[Cite as *State v. Poling*, 2010-Ohio-1155.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-A-0071**
- vs -	:	
TIMOTHY F. POLING,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2008 CR 363.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

Robert E. Shea, The Spitz Law Firm, 4568 Mayfield Road, #102, South Euclid, OH 44121 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Timothy F. Poling, appeals the Judgment Entry of the Ashtabula County Court of Common Pleas, in which the trial court found Poling guilty of two counts of Rape, four counts of Gross Sexual Imposition (GSI), and sentenced him to life imprisonment for the Rape charges as well as a five-year

sentence for each of the four GSI counts, to be served concurrently. For the following reasons, we affirm the decision of the trial court.

{¶2} Poling was indicted on two counts of Rape, in violation of R.C. 2907.02(A)(1)(B) and R.C. 2907.02(A)(2), and 25 counts of Gross Sexual Imposition, in violation of R.C. 2907.05. The indictment stemmed from allegations that Poling engaged in sexual contact with his girlfriend, Deborah Cunningham's, minor granddaughter, H.C., d.o.b.10/16/97.

{¶3} Poling and Cunningham have been in a relationship for many years and reside together. Cunningham is H.C.'s paternal grandmother. After H.C.'s parents divorced, and H.C.'s father joined the Navy, H.C.'s mother allowed H.C. to spend almost every other weekend at Poling/Cunningham's residence. H.C. called Poling "Grandpa Tim."

{¶4} After watching an episode of *Law and Order: Special Victims Unit*, a fictional television program about sexual crimes, with her babysitter, H.C. made allegations that Poling had been molesting her. H.C. alleged that while Cunningham was either sleeping or out of the house, Poling touched her inappropriately on her thighs, shoulders, and "two and a half inches below her belly button" also referred to, by H.C., as her "peach". She also claimed that Poling performed oral sex on her once and that Poling gave her money in return for sexual favors.

{¶5} A jury trial was held on October 7, 2008, in which the State of Ohio called six witnesses: Lisa Ann Szparaga, H.C.'s babysitter; Chastity Eichele, H.C.'s mother; H.C.; Dr. Paul McPherson, a physician at the Akron Children's Hospital in Youngstown; Janet Gorsuch, a nurse practitioner that interviewed/examined H.C. at the Youngstown

Children's Advocacy Center; and Michael Rose, a Detective at the Ashtabula County Children's Services Department.

{¶6} The Defense called 18 witnesses including numerous children; adults; and neighbors who, in the past, had visited and/or spent the night at Poling's residence; Cunningham; and Poling.

{¶7} After the witness testimony had concluded, Poling made a Rule 29 Motion for Acquittal and a Motion for Mistrial, which were both overruled. Additionally, seven counts of GSI were dismissed upon motion by Poling.

{¶8} The jury subsequently found Poling Guilty of both counts of Rape and four counts of GSI and Not Guilty on the remaining 14 counts of GSI.

{¶9} On October 24, 2008, Poling's Sentencing Hearing was held. At the hearing, the court merged the two Rape charges and sentenced Poling to a mandatory term of life in Prison. Poling was further ordered to serve a five year sentence for each of the four GSI counts, to be served concurrently. Further, the GSI sentence was to be served consecutively to the life sentence. Poling was also classified as a Tier III Sex Offender.

{¶10} Poling timely appeals and raises the following assignments of error:

{¶11} "[1.] The trial court did err by allowing the State to admit evidence of the defendant's prior bad acts.

{¶12} "[2]. The trial court did err by making inappropriate comments to the jury.

{¶13} "[3.] The trial court did err by allowing improper expert testimony.

{¶14} "[4.] Defendant was denied effective assistance of counsel.

{¶15} "[5.] The cumulative effect of the errors at trial deprived appellant of his constitutional right to a fair trial.

{¶16} "[6.] The trial court did err when it entered judgment against the defendant when the evidence was insufficient to sustain a conviction and was not supported by the manifest weight of the evidence."

{¶17} In his first assignment of error, Poling contends that the trial court erred when it permitted testimony from both H.C. and Janet Gorsuch that Poling had shown H.C. a pornographic movie. Poling argues that "the jury was allowed to consider an unrelated bad act" and he "was harmed by the admission of this evidence" and "is entitled to a new, fair, trial."

{¶18} Poling also claims the State failed to meet the burden of R.C. 2945.59, which states that "[i]n any criminal case in which the defendant's motive or intent *** or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent *** or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

{¶19} As a general matter, "[e]videntiary rulings are matters within the sound discretion of the trial court, and will not be disturbed absent a clear abuse of that discretion whereby the defendant has suffered material prejudice." *State v. Sweeney*, 11th Dist. No. 2006-L-252, 2007-Ohio-5223 , at ¶22. Moreover, "[r]elevant evidence is admissible, 'unless some other provision of the law makes it inadmissible.'" Id. at ¶23 (citations omitted).

{¶20} Ohio Evidence Rule 404(B) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such

as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶21} The State argues that "the evidence clearly shows preparation, plan, and knowledge. The testimony shows that [Poling] used these movies in the process of grooming [H.C.] for further sexual abuse. Showing [H.C.] these movies was an effort on [Poling's] part to make her believe that there was nothing wrong with the abuse which was occurring." We agree. Evid.R. 404(B) permits the introduction into evidence of statements that tend to prove, inter alia, preparation or motive. *State v. Broom* (1988), 40 Ohio St.3d 277, at paragraph one of the syllabus.

{¶22} In *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, at ¶21, the Supreme Court of Ohio praised the court for its "careful stewardship of this sensitive evidence" and acknowledged that the court "demonstrated a skillful application of the evidentiary rules" when it permitted "testimony that [a child] viewed child pornography on [the alleged abuser's] computer" which was "consistent with the state's desensitization theory of the case."

{¶23} "[T]he standard for admitting other-acts evidence *** is whether the evidence 'tend[s] to show' motive, plan, or intent." Id. at ¶19. Furthermore, evidence establishing motive, intent, scheme, or plan "is always material because it tends to show why one version of events should be believed over another." Id. at ¶20.

{¶24} Dr. McPherson testified that grooming "is a process that some offenders use to gain the trust of the child that they are trying to abuse. *** there's just kind of a gradual exposure to the sexual abuse." He further testified that sometimes the child is "shown pictures of other children engaging in that activity [making the child believe] 'Oh, other kids do it. It must be okay.'"

{¶25} Nurse Gorsuch testified that H.C. told her that when they were watching the pornography, Poling pointed out "different things that were going on in the movies. [He said to H.C.] 'Hey, see they're doing this, see they're doing that.'"

{¶26} The testimony that Poling showed H.C. pornography showed preparation and planning. Therefore, it was admissible under Evid.R. 404(B).

{¶27} Poling's first assignment of error is without merit.

{¶28} Poling next argues that the trial court made improper statements to the jury that prejudiced him. During Dr. McPherson's testimony, he was asked how children's memory differs from adults'. Poling's counsel objected, stating "[McPherson] hasn't testified he has any expertise in this area at all." To which the trial court responded, "Well, I think he's got a medical degree in pediatrics and he's Board-eligible in abuse. Overruled. He's qualified, in my opinion. I've already ruled he's a qualified expert in this case. Go ahead." Poling claims that the trial court's "opinion significantly enhanced McPherson's qualifications." Poling's counsel failed to object to the judge's statements. He argues that by "endorsing the State's witnesses in front of the jury[,] the trial Court awarded instant credibility to both [expert] witnesses, providing the State a tremendous advantage."

{¶29} Secondly, Poling contends that the trial court "issued an inappropriate and prejudicial limiting instruction" when the court "informed the jury that if Poling was convicted on both [Rape] counts, the two counts would merge for sentencing." To which he admits, "neither counsel objected to the trial Court's instruction." Poling claims that the trial court's "instruction caused the jury to consider punishment, and disregard the fact that each rape charge was a separate and distinct offense."

{¶30} During her testimony, H.C. was confused about two counts of Rape stemming from one incident. A bench conference was then held off the record and out of the jury's hearing. The trial court then went back on record and stated the following:

{¶31} "Ladies and gentlemen of the Jury, just to clear up a little confusion here, and counsel have authorized me here to tell you this. There's two counts of Rape in this Indictment, but both counts relate to the same factual incident. *** We're talking about one event, but it's charged two different ways. One event relates to the age of the person, and the other charge relates to the use of force or threat of force. *** I'll go even further. If the defendant were ever convicted of both, he couldn't be sentenced on both because they'd have to merge. There's only – there's only one alleged Rape here that the State says it happened two different ways. Okay. That's enough."

{¶32} "In the exercise of this duty, the judge must be cognizant of the effect of his comments upon the jury." *State v. Wade* (1978), 53 Ohio St.2d 182, 187, vacated on other grounds by *Strodes v. Ohio* (1978), 438 U.S. 911. Thus, it is incumbent upon the judiciary to remain detached and neutral in any proceeding before it. *State v. Hardy*, 11th Dist. No. 96-P-0129, 1997 Ohio App. LEXIS 4588, at *20. "However, this does not mean that a trial judge is precluded from making comments during the course of the trial." Id. Instead, when determining whether or not a trial judge's comments were appropriate, a reviewing court must decide whether the remarks were prejudicial to a defendant's right to a fair trial. *Wade,* 53 Ohio St.2d at 188; *Hardy*, 1997 Ohio App. LEXIS 4588, at *20-*21.

{¶33} In *Wade*, the Ohio Supreme Court established that the following factors must be considered when determining whether a trial judge's remarks were prejudicial: "(1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is

presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel." 53 Ohio St.2d at 188.

{¶34} However, in *Wade*, similar to the instant case, the "appellant failed to object to the content of the judicial statements as being prejudicial to appellant's rights." Id. The *Wade* court held that the "failure to object has been held to constitute a waiver of the error and to preclude its consideration upon appeal, for, absent an objection, the trial judge is denied an opportunity to give corrective instructions as to the error. *State v. Williams* (1974), 39 Ohio St.2d 20; *State v. Childs* (1968), 14 Ohio St.2d 56; *Smith v. Flesher* (1967), 12 Ohio St.2d 107." Id.; *State v. Dzurovcin*, 11th Dist. No. 1877, 1988 Ohio App. LEXIS 4224, at *4 ("We conclude appellant, by not objecting to the judge's comments, waived any possible error by the judge as to said comments").

{¶35} Accordingly, since Poling did not object to the judicial statements, he has waived any possible error.

{¶36} Poling's second assignment of error is without merit.

{¶37} In his third assignment of error, Poling contends that Nurse Gorsuch and Dr. McPherson "essentially testified to the veracity of [H.C.'s] statement, usurping the jury's role as fact finder." He asserts that this was improper testimony and he was prejudiced by its admission.

{¶38} Both Dr. McPherson and Nurse Gorsuch were admitted as expert witnesses without objection; McPherson as an "expert in the area of child abuse" and Gorsuch as an "expert in her field of nurse practitioner."

{¶39} Poling first contends that Dr. McPherson "testified far afield of his area of expertise. McPherson was not trained in either adult or child psychology, and he was unqualified to testify as to the differences between children's memories or mental processes and adult's memories or mental processes. *** As such, it was inappropriate for McPherson to testify about 'grooming' behavior and classify some of Poling's actions as 'grooming.'"

{¶40} Under Evid.R. 702(B), an expert witness must be "qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." The trial court's determination that a witness is qualified as an expert is within the court's discretion, and will not be overturned absent an abuse of discretion. *State v. Baston*, 85 Ohio St.3d 418, 423, 1999-Ohio-280. Furthermore, "[t]he admission or exclusion of evidence rests within the sound discretion of the trial court." *Grange Mut. Cas. Co. v. Tackett*, 11th Dist. No. 2007-P-0037, 2008-Ohio-631, at ¶12 (citation omitted).

{¶41} "It is well established that rulings concerning the admissibility and scope of expert opinion testimony are within the broad discretion of the trial court and will not be reversed on appeal absent a clear showing of an abuse of discretion resulting in material adverse prejudice." *Pacific Great Lakes Corp. v. Bessemer & Lake Erie R.R.* (1998), 130 Ohio App.3d 477, 501. To qualify as an abuse of discretion, legal error is not enough; the ruling must be unreasonable, arbitrary, or unconscionable. Id. at 502.

{¶42} The State contends that "McPherson is clearly well versed in all aspects of child abuse, including psychological and behavioral[.] *** The trial court did not abuse its discretion in declaring Dr. McPherson an expert in the area of child abuse."

Furthermore, "McPherson's testimony also demonstrates that his opinion is based on the behavior of other children in similar situations."

{¶43} "The expert's opinion may be based on facts or data perceived by him or it may be drawn from knowledge gained from other experts in the field." *State v. Muhleka*, 2nd Dist. No. 19827, 2004-Ohio-1822, at ¶76.

{¶44} "[T]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing." For facts or data to be perceived by the expert, the facts must either be within the personal knowledge of the expert or based upon facts shown by other evidence. *Burens v. Indus. Comm. of Ohio* (1955), 162 Ohio St. 549, at paragraph one of the syllabus. Furthermore, weaknesses in the factual basis of an expert's testimony go to the weight and credibility of the expert's testimony, not to its admissibility. *Pacific Great Lakes Corp*., 130 Ohio App.3d at 503; *Johnson v. Knipp* (1973), 36 Ohio App.2d 218, 220 ("[t]he absence of certain facts, or the failure of proof of others, goes to the weight and credibility of the testimony, and not to its admissibility. The burden falls on the opposing party to discredit or minimize the expert's testimony through cross-examination").

{¶45} Dr. McPherson's training and experiences have exposed him to the mental processes of adults and children and the behavioral aspects of child abuse victims. The trial court did not abuse its discretion in admitting the expert testimony of Dr. McPherson.

{¶46} Poling next contends that McPherson and Gorsuch offered their medical opinions that H.C. was sexually abused, thus, "usurping the role of the fact finder" by testifying to the "veracity of the statements of a child declarant."

{¶47} In *State v. Stowers*, 81 Ohio St.3d 260, 1998-Ohio-632, the Ohio Supreme Court allowed expert testimony conveying a belief that a complaining child was sexually abused. Id. at 261. In *Stowers*, the court permitted expert testimony stating that the behavior of the child victim was consistent with the general behavior of other children who had been sexually abused. Id. Additionally, it was determined that "testimony is permitted to counterbalance the trier of fact's natural tendency to assess recantation and delayed disclosure as weighing against the believability and truthfulness of the witness. This testimony 'does not usurp the role of the jury, but rather gives information to a jury which helps it make an educated determination.'" Id. at 263 (citation omitted). Additionally, "an expert does not need physical findings to reach a diagnosis. If the expert relies on other facts in addition to the child's statements, then the expert's opinion will not be an improper statement on the child's veracity." *State v. Schewirey*, 7th Dist. No. 05 MA 155, 2006-Ohio-7054, at ¶50.

{¶48} Both expert witnesses based their testimony on their training, experience, and interactions with other abused children. The testimony aided the trier of fact to assess H.C.'s testimony. It was not an abuse of discretion to permit the testimony.

{¶49} Poling's third assignment of error is without merit.

{¶50} In his fourth assignment of error, Poling asserts that he was denied the effective assistance of counsel when his counsel failed to object to the admission of certain testimony.

{¶51} The Ohio Supreme Court has adopted a two-part test to determine whether an attorney's performance has fallen below the constitutional standard for effective assistance. To reverse a conviction for ineffective assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard

of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 2000-Ohio-448, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688.

{¶52} The United States Supreme Court in *Strickland* held: "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's performance was reasonable considering all the circumstances. *** Judicial scrutiny of counsel's performance must be highly deferential. *** A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 688-689.

{¶53} "There is a strong presumption that the attorney's performance was reasonable." *State v. Gotel*, 11th Dist. No. 2006-L-015, 2007-Ohio-888, at ¶10 (citation omitted). Attorneys are presumed competent, reviewing courts must refrain from second-guessing strategic, tactical decisions and strongly assume that counsel's performance falls within a wide range of reasonable legal assistance. *State v. Carter*, 72 Ohio St.3d 545, 558, 1995-Ohio-104.

{¶54} Furthermore, "[s]trategy and tactical decisions exercised by defense counsel 'well within the range of professionally reasonable judgment' need not be analyzed by a reviewing court." *State v. Walker* (1993), 90 Ohio App.3d 352, 359 (citation omitted).

{¶55} Poling first takes issue with his counsel's failure to object to the admission of evidence of other bad acts, the same testimony Poling asserts in his first assignment

of error. We found that the testimony was admissible under the exception provided in Evidence Rule 404(B). Therefore, Poling's counsel cannot be ineffective for failing to object to the admission of admissible evidence.

{¶56} Poling next contends his counsel was ineffective for failing to object when the court declared McPherson and Gorsuch to be experts.

{¶57} An expert witness's qualifications stem from the expert's possession of special knowledge that he or she has acquired, either by study of recognized authorities on the subject or by practical experience, that he or she can impart to the jury and will assist the jury in understanding a pertinent matter. *State Auto Mut. Ins. Co. v. Chrysler Corp.* (1973), 36 Ohio St.2d 151, 160; *Nichols v. Hanzel (*1996), 110 Ohio App.3d 591, 597; see, also, Evid.R. 702 (noting that a witness is qualified as an expert by specialized knowledge, skill, experience, training or education regarding a pertinent subject matter).

{¶58} "To qualify as an expert, the witness need not be the 'best witness' on the particular subject in question. *** However, expert testimony must assist the jury in determining a fact issue or understanding the evidence." *State v. Rhodes*, 11th Dist. No. 2001-Ohio-8693, 2001 Ohio App. LEXIS 5650, at *5 (citations omitted).

{¶59} Dr. McPherson testified that he was a physician at Akron Children's Hospital, had completed a residency in pediatrics, had specialty training in child abuse and helped train others in that field, and was board eligible in pediatrics. Furthermore, he testified that he was the Medical Director at a child advocacy center, he was published in the child abuse area, and he was a member of the APSAC, a group comprised of professionals that deal with abused children.

{¶60} Nurse Gorsuch testified that she is a nurse practitioner, a registered nurse with a master's degree that has extensive training in physical examination and treatment of medical conditions; works at the Tri-County Child Advocacy Center conducting examinations of children who report abuse; has attended specialized training from the national organization, American Society for the Prevention of Child Abuse, several times; attended a national Advanced Sexual Abuse Examiners Training; she is a licensed clinical counselor; she trains professionals at a yearly seminar for recognition of abuse and reporting; and she has been invited to edit a book on sexual abuse.

{¶61} Accordingly, we reject Poling's contention that Dr. McPherson and Nurse Gorsuch were not qualified as expert witnesses and, thus, counsel was not ineffective for failing to object.

{¶62} Next, Poling argues that his counsel was ineffective for failing to object to the court's curative instructions regarding the merging of the Rape charges and for failing to object during McPherson's testimony about "grooming." However, "[e]xperienced trial counsel learn that objections to each potentially objectionable event could actually act to their party's detriment. In light of this, any single failure to object usually cannot be said to have been error unless the evidence sought is so prejudicial that failure to object essentially defaults the case to the state." *State v. Kitcey*, 11th Dist. No. 2007-A-0014, 2007-Ohio-7124, at ¶62 (citations omitted). These alleged failures of defense counsel to object did not result in an unreliable or fundamentally unfair outcome of the proceeding.

{¶63} Finally, Poling maintains that his counsel was deficient for failing to object to McPherson and Gorsuch's testimony concerning their opinions about H.C.'s abuse.

However, as discussed above, an expert is not prohibited from conveying a belief that a complaining child was sexually abused. The expert may give an opinion, which is additional support for the truth of the facts testified to by the child, or which assists the fact finder in assessing the child's veracity. *Muhleka*, 2004-Ohio-1822, at ¶18. Consequently, counsel cannot be ineffective for failing to object to admissible testimony.

{¶64} Poling's fourth assignment of error is without merit.

{¶65} For the purpose of presentation and clarity, we will address the sixth assignment of error prior to addressing the fifth assignment of error.

{¶66} Poling argues that both convictions for Rape are not supported by sufficient evidence and are against the manifest weight of the evidence.

{¶67} '"[S]ufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury," i.e. "whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, quoting Black's Law Dictionary (6 Ed.1990), 1433. Essentially, "sufficiency is a test of adequacy," that challenges whether the state's evidence has created an issue for the jury to decide regarding each element of the offense. Id.

{¶68} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 319. In reviewing the sufficiency of the evidence to support a criminal conviction, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the

prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. at paragraph two of the syllabus.

{¶69} Weight of the evidence, in contrast to its sufficiency, involves "the inclination of the *greater amount of credible evidence*." *Thompkins*, 78 Ohio St.3d at 387 (emphasis sic) (citation omitted). Whereas the "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support the verdict as a matter of law, *** weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25 (citation omitted). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" Id.

{¶70} Generally, the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact to determine. *State v. Thomas* (1982), 70 Ohio St.2d 79, at the syllabus. When reviewing a manifest weight challenge, however, the appellate court sits as the "thirteenth juror." *Thompkins*, 78 Ohio St.3d at 387 (citation omitted). The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses, to determine whether, "in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶71} In order to convict Poling of the first count of Rape, the State had to prove, beyond a reasonable doubt, that Poling "did engage in sexual conduct, to wit:

cunnilingus, with a minor female, not the spouse of *** [and] being less than thirteen (13) years of age, to wit: dob: 10-16-1997." Cf. R.C. 2907.02(A)(1)(b).

{¶72} In order to convict Poling of the second count of Rape, the State had to prove, beyond a reasonable doubt, that Poling "did engage in sexual conduct, to wit: cunnilingus, with a minor female, dob: 10-16-1997, and that [Poling] purposely compelled said minor female to submit by force or threat of force." Cf. R.C. 2907.02(A)(2).

{¶73} Poling first contends that the time span in the indictment does not match the testimony H.C. gave for the time span she was raped. Second, he argues that the State has failed to "prove that Poling compelled [H.C.] to submit by force or threat of force."

{¶74} R.C. 2901.01(A)(1) defines force as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."

{¶75} In *State v. Dye*, 82 Ohio St.3d 323, 1998-Ohio-234, the court premised its decision on testimony that the victim's mother instructed her son to mind the defendant and not to aggravate him, or she would come and pick him up or the defendant would bring him home. Id. at 328. The Court was also unmoved by the fact that the defendant and the victim were not related, since the victim spent at least one day a week at the defendant's house, and all of the sexual abuse occurred while the victim was visiting the defendant. Id.

{¶76} "The force and violence necessary to commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other." *State v. Eskridge* (1988), 38 Ohio St.3d 56, at paragraph one of the syllabus. "[F]orce need not be overt and physically brutal, but can be subtle and psychological. As long as it can be

shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established." *Dye*, 82 Ohio St.3d at 327 (citation omitted).

{¶77} "Those in authority over children of tender years may be found to have committed rape with force absent *express threats or significant physical harm* to the victim." *State v. Borecky*, 11th Dist. No. 2007-L-197, 2008-Ohio-3890, at ¶25 (emphasis added).

{¶78} H.C. testified that Poling told her "to pose for him a certain way, and then [she] did." Then she testified that "he went up underneath of me like, yeah, he went in front of me and then he like went underneath me. *** And then he started licking me *** [b]y my private area." When asked how her pants came off, she responded "I took them off. Because he told me to." She then stated that Poling "heard the door slam on a car, so he jumped up *** I got my clothes and ran to my room." When asked when this incident occurred, [H.C.] stated that it was when she was "seven, six, six. I think. Seven. Seven."

{¶79} The record reflects that H.C. considered Poling her grandfather. She was left in Poling and Cunningham's supervision by her mother. On instances when Cunningham was sleeping or out of the house, she was left under Poling's supervision and authority. H.C. testified to removing her pants before the rape took place because Poling "told [her] to." H.C. was under 8 years old when the incident took place. We agree with the trial court that Poling was sufficiently a figure of power and authority to the victim to overcome her will by fear or duress, thus establishing the element of force required by R.C. 2907.02(A)(2).

{¶80} Poling also contends that the State failed to prove adequate proof on both counts of Rape due to the time frame alleged. We disagree.

{¶81} The indictment stated the rape took place between April 1, 2002, and November 20, 2005. H.C. was born October 16, 1997. That would place H.C. between 4 years, 5 months, 16 days and 8 years, 1 month, 4 days old. However, both the Bill of Particulars and the instructions read to the jury by the court stated that Rape took place between August 1, 2002, and December 31, 2004, which would place H.C. between 4 years, 9 months, 16 days and 7 years, 2 months, 15 days old. Nevertheless, both would coincide with H.C.'s testimony which stated that the rape took place when she was "seven, six, six. I think. Seven. Seven" years of age.

{¶82} Therefore, there was sufficient evidence to convict Poling on both counts of Rape and the convictions were not against the manifest weight of the evidence.

{¶83} Poling's sixth assignment of error is without merit.

{¶84} In his fifth assignment of error, Poling contends that the cumulative effect of the errors at trial deprived him of his right to a fair trial.

{¶85} "This court has found in the past that multiple errors that are separately harmless may, when considered together, violate a person's right to a fair trial in the appropriate situation. See *State v. DeMarco* (1987), 31 Ohio St.3d 191,*** paragraph two of the syllabus. However, in order even to consider whether 'cumulative' error is present, we would first have to find that multiple errors were committed in this case." *State v. Goff*, 82 Ohio St. 3d 123, 140, 1998-Ohio-369.

{¶86} Since this court has found all of Poling's assignments of error to be meritless, there was no cumulative effect.

{¶87} Poling's fifth assignment of error is without merit.

{¶88} For the foregoing reasons, the Judgment Entry of the Ashtabula County Court of Common Pleas, finding Poling guilty of two counts of Rape and four counts of

Gross Sexual Imposition and sentencing him to a term of life imprisonment, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

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COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶89} I respectfully dissent.

{¶90} In his third assignment of error, appellant maintains that the trial court erred by allowing improper expert testimony. I agree.

{¶91} Pursuant to Evid.R. 702(B), an expert may be qualified by reason of his or her specialized knowledge, skill, experience, training, or education to give an opinion that will assist the jury in understanding the evidence and determining a fact at issue. "Pursuant to Evid.R. 104(A), the trial court determines whether an individual qualifies as an expert, and that determination will be overturned only for an abuse of discretion." *State v. Hartman* (2001), 93 Ohio St.3d 274, 285, citing *State v. Williams* (1983), 4 Ohio St.3d 53, 58.

{¶92} In the instant case, both Dr. McPherson and Nurse Gorsuch offered expert testimony that H.C. was the victim of sexual abuse. The only abnormality in H.C.'s physical examination, however, was genital redness. Both Dr. McPherson and Nurse Gorsuch agreed that genital redness was a nonspecific finding which could have been caused by many factors other than sexual abuse. Thus, due to the absence of physical

evidence of sexual abuse, both Dr. McPherson and Nurse Gorsuch based their medical opinions on H.C.'s videotaped interview. By offering a medical opinion based upon the victim's statement that she was sexually abused by appellant, this writer believes that Dr. McPherson and Nurse Gorsuch improperly testified to the veracity of H.C.'s statement, thereby usurping the jury's role as fact finder. See *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, at ¶122, citing *State v. Boston* (1989), 46 Ohio St.3d 108, 129 (overruled on other grounds) (holding an expert may not express an opinion of a child declarant's veracity).

{¶93} This writer would reverse the judgment of the trial court and remand the matter for a new trial.

{¶94} Accordingly, I dissent.