**[Cite as *State v. Wild*, 2010-Ohio-4751.]**

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

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| STATE OF OHIO | : | |
| Plaintiff-Appellee | : | C.A. CASE NO. 2009 CA 83 |
| v. | : | T.C. NO. 08CR540 |
| ANDREW WILD | : | (Criminal appeal from Common Pleas Court) |
| Defendant-Appellant | : | |
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**O P I N I O N**

Rendered on the 1st day of October, 2010.

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FROELICH, J.

**{¶ 1}** Andrew Wild pled no contest in the Clark County Court of Common Pleas to one count of rape of a child under the age of ten, and was sentenced accordingly. In exchange for his plea, one count of gross sexual imposition and seventeen counts of illegal

use of a minor in nudity oriented material were dismissed. On appeal, Wild challenges several rulings made by the trial court prior to his plea, including its denial of his motion to suppress evidence, its denial of his motion to sever the charges for trial, its denial of his motion to exclude evidence of child pornography that did not involve the victim of the charged offenses, and its finding that the victim, who was six years old, was competent to testify. For the following reasons, the judgment of the trial court will be affirmed.

I

**{¶ 2}** On July 9, 2008, Wild was indicted on one count of rape of a child under the age of thirteen, one count of gross sexual imposition involving a child under the age of thirteen, and seventeen counts of illegal use of a minor in nudity oriented material. The charges involved a friend's daughter, M.R. In the following months, Wild filed a motion to suppress evidence and a motion for relief from prejudicial joinder. Wild also challenged the victim's competency to testify at trial. The State filed a motion in limine to admit all child pornography found on Wild's computer.

**{¶ 3}** The trial court overruled Wild's motions to suppress and to sever the charges. The court also found the six-year-old victim competent to testify and granted the State's motion to admit the child pornography found on Wild's computer. These rulings will be discussed in greater detail below.

**{¶ 4}** Following the court's pretrial rulings, Wild pled no contest to rape of a child under the age of ten, and the other charges were dismissed. He was sentenced to a term of life in prison, with eligibility for parole after ten years.

**{¶ 5}** Wild appeals, raising five assignments of error. We will address these

assignments in an order that facilititates our discussion.

II

**{¶ 6}** The first assignment of error states:

**{¶ 7}** "THE TRIAL COURT IMPROPERLY JOINED SEXUAL CONTACT OFFENSES WITH UNRELATED ILLEGAL USE OF A MINOR IN NUDITY ORIENTED MATERIAL THEREBY VIOLATING APPELLANT'S RIGHTS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF OHIO."

**{¶ 8}** Wild contends that the trial court erred in refusing to sever the rape and gross sexual imposition charges from the seventeen counts of illegal use of a minor in nudity oriented material, where the "only similar characteristic is the sexual nature of each offense."

**{¶ 9}** Pursuant to Crim.R. 8(A), joinder of multiple offenses is permitted when the charged offenses are "of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." As a general rule, joinder of offenses is favored to prevent successive trials, to minimize the possibility of incongruous results in successive trials before different juries, to conserve judicial resources, and to diminish inconvenience to the witnesses. *State v. Torres* (1981), 66 Ohio St.2d 340, 343; *State v. Powell* (Dec. 15, 2000), Montgomery App. No. 18095.

**{¶ 10}** If offenses are properly joined, a defendant may move to sever under Crim.R. 14. A defendant claiming error in the joinder of multiple counts in a single trial must make an

affirmative showing that his rights would be prejudiced. *Torres,* 66 Ohio St.2d at 343. A defendant cannot demonstrate prejudice where evidence of each of the offenses joined at trial is simple and direct. *State v. Franklin* (1991), 62 Ohio St.3d 118, 122. Where the evidence is uncomplicated, the finder of fact is believed capable of segregating the proof on multiple charges. *State v. Brooks* (1989), 44 Ohio St.3d 185, 194. For an appellate court to reverse a trial court ruling that denies severance, the accused must show that the trial court abused its discretion. *Franklin,* 62 Ohio St.3d at 122.

**{¶ 11}** M.R., the victim of the alleged rape and gross sexual imposition, was depicted in pictures found on Wild's computer which formed the basis for the seventeen counts of illegal use of a minor in nudity oriented material. Wild contends that the trial court's decision to try all of the counts together was prejudicial to him because the child pornography could have prejudiced a jury against him with respect to the rape and gross sexual imposition offenses. He claims that the admission of such evidence violated Evid.R. 404.

**{¶ 12}** In response to Wild's motion to sever, the State argued that the evidence in support of the various offenses was simple and direct. The State also argued that the pictures of the victim would have been admissible at a separate trial on the rape and gross sexual imposition charges because the pictures were relevant to Wild's motive and intent. Wild had made statements to the sheriff's deputies and to the victim's mother in which he admitted having touched the victim's genitals, but claimed that he had done so for the purpose of applying lotion to a rash and of getting toilet paper out of her labia. According to the State, the photographs tended to show that Wild got sexual gratification from young girls; thus, they were relevant to his intent or purpose in touching M.R.

**{¶ 13}** Evidence of other crimes or wrongs is not admissible to prove the character of a person in order to show action in conformity therewith, but it may be used for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evid.R. 404(B). "The admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment. See *State v. Curry* (1975), 43 Ohio St.2d 66, 68 ***. This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature, ***." *State v. Knisley*, Montgomery App. No. 22897, 2010-Ohio-116, ¶59.

**{¶ 14}** In denying Wild's motion to sever, the trial court concluded that the photographs of the victim were "relevant to show proof of motive or intent with respect to the rape and gross sexual imposition charge[s]." The court reasonably concluded that the sexually suggestive pictures of M.R. were "relevant to show proof of motive or intent with respect to the rape and the gross sexual imposition charge" and would have been been admissible at a separate trial on those counts, because the pictures tended to refute Wild's claims that his motive for touching M.R.'s genitals was non-sexual. The trial court did not abuse its discretion in concluding that severance of the charges was unwarranted.

**{¶ 15}** The first assignment of error is overruled.

III

**{¶ 16}** The fifth assignment of error states:

**{¶ 17}** "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE COMPETENCY OF 6 YEAR OLD M.R. TO TESTIFY WHEN SHE COULD NOT RECALL SPECIFIC EVENTS FROM OVER A YEAR PRIOR TO THE COMPETENCY HEARING, THEREBY VIOLATING APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION."

**{¶ 18}** Wild contends that M.R.'s testimony at the competency hearing demonstrated that she could not recall events from when she was five years old (her age when the alleged offenses occurred). Thus, he argues that the trial court erred in finding M.R. competent to testify.

**{¶ 19}** Evid.R. 601 provides: "Every person is competent to be a witness except: (A) *** children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." In determining whether a child under ten is competent to testify, the trial court must take into consideration (1) the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child's ability to recollect those impressions or observations, (3) the child's ability to communicate what was observed, (4) the child's understanding of truth and falsity, and (5) the child's appreciation of his or her responsibility to be truthful. *State v. Frazier* (1991), 61 Ohio St.3d 247, 251 (citations omitted).

**{¶ 20}** It is the duty of the trial judge to conduct a voir dire examination of a child under ten years of age to determine the child's competency to testify. Id. at 250. The judge may rely on the child's appearance, fear or composure, his or her general demeanor and

manner of answering questions, and his or her ability to relate facts accurately and truthfully in determining whether a child is competent to testify. Id. at 250-251, citing *State v. Wilson* (1952), 156 Ohio St. 525. "There is no requirement *** that the court have corroborating evidence in order to be convinced of the accuracy of the child's recollection of past events." *State v. Markland*, Miami App. No. 07-CA-05, 2008-Ohio-992, ¶36, citing *State v. Glass*, Cuyahoga App. No. 81607, 2003-Ohio-879, ¶41.

**{¶ 21}** The proponent of testimony from a child under ten years old bears the burden of proving that the witness is competent to testify. *State v. Clark*, 71 Ohio St.3d 466, 469, 1994-Ohio-43.

**{¶ 22}** We review the trial court's decision on competency for an abuse of discretion. *Frazier*, 61 Ohio St.3d at 251. "Abuse of discretion has been defined as an attitude that is unreasonable, arbitrary, or unconscionable. *** It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary." *State v. Jackson*, Montgomery App. No. 23458, 2010-Ohio-2836, ¶56 (internal citations omitted).

**{¶ 23}** M.R. was six years old at the time of the hearing and had just finished kindergarten. She did not recall what "grade" she had been in prior to kindergarten. She testified as to her kindergarten teacher's name and that this person had not been her first teacher, but she could not remember the names of any previous teachers. M.R. could not provide her date of birth or recall whether she had a party for her sixth birthday, but she was able to recall some details about Christmas six months earlier. For example, she remembered that her mother had not received any gifts because she (her mother) was "on the

bad list." M.R. also described in detail some gifts that she had received.

**{¶ 24}** M.R. further testified that she knew about lying and telling the truth from her mom. In response to questions from the judge regarding facts that could be discerned in the courtroom, such as the color of her dress, M.R. indicated correctly whether the statements were the truth or a lie. She also stated that kids "get soap in their mouth" if they tell a lie.

**{¶ 25}** At the end of the hearing, the trial court concluded that M.R. was competent to testify. The judge found M.R. to be outgoing, with good eye contact, and "a little more mature than I would expect a six-year-old to be." The court concluded that M.R. had a good understanding of the difference between the truth and a lie. The court observed that M.R. "doesn't seem to have a particularly strong memory of things that occurred maybe a year ago," but was "capable of receiving just impressions of the facts and relating them truthfully." The court also noted that M.R. did remember some details of Christmas six months earlier. In sum, the court concluded that the limitations in M.R.'s memory went to the weight to be given to her testimony, not its admissibility.

**{¶ 26}** Although Wild and the State disagree about whether M.R.'s testimony at the competency hearing demonstrated that she was competent to testify at trial, we begin our discussion by considering whether Wild suffered any prejudice as a result of the trial court's ruling on M.R.'s competence, in light of his no contest plea.

**{¶ 27}** "A motion in limine is defined as '[a] pretrial motion requesting [the] court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to [the] moving party that curative instructions cannot prevent [a] predispositional effect on [the] jury.'" *State v. French,* 72 Ohio St.3d 446, 449, citing Black's Law Dictionary.

Stated another way, a motion in limine challenges the admissibility of evidence because it is irrelevant or is more prejudicial than probative. *State v. Gabel* (1991), 75 Ohio App.3d 675, 677.

**{¶ 28}** A ruling on a motion in limine reflects the trial court's anticipated treatment of the issue at trial and, therefore, is a tentative, interlocutory, precautionary ruling. *French*, 72 Ohio St.3d at 450; *McCabe/Marra Co. v. Dover* (1995), 100 Ohio App.3d 139, 160; *Collins v. Storer Communications, Inc.* (1989), 65 Ohio App.3d 443, 446. Accordingly, "the trial court is at liberty to change its ruling on the disputed evidence in its actual context at trial. Finality does not attach when the motion is granted." *French*, 72 Ohio St.3d at 450, citing *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 4.

**{¶ 29}** Because of their tentative and interlocutory nature, appellate courts generally do not directly review rulings on motions in limine; only when the trial court has made a final determination as to the admissibility of the evidence at trial can the movant preserve any objection on the record for purposes of appeal. *Collins*, 65 Ohio App.3d at 446. See, also, *State v. White* (Oct. 21, 1996), Gallia App. No. 95CA08. "The grant or denial of a motion in limine does not preserve error for review. See *State v. Hill* (1996), 75 Ohio St.3d 195, 202-203, ***. In order to preserve the error for appeal, the evidence must be presented at trial and a proper objection be lodged. See *State v. Brown* (1988), 38 Ohio St.3d 305, ***, at paragraph three of the syllabus; *State v. Grubb* (1986), 28 Ohio St.3d 199, ***, at paragraph two of the syllabus. An appellate court will then review the correctness of the trial court's ruling on the objection rather than the ruling on the motion in limine. *White*, supra; *Wray v. Herrell* (Feb. 24, 1994), Lawrence App. No. 93CA08, ***. When there is no trial, *** there

can be no review on the motion in limine. *Gallucci v. Freshour* (Jun. 22, 2000), Hocking App. No. 99CA2, ***; *State v. James* (May 11, 1994), Medina App. No. 2261-M, ***; *State v. Schubert* (Dec. 22, 1986), Seneca App. No. 13-85-22, ***." *Carver v. Map Corp.*, Scioto App. No. 01CA2757, 2001-Ohio-2403.

**{¶ 30}** Although Crim.R. 12(I) [formerly Crim.R. 12(H)] provides that a plea of no contest does not preclude a defendant from asserting on appeal that the trial court prejudicially erred in ruling on a pretrial motion, a decision on the competency of a witness does not fall within the definition of a pretrial motion set forth in Crim.R. 12. See *Gabel*, 75 Ohio App.3d at 677 ("The characteristic of a motion in limine which prohibits it from fitting the requirements of Crim.R. 12(B) [now Crim.R. 12(C)] is that a ruling on a motion in limine is a *** prospective ruling in advance of the introduction of trial evidence."). See, also, *State v. Benson* (March 31, 1992), Wood App. No. APWD102 (holding that, even after the trial court has reaffirmed a liminal ruling during trial, a no contest plea does not preserve the right to appeal that ruling). Because finality had not attached to the trial court's decision to permit M.R. to testify, the court could have changed its ruling prior to or at trial if additional evidence or other circumstances warranted doing so. Thus, we cannot say that Wild would have been prejudiced by the trial court's ruling if the matter had proceeded to trial. Accordingly, we cannot review the trial court's liminal ruling on M.R.'s competence to testify on appeal from Wild's conviction after a no contest plea.

**{¶ 31}** Wild also contends that his Sixth Amendment rights were violated when the trial court overruled his objection to M.R.'s competency, but he does not explain how the trial court's ruling allegedly infringed on his constitutional rights. Although this argument is

unclear, we infer that it relates in some way to his right to confront the witnesses against him. In response, we simply note that the Confrontation Clause guarantees only an opportunity for cross-examination where substantive trial evidence is given; as long as the defendant is given full cross-examination at the time of trial, the Confrontation Clause is not implicated. *Kentucky v. Stincer* (1987), 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631. Defense counsel participated in the competency hearing, and we presume that the defense would have cross-examined the witness if she had testified at trial. Wild's no contest plea eliminated the need for the victim to testify. Moreover, Wild explicitly waived his constitutional right to confront the witnesses against him when he pled no contest (Disposition Transcript, p. 8).

**{¶ 32}** The fifth assignment of error is overruled.

IV

**{¶ 33}** The second assignment of error states:

**{¶ 34}** "THE TRIAL COURT ERRED BY SUSTAINING THE STATE'S MOTION TO INTRODUCE UNCHARGED CHILD PORNOGRAPHY PICTURES IN APPELLANT'S RAPE, GROSS SEXUAL IMPOSITION, AND ILLEGAL USE OF A MINOR IN NUDITY ORIENTED MATERIAL TRIAL TO [SIC] THEREBY VIOLATING APPELLANT'S RIGHTS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF OHIO."

**{¶ 35}** Wild contends that the trial court's ruling that "unrelated and uncharged child pornography pictures" found on his computer could be admitted at trial was "extremely prejudicial," and that the pictures were irrelevant and inflammatory. These pictures differ

from those discussed under the first assignment of error in that M.R. is not depicted, and the State does not suggest that Wild took these pictures.

**{¶ 36}** The State argues that the child pornography found on Wild's computer and software was admissible because it showed motive, intent, and identity. The State also contends that the child pornography was relevant because Wild stated to investigators that no child pornography would be found on his computer. Finally, the State asserts that "the collection of child pornography shows that M.R. did not take pictures of herself as claimed by Wild, but rather that Wild took the pictures."

**{¶ 37}** In general, relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid.R. 402; Evid.R. 403(A). As we discussed above, evidence of other crimes or wrongs is not admissible to prove the character of a person or to show action in conformity therewith due to the risk of unfair prejudice; it may be used for other purposes, such as proof of motive and intent, as set forth in Evid.R. 404(B). Even assuming it is relevant, considering the very limited purposes for which other acts evidence may be offered, we agree with Wild that the trial court erred in finding that the child pornography on Wild's computer *that did not depict the victim in this case* was admissible at trial. This evidence was unfairly prejudicial and inflammatory and, to the extent that it might tend to show that Wild got sexual gratification from looking at young girls, it was cumulative of the photographs in which the victim herself was depicted. In other words, the State could have proved, through the use of the photographs that formed the basis of the illegal use of a minor in nudity oriented material charges, that Wild was sexually attracted to young

girls (again, to the extent that this was relevant to the charges involving M.R.); offering additional pictures for this same purpose was unnecessary and more prejudicial than probative. The motion in limine seeking the use of these pictures should have been denied. See *Knisley*, supra.

**{¶ 38}** We also note, however, that the trial court's ruling on the admissibility of the pornographic photographs was liminal and, for the reasons discussed under the fifth assignment of error, the trial court would have been free to change its ruling at trial when it saw how this evidence was used by the State. Because it was a liminal ruling, the trial court's decision on the pornographic pictures cannot be challenged on appeal following a no contest plea.

**{¶ 39}** The second assignment of error is overruled.

V

**{¶ 40}** The third assignment of error states:

**{¶ 41}** "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS APPELLANT'S STATEMENTS TO CLARK COUNTY SHERIFF'S DETECTIVES AFTER APPELLANT INVOKED HIS RIGHT TO COUNSEL IN VIOLATION OF HIS RIGHTS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF OHIO."

**{¶ 42}** Wild argues that his statements to the sheriff's deputies, which included an admission that he had touched M.R.'s genitals, should have been suppressed because he had invoked his right to an attorney before the statements

were made and because he was questioned in an intimidating atmosphere. The State contends that Wild's argument that he was in custody at the time of the interview is not properly raised on appeal because it is not "separately assign[ed]" as error. The State also argues that Wild's claim that he invoked his right to counsel during the interview is without merit.

**{¶ 43}** In *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, the United States Supreme Court held that the State may not use statements stemming from a defendant's custodial interrogation unless it demonstrates the use of procedural safeguards to secure the defendant's privilege against self-incrimination. Id. at 444. In order for a defendant's statements made during a custodial interrogation to be admissible, the State must establish that the accused knowingly, voluntarily, and intelligently waived his rights. *Miranda,* supra; *State v. Edwards* (1976), 49 Ohio St .2d 31, 38, overruled on other grounds, (1978), 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155.

**{¶ 44}** In our view, aside from the State's concern that this issue was not adequately raised on appeal, the question of whether Wild was in custody is not central to our consideration of his argument. Even if he were in custody (and the State does not concede this point), the parties agree that Wild was informed of his rights before the questioning began, in keeping with *Miranda*'s requirements for a custodial interview. Wild's motion to suppress his statements did not assert that his statement had been coerced or had been involuntarily made, and he may not raise that argument for the first time on appeal. Because Wild was fully advised of his rights, we fail to see how a finding that Wild was in custody would benefit him.

Rather, this assignment involves Wild's Sixth Amendment right to counsel, which is not generally controlled by the custodial nature of the interrogation.

**{¶ 45}** The following evidence was offered at the suppression hearing with respect to whether Wild invoked his right to counsel during his interview with the deputies.

**{¶ 46}** On May 16, 2008, Detectives Strileckyj and Alexander arrived at Wild's workplace, asked to talk with him, and asked his employer if they could confiscate his computer. The detectives read Wild his *Miranda* rights, and he signed a waiver of those rights.

**{¶ 47}** According to Wild, the interview at his workplace lasted 30 to 45 minutes, during which its tone changed from "calmer" to "crescendoing into *** yelling *** and [Strileckyj] slamming her hand on the table." As the conversation escalated, Wild claims that he made a comment that "maybe [he] needed to talk to a lawyer," but the questioning continued. Eventually, Wild left the office with the detectives and rode with them to the police station in the detectives' car. Wild claims that, while he was in the car with the detectives, he asked how it would be possible for him to get a public defender to be present when questioning resumed. He claims that the detectives responded by asking why he would ask for a lawyer and stating, "If you get a lawyer, you know how that makes you look," implying that it made him look guilty. On cross-examination, however, Wild admitted that he had not asked for a lawyer directly. He also admitted that he had wanted to leave his workplace to continue the questioning, because the "very lightweight door" of the conference room provided little privacy.

**{¶ 48}** Detective Strileckyj recounted a different version of events. She acknowledged that Wild had made a statement to the effect that the questioning "sounds like something I need a lawyer for," but she testified that she did not take this statement as an invocation of his right to an attorney. She also testified that Wild asked to move the questioning from his workplace to the station. She denied that Wild had made any statement about getting a lawyer when they were in the car; she also denied that either of the detectives had discouraged him from contacting a lawyer because it would make him look guilty.

**{¶ 49}** Police officers must immediately stop questioning a suspect who clearly asserts his right to counsel. *Edwards v. Arizona* (1981), 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378. But "[i]f the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Davis v. United States* (1994), 512 U.S. 452, 461-462, 114 S.Ct. 2350, 129 L.Ed.2d 362; see, also, *State v. Jackson,* 107 Ohio St.3d 300, 2006-Ohio-1, ¶94. A suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis,* 512 U.S. at 459.

**{¶ 50}** In *Davis*, the U.S. Supreme Court held that the statement "Maybe I should talk to a lawyer" did not invoke the right to counsel. Id. Similarly, the Supreme Court of Ohio has found that statements such as "I think I need a lawyer," "don't I supposed to have a lawyer present," and "could I call my lawyer" (followed by an affirmative response) do not invoke a right to counsel. *State v. Jackson*, 107 Ohio St.3d 300, 2006-Ohio-1, ¶94 (internal citations omitted).

**{¶ 51}** "[I]n reviewing decisions on motions to suppress, an appellate court reviews the record to see if substantial evidence exists to support the trial court's ruling, bearing in mind that the trial court has the function of assessing credibility and weighing evidence. See, e.g., *State v. Brown* (1993), 91 Ohio App.3d 427, 429-430, ***." *State v. Buk-Shul*, Montgomery App. No. 23603, 2010-Ohio-3902, ¶10. In this case, with the existing case law, the trial court could have reasonably concluded that Wild's statement at his workplace that the topic being discussed sounded like something he was "going to need a lawyer for" was insufficient to put the detectives on notice that he was invoking his right to counsel at that time.

**{¶ 52}** What Wild claims happened in the car on the way to the station is potentially more troubling. A law enforcement officer may not discourage an interviewee from seeking the advice of counsel by suggesting, for example, that only people that are guilty or are lying exercise that right. See, e.g, *Simpson v. Jackson* (C.A.6, 2010), Case No. 08-3224, _____ F.3d _____. However, the trial court apparently credited Detective Strileckyj's testimony – and rejected Wild's claims – about whether the detectives had discouraged Wild from invoking his right to an attorney while they were in the car, as it was entitled to do. Because the trial court reasonably concluded that Wild had not invoked his right to counsel during the workplace interview or in the car, it did not err in overruling his motion to suppress the statements subsequently made to the detectives.

**{¶ 53}** The third assignment of error is overruled.

VI

**{¶ 54}** The fourth assignment of error states:

**{¶ 55}** "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS A FORM SEARCH WARRANT THAT DOES NOT CONNECT APPELLANT'S PROPERTY TO ANY ALLEGED CRIME, THEREBY VIOLATING APPELLANTS FOURTH AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION."

**{¶ 56}** Wild claims that the affidavits in support of the warrants to search his house and his computer "lack a nexus between the alleged criminal behavior and the areas/items to be search[ed]."[1] Although some of the language in Wild's brief seems to challenge both the warrant to search his house and a second warrant which authorized the search and seizure of his computer and electronic storage equipment, Wild's argument focuses on the affidavit in support of the warrant to search the computer equipment. We will do the same.

**{¶ 57}** Wild claims that the affidavits do not relate why the State believed he had contraband on his computer, "but only a generalized recitation of the facts of the case and how child pornography is created, stored, and disseminated."

**{¶ 58}** The affidavit recounted statements that had been made to the detectives by M.R.'s mother. In April 2008, M.R. told her mother that Wild had taken "silly pictures of her butt and her area 'down there.'" Shortly thereafter, M.R.'s mother confronted Wild and demanded to know where his camera was. Wild

[1]Only one affidavit is contained in the record, but Wild acknowledges in his supplemental motion to suppress that the affidavits in support of the two warrants "were almost identical save for the items to be searched."

claimed that M.R. had taken pictures of herself because she was "curious," that he had deleted the pictures, and that he had destroyed the memory card.

**{¶ 59}** The affidavit also contained background information about Wild provided by M.R.'s mother, who had been friends with Wild for a long time. The mother told the detectives that Wild kept several computers in his house, that he was proficient in the use of digital technology, including the use of digital cameras and computers, and that Wild's parents had found child pornography on his computer in the past.

**{¶ 60}** In addition to the information that was tied to the specific allegations in this case, the affidavit contained a lengthy recitation of general patterns and methods of computer usage observed by law enforcement officers in child pornography cases.

**{¶ 61}** Wild claims that, because the affidavit did not state a specific reason to suspect that evidence would be found on his computer – such as a specific allegation that he had uploaded pictures from his camera to his computer – the affidavit was inadequate to support the issuance of a search warrant.

**{¶ 62}** "In determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, '[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *State v. George* (1989), 45 Ohio St.3d 325, paragraph one of the syllabus, following *Illinois*

*v. Gates* (1983), 462 U.S. 213, 238-239, 103 S.Ct. 2317, 76 L.Ed.2d 527. "In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate, neither a trial court nor an appellate court should substitute its judgment for that of the magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant." Id., at paragraph two of the syllabus. The nexus between the items sought and the place to be searched depends upon all of the circumstances of each individual case, including the type of crime and the nature of the evidence. *State v. Freeman,* Highland App. No. 06CA3, 2006-Ohio-5020.

**{¶ 63}** A search warrant enjoys a presumption of validity; when a defendant's motion to suppress attacks the validity of a search conducted under a warrant, the defendant bears the burden of proof. *State v. Barnes* (Mar. 16, 2000), Franklin App. No. 99AP-572.

**{¶ 64}** After considering the evidence offered in support of the search warrant, the trial court held that the issuing judge had had a reasonable basis to conclude that evidence of child pornography was likely to be found on Wild's computer and digital storage devices. The court stated: "I think there is a

permissible inference that the victim is saying that the perpetrator took photographs of her on a digital camera. And he's proficient with digital technology and computers. It's a permissible inference to draw that he would store those on his computer hard drive."

**{¶ 65}** Based on the evidence presented in the affidavit, the trial court did not err in concluding that the search warrants had been based on sufficient information to justify a search of Wild's computer and/or his digital storage devices.

**{¶ 66}** The fourth assignment of error is overruled.

VII

**{¶ 67}** The judgment of the trial court will be affirmed.

. . . . . .

FAIN, J. and OSOWIK, J., concur.

(Hon. Thomas J. Osowik, Sixth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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