[Cite as *State v. Simms*, 2012-Ohio-2321.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-1063 (C.P.C. No. 09CR-07-4205)
Timothy Simms,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 24, 2012

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Timothy Simms ("appellant"), appeals from a judgment of conviction entered following a jury trial in the Franklin County Court of Common Pleas in which he was convicted of six counts of rape, six counts of sexual battery, and three counts of gross sexual imposition. For the reasons that follow, we affirm in part and reverse in part and remand this matter for resentencing.

I. Facts and Procedural History

{¶ 2} On July 15, 2009, appellant was indicted on 17 counts alleging he committed numerous sexual acts involving his nine-year-old daughter, as well as tampering with evidence and disseminating matter harmful to juveniles. The alleged sexual acts occurred between November 5, 2008 and June 28, 2009, and involved acts

such as fellatio, cunnilingus, digital vaginal penetration, anal penetration, and sexual contact.

{¶ 3} On October 19, 2010, a jury trial commenced. The State of Ohio ("the State") introduced the testimony of appellant's daughter, E.J., E.J.'s mother S.J., and Detective David McGuire, as well as the testimony of forensic interviewer Diane Lampkins, and Mary Ranee Leder, M.D.

{¶ 4} E.J., who was almost 11 years old by the time of the trial, testified she lived with her mother, stepfather, older sister, and younger brother in Circleville, Ohio. Prior to moving to Circleville, E.J. testified she had lived in Columbus and visited her father (appellant) every other weekend and after school when he got off work. He usually picked her up at 4:30 p.m. on school nights and then took her home to her mother's house, which was about ten minutes away, at approximately 6:00 p.m. When she stayed at her father's house, she slept downstairs in the basement.

{¶ 5} E.J. testified that when she went to visit appellant, he would touch her private parts inappropriately underneath her clothing. E.J. explained appellant touched her on both the inside and the outside of her vagina, as well as inside and outside of her butt. She testified this touching happened more than two times and that it was with his hands or fingers. E.J. also testified appellant made her lick his penis and he put his mouth on her vagina. She testified both of these things happened more than once. In addition, E.J. testified she observed appellant ejaculate when she saw "white stuff" coming out of his penis. (Tr. 38.) Finally, E.J. testified appellant asked her to help give him an enema more than once and he also gave her an enema one time. E.J. further testified all of these acts occurred at her father's house some time after she turned nine years old and that her stepmother was at work when they occurred.

{¶ 6} E.J. described a locked black suitcase her father kept in his bedroom which contained items such as a ping-pong paddle they used to smack one another on the butt, magazines and movies displaying naked women and "their private parts," the enema, a dildo, a red cord, a flyswatter, and a tube of KY jelly. (Tr. 40.) She testified appellant used the items in the suitcase when she came to visit. E.J. also testified appellant showed her videos of naked women on his computer. Additionally, E.J. testified they played a card

game on more than one occasion called "21," which required the person whose cards totaled more than 21 to remove an item of clothing.

{¶ 7} One day when E.J. was telling a friend about what happened with appellant, E.J.'s older sister overheard the conversation and reported it to their mother, S.J. E.J. eventually told her mother about what had happened with appellant. She testified her mother asked a lot of questions and then called someone who came over to the house and interviewed E.J. E.J. and her mother, stepfather, and two siblings then packed up the car to go on a vacation, but appellant came to the house and began following them, so they drove to the police station. The police then escorted E.J. and her family to Nationwide Children's Hospital. At the hospital, E.J. was interviewed and drew pictures of the black suitcase and its contents. She was also examined by a doctor.

{¶ 8} S.J., E.J.'s mother, testified she had known appellant for approximately 13 years. The two of them were romantically involved for approximately two and one-half months and had E.J. as a result of that relationship, but they had remained the best of friends. S.J. testified she and appellant had shared parenting and appellant took care of E.J. almost as much as she did. S.J. testified appellant had E.J. every other weekend and some holidays, but if he had time off work, she would allow him to spend additional time with E.J. S.J. testified she did not think she had any problems in her relationship with appellant.

{¶ 9} S.J. testified she learned of what was going on between appellant and E.J. from her older daughter and from E.J.'s friend in June 2009. S.J. could not believe the allegations. The mother of E.J.'s friend threatened to call Franklin County Children's Services, so S.J. called children's services first. A social worker came to the house to interview E.J. During that time, appellant called S.J. several times and wanted to know what was happening. After the interview, as S.J. and her family were leaving the residence, appellant arrived at the house. The family then drove to the police department in order to be escorted to Nationwide Children's Hospital, where E.J. was interviewed and examined.

{¶ 10} Diane Lampkins, a forensic interviewer at the child-advocacy center ("CAC") of Nationwide Children's Hospital who interviews children regarding abuse and neglect allegations, testified she interviewed E.J. During the interview, E.J. disclosed the

type of sexual abuse to which she had been exposed. Ms. Lampkins testified E.J. talked about the following: exposure to pornography; anal contact; games involving sexual acts; a box containing secret sex toys; ejaculation; enemas and KY gel; and putting her mouth on appellant's penis. Trial counsel for appellant objected to this testimony, claiming it should be excluded pursuant to Evid.R. 807. The State, on the other hand, argued it was admissible as a prior consistent statement used to rebut a claim of recent fabrication pursuant to Evid.R. 801(D)(1)(b), and for purposes of medical treatment and diagnosis pursuant to Evid.R. 803(4) and the recent case of *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742. The trial court agreed to allow the testimony but declined to permit the introduction of any testimony through Ms. Lampkins regarding the black suitcase or anything involving forensics.

{¶ 11} Ms. Lampkins also testified E.J. described multiple incidents that had occurred with her father and that the incidents had occurred after E.J.'s ninth birthday and had been going on for about six months. Ms. Lampkins originally testified E.J. identified the perpetrator as E.J.'s stepfather, but she later testified E.J. reported her father was the perpetrator.

{¶ 12} Dr. Leder, an attending physician at Nationwide Children's Hospital, testified she evaluates children and adolescents who may have been mistreated physically or sexually or who may have been neglected. Her duties include working at the CAC. Dr. Leder testified she met and examined E.J. for possible sexual abuse at the CAC on June 29, 2009. Dr. Leder also testified she relied upon the history obtained from the forensic interviewer in conducting her own medical examination. Dr. Leder testified the general exam was normal, as was the exam of E.J.'s anal and genital areas. Although the examination was normal, Dr. Leder testified a normal exam neither proved nor disproved that E.J. had sexual contact, and that the absence of abnormal findings or injury was consistent with the history provided by E.J., as one would not expect such findings based on the type of contact E.J. had described.

{¶ 13} Detective McGuire, a Columbus police detective with the sexual assault unit in the special victims bureau, testified he was assigned to assist in the investigation of the case involving E.J. When he arrived at work on June 29, 2009, Detective McGuire was sent to observe, via television monitor, an interview with E.J., which was already in

progress. Based on information obtained from the interview, Detective McGuire acquired a search warrant for appellant's residence at 2635 Youngs Grove Road, in Franklin County, Ohio. Detective McGuire and several other officers went to appellant's residence to interview appellant and to execute the search warrant. Detective McGuire and his partner, Detective Dave Phillips, met appellant and his wife and asked to interview appellant alone. Appellant agreed to speak to the detectives alone. Both detectives possessed active recording devices and recorded their conversation with appellant. Detective McGuire identified a CD of the recorded interview of appellant, which was then played in court for the jury.

{¶ 14} The detectives spoke with appellant for approximately 30 to 60 minutes. During that time, appellant was not given *Miranda* warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). However, appellant was advised that he was not under arrest and that the detectives had no intention of arresting him that night; instead, they just wanted to get his version of events. The detectives informed appellant that they wanted to have an honest interview in order to determine whether the information provided by E.J. was accurate, since frequently these types of cases do not initially produce completely accurate information. They further advised appellant that his willingness to take responsibility and to acknowledge his issues would determine how the case was handled in the court system.

{¶ 15} The detectives informed appellant that E.J. alleged certain sexual things had occurred and that she wanted it to stop. Upon questioning, appellant admitted he and E.J. had played the card game "21." He claimed no clothing was ever removed, but he explained to E.J. that if she ever played the game with boys, they would want her to take off her clothing. Appellant also admitted he had previously applied Desitin cream between E.J.'s legs, given her showers when she was younger, and recently washed her hair to make sure it was clean. Appellant stated he may have unintentionally touched her private areas while she was in the shower or while she was in the bed when he was applying the Desitin cream.

{¶ 16} During the interview, the detectives repeatedly advised appellant they wanted to get help for E.J. They also advised there was help available for appellant as well, but that appellant first had to acknowledge that he had a problem. Appellant

eventually acknowledged he had a problem and asked for help, stating he did not want to go to court or to jail. Appellant advised the detectives his daughter had asked him questions about oral sex and wanted to know how it felt because her sister was taking sex education classes at school and she had books on the subject. Appellant claimed he gave E.J. oral sex one time to answer her questions, and that, unfortunately, it continued to occur.

{¶ 17} The detectives informed appellant that they did not believe E.J. was lying about the events she claimed had occurred. They also encouraged appellant to be truthful. Appellant admitted he had made a big mistake and conceded that E.J. had put her mouth on his penis once, and possibly twice. He stated his wife was at work when these incidents occurred. In response to questioning from the detectives, appellant acknowledged he had a locked briefcase which, at one time, contained items such as magazines, a ping-pong paddle, some KY jelly he and his wife used, and a butt plug. Appellant told the detectives he had gotten rid of the items in the briefcase a few weeks earlier because he knew it was wrong to have them and for E.J. to see them.

{¶ 18} During the interview, appellant admitted E.J. had inserted the butt plug into his butt. He conceded he once had E.J. rub his penis with her hand. Another time, he asserted E.J. asked questions about ejaculation because it was in one of her sister's sex education books, so appellant ejaculated in the shower. Appellant also confessed to performing oral sex on E.J. on more than one occasion.

{¶ 19} In addition, appellant admitted E.J. observed part of a pornographic movie on his computer when it accidently flashed up on the screen and that she also accidently observed part of a pornographic movie on television. Appellant claimed he got rid of those movies a few months ago. Appellant advised the detectives he did not have an issue with child pornography and that any child pornography on his computer was there as a result of "pop ups."

{¶ 20} In response to questioning about playing poker, appellant told the detectives that if he lost the poker game, E.J. was supposed to swat him with the paddle, and if she lost, she was supposed to clean the house naked and appellant was also supposed to be naked. However, appellant asserted that scenario had only been a suggestion and it never actually occurred. Appellant also admitted E.J. gave him an

enema. He gave E.J. an enema as well, although he claimed it was for medical purposes, rather than for sexual purposes. Appellant further stated he had never intentionally put his fingers in E.J.'s vagina, but it may have occurred unintentionally when he was applying Desitin cream because she was experiencing irritation in her private area.

{¶ 21} After the State finished playing the recorded interview with appellant, Detective McGuire testified that the search warrant was executed following the interview. Appellant also signed a consent to search without a warrant form that was presented to him after his interview. During the search, the black briefcase was recovered from appellant's bedroom. However, as appellant had suggested, it was empty.

{¶ 22} Finally, on cross-examination, Detective McGuire was asked about police training he had received on false confessions. He testified he did not believe appellant had made a false confession, but he could not state with certainty that it was not a false confession.

{¶ 23} At the close of the State's case, the prosecution withdrew the count charging appellant with disseminating matter harmful to juveniles (Count 17 of the indictment). Appellant then introduced the testimony of his wife, Mareda "Sue" Simms, as well as a stipulation regarding appellant's payroll records from Rumpke Transportation Company, L.L.C., for the time frame between May 8, 2008 and February 28, 2009.

{¶ 24} Mrs. Simms testified she has known appellant since 1992 and they have been married for ten years. She testified appellant used to exercise visitation with E.J. every other weekend and on Tuesdays and Thursdays, but that between November 2008 and June 2009, that visitation schedule was not in effect because appellant's work schedule had changed. As a result, Mrs. Simms stated they did not see E.J. at all during that time frame. Mrs. Simms also testified that between November 2008 and June 2009, she worked for David's Bridal, in addition to her full-time job at AT&T, where she worked from 7:30 a.m. to 4:00 p.m.

{¶ 25} On October 22, 2010, the jury returned guilty verdicts on all counts except the count charging appellant with tampering with evidence.[1] Thus, appellant was found guilty of 6 counts of rape, 6 counts of sexual battery, and 3 counts of gross sexual

[1] The State dismissed the count alleging dissemination of matter harmful to juveniles prior to the case being submitted to the jury.

imposition. A sentencing hearing was held on October 25, 2010. The trial court orally imposed the following sentence: a term of life imprisonment as to Counts 1 through 6 of the indictment (the rape counts), with Counts 1, 3, 5, and 6 of the indictment running consecutively, and Counts 2 and 4 of the indictment running concurrently; 8 years on Counts 7 through 12 of the indictment (the sexual battery counts), with all counts running concurrently; and 5 years for Counts 13 through 15 (the gross sexual imposition counts), with all counts running concurrently. The trial court also imposed a total of $50,000 in fines, plus court costs. Appellant's judgment entry of conviction was journalized on October 25, 2010. In the judgment entry, the trial court imposed a sentence of life imprisonment without the possibility of parole on the 6 rape convictions. All other aspects of the sentencing entry were consistent with the trial court's oral pronouncement earlier in the day on October 25, 2010.

II. Assignments of Error

{¶ 26} Appellant has now filed a timely appeal and raises five assignments of error for our review:

FIRST ASSIGNMENT OF ERROR

> The trial court erred in permitting the state to introduce a prior consistent statement to bolster the testimony of its critical witness in violation of the Rules of Evidence and due process protections under the state and federal Constitutions.

SECOND ASSIGNMENT OF ERROR

> Appellant was denied effective assistance of counsel as guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

THIRD ASSIGNMENT OF ERROR

> The trial court erred in increasing Appellant's orally pronounced sentence of life imprisonment to a term of life without possibility of parole in its written entry.

FOURTH ASSIGNMENT OF ERROR

> The trial court abused its discretion in imposing consecutive sentences of life imprisonment without possibility of parole.

FIFTH ASSIGNMENT OF ERROR

> The trial court committed plain error in imposing concurrent terms for allied offenses of similar import.

A. First Assignment of Error—Testimony of Forensic Interviewer

{¶ 27} In his first assignment of error, appellant argues the trial court erred by allowing the admission of certain testimony from Ms. Lampkins, the forensic interviewer who spoke with E.J. at the CAC. Specifically, appellant argues much of Ms. Lampkins' testimony constituted hearsay which should have been excluded, and that the admission of such testimony had the effect of bolstering E.J.'s testimony because it represented a prior consistent statement that presented a prior consistent version of events.

{¶ 28} During the trial, appellant's counsel objected to the admission of testimony from Ms. Lampkins regarding the types of sexual activity to which E.J. was exposed and the identity of the perpetrator. In support of the objection, appellant's counsel cited to Evid.R. 807 as authority, claiming the State could not meet the necessary prerequisites set forth in the rule which would prevent E.J.'s out-of-court statements from being excluded as inadmissible hearsay. Here, because E.J. herself had already testified, appellant argued it could not be found that her testimony was not reasonably obtainable and, therefore, the exception was not applicable and Ms. Lampkins' testimony regarding certain statements made to her by E.J. was not admissible. In addition, appellant appears to have possibly raised or inferred a confrontation clause issue existed.

{¶ 29} In response to appellant's objection, the State argued the statements were admissible under Evid.R. 803(4) as statements made for the purpose of medical diagnosis and treatment and subject to the limitations imposed by the recent case of *Arnold*. The State further argued the admission of the prior statement was proper in order to rebut a claim of recent fabrication, pursuant to Evid.R. 801(D)(1)(b). In addition, the State pointed out that, because E.J. testified at the trial, the confrontation clause, as well as *Crawford v. Washington*, 541 U.S. 36 (2004) and its progeny, were not applicable.

{¶ 30} The trial court overruled appellant's objection to this testimony. During the course of the examination, the trial court, sometimes over defense objection, also permitted Ms. Lampkins to testify as to the location where the sexual acts took place, the

fact that there were multiple incidents, and an approximate time frame of several months during which the incidents occurred.

{¶ 31} On appeal, appellant's counsel argues there was no allegation of a change in testimony or of a recent event affecting E.J.'s credibility and, therefore, without an express or implied claim of *recent* fabrication, fraud, or improper motive arising after the original statement was made, the prior statement was not admissible pursuant to Evid.R. 801(D)(1)(b). Stated differently, appellant asserts that the prior statement is not admissible simply because appellant's assertion of innocence puts his version of events at odds with the testimony of E.J. (i.e., appellant's general claims of innocence, which advance the proposition that E.J. fabricated the entire event from the beginning, do not create an express or implied claim of *recent* fabrication to trigger admissibility of the testimony as a prior consistent statement pursuant to Evid.R. 801(D)(1)(b)). Appellant also argues the primary purpose for the interview at the CAC was forensic, rather than for purposes of medical diagnosis and treatment, and therefore, pursuant to *Arnold*, the statements about which Ms. Lampkins testified were inadmissible.

{¶ 32} The State disputes appellant's contention that there is no evidence in the record to support an inference of fabrication or improper influence. For example, the State points out defense counsel questioned E.J. about: (1) her fading memory and whether she had imagined certain items in the black suitcase; (2) talking to the prosecutor in order to prepare for trial and knowing what was expected of her; and (3) specific details which she was unable to recall, such as the dates and locations of the various sexual acts. The State argues this questioning insinuated that E.J. was fabricating the allegations or was improperly influenced, thereby making the prior consistent statements admissible under Evid.R. 801(D)(1)(b). Additionally, the State argues Ms. Lampkins' testimony was admissible pursuant to Evid.R. 803(4), which permits statements for purposes of medical diagnosis or treatment.

{¶ 33} Pursuant to Evid.R. 801(D)(1)(b), a statement is not hearsay if the declarant of the statement testifies at trial and is subject to cross-examination regarding the statement, and the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive.

{¶ 34} In the instant case, even if we were to find that the record lacks sufficient evidence of an express or implied charge of recent fabrication, improper influence, or motive (an issue we need not specifically analyze in this decision), it is readily apparent that the statements at issue here are admissible, pursuant to Evid.R. 803(4), as statements for purposes of medical diagnosis or treatment.

{¶ 35} Evid.R. 803(4), which is entitled "Statements for purposes of medical diagnosis or treatment," provides an exception to the hearsay rule for certain statements and permits the admission of such statements at trial. It provides an exception for the following:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

{¶ 36} Appellant cites to *Arnold* in support of his position that investigative inquiries do not justifiably result in statements made for medical diagnosis or treatment where the interview was primarily forensic in nature because the resulting statements are testimonial and, therefore, violate the confrontation clause.

{¶ 37} We begin our analysis by noting that we do not have a confrontation clause issue in the instant case, as E.J. testified at trial and was subject to cross-examination. Consequently, we believe *Arnold* has limited application to the instant case. Nevertheless, a brief review of the *Arnold* decision is warranted here.

{¶ 38} In *Arnold*, the Supreme Court of Ohio addressed the confrontation clause issue set forth in the United States Supreme Court case of *Crawford*. The Supreme Court of Ohio found "[t]he objective a child-advocacy center * * * is neither exclusively medical diagnosis and treatment nor solely forensic investigation." *Arnold* at ¶ 29. The court held that statements made to interviewers at child-advocacy centers that are made for the purpose of medical diagnosis and treatment are nontestimonial, and therefore admissible without offending the confrontation clause. *Id.* at ¶ 2. The court further held that statements made to interviewers at child-advocacy centers that serve primarily a forensic or investigative purpose are testimonial, and therefore inadmissible pursuant to the confrontation clause. *Id*.

{¶ 39} The *Arnold* court went on to analyze particular statements and to determine whether the statement at issue primarily served a forensic or investigative purpose, or whether the statement provided information necessary to diagnose and provide medical treatment. *Id*. at ¶ 34-37. The court classified information regarding the identity of the perpetrator, the type of abuse alleged, the identification of the areas where the child had been touched and the body parts of the perpetrator that had touched her, as well as the time frame of the abuse, as statements for diagnosis and treatment because that information allowed the doctor or nurse to determine whether to test the child for sexually transmitted diseases, and to identify any trauma or injury sustained during the alleged abuse. *Id*. at ¶ 32, 38. On the other hand, the court determined statements such as: the child's assertion that the offender shut and locked the door before raping her; the child's description of where others were in the house at the time of the rape; the child's statement that the offender removed her underwear; and the child's description of the offender's boxer shorts, were statements related primarily to the investigation, and therefore, such statements were prohibited by the confrontation clause.

{¶ 40} Courts in subsequent cases have reached similar determinations. *See In the Matter of: J.M.M*., 4th Dist. No. 08CA782, 2011-Ohio-3377, ¶ 39 (child's statement that the offender "rubbed his pee-pee all over my face and then put his pee-pee in my butt," as well as her statements that "her butt hurt" and that the incident had occurred that day were statements made for medical diagnosis and treatment and, therefore, they were nontestimonial and admissible); *State v. Dorsey*, 5th Dist. No. 11 CA 39, 2012-Ohio-611, ¶ 24-28 (victim's statements describing forms of sexual activity, such as statements explaining that the offender "grabbed me[,] hugged me and grabbed my boob and my pussy. He got on top of me and put his dick in my pussy and I fought him. He's been doing it to me for a while. If I'm not at home he does it to Pam[,]" would cause a medical professional to be concerned about possible injuries and sexually transmitted diseases; such statements were not testimonial and were for medical diagnosis and treatment); and *In re T.L*., 9th Dist. No. 09CA0018-M, 2011-Ohio-4709, ¶ 14-22 (statements that the perpetrator touched the child's "pee-pee with his fingers" under her underwear and also inside her "pee-pee" were for purposes of medical diagnosis and treatment and therefore admissible; however, statements that she and the offender were playing hide-and-seek

and that the offender told her to sit on the bed immediately prior to the abuse were investigative in nature and should not have been admitted; nevertheless, their admission was harmless beyond a reasonable doubt).

{¶ 41} We disagree with appellant's conclusory assertion that E.J.'s statements were made simply as part of the criminal investigation. In fact, Dr. Leder testified she relied upon the history obtained from the forensic examiner in conducting her own medical examination. With one possible exception, the substance of the statements to which Ms. Lampkins testified indicates that the statements were made primarily for purposes of medical diagnosis and treatment, not for forensic purposes. We believe our conclusion is supported by the fact that similar statements have been classified as such by other courts, as set forth above. The only possible exception to this could be the statement as to the location where the events occurred. However, any error which may have occurred by the admission of that statement is clearly harmless beyond a reasonable doubt.

{¶ 42} Furthermore, as we stated above, because E.J. testified in this matter, there is no confrontation clause issue here. *See State v. Rucker*, 1st Dist. No. C-110082, 2012-Ohio-185, ¶ 37, quoting *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 113 (" '[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. * * * The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.' ").

{¶ 43} We find the statements at issue were admissible pursuant to Evid.R. 803(4). Accordingly, we overrule appellant's first assignment of error.

B. Second Assignment of Error—Ineffective Assistance of Counsel

{¶ 44} In his second assignment of error, appellant claims he was denied the effective assistance of counsel because his trial counsel failed to file a motion to suppress his confession and failed to properly challenge the admission of prior consistent statements made by E.J. through the testimony of Ms. Lampkins. Appellant asserts he was prejudiced by his counsel's ineffectiveness.

{¶ 45} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell*, 2 Ohio St.2d 299, 301 (1965). Therefore, the burden of showing ineffective

assistance of counsel is on the party asserting it. *State v. Smith*, 17 Ohio St.3d 98, 100 (1985). Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 675 (1998). Additionally, in fairly assessing counsel's performance, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 101.

{¶ 46} Trial strategy and even debatable trial tactics do not establish ineffective assistance of counsel. *Id.* A reviewing court must be "highly deferential to counsel's performance and will not second-guess trial strategy decisions." *State v. Tibbetts*, 92 Ohio St.3d 146, 166-67 (2001). Strategic choices made after substantial investigation "will seldom if ever" be found wanting. *Strickland v. Washington*, 466 U.S. 686, 681 (1984). "Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." *Id.*

{¶ 47} "[T]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result." *Id.* at 686. In order to succeed on a claim of ineffective assistance of counsel, appellant must satisfy a two-prong test. First, he must demonstrate that his trial counsel's performance was deficient. *Id.* at 687. This requires a showing that his counsel committed errors which were "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* If he can show deficient performance, he must next demonstrate that he was prejudiced by the deficient performance. *Id.* To show prejudice, he must establish there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one sufficient to erode confidence in the outcome. *Id.* at 694.

{¶ 48} Because we have already analyzed and rejected appellant's challenge regarding the admission of prior consistent statements and determined the admission of those statements was proper on other grounds, counsel cannot be ineffective for failing to object to the statements at issue. Therefore, in addressing appellant's second assignment

of error, we shall focus our analysis on the issue of trial counsel's failure to file a motion to suppress appellant's confession.

{¶ 49} The failure to file a motion to suppress is not ineffective assistance of counsel per se. *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, ¶ 65, citing *State v. Madrigal*, 87 Ohio St.3d 378, 389 (2000). In order to establish ineffective assistance of counsel for failure to file a motion to suppress, the defendant must prove there was a basis for suppressing the evidence at issue. *Brown* at ¶ 65, citing *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶ 35. Counsel is not deficient for failing to raise a meritless issue. *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, ¶ 117, citing *State v. Taylor*, 78 Ohio St.3d 15, 31 (1997).

{¶ 50} "[T]he ineffective assistance of counsel test set forth in Strickland can be summarized, in cases involving a failure to make a motion on behalf of the defendant * * * as requiring the defendant to: (1) show that the motion * * * was meritorious, and (2) show that there was a reasonable probability that the verdict would have been different had the motion been made." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 63, citing *State v. Santana*, 90 Ohio St.3d 513 (2001), and *State v. Lott*, 51 Ohio St.3d 160 (1990). "Where the record contains no evidence which would justify the filing of a motion to suppress, the appellant has not met his burden of proving that his attorney violated an essential duty by failing to file the motion." *State v. Gibson*, 69 Ohio App.2d 91, 95 (8th Dist.1980).

{¶ 51} The failure to file a motion to suppress may constitute ineffective assistance of counsel where there is a solid possibility that the court would have suppressed the evidence. *State v. Jones*, 10th Dist. No. 99AP-704 (June 13, 2000), citing *State v. Garrett*, 76 Ohio App.3d 57 (11th Dist.1991). Nevertheless, even when some evidence in the record supports a motion to suppress, we must presume that defense counsel was effective if counsel could have reasonably decided that filing a motion to suppress would have been a futile act. *Jones*, citing *State v. Edwards*, 8th Dist. No. 69077 (July 11, 1996), citing *State v. Martin*, 20 Ohio App.3d 172 (1st Dist.1983).

{¶ 52} Appellant argues the police used a "ploy" to circumvent his *Miranda* protections by advising him they were there to gather information and stating they were not going to arrest him at that time, yet, failing to advise him prior to the interview that

they had already obtained a search warrant to search his residence, predicated on probable cause. Appellant claims this tactic was instituted to give him a false sense of freedom and because executing the search warrant prior to interviewing him would have likely prevented the police from obtaining a confession.

{¶ 53} An individual's confession "is made voluntarily absent evidence that his will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct." *State v. Dailey*, 53 Ohio St.3d 88 (1990), paragraph two of the syllabus. In determining whether or not a confession was voluntary, the court " 'should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.' " *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶ 112, quoting *State v. Edwards*, 49 Ohio St.2d 31, 40-41 (1976) (vacated on other grounds).

{¶ 54} *Miranda* warnings are only required under circumstances involving custodial interrogations. *Miranda*, 384 U.S. 436. "Custodial interrogation," has been defined as "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; *State v. Perry*, 14 Ohio St.2d 256, 261 (1968). "A person is considered in custody for purposes of *Miranda* when he is placed under formal arrest or his freedom of action is restrained to a degree associated with a formal arrest." *State v. Simpson*, 10th Dist. No. 01AP-757, 2002-Ohio-3717, ¶ 33, citing *Minnesota v. Murphy*, 465 U.S. 420 (1984). In determining whether an individual is in custody, the relevant inquiry is whether a reasonable person in that individual's position would have believed he was not free to leave under the totality of the circumstances. *Simpson* at ¶ 33, citing *Berkemer v. McCarty*, 468 U.S. 420 (1984); *State v. Gumm*, 73 Ohio St.3d 413, 429 (1995).

{¶ 55} In *State v. Estepp*, 2d Dist. No. 16279 (Nov. 26, 1997), the Second District Court of Appeals, citing to cases from several other districts, including our district, set forth several factors to consider in assessing how a reasonable person would have understood and interpreted the interview, including: (1) the location where the questioning took place and whether it was somewhere the defendant would normally feel free to leave, such as a home, or a more restrictive environment, such as a police station;

(2) whether the defendant was a suspect at the time the interview began (although *Miranda* warnings are not required simply because the investigation has focused); (3) whether the defendant's freedom to leave was restricted in any way; (4) whether the defendant was handcuffed or advised he was under arrest; (5) whether there were threats or physical intimidation during questioning; (6) whether the police verbally dominated the interrogation; (7) the defendant's purpose for being at the location where the questioning occurred; (8) whether there were neutral parties present at any point during the questioning; and (9) whether the police took any action to overpower, trick, or coerce the defendant into providing a statement. *See also State v. Smith*, 10th Dist. No. 96APA10-1281 (June 3, 1997); and *State v. Evins*, 2d Dist. No. 15827 (Feb. 28, 1997).

{¶ 56} In the instant case, we believe it was reasonable for appellant's trial counsel to decide that filing a motion to suppress would have been a futile act. Appellant would not have prevailed, since he was not in custody and his statements were voluntary.

{¶ 57} Here, the interview was conducted at appellant's home and took place over the course of 30 to 60 minutes. Initially, when the detectives first arrived, appellant's wife was present, but she was asked to leave and did so without incident. There is nothing in the record to suggest that the interview was coercive. The record does not suggest that appellant was not free to leave or to terminate the interview. In fact, appellant smoked and took phone calls during the interview and, at one point, walked around and turned on some lights inside the house.

{¶ 58} The detectives advised appellant they were there to gather information and to have an honest interview in order to get to the truth. The detectives informed appellant from the beginning that he was not under arrest and that regardless of their discussion, they were not going to arrest him that night, so he should not feel like he was "backed into any corners." (Tr. 210.)

{¶ 59} Other than stating that appellant would not be arrested that night, the detectives did not make any specific representations or promises to appellant, and there is absolutely no evidence to indicate that the detectives promised to keep appellant out of the court system or out of jail/prison in the future if he was honest about his actions, although they did encourage honesty, stating it could help him. Nevertheless, admonitions to tell the truth are neither threats nor promises and are permissible. *State*

v. Loza, 71 Ohio St.3d 61, 67 (1994). The detectives did nothing more than to encourage appellant to tell the truth. This did not rise to the level of coercion. Furthermore, there is nothing in the record to suggest that the police used trickery or coercion with appellant during the interview in order to obtain a confession. The record also indicates that appellant was cooperative throughout the interview and even afterwards, he signed a consent to search without a warrant form.

{¶ 60} Despite appellant's contention that the detectives engaged in a strategy to undermine appellant's constitutional right against self-incrimination, there is no evidence or applicable case law to support this assertion. Appellant's comparison of the instant case to the case of *Dixon v. Houk*, 627 F.3d 553 (6th Cir.2010) is inapposite, as there is no "question first, warn later" scenario here, nor is there a "second confession" at issue, and the facts here are substantially different from those found in *Dixon*, which was subsequently reversed and remanded by *Bobby v. Dixon*, ___ U.S. ___, 132 S.Ct. 26 (2011).

{¶ 61} In looking at the totality of the circumstances, it is apparent a reasonable person would have felt free to terminate the interview and/or to decline to engage in the questioning. Therefore, we find appellant was not in custody, the statements made by appellant during the interview were voluntary, and consequently, the statements were admissible. Furthermore, appellant would not have prevailed on a motion to suppress, even assuming the decision not to file a motion to suppress fell outside the bounds of reasonable trial strategy, and thus, appellant did not suffer any prejudice, since the result of the trial would not have been different. Accordingly, we overrule appellant's second assignment of error.

C. Third Assignment of Error—Sentencing Discrepancy

{¶ 62} In his third assignment of error, appellant asserts the trial court erred by increasing the sentence set forth in the judgment entry on the six rape counts to terms of life without the possibility of parole after the trial court had previously orally pronounced sentences of life imprisonment for the rape counts at the sentencing hearing.

{¶ 63} The State concedes that because there is a discrepancy between the sentence orally imposed at the sentencing hearing and the sentence set forth in the trial court's judgment entry, appellant is entitled to be resentenced on the six rape counts. Therefore,

based upon the authority set forth in *State v. Kase*, 187 Ohio App.3d 590, 2010-Ohio-2688, ¶ 30-32 (8th Dist.) (trial court erred when its judgment entry differed from the sentence announced at the sentencing hearing; sentence pronounced at the sentencing hearing differed from that in the judgment entry because "life sentence" language was imprecise, thereby requiring resentencing), and *State v. Jordan*, 10th Dist. No. 05AP-1330, 2006-Ohio-5208, ¶ 48 (trial court erred when it issued a judgment entry imposing a sentence that differed from the sentence announced at the sentencing hearing), we sustain appellant's third assignment of error, and order this matter be remanded for resentencing on Counts 1 through 6 of the indictment (the rape counts).

D. Fourth Assignment of Error —Sentencing Guidelines

{¶ 64} Appellant's fourth assignment of error asserts the trial court abused its discretion in imposing consecutive sentences of life imprisonment without the possibility of parole. Appellant submits the trial court failed to properly apply the applicable statutory sentencing guidelines, including R.C. 2929.11 and 2929.12, in imposing sentence in this matter. Specifically, appellant contends the trial court failed to apply the factors regarding the seriousness of the offense and the risk of recidivism set forth in R.C. 2929.12, and cited only to the elements of the offense. Appellant also argues the trial court failed to apply the proportionality analysis set forth in R.C. 2929.11. Appellant further argues that imposition of the maximum sentence of life without the possibility of parole is excessive and constitutes an abuse of discretion.

{¶ 65} In addressing appellant's third assignment of error, we determined this matter must be remanded for resentencing in order to address the imprecise language creating the discrepancy surrounding the phrase "life sentences." As a result, we find it unnecessary to address appellant's fourth assignment of error at this time, given the fact that the trial court's sentence is unclear and a resentencing hearing must occur in order to clarify the sentence. Therefore, we render appellant's fourth assignment of error as moot.

E. Fifth Assignment of Error—Merger of Allied Offenses of Similar Import

{¶ 66} In his fifth assignment of error, appellant asserts the trial court committed plain error in imposing concurrent sentences for numerous allied offenses of similar import. Appellant argues the six counts of sexual battery (counts 7, 8, 9, 10, 11, and 12 of

the indictment) and the six counts of rape (Counts 1, 2, 3, 4, 5, and 6 of the indictment) are in fact duplicate charges and that the sexual battery charges are lesser offenses of the rape charges. Appellant also argues the three counts of gross sexual imposition (Counts 13, 14, and 16 of the indictment) are based upon the very same conduct and cannot be differentiated from the rape and sexual battery charges because there is no separately identifiable conduct that could establish a separate animus. As a result, appellant argues the trial court erred in imposing multiple sentences for these allied offenses and, therefore, this matter must be remanded for resentencing and the State must elect which of the offenses it wishes to pursue.

{¶ 67} The State, on the other hand, argues that multiple acts were committed in different places throughout appellant's home over an extended period of time and that the prosecutor differentiated the counts in closing arguments. However, the State concedes four of the sexual battery counts (Counts 7, 8, 9, and 10 of the indictment) relate to the conduct charged in four of the rape counts (Counts 1, 2, 3, and 4 of the indictment), and therefore they are allied offenses of similar import. Consequently, the State concedes resentencing is necessary as to those counts so that the State can elect the counts on which it wishes to proceed.

{¶ 68} Although the State concedes that resentencing is necessary with respect to Counts 1, 2, 3, 4, 7, 8, 9, and 10 of the indictment, the State argues the sexual battery guilty findings for Counts 11 and 12 of the indictment resulted from conduct different than the conduct charged in the rape counts, and therefore they are not subject to merger. Additionally, the State argues the sexual contact which constituted the gross sexual impositions charged in Counts 13, 14, and 15 of the indictment was not incidental to the other sexual acts and, in fact, constituted separate, identifiable acts and, therefore, they are not allied offenses subject to merger.

{¶ 69} Based upon the State's concessions, we sustain appellant's fifth assignment of error as it relates to Counts 1, 2, 3, and 4 of the indictment, and Counts 7, 8, 9, and 10 of the indictment so that the State can elect the counts on which it wishes to proceed. As to the issue of whether or not the remaining counts are allied offenses subject to merger, because this matter is hereby remanded for resentencing due to a variety of issues, we shall leave it to the trial court to make a determination at the time of resentencing as to

whether those offenses are allied and subject to merger, based upon the facts as presented at trial and the authority set forth in *State v. Damron*, 129 Ohio St.3d 86, 2011-Ohio-2268, and *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314.

{¶ 70} Accordingly, appellant's fifth assignment of error is sustained, subject to the limitation set forth above.

III. Conclusion

{¶ 71} Appellant's first and second assignments of error are overruled. Appellant's third and fifth assignments of error are sustained to the extent set forth above, and the fourth assignment of error is rendered moot. Therefore, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas, and we remand this matter for resentencing, consistent with this decision.

Judgment affirmed in part
and reversed in part;
cause remanded with instructions.

SADLER and TYACK, JJ., concur.
