[Cite as *In re N.Z.*, 2011-Ohio-6845.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

IN THE MATTER OF:	:	**O P I N I O N**
N.Z., DELINQUENT CHILD	:	**CASE NOS. 2010-L-023,**
	:	**2010-L-035,**
		and 2010-L-041

Civil Appeal from the Lake County Court of Common Pleas, Juvenile Division, Case No. 2009 DL 1840.

Judgment: Affirmed in part; vacated in part, and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Appellee State of Ohio).

Timothy Young, Ohio Public Defender, and *Sheryl A. Trzaska*, Assistant Public Defender, 250 East Broad Street, #1400, Columbus, OH 43215-9308 (For Appellant N.Z.).

MARY JANE TRAPP, J.

{¶1} N.Z. appeals from a judgment of the Lake County Court of Common Pleas, Juvenile Division, which found him delinquent for raping his stepsister over a 15-month period of time. The court also classified him as a Tier III sex offender. For the following reasons, we affirm N.Z.'s adjudication, but vacate his classification and remand the case for a redetermination of his classification.

{¶2} **Substantive Facts and Procedural History**

{¶3} N.Z., born August 18, 1993, lived with his father, Gabriel, his step-mother, Dawn, and Dawn's two biological children, Robert, 17, and J.B., born June 29, 1992, the victim in this case. The couple had been together for 15 years, and married for five years. They resided in a single family home, with two bedrooms upstairs. N.Z. and Robert shared a bedroom, and J.B. had her own room across the hallway.

{¶4} The sexual incidents between N.Z. and J.B. came to light in March 2009 when J.B. revealed them to her counselor at Laurelwood-Windsor Hospital, where she was being treated for mental health issues, including depression, self-mutilation or "cutting," and bipolar disorder. Lake County Department of Job and Family Services ("DJFS") took emergency temporary custody of J.B., and she eventually was placed at Belmont Pines Hospital in September, 2009.

{¶5} On September 25, 2009, a complaint was filed in the Lake County Juvenile Court, which alleged N.Z. was delinquent for committing (1) one count of rape against J.B., in violation of R.C. 2907.02(A)(1), and (2) one count of gross sexual imposition against N.G., in violation of R.C. 2907.05. N.G. is J.B.'s cousin, and she stayed with the family in the summer of 2008. The two counts were subsequently severed for trial, and this appeal only concerns count one of the complaint relating to J.B.

{¶6} N.Z. filed a motion in limine before trial. The court ruled that prior bad acts of violence between N.Z. and J.B. would be admissible only to the extent they explained J.B.'s fear of N.Z. and her delayed disclosure of the sexual incidents, and the state could not introduce evidence of the alleged sexual incident involving N.G. The court also ruled that the state would not be limited to evidence regarding only one incident,

but would be limited to incidents occurring within the time frame specified in the complaint.

{¶7} At trial before a magistrate, the state presented three witnesses: the victim, N.G., and the deputy in charge of the investigation.

{¶8} **Victim's testimony**

{¶9} J.B. testified the first incident occurred when she and N.Z. went to visit N.Z.'s grandparents in Geauga County, in the spring of 2007. The testimony, however, was ruled inadmissible because it occurred, not in Lake County, but in Geauga County. The first incident in Lake County occurred at the family home, a few days after the visit to the grandparents.

{¶10} As J.B. was sleeping in her bed at night, she felt "somebody's hand going underneath the covers and touching my back." She woke up and rolled over, seeing a figure that she then recognized as N.Z. standing next to her bed. She noticed her Christmas lights which she used as night lights were unplugged. He started to touch her down her back and arms underneath the blanket. She resisted and rolled round in an attempt to get him to stop. He pulled her pants and underwear down to her ankles. He touched her genital area with his hand, and then inserted his penis into her vagina. She tried to push him off without success. He stayed on top of her for about "five to ten minutes." She did not call out to anyone because she was afraid he would hurt her – when he was angry with her in the past he would yell at her or hit her. She told no one about the incident, including her mother, because she was afraid of him.

{¶11} The second incident at her home occurred a couple of days later. N.Z. came into her bedroom in the early morning, again turned off the night lights, went to her bed, pulled her pants down and inserted his penis into her vagina. J.B. related that

similar incidents took place in her bedroom on about 15 or 20 occasions. Some of them were days apart; some were weeks apart; and some were months apart. J.B. recalled "at least" five incidents in the summer of 2007, three in the fall of 2007, and five in the winter of 2007. They continued until the summer of 2008, when an incident involving N.Z. and J.B.'s cousin apparently triggered the installation of a lock on J.B's bedroom door.

{¶12} In July 2008, J.B.'s cousins, A.G. and N.G., and their father moved into the house and stayed for three months. They shared J.B.'s bedroom with her. One night J.B. was awaken by N.G.'s crying. N.G. told J.B. that N.Z. had come into the room. J.B. told N.G. to tell someone about it. As a result, N.G. told J.B.'s mother, Dawn, in the morning.

{¶13} On the heels of this disclosure, J.B. then wrote a note to her mother, saying N.Z. had raped her several times. Her mother asked her if it was true, and she affirmed it. According to J.B., her stepfather was also there when she handed her mother the note. He went to talk to N.Z. after seeing the note. This testimony was disputed by both J.B.'s mother and stepfather.

{¶14} Several days later, J.B.'s mother had a lock installed on the inside of the bedroom door, so that the door could be locked from the inside. Both J.B. and N.G. testified that Dawn required the girls to be in the room by a certain time at night, and the door to be locked. No further sexual conduct between N.Z. and J.B. occurred after the lock was installed.

{¶15} J.B. also revealed the sexual incidents to her cousins, and finally told a mental health counselor in March 2009. However, J.B. was not taken to an emergency room for a sexual assault examination. J.B.'s medical records obtained by the

investigation deputy confirm that she was not seen by her own physician for such examination, despite her mother's statement made during the investigation to the contrary.

{¶16} **Cousin's Testimony**

{¶17} N.G., aged 14, testified that while staying with J.B.'s family in the summer of 2008, she slept on J.B.'s bed while her sister slept on a futon on the floor. N.Z. would come into the room to smoke cigarettes while the girls were sleeping. The magistrate limited the scope of N.G.'s testimony and she was not permitted to describe what happened to her when N.Z. came into the room on one specific occasion. She was allowed to testify about the lock installed on the bedroom door, however. She stated the lock was not in existence when she first moved in; after it was installed, she confirmed that Dawn required the door to be locked every night.

{¶18} **Deputy Bachnicki's Testimony**

{¶19} Deputy Bachnicki, of the Lake County Sheriff's Department, testified he interviewed J.B. and her mother after DJFS filed a complaint alleging rape. J.B.'s mother told the deputy she had taken J.B. to Dr. Modarelli to be examined to verify if she was still a virgin, after J.B. told her about the sexual incidents. The medical records around that period obtained from the doctor, however, did not show any examination for sexual abuse. The records only showed two visits, one for a rash, and one for a bee sting. An early medical record, dated February 28, 2008, indicated J.B. was sexually active. No DNA or other physical evidence, however, was obtained, and J.B. was not physically examined as part of the investigation. Deputy Bachnicki observed that the lock in J.B.'s bedroom was installed on the inside of the door.

{¶20} The defense presented four witnesses: N.Z.'s father, J.B.'s mother and brother, and N.Z. himself.

{¶21} **N.Z.'s Father**

{¶22} N.Z.'s father, Gabriel, testified he was unaware of the allegation of the sexual abuse until March 9, 2009, when Deputy Bachnicki and the social worker came to his house. He denied J.B. ever told him about the incidents. He also denied he was present when J.B. gave a note to her mother about his son, or that he confronted his son about the allegation. He was aware of the inside lock installed on J.B.'s bedroom door by his wife, but remembered the lock to have been installed before August 2008.

{¶23} **Victim's Mother**

{¶24} J.B.'s mother, Dawn, testified that she never received a note from J.B. about N.Z in August 2008; and she denied that N.G., the cousin, ever told her anything about N.Z. She explained the lock on J.B.'s bedroom door was installed to ensure her daughter's privacy, because she had walked in on her daughter while she was dressing. Dawn testified she first learned of the sexual allegation on March 8, 2009, when her daughter told the Laurelwood counselor. Regarding the medical examination, she testified she took J.B. to the doctor in August 2008 for a PAP test and for bee stings only, unrelated to any sexual allegation. In direct contradiction to Deputy Bachnicki's testimony, she denied ever telling the deputy that she took her daughter to the doctor for an examination after she heard about the sexual conduct between N.Z. and J.B. in August of 2008. She did confirm she had taken her in February of 2008 for a PAP test and for abnormal menstrual cycles.

{¶25} **Victim's Brother**

{¶26} The victim's biological brother, Robert, testified that the door lock was installed before August 2008, and he was not aware of the sexual allegation until the spring of 2009. He explained the lock was put on the door because N.Z. was accused of going into J.B.'s room and taking her possessions. He also added J.B. had, on several occasions, locked herself inside her room and threatened to cut herself, and the police had to be called.

{¶27} **N.Z.'s Testimony**

{¶28} N.Z., age 16 at the time of trial, testified that he had had physical altercations with J.B. in the past. He described one incident where they disagreed about how to feed the family dog and ended up in a fight, where she dug her nails into his neck, and he punched her in the nose. He denied going into her room and having sexual intercourse with her.

{¶29} **Rebuttal Testimony of Deputy Bachnicki**

{¶30} After the defense rested its case, the state presented Deputy Bachnicki as a rebuttal witness. The deputy stated that when he interviewed J.B.'s mother on March 9, 2009, at the Lake County Sheriff's Office, she at first denied having any prior knowledge of the sexual assault allegation or receiving a note from J.B. about it. She then changed her account, indicating that she did have prior knowledge of the allegation, and as a result she made an appointment to have J.B. examined by her doctor. She then related to the deputy that the doctor told her J.B. was not a virgin, although there was no "markings indicating sexual intercourse." This conversation between the deputy and J.B.'s mother was not recorded, but it was documented in the deputy's report.

{¶31} **The Magistrate's Findings**

{¶32} The magistrate found the state had proven, beyond a reasonable doubt, that N.Z. committed rape during the time frame alleged in the complaint, and therefore found N.Z. to be delinquent. Upon N.Z.'s request, the magistrate filed her findings of fact and conclusion of law.

{¶33} The magistrate found it particularly significant that the door lock was installed on the inside of the door, which would allow J.B. to remain safe when she was inside the room. If the real concern had to do with theft of her belongings from her room, as Robert testified, the lock would have been placed on the outside of the door, so that J.B. could lock her door when she was not in her room, to ensure no one could enter in her absence.

{¶34} The magistrate specifically found J.B.'s mother's testimony not credible. She denied being informed in August 2008 by her daughter about the sexual incidents, by a note from her or otherwise, and denied telling Deputy Bachnicki in the March 2009 interview that she had been made aware of the allegation and had taken her daughter for a medical examination, in direct contradiction to the deputy's testimony. Based on the contradiction, and on her demeanor while she testified, the magistrate found Dawn not to be a credible witness.

{¶35} On the other hand, the magistrate found J.B.'s testimony credible, and that the evidence did not reveal any motivation for her to be untruthful. Her statements about what had occurred had been consistent. She had been removed from her home since revealing the sexual incidents, and, despite her desire to return home, she never recanted her allegations.

{¶36} N.Z. filed objections to the magistrate's decision and motions to set aside the decision. The trial court affirmed the magistrate's decision and adopted her findings

of fact and conclusions of law. The court also determined that the magistrate properly allowed evidence of more than one incident of rape to be introduced, because the evidence was not other acts but rather evidence for the charge.

{¶37} **Disposition and Sex Offender Classification**

{¶38} The court committed N.Z. to the Ohio Department of Youth Services for institutionalization in a secure facility for a minimum period of one year, and a maximum period ending on his 21st birthday. In addition, after a sex offender classification hearing, the court classified N.Z. as a Tier III sex offender.

{¶39} N.Z. now appeals.[1] He assigns eight assignments of errors for our review, including a supplemental assignment of error which was filed with our permission.

{¶40} "[1.] The juvenile court erred when it allowed evidence alleging twenty incidents of rape over a time period of fifteen months to prove Count 1, in violation of [N.Z.'s] right to due process law, which includes his right to notice of the charges against him, his right to present a defense, and his right to be free from double jeopardy. Fifth and Fourteenth Amendments to the United States Constitutions; Section 10, Article I, Ohio Constitution.

{¶41} "[2.] [N. Z.'s] adjudication of rape is against the manifest weight of the evidence, in violation of right to due process of law. Fifth and Fourteenth Amendments to the United States Constitution, and Section 10, Article I of the Ohio Constitution.

1. There are three appeal numbers for this case, because a local counsel appointed by the juvenile court filed two separate appeals, and the appellant himself also filed a notice of appeal through his own counsel. We have consolidated these three appeal numbers.

{¶42} "[3.] The juvenile court erred when it classified [N.Z.] as a Tier III juvenile sexual offender registrant when there was insufficient evidence that [N.Z.] was age-eligible for classification in violation of R.C. 2152.83(B).

{¶43} "[4.] The juvenile court committed plain error when it classified [N.Z.] as a Tier III Juvenile Offender Registrant because it did not make that determination upon his release from a secure facility, in violation of R.C. 2152.83(B)(1).

{¶44} "[5.] The trial court abused its discretion when it found that [N.Z.'s] classification as a Tier III juvenile sex offender registrant was offense-based, in violation of R.C. 2950.01(E)-(G).

{¶45} "[6.] The juvenile court erred when it applied Senate Bill 10 to [N.Z.], as the law violates his right to equal protection under the law. Fourteen Amendment to the United States Constitution; Article I, Section 2 of the Ohio Constitution.

{¶46} "[7.] The trial court erred when it applied S.B. 10 to [N.Z.], as the retroactive application of S.B. 10 violates ex post facto and retroactivity prohibitions. Section 10, Article I of the United States Constitution; Section 28, Article II of the Ohio Constitution."

{¶47} "[8.] The juvenile court committed plain error when it indicated on the Explanation of Duties to Register as a Juvenile Offender Registrant or Child Victim Offender form that [N.Z.] was subject to community registration provisions, when it did not order community notification at [N.Z.'s] dispositional hearing or in its dispositional order. R.C. 2152.82(B)(4); 2152.83(C)(3)."

{¶48} **Lack of Specificity of Dates in Complaint**

{¶49} Under the first assignment of error, N.Z. complains the lack of specificity of the time frame alleged in the complaint violates his due process rights. He claims that

the complaint is overbroad because it alleged one incident within a 15-months period; that the court should not have allowed evidence of multiple incidents to prove a single count; and that he could be subject to double jeopardy.

{¶50} The state initially alleged N.Z. committed one count of rape during the period of March 2007 to August 2008. He filed a request for a bill of particulars, asking for a specific date and time of the offense. The state was unable to narrow the time frame, however. At the beginning of the trial, the state narrowed the time frame by two months, alleging the offense to have occurred between May 2007 and August 2008.

{¶51} The law is well settled regarding the lack of specificity regarding dates and times in an indictment. This court has applied a three-prong test which had been adopted by the Supreme Court of Ohio for determining whether a criminal defendant's due process rights have been violated when an indictment does not state the exact date upon which the charged offense allegedly took place.

{¶52} "First, it must be determined whether time was an element of the alleged offense. Second, it must be determined whether the state disclosed to the defendant all of the information it had concerning when the offense occurred. Third, even if full disclosure has taken place, it must be decided whether the state's inability to pinpoint the time has prejudiced the defendant's ability to fully defend himself." *State v. Latorres* (Aug. 10, 2001), 11th Dist. Nos. 2000-A-0060 and 2000-A-0062, 2001 Ohio App. LEXIS 3533, *10, quoting *State v. Darroch* (Dec. 10, 1993), 11th Dist. No. 92-L-104, 1993 Ohio App. LEXIS 5933, *9, citing *State v. Sellards* (1985), 17 Ohio St.3d 169.

{¶53} "The precise time and date of an offense are not ordinarily considered to be essential elements of an offense; hence, the failure to provide specific times and dates in the indictment is not, in and of itself, a basis for dismissal of the charges."

State v. Pickett, 8th Dist. No. 88265, 2007-Ohio-3899, ¶22, citing *Sellards*, supra. See, also, *Latorres* at *10 (in general, the precise date and time of an alleged offense in an indictment are immaterial to the essential elements of an offense; therefore, the failure to provide an exact date and time will not by itself warrant dismissal of a charge). The courts have established that the specific date of sexual conduct is not an element of rape as defined in R.C. 2907.02(A)(2), under which N.Z. was charged. That section states: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." See, also, *State v. Poling*, 11th Dist. No. 2004-P-0044, 2006-Ohio-1008, ¶106; *State v. Stalnaker*, 11th Dist. No. 2004-L-100, 2005-Ohio-7042, ¶92.

{¶54} Nonetheless, if the state has information which would narrow the date and time of an alleged offense, the state must divulge such information when responding to a request for a bill of particulars. *Latorres* at *10, citing *Sellards* at 171. Here, the state's bill of particulars stated that all the offenses occurred during nighttime, but the prosecutor did not know the specific dates of the alleged offenses. The record does not indicate, nor is there any claim, that the state intentionally withheld information regarding the dates.

{¶55} Regarding the third prong, "omission of specific dates in an indictment or bill of particulars is without prejudice or constitutional consequence, provided that failure to provide times and dates does not materially deprive the defendant of an opportunity to prepare a defense." *State v. Daniel*, 97 Ohio App. 3d 548, 557, citing *State v. Gingell* (1982), 7 Ohio App.3d 364. If, after full disclosure by the state, the specific time remains unavailable, the defendant could be considered prejudiced, i.e., unable to fully defend himself under certain circumstances – (1) when the expiration of the statute of

limitations is at issue; (2) when the age of a child victim is an element of the charged offense; or (3) when the defendant "can unequivocally show that he was elsewhere for part of the alleged time frame specified in a charge." *Latorres* at *11-12, citing *Darroch* at *4.

{¶56} Here, the statute of limitations is not an issue. The age of the child victim is not an element of the rape offense with which N.Z. was charged. Furthermore, N.Z. did not rely on a credible alibi defense.

{¶57} The bill of particulars alleged N.Z. "on multiple occasions over the course of an extended period of time from March 2007 through August of 2008, entered the bedroom of [J.B.] and compelled [J.B.] to engage in sexual intercourse using physical force, and/or instilling fear to overcome resistance." Thus, N.Z. was on notice of the allegation that he raped J.B. on multiple occasions by entering her bedroom at nighttime and forcing her to have sexual intercourse with him during the specified period of time.

{¶58} Rather than relying on an alibi defense, N.Z. categorically denied the alleged sexual incidents ever occurred. "'A defendant is not prejudiced by the failure of the indictment to specify the dates and times upon which the charged offenses allegedly occurred if such failure does not impose a material detriment to the preparation of his defense. Where the defendant does not present an alibi defense, where he concedes being alone with the victims of the alleged sex offenses at various times throughout the relevant time frame, and where his defense is that the alleged touchings never happened, the inexactitude of dates or times in the indictment is not prejudicial error.'" *State v. Kerr* (Oct. 9, 1998), 11th Dist. No. 97-L-032, 1998 Ohio App. LEXIS 4850, *14-15, quoting *State v. Mundy* (1994), 99 Ohio App. 3d 275, 297.

{¶59} N.Z. did not rely on a credible alibi defense – he admitted living at home during the relevant period of time, although he claimed he was in other rooms at the times the alleged rapes occurred. His defense was that the alleged sexual incidents *never* happened. Therefore, it is not clear that more specific dates of the alleged offenses would have been necessary for his defense. N.Z. was able to mount a defense consisting of testimony from every member of his household: his father, his stepmother, his stepbrother, and himself. Their testimony, if believed, would have exonerated him. Thus, N.Z. failed to demonstrate that the lack of specific dates imposed a material detriment to the preparation of his defense.

{¶60} We recognize the time frame in the amended complaint was over a rather expansive period of 15 months. The courts, however, have held similar or longer time spans were not fatal to the prosecution's case. See, e.g., *Kerr*, supra (22 months); *Mundy*, supra (eight years); *Gingell*, supra (14 months).

{¶61} Indeed, in cases involving sexual misconduct with a child, the courts have specifically recognized that the precise times and dates of the alleged offense often cannot be determined with specificity. *Daniel* at 556, citing *State v. Barnecut* (1988), 44 Ohio App.3d 149, 151. It has been well settled that it is not mandatory for the state to provide precise dates and times in cases involving sexual misconduct with children. *Poling* at ¶106. This court has also noted that the state is not required to provide precise dates and times because young children are usually unable to remember such specific information, and such incidents usually take place over an extended span of time. *Latorres* at *10-11 (citations omitted). Instead, in such cases, the law only requires the state to "set forth a time frame in the indictment and charge the accused with offenses which reasonably fall within that period." *Daniel* at 557.

{¶62} We do recognize that J.B. is not a child of tender years; however, we cannot say from the record before us that N.Z.'s defense was sufficiently hampered or prejudiced by the lack of precise dates. Thus, N.Z.'s claim regarding a lack of specificity of dates in the complaint is without merit.

{¶63} ***Valentine***

{¶64} N.Z. also claims the "lack of specificity" in the complaint subjected him to double jeopardy, citing *Valentine v. Konteh* (C.A.6 2005), 395 F.3d 626. We do not find *Valentine* supports N.Z.'s argument, because *Valentine* stands for the proposition that, where the state did not differentiate the factual bases of the charges of multiple sexual incidents, a defendant could not be indicted and convicted of *multiple* counts of sex offenses.

{¶65} In *Valentine*, the defendant was indicted for and convicted of 20 "carbon-copy," identically-worded counts of child rape, and 20 counts of "carbon-copy" identically-worded felonious sexual penetration. The prosecution did not distinguish the factual bases of these charges in the indictment or in the bill of particulars. Each of the 20 rape counts alleged that the defendant unlawfully engaged in sexual conduct with his stepdaughter by purposely compelling her to submit through the use of force or threat of force, the stepdaughter being under the age of 13 years. No further information was included to differentiate one count from another. At trial, the victim testified the defendant forced her to perform fellatio in the family room on about twenty occasions, and her estimate was the only evidence to support the number of rape committed by the defendant. The Sixth Circuit reversed the 40-count conviction and held the defendant should have been convicted of only one count of rape and one count of felonious sexual penetration each.

{¶66} The Sixth Circuit was deeply troubled by the *undifferentiated multiple* counts charged in the indictment. Although N.Z. cites this case for a double jeopardy claim only, the court articulated two sets of due process violations for an indictment charging a defendant with multiple, identical, and undifferentiated counts: when such an indictment (1) failed to give a defendant adequate notice of the multiple charges in order to enable him to mount a defense; and (2) failed to protect the defendant from double jeopardy.

{¶67} Regarding the "notice" problem, the Sixth Circuit noted that "[t]he problem in this case is not the fact that the prosecution did not provide the defendant with exact times and places. If there had been singular counts of each offense, the lack of particularity would not have presented the same problem. Instead, the problem is that within each set of 20 counts, there are absolutely no distinctions made. Valentine was prosecuted for two criminal acts that occurred twenty times each, rather than for forty separate criminal acts. In its charges and in its evidence before the jury, the prosecution did not attempt to lay out the factual bases of forty separate incidents that took place." Id. at 632. "As the forty criminal counts were not anchored to forty distinguishable criminal offenses, Valentine had little ability to defend himself." Id. at 633.

{¶68} Here, N.Z. was charged with a *single* count of rape, although the victim testified regarding up to 20 occasions where N.Z. went into her bedroom and forced sexual intercourse on her. The problem of undifferentiated multiple counts does not exist in this case, because N.Z. was charged with a *single* count, consistent with the holding of *Valentine*.

{¶69} **Double Jeopardy**

{¶70} As to the double jeopardy issue, the Sixth Circuit explained there were two problems with the indictment charging multiple undifferentiated counts. "First, there was insufficient specificity in the indictment or in the trial record to enable Valentine to plead convictions or acquittals as a bar to future prosecutions. Second, the undifferentiated counts introduced the very real possibility that Valentine would be subject to double jeopardy in his initial trial by being punished multiple times for what may have been the same offense." Id. at 634-635.

{¶71} The second double jeopardy issue identified in *Valentine* – regarding the *initial* prosecution – is irrelevant here, because N.Z. was only charged with one count of rape for his sexual conduct with the victim during the 15-month span specified in the complaint. Unlike the defendant in *Valentine*, who was indicted and convicted of 20 undifferentiated counts of rape during the time frame, N.Z. was only convicted and punished once for all his conduct during the specified period, hence there is no double jeopardy issue in the *initial* prosecution.

{¶72} As to the first double jeopardy issue identified in *Valentine* – regarding future prosecutions – the Sixth Circuit explained that the lack of specificity regarding the factual bases for the charges presented a double jeopardy problem, because, if the defendant had been acquitted of these 40 charges, it was unclear what limitations would have been imposed on his re-indictment.

{¶73} "Would double jeopardy preclude any prosecution concerning the abuse of this child victim, the abuse of this victim during the stated time period, the abuse of this victim at their residence, the stated sexual offenses in the indictment, the offenses offered into evidence at trial, or some group of forty specific offenses? We cannot be sure what double jeopardy would prohibit because we cannot be sure what factual

incidents were presented and decided by this jury. If Valentine had been found not guilty, it is not clear to what extent he could ably assert that his acquittal barred prosecution for other similar incidents." Id. at 635.

{¶74} Again, that problem does not exist for N.Z., because the prosecutor was able to specify the specific sexual conduct forming the basis of the single rape charge in the bill of particulars, which stated that the offenses were committed during the nighttime hours in J.B.'s bedroom, and N.Z. entered the room and forced sexual intercourse on her on multiple occasions during the time period specified in the complaint. Thus, unlike *Valentine*, it is clear in this case that the state will be barred from a subsequent prosecution against N.Z. for any such conduct that occurred during the specified period of time. N.Z.'s double jeopardy claim is without merit.

{¶75} The first assignment of error is overruled.

{¶76} **Manifest Weight**

{¶77} Under the second assignment of error, N.Z. claims his adjudication is not supported by the manifest weight of the evidence.

{¶78} A review of a manifest weight of the evidence claim in juvenile delinquency adjudication is the same as for criminal defendants. See, e.g., *In re White*, 11th Dist. No. 2006-A-0065, 2007-Ohio-1782. In determining whether a conviction is against the manifest weight of the evidence, "the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines 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. Higgins*, 11th Dist. No. 2005-L-215, 2006-Ohio-5372, ¶35, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380,

387. "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." *State v. Fritts*, 11th Dist. No. 2003-L-026, 2004-Ohio-3690, ¶23. "A finding on review that the jury's verdict was against the manifest weight of the evidence must be reserved for those extraordinary cases where, on the evidence and theories presented, and taken in a light most favorable to the prosecution, no reasonable jury could have found the defendant guilty." *Higgins* at ¶37 (citations omitted).

{¶79} This case is a classic "he-said/she-said" rape case, with no physical evidence to corroborate the victim's allegation. Thus, credibility of the witnesses was the primary factor in determining guilt. For that determination, we must defer to the trier of fact. "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. When examining witness credibility, "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. A fact finder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Thomas*, 11th Dist. No. 2004-L-176, 2005-Ohio-6570, ¶29.

{¶80} "When reviewing a judgment under a manifest-weight-of-the-evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct. *** This presumption arises because the trial judge had an opportunity to view the witnesses and observe their demeanor in weighing the credibility of the witnesses." *State v. Reeves*, 11th Dist. No. 2006-T-0099, 2007-Ohio-4765, ¶14, citing *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 79-81.

{¶81} We recognize J.B.'s testimony was the only evidence to prove that N.Z. raped her. The court's finding that N.Z. committed rape rested on the credibility of J.B. vis-a-vis N.Z, and the court found J.B. to be a credible witness. She testified that she told her mother about the rape in August of 2008, which led her mother to install a lock on her bedroom door. The installation of the lock was corroborated by the other family members, although they gave inconsistent reasons for its installation. The inconsistency affected the credibility of their testimony, and undercut their claims that they were unaware of the sexual incidents.

{¶82} Furthermore, the magistrate placed great weight on the fact that the lock was placed on the *inside* of the door, apparently so J.B. could engage it to protect herself while she was in her room. If the lock were to prevent N.Z. from taking things from her room in her absence, as was asserted by N.Z.'s brother, Robert, it would have been placed on the outside of the bedroom door, so she could lock it when she left the room.

{¶83} J.B.'s testimony that her mother instructed her to lock the bedroom door every night was also corroborated by her cousin, N.G., whose disclosure to Dawn about her own incident involving N.Z. apparently encouraged J.B. to finally reveal the sexual incidents to Dawn via a note about her stepbrother's sexual conduct with her. N.G. testified that after the lock was installed, J.B.'s mother, Dawn, required the door to be locked every night.

{¶84} Dawn denied at trial that J.B. disclosed the sexual incidents to her in August of 2008, maintaining she was unaware of the allegation until March 2009, when J.B. revealed the incidents to her Laurelwood counselor. However, Deputy Bachnicki contradicted her testimony. He testified that, during an interview at the Lake County

Sherriff's Office, she told him J.B. had related to her the sexual incidents, and she had taken J.B. to her doctor for an examination. When confronted with the deputy's testimony, Dawn denied telling the deputy she was aware of the allegation prior to March 2009 or had taken J.B. to the doctor for an examination.

{¶85} The magistrate specifically found Dawn not to be a credible witness, based on her demeanor while testifying and based on Deputy Bachnicki's testimony, which directly contradicted her account. As the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact, we will not substitute our own judgment for that of the trial court. On the evidence and theories presented, and taken in a light most favorable to the prosecution, we cannot conclude that a reasonable trier of fact could have found N.Z. did not committed the sexual offense. The second assignment of error is without merit.

{¶86} Under the third assignment of error, N.Z. complains the trial court classified him as a Tier III juvenile sex offender when there was insufficient evidence that he was age-eligible for classification under R.C. 2152.83(B).

{¶87} **Statutory Scheme for Juvenile Sex Offender Classification**

{¶88} In 2007, Ohio's new sexual offender law was adopted by the Ohio General Assembly in Senate Bill 10. Under the new legislation, there are now three tiers of sexual offenders. The extent of the offender's registration and notification requirements depends on the tier. Senate Bill 10, as in earlier versions of Ohio's sex offender registration statutes, applies to both adult sex offenders and juvenile sex offenders. See R.C. 2950.01(B)(1) ("sex offender" includes a person who is "adjudicated a delinquent child for committing, or has been adjudicated a delinquent child for committing any sexually oriented offense").

{¶89} **Two-Step Process**

{¶90} The classification scheme for juvenile sex offenders is governed by both R.C. Chapter 2152 and R.C. Chapter 2950. As with the earlier version of the law, Senate Bill 10 requires the juvenile court to engage in a two-step process. See *In re C.A.*, 2d Dist. No. 23022, 2009-Ohio-3303, ¶37.

{¶91} First, the court must determine whether the juvenile sex offender should be designated as a juvenile offender registrant ("JOR"), and therefore, subject to classification and the attendant registration requirements.

{¶92} Second, once the juvenile offender is designated as a JOR, the statutory scheme requires the juvenile court to conduct a hearing to determine the tier in which to classify the juvenile offender. R.C. 2152.831(A); R.C. 2152.83(A)(2).

{¶93} **JOR Designation**

{¶94} The JOR designation applies only to juvenile sex offenders who are 14, 15, 16, or 17 years old at the time of committing the offense. R.C. 2152.82(A)(2).

{¶95} For certain juvenile sex offenders, the JOR designation is mandatory. The designation is mandatory for juvenile sex offenders 14 or older at the time of offense who have previously committed a sexually oriented offense. See R.C. 2152.82. The designation is also mandatory for juvenile offenders 16 or older at the time of the offense without regard to any prior offense. See R.C. 2152.83(A)(1).[2]

2. The designation is additionally mandatory for "serious youthful offenders" who are also designated as "public registry-qualified juvenile offender registrant". See R.C. 2152.86.

{¶96} As for juvenile offenders who are 14 or 15 without prior adjudication for a sexually oriented offense and who do not fall within R.C. 2152.86, their designation as JOR is governed by R.C. 2152.83(B)(1), which states:

{¶97} "The court that adjudicates a child a delinquent child, on the judge's own motion, may conduct at the time of disposition of the child or, if the court commits the child for the delinquent act to the custody of a secure facility, may conduct at the time of the child's release from the secure facility a hearing for the purposes described in division (B)(2) [regarding the designation of JOR] of this section if all of the following apply:

{¶98} "(a) The act for which the child is adjudicated a delinquent child is a sexually oriented offense or a child-victim oriented offense that the child committed on or after January 1, 2002.

{¶99} "(b) The child was fourteen or fifteen years of age at the time of committing the offense.

{¶100} "(c) The court was not required to classify the child a juvenile offender registrant under section 2152.82 of the Revised Code or as both a juvenile offender registrant and a public registry-qualified juvenile offender registrant under section 2152.86 of the Revised Code."

{¶101} For these juvenile offenders, under the plain language of the statute, the trial court has the discretion to determine whether the juvenile offender should be considered a JOR, and therefore subject to the registration requirements. See, e.g., *In re D.P.*, 11th Dist. No. 2008-L-186, 2009-Ohio-6149, reversed in part and remanded on other grounds. *In re Sexual Offender Reclassification Cases,* 126 Ohio St.3d 322, 2010-Ohio-3753; *In re T.F.*, 4th Dist. No. 09CA37, 2010-Ohio-4773.

{¶102} Moreover, R.C. 2152.83(D) enumerates six factors the court must consider before exercising its discretion to classify a juvenile sex offender as a JOR. *In re T.F.* at ¶13. These factors include: (1) the nature of the sex offense; (2) whether the juvenile has shown remorse; (3) the public interest and safety; (4) R.C. 2950.11(K) factors; (5) R.C. 2929.12 factors; and (6) results of treatment or professional assessment of the juvenile.

{¶103} **Time of Juvenile Offender's classification**

{¶104} Turning to the instant case, we first address the initial matter of when the sex offender classification should take place for the juvenile sex offenders, which is the claim raised in the fourth assignment of error. N.Z. maintains the only time the court may classify the juvenile offender who is committed to a secure facility is when the juvenile is released from the secure facility. He cites R.C. 2152.83(B)(1) for this claim. That statute provides, in pertinent part:

{¶105} "The court that adjudicates a child a delinquent child, on the judge's own motion, may conduct at the time of disposition of the child or, if the court commits the child for the delinquent act to the custody of a secure facility, may conduct at the time of the child's release from the secure facility a hearing for the purposes described in division (B)(2) of this section if all of the following apply:

{¶106} " ***

{¶107} "(b) The child was fourteen or fifteen years of age at the time of committing the offense."

{¶108} Two panels of this court have addressed the identical issue and held that the language contained in R.C. 2152.83 indicates the hearing prescribed in R.C. 2152.82(B) may occur at any time during the disposition. See *In re B.W.K.*, 11th Dist.

No. 2009-P-0058, 2010-Ohio-3050, discretionary appeal not allowed in *In re B.W.K.*, 127 Ohio St.3d 1446, 2010-Ohio-5762, 2010 Ohio LEXIS 2920; *In re Thrower*, 11th Dist. No. 2008-G-2813, 2009-Ohio-1314.

{¶109} **Whether the Juvenile Court Erred in Classifying N.Z.**

{¶110} Having determined that the juvenile court can conduct the sex offender classification hearing at his disposition, we now turn to the claim raised in the third assignment of error: whether the juvenile court can classify N.Z. as a JOR subject to registration requirement, when the time period of the complaint spanned the time during which he was age 13 through 14 years old.

{¶111} N.Z., born August 18, 1993, was 13 for the first few months of the time frame specified in the amended complaint, from May 1, 2007 to August 18, 2007. He was 14 for the remaining months, from August 19, 2007 to August 31, 2008.

{¶112} If he was 13 at the time of the offense, he is not eligible to be classified as a JOR, and cannot be subject to the tier classification and associated registration requirements. In finding the allegation of one count of rape to be true, the juvenile court did not determine his age at the time he committed the offense. Although N.Z.'s age is not an issue for adjudication of the rape offense, it is a pertinent factor for purposes of his sex offender classification. If he cannot be designated as a JOR under the statutory scheme, then he is not subject to sex offender classification.

{¶113} At the hearing for N.Z.'s disposition and classification, there was no discussion of his age at the time of the offense. The court classified him as Tier III sex offender without first making the necessary finding of his age at the time of offense. Without specifically finding him to be 14 at the time of the offense, the trial court could not designate him as a JOR subject to classification and the attendant registration

requirements. See *In re J.M.*, 7th Dist. No. 09JE21, 2010-Ohio-2700 (the court vacated a juvenile's sex offender classification because he was 13 and 14 during the complaint's time span, and the juvenile court did not make the finding he was 14 at the time of the offense).

{¶114} The state has conceded that this case should be remanded for a redetermination of whether N.Z. can be designated as a JOR subject to sex offender classification.

{¶115} The third assignment of error is with merit, and we remand the matter to the juvenile court for a redetermination of whether N.Z. can be designated as a JOR and therefore subject to sex offender classification and the attendant registration requirements. Our disposition of the third assignment of error renders the remaining assignments of error moot, as they challenge his third-tier classification.

{¶116} The judgment of the Lake County Juvenile Court is affirmed regarding the juvenile offender's adjudication, vacated regarding his sex offender classification, and the matter remanded for a redetermination of his classification.

THOMAS R. WRIGHT, J., concurs,

TIMOTHY P. CANNON, P.J., concurs with Concurring Opinion.

TIMOTHY P. CANNON, P.J., concurring.

{¶117} I concur but must write separately to address some concerns about the manner of prosecution of N.Z.

{¶118} The first assignment of error asserts the trial court erred when it allowed evidence alleging 20 incidents of rape over a time period of 15 months to prove Count 1. Based on the precise error claimed, I agree it is without merit. I agree with the treatment by the majority regarding the inability to be *date* specific in certain situations. However, the state, in charging one count of rape, needed to be *incident* specific. One count is claimed in the complaint but numerous incidents elicited from the alleged victim in her testimony. There is no indication *which incident* the magistrate found to be proven true beyond a reasonable doubt.

{¶119} In other words, of the 20 incidents testified to by the alleged victim, the state should have chosen *one*, temporally narrowed it, and disclosed that to the defense. It should have elected to proceed on the first incident described, or the second, etc. This would have allowed the state to narrow the purported *dates* of the offense to, at most, a couple of months. In addition to the violation of defendant's rights this entails, two problems are created within this case by the failure to be incident specific.

{¶120} First, as the majority points out, since the state was not specific about what *incident* it was prosecuting, we do not know the age of the offender at the time of the offense for purposes of sex offender classification.

{¶121} Second, faced with the contention in the second assignment of error that the conviction on a single count was against the manifest weight of the evidence, we, as a reviewing court, are left to guess *which incident* led to the finding of delinquency as "true." However, in spite of my concerns regarding the lack of specificity, they are not concerns that have been raised on appeal.

{¶122} With regard to the concern addressed in appellant's third issue for review—that this lack of specificity is a problem because "he therefore cannot use that adjudication as a bar to future charges"—I agree with the analysis and conclusion of the majority.