions do not *categorically* transform a children's services investigator into a law-enforcement agent. However, the specific facts here lead to the conclusion that Mack was acting as the functional equivalent of law enforcement when she had Jackson removed from his housing unit in the jail so she could question him.

{¶ 42} The lead CCDCFS sex-abuse intake social worker Tina Funfgeld explained in her testimony

that Mack was "assigned to the county jail," and indeed, Mack testified that one of her primary job duties was to interview alleged perpetrators in jail and that she interviewed no one else. Mack had 17 years of experience with CCDCFS. Jackson, on the other hand, though he had a prior criminal record, did not display a high level of insight regarding the criminal investigative process. For example, according to his testimony, after the rape allegations were levied against him, he waited for the police to arrive, believing that a rape kit would be performed on site and would immediately exonerate him.

{¶ 43} Moreover, Jackson's statement to Mack occurred after he had declined to speak to police. He did not talk to any of the officers at the hospital where he was taken upon his arrest. And when a Cleveland Police detective visited him at the jail and advised him of his *Miranda* rights, Jackson refused to speak, explaining at trial that he "just wasn't saying nothing after that."

{¶ 44} Thereafter, Mack came to the county jail to question Jackson. Importantly, for purposes of this appeal, the only issue is whether Mack acted as an agent of law enforcement. The state concedes that Jackson was in custody during Mack's interview and that Mack did not *Mirandize* Jackson; further, the state does not dispute that Mack's interview constitutes an interrogation.

{¶ 45} Mack testified to her protocol when interviewing an alleged perpetrator: "I identify myself, I let them know that they have been named as the alleged perpetrator, I let them know what the allegations are against them, and then I also let them know that anything they tell me can be subpoenaed

by the Courts. It is then up to them whether or not they want to continue with the interview or not." Mack further testified that when informed of the allegations against him, Jackson proceeded to tell her "his side of the story."

{¶ 46} The manner in which Mack conducted her interview resulted in one of the primary concerns of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.E.2d 694 (1966): the use of deceptive tactics to obtain incriminating statements. *See State v. Roberts*, 32 Ohio St.3d 225, 230–231, 513 N.E.2d 720 (1987). She never testified whether—or if so—how she followed her protocol with Jackson or whether she explained the ramifications *for him*. Specifically, there is no indication that Jackson understood that his statements to Mack could be used against him at trial or—what ultimately happened here—that the admission of her testimony would put him in the position of taking the stand at trial when he otherwise would not have. Based on these facts, it is highly questionable whether Jackson would have spoken to Mack had she first advised him of his *Miranda* rights.

{¶ 47} Contrary to the majority's conclusion, *Mathis v. United States*, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968), and *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), are instructive. *Mathis* involved an Internal Revenue Service ("IRS") agent who questioned an inmate in prison where the inmate was serving a state sentence. The inmate was ultimately charged with and convicted of violations of the federal false-claims statute. On appeal, the Supreme Court concluded that statements and information gathered by the agent should not have been admitted at the defendant's

trial because the agent had failed to provide him *Miranda* warnings. Implicit in the court's decision was a determination that the IRS agent was the functional equivalent of law enforcement.

{¶ 48} *Estelle* is even more on point. In that case, the Supreme Court held that *Miranda* applied to a psychiatric examination conducted by a court-appointed psychiatrist, concluding that the fact that the defendant "was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial." *Id.* at 467, 101 S.Ct. 1866. The Supreme Court observed that under these circumstances, the psychiatrist "went beyond simply reporting to the court on the issue of competence and testified for the prosecution." *Id.* At that point, "his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." *Id.*

{¶ 49} Similarly, Mack's interrogation of Jackson exceeded the customary function of a child advocate: to protect the safety and welfare of children. Rather, she was acting as an extension of law enforcement. Mack went beyond investigating and reporting—whether, for example, the victim was at risk of exposure to a sexually transmitted disease. Instead, she elicited and ultimately recounted Jackson's "side of the story," which put Jackson in the position of taking the stand in order to counter Mack's testimony.

{¶ 50} Further, the decision of the United States Court of Appeals for the Second Circuit in *Jackson v. Conway*—affirming the grant of federal habeas corpus relief in a case with facts strikingly similar to

those here—is persuasive. 763 F.3d 115 (2d Cir.2014). In that case, the defendant was arrested before dawn after he was accused of committing multiple rapes during the night. Later in the morning, after police had read him his *Miranda* rights, he invoked his right to remain silent and refused to speak to them. He remained in a holding cell until the afternoon. At some point during the day, after interviewing the victims, a child-protective-services ("CPS") caseworker from the county department of social services interviewed the defendant in the hallway outside of his holding cell after the defendant was escorted there by an officer. The caseworker "introduced herself as a CPS caseworker, explained her role, and asked [the defendant] if she could speak with him about the victims' allegations. She did not, however, inform him of his right to an attorney or give him any other warnings." *Id.* at 122. The defendant agreed to speak with her and, in essence, told her his side of the story. At trial, the caseworker testified about what the defendant had related to her. Applying *Mathis*, the Second Circuit held that the admission of the caseworker's testimony about the interview violated the defendant's Fifth Amendment right against compelled self-incrimination. *Jackson v. Conway* at 135–140.

{¶ 51} As the majority opinion in the court of appeals here emphasized: it "is absolutely undisputed" that if law-enforcement officers conducted interviews in the manner in which Mack did, the practice would violate the Fifth Amendment. 2016-Ohio-8144, 75 N.E.3d 922, ¶ 20. Given the facts of this case, Mack was the functional equivalent of a law-enforcement agent and absent *Miranda* warnings, her interrogation of Jackson violated his right against self-

incrimination. “Any other conclusion would allow the State to ignore a defendant’s constitutional rights merely by having the interrogation conducted by someone who lacks the title ‘law enforcement officer’ but who is otherwise performing the interrogation of such an officer.” *State v. Deases*, 518 N.W.2d 784, 790 (Iowa 1994) (concluding that “when a state official conducts a custodial interrogation that would require a *Miranda* warning if undertaken by a police officer, then the official is similarly required to give a *Miranda* warning”).

{¶ 52} Based on all of the above, the admission of Mack’s testimony violated Jackson’s Fifth Amendment right to be free from compelled self-incrimination.

{¶ 53} I would also affirm the court of appeals’ conclusion that the admission of Mack’s testimony violated Jackson’s Sixth Amendment right to counsel. “The Sixth Amendment protects the right of the accused not to be confronted by an *agent of the State* regarding matters as to which the right to counsel has attached without counsel being present.” (Emphasis added.) *Maine v. Moulton*, 474 U.S. 159, 177, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985), fn. 14. “[O]nce the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all ‘critical’ stages of the criminal proceedings. Interrogation by the State is such a stage.” (Citations omitted.) *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009).

{¶ 54} The state does not dispute that Jackson was subjected to a custodial interrogation. Mack’s interview with Jackson took place after he had been

arraigned and after he had invoked his *Miranda* rights when a detective attempted to interrogate him at the jail. Significantly (in light of Jackson's prior invocation of *Miranda*), the record fails to demonstrate that Mack *Mirandized* him or asked him whether he wanted an attorney present. Based on all of the above, the admission of Mack's testimony violated Jackson's Sixth Amendment right to counsel.

{¶ 55} In sum, based on the totality of the circumstances in this case, I would conclude that Mack was functioning as an agent of law enforcement for purposes of the Fifth and Sixth Amendments to the United States Constitution when she questioned Jackson. Therefore, I would affirm the judgment of the court of appeals.

{¶ 56} Respectfully, I dissent.

APPENDIX B

Court of Appeals of Ohio
Eighth District, Cuyahoga County

STATE of Ohio, Plaintiff–Appellee
v.
Demetrius JACKSON, Defendant–Appellant

No. 103957

Dec. 15, 2016

Jonathan N. Garver, Cleveland, OH, for appellant.

Timothy J. McGinty, Cuyahoga County Prosecutor by Sherrie S. Royster, Assistant Prosecuting Attorney, Cleveland, OH, for appellee.

Before: E.A. GALLAGHER, P.J., BOYLE, J., and S. GALLAGHER, J.

EILEEN A. GALLAGHER, P.J.

{¶ 1} Defendant-appellant Demetrius Jackson appeals his convictions for rape, gross sexual imposition and kidnapping in the Cuyahoga County Court of Common Pleas. For the following reasons, we reverse and remand.

Factual and Procedural Background

{¶ 2} Appellant was charged by a Cuyahoga County Grand Jury with three counts of rape, gross sexual imposition, importuning with a prior conviction for a sexually or child victim oriented offense, felonious assault and kidnapping with a sexual motivation specification. Each of these crimes were alleged to have been committed against a 14–year old female ("C.H.").

{¶ 3} The case proceeded to a bench trial where C.H. testified that, on August 5, 2015, she went to an older sister's home in Cleveland, Ohio and was interacting with her young relatives while two of her sisters were on the porch drinking with the appellant. C.H. testified that she did not know the appellant and that both of her sisters were intoxicated. Late that night the occupant of the home, C.H.'s sister N.J.,[1] told C.H. to go upstairs and lay down with N.J.'s two children, ages 7 and 1. C.H. had fallen asleep in a bedroom with the two children and was awakened by the appellant who told her that her sister, S.H., had told him to come lay with her. C.H. rebuffed his advances and told him to leave the room which he did and after which he went downstairs but returned and repeated that her sister told him to go upstairs and lay with her. C.H. herself went downstairs, as did the appellant, and found both of her sisters to be asleep on a couch. At that point the appellant laid himself on the living room floor and C.H. returned upstairs to a bedroom.

{¶ 4} C.H. testified that appellant returned to the upstairs bedroom and asked her to allow him to perform oral sex on her. When she refused, appellant stated "I'll give you $200 a week if you don't say anything." Appellant then "ripped" C.H.'s underwear off of her, proceeded to perform oral sex on her and when she resisted, he choked her and said "let me just do this." The appellant then inserted his fingers into her vagina and later, his penis.

{¶ 5} At some point appellant stopped his assault which gave C.H. an opportunity to grab her cellular telephone from a windowsill and run, without shoes

[1] N.J. identified herself as the victim's "god-sister."

or underwear, to a family member's home approximately eight houses away from where Cleveland police were called. C.H. was transported to University Hospitals by EMS where she was examined, treated and released.

{¶ 6} N.J., the occupant of the home where these events transpired, testified that on the night in question her sister S.H. brought appellant to the house after she went to the store to purchase alcohol. N.J. testified that she had fallen asleep and was awakened, on the couch, by her brother-in-law, K.F., who informed her that C.H. was at his home down the street and that she had been raped. N.J. went to the house of K.F. where she found the victim "hysterically crying * * * she was screaming 'he raped me, he raped me * * *'"

{¶ 7} Kathleen Hackett, the sexual assault nurse examiner who interacted and examined C.H. at U.H. Rainbow Babies and Childrens Hospital read the victim's own words from the triage notes that echoed C.H.'s testimony but for the fact that C.H. did not report to her any digital penetration and the nurse noted a mark on C.H.'s neck.

{¶ 8} Laura Evans, a DNA analyst at the Cuyahoga County Medical Examiner's Office testified that testing of the victim's vaginal swabs revealed the presence of seminal material but no DNA profile foreign to the victim was found. The DNA analyst testified that sometimes the victim's DNA can mask the another person's DNA. She testified that Jackson could not be excluded as a possible contributor to the DNA profile from a dried stain from the victim's left ear. She further testified that testing done of the pe-

nile swabs taken from Jackson could not exclude C.H. as a possible contributor.

{¶ 9} Holly Mack, an employee of the Cuyahoga County Division of Children and Family Services testified that she is the child advocate in the Cuyahoga County jail and "works" directly with incarcerated parents as well as alleged perpetrators that are in the jail.

{¶ 10} Over objection, Mack testified her protocol is that she identifies herself, advises them they have been named as a perpetrator and what the allegations are that have been levied against them and "I also let them know that anything they tell me can be subpoenaed by the courts."

{¶ 11} Appellant testified on his own behalf. He testified, however, only because the court admitted the testimony concerning what was allegedly said to the child advocate, over objection. Appellant claimed that the sexual activity with the victim was consensual. He maintained that he had only a few swigs of alcohol and smoked two blunts of marijuana on the night in question. He testified that everyone, including the victim, was drinking and that he thought the victim was at least 18 years old. He testified that the victim started kissing him, that they performed oral sex on each other and that the victim asked him to pay her for same. He denied choking the victim or in penetrating her in any fashion. He also testified to the limited mobility of his right arm.

{¶ 12} At the close of the state's case the trial court dismissed the importuning and felonious assault charges. The trial court found appellant guilty of two counts of rape, gross sexual imposition and kidnapping with a sexual motivation specification.

The trial court found appellant not guilty of the third count of rape (cunnilingus).

{¶ 13} The trial court found the kidnapping count to be an allied offense to the rape and gross sexual imposition counts and merged the kidnapping count with those offenses. The state elected to proceed to sentencing on the two rape counts and the kidnapping count. The trial court imposed prison terms of 11 years on each of the three counts and ordered the sentences to run concurrently.

Law and Analysis

I. Appellant's Statements Made to the Child Advocate

{¶ 14} In his first assignment of error, appellant argues that his Fifth and Sixth Amendment rights were violated by the introduction of the child advocate's testimony regarding her questioning of appellant after his arraignment, outside the presence of counsel and without providing him with *Miranda* warnings. Appellant's objection to the child advocate's testimony was overruled by the trial court.

{¶ 15} Pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), statements stemming from custodial interrogation of the defendant must be suppressed unless the defendant had been informed of his Fifth and Sixth Amendment rights before being questioned. *Id*. *Miranda* defines "custodial interrogations" as any "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id*. at 444, 86 S.Ct. 1602.

{¶ 16} The state argues that the child advocate did not quality as an agent of law enforcement and that a custodial interrogation did not occur. We disagree.

II. The Child Advocate functioned as an Agent of Law Enforcement

{¶ 17} Miranda requirements do not apply to admissions made to persons who are not officers of the law or their agents. *State v. Clark*, 8th Dist. Cuyahoga No. 44015, 1982 WL 5326 (Apr. 29, 1982), citing *State v. Watson*, 28 Ohio St.2d 15, 275 N.E.2d 153 (1971). In *State v. Jones*, 8th Dist. Cuyahoga No. 83481, 2004-Ohio-5205, 2004 WL 2340164, this court acknowledged that "in certain circumstances a social worker may be required to provide Miranda warnings, i.e., when acting as an agent of the police." *Id*. at ¶ 40.

{¶ 18} On the facts before us we find the child advocate to have been acting as an agent of law enforcement when she interrogated appellant. Pursuant *State v. Bolan*, 27 Ohio St.2d 15, 271 N.E.2d 839 (1971), in order to qualify as an agent of law enforcement, the agent must act under the direction or control of a law enforcement agency. *Id*. at 18, 271 N.E.2d 839. This requirement is satisfied in this instance due to the formal procedure established by CCDCFS and local law enforcement for routinely conducting interrogations of defendants without providing *Miranda* warnings. These interrogations are proceeding under the direction, and for the benefit, of law enforcement pursuant to a "memorandum of understanding" required by Ohio law. R.C. 2151.421(F), (J).

{¶ 19} The record reflects that CCDCFS has social workers assigned to the Cuyahoga County jail as a child advocate. The child advocate testified that one of her primary job duties at the jail is to interview alleged perpetrators connected to abuse and neglect cases. These interviews occur in the county jail while defendants, such as appellant, are awaiting trial. As this case evidences, those interviews are occurring after counsel has been appointed for defendants at arraignment, without any notification to said counsel and without obtaining any waiver of the defendant's Fifth or Sixth Amendment rights. The child advocate does not administer *Miranda* warnings. It is absolutely undisputed that if sworn law enforcement officers conducted interviews in this manner, the practice would violate defendants' Fifth and Sixth Amendment rights.

{¶ 20} The child advocate is required by Ohio law not only to conduct an investigation in cooperation with law enforcement but also to submit a report of the advocate's investigation, in writing, to law enforcement. R.C. 2151.421(F). The aforementioned "memorandum of understanding" required by R.C. 2151.421(F), *926 (J) formalizes and structures the investigatory relationship between CCDCFS and the law enforcement agency. The child advocate in this instance took notes of her interview with appellant and recorded the interview in CCDCFS's computer system.

{¶ 21} We can find no legitimate purpose for the child advocate's interview of appellant in this case other than to directly assist the investigation of law enforcement pursuant to R.C. 2151.421(F). Indeed, it is a struggle to conceptualize hypothetical instances where a CCDCFS social worker could have a legiti-

mate reason to interview an incarcerated defendant awaiting trial for the purpose of aiding a child victim. To the extent that such instances exist, it is evident from the record that this case is not one of those instances. The record reflects that the 14–year old victim was able to communicate the relevant facts to CCDCFS and law enforcement and that there was no familial relationship between the child victim and defendant. The dissent offers absolutely no explanation of what alternative, legitimate purpose the interview might have served. This is because there simply is no legitimate justification for the interview other than to assist the investigation of law enforcement pursuant to the formalized relationship under R.C. 2151.421(F), (J).

{¶ 22} While the child advocate may have been performing her customary duties as an investigator for CCDCFS, it is problematic to this court that the advocate's customary duties are designed to routinely violate the constitutional rights of defendants. This case reveals that law enforcement and CCDCFS have a systematic procedure in place to interview jailed defendants in a manner that blatantly attempts to evade the constrictions of the Fifth and Sixth Amendments. Consistent with this arrangement, the child advocate in this instance conducted an unconstitutional custodial interrogation of appellant, documented and shared the results with law enforcement and testified against appellant at trial regarding the admissions he made during the interrogation. We can only conclude that the practice worked as intended. The child advocate functioned as an agent of law enforcement and appellant's Fifth Amendment rights were violated when he was interrogated without being Mirandized. As the interview

would have been illegal had it been conducted by law enforcement we cannot see how it becomes legal when it is accomplished by a separate state actor who conducts the interrogation under the direction of a formal agreement with law enforcement and who is legally required to forward the collected information to law enforcement.

III. Custodial Interrogation

{¶ 23} We also find that a custodial interrogation occurred in this instance. *Howes v. Fields*, 565 U.S. 499, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012), is instructive on this issue. In *Howes* the United States Supreme Court stated: "imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*." Id. at 1190. However, relevant to the present case *Howes* explained:

> There are at least three strong grounds for this conclusion. First, questioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest. In the paradigmatic Miranda situation—a person is arrested in his home or on the street and whisked to a police station for questioning—detention represents a sharp and ominous change, and the shock may give rise to coercive pressures. A person who is "cut off from his normal life and companions," *[Maryland v.] Shatzer*, supra, [559 U.S. 98] at 106, 130 S.Ct. [1213] at 1219, 175 L.Ed.2d [1045] at 1051 [(2010)], and abruptly transported from the street into a "police-dominated atmosphere," *Miranda*, 384 U.S., at 456, 86 S.Ct. 1602, 16 L.Ed.2d 694, may feel coerced into answering questions.

By contrast, when a person who is already serving a term of imprisonment is questioned, there is usually no such change. "Interrogated suspects who have previously been convicted of crime live in prison." *Shatzer*, 559 U.S., at 113, 130 S.Ct. at 1220, 175 L.Ed.2d at 1054. For a person serving a term of incarceration, we reasoned in *Shatzer*, the ordinary restrictions of prison life, while no doubt unpleasant, are expected and familiar and thus do not involve the same "inherently compelling pressures" that are often present when a suspect is yanked from familiar surroundings in the outside world and subjected to interrogation in a police station. 559 U.S., at 99, 130 S.Ct. at 1217, 175 L.Ed.2d at 1050.

Second, a prisoner, unlike a person who has not been sentenced to a term of incarceration, is unlikely to be lured into speaking by a longing for prompt release. When a person is arrested and taken to a station house for interrogation, the person who is questioned may be pressured to speak by the hope that, after doing so, he will be allowed to leave and go home. On the other hand, when a prisoner is questioned, he knows that when the questioning ceases, he will remain under confinement. 559 U.S., at 124, n. 8, 130 S.Ct. at 1220–1221, 175 L.Ed.2d at 1054–1055.

Third, a prisoner, unlike a person who has not been convicted and sentenced, knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence. 559 U.S., at 113–114, 130 S.Ct. at 1220–1221, 175 L.Ed.2d at 1054–1055.

> And "where the possibility of parole exists," the interrogating officers probably also lack the power to bring about an early release. *Ibid*. "When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners." *[Illinois v.] Perkins*, 496 U.S. [292], at 297, 110 S.Ct. 2394, 110 L.Ed.2d 243 [(1990)]. Under such circumstances, there is little "basis for the assumption that a suspect ... will feel compelled to speak by the fear of reprisal for remaining silent or in the hope of [a] more lenient treatment should he confess." 496 U.S., at 296–297, 110 S.Ct. 2394, 110 L.Ed.2d 243.
>
> In short, standard conditions of confinement and associated restrictions on freedom will not necessarily implicate the same interests that the Court sought to protect when it afforded special safeguards to persons subjected to custodial interrogation. Thus, service of a term of imprisonment, without more, is not enough to constitute Miranda custody.

Id. at 1190–1191.

{¶ 24} This analysis clearly distinguishes the situation faced by the defendant in *Howes*, who was questioned about pending charges while serving a prison term on an unrelated offense. Unlike *Howes*, appellant was questioned concerning pending charges while in custody at the county jail awaiting trial on said charges. In fact, each of the three above rationales identified in *Howes* weigh in favor of appellant's argument that he was subjected to a custodial interrogation in this instance.

{¶ 25} *Howes* set forth the appropriate analysis for determining if a person is in custody for *Miranda* purposes:

> In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of the objective circumstances of the interrogation, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. In considering a suspect's freedom of movement, a court must consider the totality of the circumstances, including the following relevant factors: (1) the location of the questioning, (2) its duration, (3) statements made during the interview, (4) the presence or absence of physical restraints during the questioning, and (5) the release of the interviewee at the end of the questioning. However, freedom of movement is not a solely determinative factor, and courts must consider whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in Miranda.

Id. at 1189–1190 (internal quotations and citation omitted).

{¶ 26} In this instance the child advocate from CCDCFS testified that one of her job duties is interviewing alleged perpetrators, such as appellant, regarding the allegations made against them while they are in custody at the Cuyahoga County jail. These interviews occur outside the defendant's housing unit within the jail. The child advocate testified that she identifies herself, informs the alleged perpetrators of what the allegations are against them and

informs them that anything they tell her can be "subpoenaed by the courts." The child advocate stated that it is then up to the incarcerated person to continue with the interview or not. Within this protocol, the child advocate testified that she interviewed appellant on August 11, 2015 regarding the allegations that he had had oral and vaginal sex with a minor.

{¶ 27} The record establishes that a custodial interrogation occurred in this instance. Applying the above framework, (1) appellant was questioned while awaiting trial in the county jail, (2) we have no information on the duration of the questioning, (3) appellant admitted during the questioning to having oral sex with a minor, (4) implicit within the child advocate testimony was the fact that appellant was restrained during the interview if, as she described, she interviewed him outside his housing unit and (5) appellant was returned to his jail cell following the questioning. In addition to these factors, the three further considerations identified above by the Supreme Court in *Howes*, all weigh in favor of finding that the questioning of appellant, an individual charged with crimes and awaiting trial in jail, was a custodial interrogation.

{¶ 28} Therefore, we conclude that a custodial interrogation occurred here, it was conducted by an agent of law enforcement and appellant's Fifth Amendment rights were violated when the child advocate failed to administer *Miranda* warnings.

IV. Appellant's Sixth Amendment Rights Were Also Violated

{¶ 29} We note that appellant's Sixth Amendment right to counsel was violated as well. Appellant was arrested on August 5, 2015, arraigned and assigned an attorney on August 7, 2015 and interviewed outside the presence of his attorney and without *Miranda* warnings on August 11, 2015. This is a plain violation of his Sixth Amendment right to counsel pursuant to the United States Supreme Court's decisions in *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009), and *Massiah v. United States*, 377 U.S. 201, 204–205, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). As *Montejo* makes clear, any custodial interrogation conducted by an agent of law enforcement after counsel is assigned at arraignment must be immediately precipitated by *Miranda* warnings and a valid waiver of counsel. As neither occurred in this instance, we find that appellant's Sixth Amendment rights were also violated.

{¶ 30} Jackson's first assignment of error is sustained.

{¶ 31} We find appellant's second and third assignments of error to be moot.

{¶ 32} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

MARY J. BOYLE, J., concurs.

SEAN C. GALLAGHER, J., dissents.

SEAN C. GALLAGHER, J., dissenting.

{¶ 33} I respectfully dissent from the majority decision and would affirm the decision of the trial court. I disagree with the majority's determination

that the child advocate was acting as an agent of law enforcement and conducted a custodial interrogation. I do not believe that appellant's Fifth or Sixth Amendment rights were violated. I would overrule each of the assignments of error raised.

{¶ 34} Under his first assignment of error, appellant claims the trial court erred by allowing the child advocate from the Cuyahoga County Division of Children and Family Services ("CCDCFS") to testify about the statements she elicited from appellant. Appellant was questioned by the child advocate while he was in custody at the county jail after he had been arrested. Although appellant had been given Miranda warnings when questioned at the jail by the detective, he was later independently interviewed by the child advocate without being given *Miranda* warnings. Appellant claims his statements to the child advocate were obtained during a custodial interrogation and without first advising appellant of his *Miranda* rights and obtaining a valid waiver.

{¶ 35} Pursuant to *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." "Custodial interrogation" is considered "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*

{¶ 36} *Miranda* warnings are required only when a suspect is subjected to custodial interrogation.

State v. Jones, 8th Dist. Cuyahoga No. 83481, 2004-Ohio-5205, 2004 WL 2340164, ¶ 39.[2] Further, the *Miranda* requirements do not apply when admissions are made to persons who are not law enforcement officers or their agents. *State v. Coonrod*, 12th Dist. Fayette No. CA2009–08–013, 2010-Ohio-1102, 2010 WL 1019586, ¶ 8, citing *State v. Watson*, 28 Ohio St.2d 15, 26, 275 N.E.2d 153 (1971).

{¶ 37} The child advocate was not a "law enforcement officer" as the term is defined under R.C. 2901.01(A)(11)(b).[3] Furthermore, because social workers are private individuals without the power to arrest, they generally have no duty to provide *Miranda* warnings. *Jones* at ¶ 40; *Coonrod* at ¶ 9. Nevertheless, they may be required to do so in specific instances, i.e., when acting as an agent of the police department. *Jones* at ¶ 40; *Coonrod* at ¶ 9. The record does not reflect that the child advocate acted as an agent of a law enforcement officer.

{¶ 38} The child advocate testified that the agency receives referrals for abuse and neglect and that she works "directly with * * * alleged perpetrators that are in the jail" and interviews the alleged perpetrators regarding the allegations. In regard to the sex-

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[2] I do not agree with the state's reliance on the "freedom of movement standard." Also, I acknowledge that this is not a case of a prisoner who is already serving a term of imprisonment on unrelated charges. *See Howes v. Fields*, 565 U.S. 499, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012).

[3] A law enforcement officer is defined under R.C. 2901.01(A)(11)(b) as follows: "An officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, a duty to conserve the peace or to enforce all or certain laws is imposed and the authority to arrest violators is conferred * * *."

abuse referral CCDCFS received in this matter, the child advocate testified she interviewed appellant at the request of the ongoing social worker of record. The child advocate indicated that her protocol is to identify herself, inform the individual that the individual has been named as an alleged perpetrator, inform the individual of the allegations, and inform the individual that anything said can be subpoenaed by the courts and that it is up to the individual whether to continue with the interview. The record reflects that the child advocate was performing her customary duties as a child advocate, by interviewing an alleged perpetrator in jail.

{¶ 39} Appellant claims that there was testimony from the sex abuse intake social worker, who was assigned to the case, about how her department collaborates with the Cleveland Police Department in the investigation of sex crimes involving minors, and that such cooperation is required by Ohio law. However, her testimony was that she had contacted the police department in an effort to conduct a joint interview with the child, but she conducted her own interview because the police had already spoken to the child. She also contacted the hospital, spoke with the nurse, and viewed the hospital reports. She did not speak to the defendant, whose interview was conducted by the child advocate at the county jail.

{¶ 40} Pursuant to R.C. 2151.421(F), the children services agency's investigation of a report of child abuse or child neglect "shall be made in cooperation with the law enforcement agency" and the agency must "submit a report of its investigation, in writing, to the law enforcement agency." The duty to cooperate with and submit a report to law enforcement does not, in itself, demonstrate that the child advo-

cate acted as an agent of law enforcement. *See State v. Phillips*, 4th Dist. Highland No. 11CA11, 2011-Ohio-6773, 2011 WL 6930202, ¶ 14. *Phillips* was a similar case where the defendant was questioned by children services employees regarding allegations of sexual abuse of a child while he was incarcerated and after he had been questioned by a member of law enforcement and had invoked his Fifth Amendment rights. *Id.* at ¶ 17. The court recognized that children services has a statutory duty to investigate and that the investigation must be made in cooperation with law enforcement, but found this fell short of demonstrating that the children services investigators acted as agents of law enforcement. *Id.* at ¶ 13–14. The court determined that the children services investigators were simply executing their duty to investigate allegations of child abuse, and there was no evidence to suggest the children services agency acted at the direction, behest, or control of law enforcement. *Id.* at ¶ 17.

{¶ 41} As the Ohio Supreme Court has recognized:

> [T]he duty of giving "*Miranda* warnings" is limited to employees of governmental agencies whose function is to enforce law, or to those acting for such law enforcement agencies by direction of the agencies; that it does not include private citizens not directed or controlled by a law enforcement agency, even though their efforts might aid in law enforcement.

State v. Bolan, 27 Ohio St.2d 15, 18, 271 N.E.2d 839 (1971).

{¶ 42} Although the child advocate's report might have aided law enforcement, the record does not

demonstrate that the child advocate was acting as an agent of law enforcement. Moreover, the child advocate is not deemed an agent of law enforcement by the mere fact that child advocates may cooperate and collaborate their investigations with the police. This also is not a case where a police officer was present during the interview conducted by the child advocate; rather, an independent interview was conducted.

{¶ 43} The record reflects that the child advocate was performing her customary duties as an investigator for CCDCFS, and there is nothing to show that she was acting at the direction, control, or behest of law enforcement. Thus, it cannot be said that the child advocate was acting as an agent of law enforcement or that appellant was subjected to a "custodial interrogation" as contemplated by *Miranda*. *See Phillips* at ¶ 17–18; *Coonrod*, 12th Dist. Fayette No. CA2009–08–013, 2010-Ohio-1102, 2010 WL 1019586, at ¶ 13; *State v. Simpson*, 4th Dist. Ross No. 1706, 1992 WL 37793, (Feb. 21, 1992). Because no custodial interrogation occurred, appellant's Fifth and Sixth Amendment rights were not violated. Therefore, I believe appellant's first assignment of error should be overruled.

{¶ 44} Under his second assignment of error, appellant claims that the trial court committed prejudicial error by admitting hearsay declarations made by the alleged victim to the police officer who interviewed her. Specifically, he argues that the court erred by allowing the responding officer to testify that the alleged victim told him she had been raped.

{¶ 45} The record reflects that the responding officer was testifying to what the victim told him when

he first arrived at the scene and began his investigation. Although the trial court overruled an objection to this testimony, this was a bench trial and the trial court did not afford any deference to the statement. The trial court stated, "I'm certainly not going to take it as evidence of the content." Further, the improper admission of evidence is harmless beyond a reasonable doubt where the remaining evidence constitutes overwhelming proof of a defendant's guilt. *State v. Murphy*, 91 Ohio St.3d 516, 555, 747 N.E.2d 765 (2001), citing *State v. Williams*, 6 Ohio St.3d 281, 452 N.E.2d 1323 (1983), paragraph six of the syllabus. In this matter, several other witnesses testified to the victim exclaiming she had been raped, and the remaining evidence in the record provided overwhelming evidence of appellant's guilt beyond a reasonable doubt. Thus, any error in the admission of the statement would have constituted harmless error. For these reasons, I would overrule appellant's second assignment of error.

{¶ 46} Under his third assignment of error, appellant claims his convictions were against the manifest weight of the evidence. When reviewing a claim challenging the manifest weight of the evidence, the court, reviewing the entire record, must weigh the evidence and all reasonable inferences, consider the credibility of witnesses, 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 that the conviction must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Reversing a conviction as being against the manifest weight of the evidence should be reserved for only

the exceptional case in which the evidence weighs heavily against the conviction. *Id.*

{¶ 47} Appellant argues that the case came down to the victim's credibility and that doubt was cast on the state's case because it failed to present a crucial piece of evidence, i.e., the victim's underwear. The record reflects that the victim provided detailed testimony of the events that transpired, and other testimony and evidence introduced supported the victim's version of events. The witnesses were effectively cross-examined, and the court also heard testimony from appellant. The trial court was able to observe the witnesses and was in the best position to take into account any inconsistencies in their testimony in determining whether the proffered testimony was credible. The trial court thoroughly examined the testimony and the evidence presented and stated that it "didn't find anything about [appellant's] story to be credible[,]" that the victim's version of events "very credibly portrays a sexually assaulted 14–year–old[,]" and that "it cannot be believed that the victim's actions here * * * was [sic] anything other than a recent victim of a brutal sexual assault."

{¶ 48} Upon review of the record, I do not believe this to be the exceptional case where the evidence weighs heavily against conviction. I would find appellant's convictions are not against the manifest weight of the evidence and overrule his third assignment of error.

{¶ 49} Accordingly, I dissent from the majority opinion and would affirm the judgment of the trial court.

APPENDIX C

Court of Appeals of Ohio
Eighth District, Cuyahoga County

STATE OF OHIO PLAINTIFF-APPELLEE

v.

DEMETRIUS JACKSON DEFENDANT-APPELLANT

No. 103957

RELEASED AND JOURNALIZED: August 30, 2018

JUDGMENT: AFFIRMED

Criminal Appeal from the Cuyahoga County Court of Common Pleas

Case No. CR-15-598188-A

ATTORNEY FOR APPELLANT Jonathan N. Garver The Brownhoist Building 4403 St. Clair Avenue Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEE Michael C. O'Malley Cuyahoga County Prosecutor BY: Sherrie S. Royster Anthony Thomas Miranda Assistant Prosecuting Attorneys The Justice Center, 8th Floor 1200 Ontario Street Cleveland, Ohio 44113

BEFORE: E.A. Gallagher, A.J., Boyle, J., and S. Gallagher, J.

EILEEN A. GALLAGHER, A.J.:

{¶1} This cause is before this court on remand from the Ohio Supreme Court in *State v. Jackson*, Slip Opinion No. 2018-Ohio-2169, for further review of our decision released December 15, 2016. The Ohio Supreme Court, having reversed our judgment in this case which was based on the Fifth and Sixth Amendments to the United States Constitution, has

remanded it to us with instructions to consider Jackson's second and third assignments of error.

{¶2} Defendant-appellant Demetrius Jackson appeals his convictions for rape, gross sexual imposition and kidnapping in the Cuyahoga County Court of Common Pleas. For the following reasons, we affirm as to those assignments of error.

Factual and Procedural Background

{¶3} Appellant was charged by a Cuyahoga County Grand Jury with three counts of rape, gross sexual imposition, importuning with a prior conviction for a sexually or child victim oriented offense, felonious assault and kidnapping with a sexual motivation specification. Each of these crimes were alleged to have been committed against a 14-year old female ("C.H.").

{¶4} The case proceeded to a bench trial where C.H. testified that, on August 5, 2015, she went to an older sister's home in Cleveland, Ohio and was interacting with her young relatives while two of her sisters were on the porch drinking with the appellant. C.H. testified that she did not know the appellant and that both of her sisters were intoxicated. Later that night, the occupant of the home, C.H.'s sister N.J.,[1] told C.H. to go upstairs and lay down with N.J.'s two children, ages 7 and 1. C.H. had fallen asleep in a bedroom with the two children and was awakened by the appellant who told her that her sister, S.H., had told him to come lay with her. C.H. rebuffed his advances and told him to leave the room, which he did, and after which he went downstairs but returned and repeated that her sister told

[1] N.J. identified herself as the victim's "god-sister."

him to go upstairs and lay with her. C.H. herself went downstairs, as did the appellant, and found both of her sisters to be asleep on a couch. At that point the appellant laid himself on the living room floor and C.H. returned upstairs to a bedroom.

{¶5} C.H. testified that appellant returned to the upstairs bedroom and asked her to allow him to perform oral sex on her. When she refused, appellant stated "I'll give you $200 a week if you don't say anything." Appellant then "ripped" C.H.'s underwear off of her, proceeded to perform oral sex on her and when she resisted, he choked her and said "let me just do this." The appellant then inserted his fingers, and later his penis, into her vagina.

{¶6} At some point appellant stopped his assault which gave C.H. an opportunity to grab her cellular telephone from a windowsill and run, without shoes or underwear, to a family member's home approximately eight houses away and from where Cleveland police were called. C.H. was transported to University Hospitals by EMS where she was examined, treated and released.

{¶7} N.J., the occupant of the home where these events transpired, testified that on the night in question, her sister S.H. brought appellant to the house after she went to the store to purchase alcohol. N.J. testified that she had fallen asleep and was awakened, on the couch, by her brother-in-law, K.F., who informed her that C.H. was at his home down the street and that she had been raped. N.J. went to the house of K.F. where she found the victim "hysterically crying ... she was screaming 'he raped me, he raped me. . .' "

{¶8} Kathleen Hackett, the sexual assault nurse examiner who interacted and examined C.H. at U.H. Rainbow Babies and Children's Hospital read the victim's own words from the triage notes that echoed C.H.'s testimony but for the fact that C.H. did not report to her any digital penetration. The nurse noted a mark on C.H.'s neck.

{¶9} Laura Evans, a DNA analyst at the Cuyahoga County Medical Examiner's Office testified that testing of the victim's vaginal swabs revealed the presence of seminal material but no DNA profile foreign to the victim was found. The DNA analyst testified that sometimes the victim's DNA can mask another person's DNA. She testified that Jackson could not be excluded as a possible contributor to the DNA profile from a dried stain from the victim's left ear. She further testified that testing done of the penile swabs taken from Jackson could not exclude C.H. as a possible contributor.

{¶10} Appellant testified on his own behalf. He testified, however, only because the court admitted the testimony concerning what was allegedly said to the child advocate, over objection. Appellant claimed that the sexual activity with the victim was consensual. He maintained that he had only a "few swigs" of alcohol and smoked two blunts of marijuana on the night in question. He testified that everyone, including the victim, was drinking and that he thought the victim was at least 18 years old. He testified that the victim started kissing him, that they performed oral sex on each other and that the victim asked him to pay her for same. He denied choking the victim or in penetrating her in any fashion. He also testified to the limited mobility of his right arm.

{¶11} At the close of the state's case the trial court dismissed the importuning and felonious assault charges. The trial court found appellant guilty of two counts of rape, gross sexual imposition and kidnapping with a sexual motivation specification. The trial court found appellant not guilty of the third count of rape (cunnilingus).

{¶12} The trial court found the kidnapping count to be an allied offense to the rape and gross sexual imposition counts and merged the kidnapping count with those offenses. The state elected to proceed to sentencing on the two rape counts and the kidnapping count. The trial court imposed prison terms of 11 years on each of the three counts and ordered the sentences to run concurrently.

Law and Analysis

I. Hearsay

{¶13} In his second assignment of error, Jackson argues that he was denied his Sixth Amendment right to be confronted with the witnesses against him when the state introduced an alleged hearsay statement through the testimony of Cleveland police officer Louis Adipietro. Adipietro testified that he responded to the scene and that C.H. told him, "I was raped."

{¶14} 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. *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588, ¶ 118.

{¶15} "Law-enforcement officers may testify to out-of-court statements for the nonhearsay purpose of explaining the next investigatory step." *State v. Beasley*, Slip Opinion No. 2018-Ohio-493, ¶ 172, citing *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 186. Testimony to explain police conduct is admissible as nonhearsay if it satisfies three criteria: (1) the conduct to be explained is relevant, equivocal, and contemporaneous with the statements, (2) the probative value of the statements is not substantially outweighed by the danger of unfair prejudice, and (3) the statements do not connect the accused with the crime charged. *Id.*, citing *State v. Ricks*, 136 Ohio St.3d 356, 2013-Ohio-3712, 995 N.E.2d 1181, ¶ 27.

{¶16} The testimony in this instance satisfies the standard of *Ricks*. Officer Adipietro was describing his interaction with C.H. when he arrived on scene solely as context for his subsequent investigatory steps and C.H.'s statement did not implicate Jackson. Therefore, the statement was nonhearsay and did not violate the Confrontation Clause. *Id.* at ¶ 175, citing *McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, at ¶ 186.

{¶17} Furthermore, even if the statement had not been admissible under *Ricks*, any error would be harmless in this instance. First, this case was tried to the bench and despite overruling the objection the trial court stated that it would not consider the statement as evidence to establish that C.H. was raped. Secondly, C.H. testified at trial that she was raped. 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, 8th Dist. Cuyahoga No. 83419, 2004-Ohio-5380, ¶ 78, citing *State v. Tomlinson*, 33 Ohio App.3d 278, 281, 515 N.E.2d 963 (12th Dist.1986); *State v. Shropshire*, 8th Dist. Cuyahoga No. 104775, 2017-Ohio-8308, ¶ 26.

{¶18} Jackson's second assignment of error is overruled.

II. Manifest Weight

{¶19} In his third assignment of error, Jackson argues that his convictions are against the manifest weight of the evidence.

{¶20} A manifest weight challenge attacks the credibility of the evidence presented and questions whether the state met its burden of persuasion at trial. *State v. Whitsett*, 8th Dist. Cuyahoga No. 101182, 2014-Ohio-4933, ¶ 26, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541; *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. Because it is a broader review, a reviewing court may determine that a judgment of a trial court is sustained by sufficient evidence but nevertheless conclude that the judgment is against the weight of the evidence.

{¶21} In evaluating a challenge to the verdict based on the manifest weight of the evidence in a bench trial,

> [T]he trial court assumes the fact-finding function of the jury. Accordingly, to warrant reversal from a bench trial under a manifest weight of the evidence claim, this court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolv-

> ing conflicts in evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered.

Cleveland v. Welms, 169 Ohio App.3d 600, 2006-Ohio-6441, 863 N.E.2d 1125, ¶ 16 (8th Dist.), citing *Thompkins*.

{¶22} In conducting such a review, this court remains mindful that the credibility of witnesses and the weight of the evidence are matters primarily for the trier of fact to assess. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraphs one and two of the syllabus. Reversal on manifest weight grounds is reserved for the "exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983).

{¶23} Jackson argues that his convictions were against the manifest weight of the evidence because the convictions hinged on the credibility of C.H.'s account of the incident and because the investigating officers failed to collect C.H.'s underwear for examination. The trial court in this instance heard accounts of the incident from both C.H. and Jackson and concluded that C.H.'s version of events "very credibly portrays a sexually assaulted 14-year-old." Conversely, the trial court did not find Jackson's story to be credible particularly in light of the C.H.'s flight from the scene following their encounter. The trial court also noted that Jackson's use of his right arm at trial was inconsistent with the defense's position he could not have used the arm as described by C.H. due to its limited mobility. The trial court was in the best position to judge the credibility of the

witnesses in this instance. We cannot say that its judgment is against the manifest weight of the evidence.

{¶24} Jackson's third assignment of error is overruled.

{¶25} Judgment affirmed.

It is ordered that appellee recover from appellant the 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

SEAN C. GALLAGHER, J., CONCURS IN JUDGMENT ONLY (WITH SEPARATE OPINION); MARY J. BOYLE, J., CONCURS IN JUDGMENT ONLY AND CONCURS WITH SEPARATE OPINION

SEAN C. GALLAGHER, J., CONCURRING IN JUDGMENT ONLY:

{¶26} I concur in judgment only with the lead opinion because I believe the law enforcement officer's testimony that C.H. told him "I was raped" was hearsay. It is clear from the record that appellant was the suspect in the case. The testimony was introduced after the officer was questioned regarding what the victim meant when she indicated "it's my fault" while on the scene. The officer then testified that "[w]hile on the scene, she did say, 'I was raped.'"

By implication, the statement was in reference to the incident between appellant and the victim, thereby connecting appellant to the crime charged. The testimony constituted inadmissible hearsay because it was offered to prove the truth of the matter asserted, rather than to explain police conduct. Nonetheless, I agree with the majority that any error was harmless because the trial court did not consider the statement as evidence that the victim was raped and the victim herself testified at trial that she had been raped. I also agree that appellant's convictions are not against the manifest weight of the evidence. Therefore, the trial court's judgment should be affirmed.

APPENDIX D

The Supreme Court of Ohio

State of Ohio Case No. 2018-1277

v.

Demetrius Jackson ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S. Ct. Prac. R. 7.08(B)(4).

(Cuyahoga County Court of Appeals; No. 103957)

/s/ Maureen O'Connor
Chief Justice

[Stamp]
Filed Nov. 21 2018
Clerk of Court
Supreme Court of Ohio