[Cite as *State v. Ross,* 2010-Ohio-843.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22958
v.	:	T.C. NO. 2006 CR 4079
THOMAS L. ROSS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 5th day of March, 2010.

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FROELICH, J.

{¶ 1} Thomas Ross was found guilty by a jury in the Montgomery County Court of Common Pleas of four counts of gross sexual imposition of a child under the age of thirteen, one count of rape of a child under age ten, and one count of possession of cocaine. He was sentenced to life in prison. Ross appeals.

{¶ 2} For the reasons discussed herein, the judgment of the trial court will be

affirmed.

I

{¶ 3} In September 2006, B.B., age 11, reported to his mother and grandfather that Ross, who was a former boyfriend of B.B.'s grandmother, had been touching him inappropriately. The family went to the police, and B.B. disclosed that he and other boys had watched pornographic movies at Ross's house, had engaged in oral sex with him, and had masturbated at his direction. B.B. also reported that Ross had provided marijuana, beer, and cigarettes to the boys and had offered them cocaine. Detectives then interviewed one of the other boys, D.D., and searched Ross's home. As a result, Ross was charged with four counts of gross sexual imposition of a child under the age of thirteen, three counts of rape of a child under the age of thirteen, and three counts of rape of a child under the age of ten. A second indictment later added a charge for possession of cocaine.

{¶ 4} Ross was tried by a jury in March 2008. Following the State's case, the trial court granted a directed verdict on one count of rape of a child under age ten (Count 9). The jury found Ross guilty on four counts of gross sexual imposition, one count of rape of a child under the age of ten, and possession of cocaine. The jury acquitted Ross of four other counts of rape. He was sentenced to five years of imprisonment on each count of gross sexual imposition (Counts 1, 2, 6, and 7), to life with parole eligibility after ten years on rape of a child under the age of ten (Count 10), and to six months for possession of cocaine (the "B" indictment"). Counts 1 and 2 were to be served consecutively; Counts 6, 7, and 10

were to be served concurrently; and Counts 1 and 2 were to be served concurrently with Counts 6, 7, and 10. The sentence on the "B" indictment was to be served concurrently with the sentences on the "A" indictment.

{¶ 5} Ross raises ten assignments of error on appeal. We will address these assignments in an order that facilitates our discussion.

II

{¶ 6} Ross's third assignment of error states:

{¶ 7} "THE TRIAL COURT ERRED IN PROHIBITING CROSS-EXAMINATION OF B.B. ON FALSE ALLEGATIONS OF ANAL RAPE AND ATTEMPTED ANAL RAPE."

{¶ 8} Ross contends that he should have been permitted to cross-examine B.B. about CARE House records which indicated that B.B. claimed to have been touched by Ross on the anus and which were inconsistent with his testimony at trial. The State contends that Ross mischaracterizes the evidence, that B.B. did not make such a statement, and that, therefore, cross-examination about such a statement was inappropriate.

{¶ 9} On cross-examination, a party may inquire into all matters pertinent to the case that the party calling the witness would have been entitled or required to raise. *In re Fugate* (Sept. 22, 2000), Darke App. No. 1512, citing *Smith v. State* (1932), 125 Ohio St. 137, paragraph one of the syllabus. However, the trial court has broad discretion in imposing limits on the scope of cross-examination. *State v. Cobb* (1991), 81 Ohio App.3d 179, 183. Trial judges have wide latitude "to impose reasonable limits on such cross-examination based on concerns about, among

other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674. An appellate court will not interfere with a trial court's decision about the scope of cross-examination absent an abuse of discretion. *Fugate*, supra. The term abuse of discretion "connotes more than an error in *** judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 10} The CARE House record of an outpatient consultation with B.B. states that the history was obtained by caseworker Lisa Howze and that the medical history and evaluation were conducted by Dr. Lori Vavul-Roediger. Under "Details of Disclosure," the report of the consultation states:

{¶ 11} "On 9/25/06, [B.B.] disclosed to his mother [A.B.] that he had been experiencing ongoing sexual abuse by his paternal grandmother's boyfriend, Mr. Tom Ross. [Ross] would make [B.B.] and another alleged victim *** take their clothes off and touch [Ross's] penis using their hands and mouth. [B.B.] also reported that [Ross] would touch [B.B.] and [another alleged victim]'s penis with his hands. [Ross] would give the boys money in exchange for the sexual contact. *** [B.B.] also recently mentioned to his mother that [Ross] might have tried to penetrate [B.B.'s] butt with [Ross's] penis."

{¶ 12} Under "Medical Assessment," the report states:

{¶ 13} "[B.B.] recently disclosed to his biological mother and during an interview at the CARE House that an adult male ("Tom") engaged in multiple sexual

acts with him. [B.B.] disclosed a history of penile-anal contact as well as being made to engage in oral-penile contact and genital fondling."

{¶ 14} At trial, Ross wanted to cross-examine B.B. about B.B.'s allegations during CARE House interviews of anal rape or attempted anal rape. The State objected, claiming that Dr. Vavul-Roediger did not talk with B.B. personally to obtain details of the allegations and that the statements in the report came from investigators or family members. Specifically, the prosecutor represented to the court that the statements regarding anal rape had been made by B.B.'s mother, A.B., rather than by B.B., and that Ross could not be permitted to cross-examine B.B. about a statement his mother made. The trial court ruled that there was "a state of confusion here." "[T]his report *** is not the statement of the testifying witness. It's not a written statement, it's not a recorded statement. It's a summary of information from some source. ***" The trial court concluded that, unless the defense could "confirm that [B.B.] made the statement that Ross had tried to penetrate his butt with his penis, you can't use that because it's not clear this is a statement of the patient." The trial court would permit Ross to confirm this through the testimony of another witness – such as Howze or A.B. – if he or she had heard B.B. say that there had been anal intercourse or attempted anal intercourse.

{¶ 15} In light of the ambiguity about the source of the assertion that there might have been penile-anal contact between Ross and B.B., the trial court did not abuse its discretion in prohibiting Ross from cross-examining B.B. about those assertions unless and until a witness could verify that B.B. had made such a statement himself.

{¶ 16} Later in the trial, Howze testified outside the presence of the jury that neither A.B. nor B.B. told her that B.B. had been anally penetrated by Ross. A.B. was out of state during the trial, but the trial judge had a recorded conversation with her by phone at which all the attorneys were present. In this conversation, defense counsel questioned A.B. about whether B.B. had reported to her "something about penile/anal contact, that he [Ross] might have or might have tried it." A.B. stated that B.B. never told her that Ross had tried to anally penetrate him. A.B. had pressed B.B., asking B.B. whether Ross had ever tried to anally penetrate him, and B.B. replied that "he might have, Mom, but I really don't want to talk about it." A.B. then specifically asked B.B. if Ross ever tried to anally penetrate him, and B.B. said no.

{¶ 17} Ross was allowed to use the outpatient consultation, Howze's testimony, and the telephone conversation with A.B. in his defense. He was only prohibited from questioning B.B. about reporting anal contact because, when B.B. testified, no one had yet testified that B.B. had ever made such a claim. Thus, the trial court simply prohibited Ross from attempting to impeach B.B. based on an alleged prior inconsistent statement without establishing that B.B. had indeed made such a statement.

{¶ 18} Evid.R. 607(B) provides that "[a] questioner must have a reasonable basis for asking any question pertaining to impeachment that implies the existence of an impeaching fact." See, also, *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, at ¶141. Without this basis, the mere asking of the question, even with a denial by B.B., would submit an irrelevant fact to the jury, which it would

then have to be ordered to disregard. The trial court did not abuse its discretion by requiring Ross to establish this fact before allowing him to cross-examine B.B. about it.

{¶ 19} The third assignment of error is overruled.

III

{¶ 20} Ross's first assignment of error states:

{¶ 21} "THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT A NEW TRIAL BASED ON THE STATE'S FAILURE TO DISCLOSE EXCULPATORY MATERIALS."

{¶ 22} Ross claims that important exculpatory materials were withheld by the State until after his trial began, that other materials were never disclosed, and that he was deprived of a fair trial as a result. Ross claims that "large portions of the CARE House investigation into the sexual abuse" and a CARE House protocol were not disclosed. Ross claims that these materials "were essential *** to prove that false accusations were being manufactured against Tom Ross" and that proof of false accusations would have undercut the State's case. Ross relies on *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, which requires the State to disclose exculpatory evidence to the defense. He also claims that, because of *Brady* violations, his Motion for New Trial should have been granted.[1, 2]

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[1]Ross also contends that *Brady* compels the State to produce grand jury testimony that is potentially exculpatory. However, pursuant to Crim.R. 6(E), such evidence can be disclosed by the prosecuting attorney "only when permitted by the court." As such, we will address this argument under the second assignment of error, which challenges the court's refusal to order production of the grand jury testimony.

{¶ 23} The State's withholding of evidence favorable to an accused "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. "[F]avorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles v. Whitley* (1995), 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490, quoting *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481. A "reasonable probability" of a different result is demonstrated when the State's suppression of evidence "undermines the confidence in the outcome of the trial." Id. at 434. "Both exculpatory and impeachment evidence may be the subject of a *Brady* violation, so long as the evidence is material." *State v. Gibson*, Butler App. No. CA2007-08-187, 2008-Ohio-5932, at ¶25, citing *Bagley*, 473 U.S. at 676.

{¶ 24} A motion for a new trial is addressed to the sound discretion of the trial court, and its decision will not be disturbed on appeal absent an abuse of discretion. *State v. Beavers*, Montgomery App. No. 22588, 2009-Ohio-5604, at ¶23, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71.

{¶ 25} First, Ross claims that the CARE House records contained a statement that B.B. had accused Ross of anal rape. As we discussed under the third assignment of error, such a statement would have been inconsistent with his

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[2] Ross's motion for a new trial was filed on March 18, 2008, before the jury had

trial testimony, and Ross sought to use the alleged statement to impeach B.B. It was not clear from the CARE House records, however, who made the statement that there might have been anal penetration. B.B. went to CARE House with his mother, A.B, and *she* was concerned that Ross might have tried to anally penetrate B.B. A.B. stated unequivocally, however, that B.B. had denied that there had been any anal penetration. The Care House caseworker, Lisa Howze, did not recall either B.B. or his mother's alleging possible anal penetration, although her report stated that B.B.'s mother mentioned that Ross might have attempted anal penetration.

{¶ 26} B.B. had already testified when Howze testified about her (Howze's) recollection of the conversation. Ross did not ask to recall B.B. to question him about the allegation of possible anal penetration.

{¶ 27} Although Ross apparently had not seen a copy of the CARE House report before trial, near the end of B.B.'s testimony, the trial court gave Ross's attorney time outside the presence of the jury to read through the report and to point out alleged inconsistencies with the trial testimony to the court. The trial court permitted Ross to fully explore this line of questioning at trial. The trial court also delayed Howze's testimony for part of a day and overnight so that she could obtain and more fully review the CARE House records of the case before she testified. Ross's counsel had this time in which to prepare to use the CARE House report during Howze's testimony and did not request an additional continuance.

{¶ 28} In our view, the issues that Ross raised with respect to B.B.'s interview

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rendered its verdict.

were not complex, and he was given ample time to pursue this line of questioning at trial. Even assuming that the CARE House report pertaining to Howze's interview with B.B. and his mother was not disclosed before trial,[3] Ross's argument that his due process rights were violated by the trial court's handling of this matter is without merit.

{¶ 29} Next, Ross argues that he was not provided with and was not able to make use of the CARE House records related to D.D., one of the other boys, which allegedly contradicted D.D.'s trial testimony.

{¶ 30} At trial, D.D. testified that he had sat on Ross's lap while Ross was naked and that Ross's "penis would be soft and then it would turn hard." Although D.D. testified that Ross had made him take his clothes off on other occasions, D.D. stated that he had been dressed when he sat on Ross's lap and felt Ross's erection. The CARE House records prepared by Howze requesting a psychological referral for D.D. stated that D.D. had reported anal penetration. At trial, Howze testified that the CARE Clinic Report actually stated that "patient disclosed penile anal contact with questionable penile anal penetration." Howze testified that this discrepancy represented an error on her part, not an inconsistency in D.D.'s statements.

{¶ 31} The trial court permitted Ross to examine Howze and D.D. about the alleged inconsistencies in their statements about anal contact between D.D. and Ross, and counsel did so effectively. Thus, we are unpersuaded by his argument

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[3] There is some dispute as to whether the State disclosed these items to Ross's prior attorney.

that he was prejudiced by the court's handling of the alleged inconsistencies regarding D.D.'s claims of anal penetration.

{¶ 32} Notably, with respect to both B.B. and D.D., the trial court did not include an allegation of anal rape in any of its instructions to the jury. On each count of rape, the trial court described the alleged conduct as oral sex – one of the boys touching Ross's penis with his mouth or Ross touching the boy's penis with his (Ross's) mouth. Thus, Ross was not convicted of anal rape.

{¶ 33} Finally, Ross claims that a copy of the CARE House protocols for forensic interviews would have been helpful to the defense because it would have allowed Ross to challenge Howze's assertion that the interview with D.D. had conformed to the protocols. The CARE House protocols were presumably developed to assure that questioning was conducted in such a way as to elicit the truth from alleged victims of child sexual abuse, and Ross could have highlighted any deviations from these protocols to cast doubt on the reliability of D.D.s prior statements. However, even if the protocols were not disclosed before trial, Ross was able to use them at trial. Moreover, Ross called his own expert to testify that the manner in which an interview is conducted can affect recollection of events and that children can be susceptible to suggestion. The jury also viewed the recording of Detective Daugherty's interview with D.D. at CARE House and could judge for itself (in light of the defense expert's testimony) whether the questions were unduly suggestive. Ross's due process rights were not violated by the State's alleged failure to give the defense a copy of CARE House interview protocols before trial.

{¶ 34} The trial court did not abuse its discretion in refusing to grant a new

trial on the basis of the alleged *Brady* violations.

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

IV

{¶ 36} Ross's second assignment of error states:

{¶ 37} "THE TRIAL COURT ERRED WHEN IT FAILED TO ORDER PRODUCTION OF THE GRAND JURY TESTIMONY."

{¶ 38} Ross claims that the trial court erred when it refused to provide him with the victims' grand jury testimony.

{¶ 39} "Grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy." *State v. Greer* (1981), 66 Ohio St.2d 139, at paragraph two of the syllabus; see Crim.R. 6(E). A "particularized need" exists "when the circumstances reveal a probability that the failure to provide the grand jury testimony will deny the defendant a fair trial ***." *State v. Sellards* (1985), 17 Ohio St.3d 169, 173. The disclosure of grand jury testimony is governed by Crim.R. 6(E), and the decision whether to release grand jury testimony is within the trial court's discretion. *Greer,* supra, at paragraph one of the syllabus.

{¶ 40} A trial court does not abuse its discretion by finding no particularized need when a defendant speculates that grand jury testimony might have revealed contradictions. *State v. Carr*, Montgomery App. No. 22603, 2009-Ohio-1942, at ¶41, quoting *State v. Mack*, 73 Ohio St.3d 502, 508. "If the use of grand jury

testimony were permitted simply because a defendant claims that the prior statements of a witness could be used for impeachment purposes, virtually all grand jury testimony would be subject to disclosure." Id., quoting *State v. Cherry* (1995), 107 Ohio App.3d 476, 479.

{¶ 41} Ross claims that he showed a particularized need for the grand jury testimony "based on the inconsistencies in the testimony of his accusers with prior accusations." He contends that the grand jury testimony of Ross's accusers "must have contradicted" the accounts in the CARE House records or presented at trial because "the bill of particulars that resulted from the grand jury indictment contained accusations of possible anal rape." With respect to the counts of rape, the bill of particulars stated that Ross had engaged in sexual conduct that "include[d], but [was] not limited to, oral sex being performed on the victim, the victim performing oral sex on the defendant and/or anal sex performed on the victim." As discussed under the first and third assignments of error, the parties and the court spent a great deal of time and effort at trial discussing Ross's inferences – from the bill of particulars and other documents – that the victims had made prior inconsistent statements about anal contact with Ross. The evidence from which these inferences were drawn involved statements made by third parties. Nonetheless, Ross was permitted to question D.D. about the alleged inconsistent statements regarding anal contact. There was scant evidence that B.B. had made such an allegation in the past, although his mother had been concerned about anal rape and had questioned whether B.B. was fully disclosing what had happened. CARE House records, along with the statements of B.B.'s mother and the testimony

of the caseworker, demonstrated that B.B.'s mother had voiced this concern. But there was no evidence that B.B. had affirmatively reported such contact to anyone.

{¶ 42} The indictments and bill of particulars included anal sex as a possible form of sexual conduct that would be established at trial, but the evidence at trial did not establish this offense, and the trial court limited the jury's consideration to oral rape. The trial court could have reasonably concluded that the possibility that anal rape had been mentioned in the grand jury testimony was slim, that Ross did not demonstrate a particularized need for disclosure of grand jury testimony that outweighed the need for secrecy, and that the refusal to provide grand jury testimony would not deprive Ross of a fair trial. Because "'a bald assertion on appeal that [the defendant] needed to examine the testimony of an adverse witness for inconsistencies fails to set forth a particularized need,'" *Carr* at ¶41, quoting *Mack,* 73 Ohio St.3d at 508, the trial court did not abuse its discretion in refusing to allow Ross to review the grand jury testimony.

{¶ 43} The second assignment of error is overruled.

V

{¶ 44} Ross's fourth assignment of error states:

{¶ 45} "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENDANT'S REQUEST FOR EXPERT PSYCHOLOGICAL EXAMINATION."

{¶ 46} Ross claims that his designated expert, Dr. Frederick Peterson, should have been allowed to conduct a psychological evaluation of Ross's accusers. He contends that such evidence was necessary "to remedy a fundamental unfairness" created by the fact that the prosecutors had pre-trial access to the children and the

defense did not. He also claims that such testimony would have balanced the expert testimony of State's witness Dr. Brenda Miceli, who was permitted to testify "for the purpose of verifying the consistency of the children's conduct *** with childhood sexual abuse."

{¶ 47} A defendant does not have a right to compel a rape victim to undergo a psychiatric or psychological evaluation. *State v. Bolling,* Montgomery App. No. 20225, 2005-Ohio-2509, at ¶54, citing *State v. Gray* (June 28, 1995), Hamilton App. No. C-940276. In particular, "a psychological examination of a child alleged to be the victim of sexual abuse is intrinsically dangerous and therefore permission to conduct the examination should not be granted lightly." *State v. Lacy* (Dec. 2, 1996), Butler App. No. CA95-12-221, citing *State v. Shoop* (1993), 87 Ohio App.3d 462, 469-70. A trial court may, in its discretion, order such an examination, but it should do so only in exceptional circumstances and only when necessary to further the ends of justice. *Bolling, supra.* Furthermore, expert testimony is not admissible for the purpose of attacking the veracity of the victim's allegations. *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, citing *State v. Boston* (1989), 46 Ohio St.3d 108, 128-129. Using the results of a mental exam for that purpose would usurp the jury's function of determining the credibility of the witnesses. *Gray*, supra.

{¶ 48} Ross did not establish that extraordinary circumstances justified a forensic psychological examination of the accusers in this case. He also suffered no unfair prejudice by the testimony of Dr. Miceli. Dr. Miceli testified about typical characteristics of child sexual abuse – e.g, the emphasis on secrecy, the frequency of delayed disclosure, the types of events that can trigger disclosure, and the

frequency with which children give incomplete information when they first disclose. Ross presented testimony through his psychological expert, Dr. Solomon Fulero, who testified about the risk of false disclosure, how vulnerable children are to suggestion during an interview, and how the manner in which a child is interviewed can affect his or her recollection of events. Dr. Fulero further testified that Detective Daugherty had violated many accepted psychological interviewing techniques when he questioned Ross's alleged victims. The State did not present psychological evidence about these children in particular, so Ross had no legitimate need to conduct a psychological interview to refute such testimony.

{¶ 49} The trial court found that "exceptional circumstances [were] not present to justify the extraordinary order of requiring the alleged sexual assault victims to submit to psychological evaluations; the defense ha[d] not demonstrated that the evidence [could not] be obtained by other reasonable means; and the ends of justice [did] not necessitate such an order." The trial court did not abuse its discretion in reaching this conclusion.

{¶ 50} The fourth assignment of error is overruled.

VI

{¶ 51} Ross's fifth assignment of error states:

{¶ 52} "THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY FROM DEFENDANT'S EXPERT, DR. PETERSON."

{¶ 53} At trial, Ross also sought to have Dr. Frederick Peterson testify "regarding the incompatibility of Ross's psychological profile with that of a pedophile." The trial court refused to allow expert testimony as to the

characteristics of a pedophile and whether Ross did or did not possess those characteristics. Ross claims that the trial court erred in concluding that *State v. Smith* (1992), 84 Ohio App.3d 647, a case from our district, created a per se rule that such evidence must be excluded.

{¶ 54} In his Motion to Admit Testimony, Ross asked the court to admit Dr. Peterson's testimony based on the attached report. In that report, Dr. Peterson stated that "[t]he focus of this assessment is whether or not Mr. Ross is a pedophile, which is defined as an individual with enduring sexual interest in young children." Based on the assessment conducted as part of the evaluation, Dr. Peterson concluded that the assessment "confirm[ed] Mr. Ross's self-reported sexual interest in females, including adolescent females but primarily adult females," that the results were "valid and reliable," and that Ross was "not a pedophile." Ross claims that such evidence was admissible character evidence.

{¶ 55} "Character" is defined as the "aggregate of the moral qualities which belong to and distinguish an individual person; the general result of one's distinguishing attributes." Black's Law Dictionary 232 (6th ed. Rev.1990). Relevant character traits include a defendant's reputation for sobriety in a driving while intoxicated case, a defendant's reputation for honesty and fair dealing in a fraud case, and a defendant's reputation for being peaceful and law-abiding in a sexual assault case. *Valdez v. Texas* (1999), 2 S.W.2d 518, 520, fn. 1. Although we are unpersuaded that one's sexual orientation or preferences are evidence of one's character, for the sake of addressing this argument, we will assume that Ross's "sexual interests" did constitute character evidence.

{¶ 56} Ross sought to create an inference that he did not commit these offenses through expert testimony that proved he was not the type of person (a pedophile) who would have committed the type of crime of which he was accused. Evid.R. 405(A) provides that proof of character may be made by testimony as to reputation or by testimony in the form of an opinion. Expert opinion evidence is not the type of opinion evidence contemplated by Evid.R. 405(A). *State v. Ambrosia* (1990), 67 Ohio App.3d 552, 562. "The Staff Notes to Evid.R. 405(A) indicate that Ohio included opinion evidence because the distinction between reputation evidence and opinion evidence was negligible. 'Reputation evidence' is defined in the Staff Notes to Evid R. 405(A) as the 'consensus of individual opinions, the general estimations of others.'" Id. Where an expert bases an opinion on test results rather than his or her acquaintance with the defendant in a community sense, the expert's opinion does not constitute proper character evidence. Id.

{¶ 57} We agree with *Ambrosia's* analysis of the permissible scope of character evidence. Dr. Peterson's opinion, based on scientific assessments and Ross's self-reporting, that Ross's sexual interest focused on "primarily adult females" and that he was not a pedophile was not the type of opinion evidence permitted by Evid.R. 405.

{¶ 58} In *Smith*, the State offered circumstantial evidence from which the jury could infer that the defendant was a pedophile (and therefore that he was guilty of the crimes), including how he had befriended the child-victims and taken them on various outings and the defendant-teacher's principal's testimony that the defendant spent an unusual amount of time with young children and seemed to

prefer boys to girls. Expert testimony was also offered by the State concerning pedophiles and their behavior. The jury was then asked to infer that Smith's behaviors demonstrated that he was a pedophile and that had acted in accordance with his propensity to commit the crimes alleged. Id. at 661. We held that such an inferential pattern presented two difficulties. "First, it violates the rule of evidence that one inference cannot be deduced from or predicated upon another inference, but must be predicated on the facts supported by the evidence. *** Second, it employs evidence of a defendant's character to prove that he acted in conformity therewith to commit the offense alleged." Id. at 661. We concluded that this inferential pattern was prohibited by Evid.R. 404 and that the expert testimony concerning the pedophilic behavior "did not concern a matter outside the competence of the jury," and we reversed the conviction. Id. at 652. In Ross's case, the trial court concluded that Ross's attempt to offer evidence of his alleged lack of "sexual interest" in boys demonstrated that he had not committed the alleged crimes. The trial court did not err in relying on or misinterpret our holding in *Smith* when it concluded that such testimony was not permissible.

{¶ 59} In the trial court, Ross also argued that Dr. Peterson's testimony was "not offered to show that Mr. Ross acted in conformity with any prior act, but rather to show that Mr. Ross had no motive, intent, plan, preparation or knowledge to commit the crimes" of which he was accused, citing Evid.R. 404. Evid.R. 404(B) is addressed to the use of other acts evidence; it does not permit the use of expert testimony to show motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

{¶ 60} The trial court did not abuse its discretion in refusing to admit Peterson's testimony.

{¶ 61} The fifth assignment of error is overruled.

VII

{¶ 62} Ross's sixth assignment of error states:

{¶ 63} "THE JURY'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 64} Ross claims that the jury's verdict was against the manifest weight of the evidence because there was "no coherent story among the alleged victims", the evidence was contradictory, and Ross's immobility made some of the claims impossible. (One of Ross's legs had been amputated, and he wore a prosthetic device.) Ross also contends that Detective Daugherty interviewed the victims in such a way as to suggest the answers he wanted to hear or had already heard from other children. For these reasons, Ross asserts that no reasonable jury could have convicted him.

{¶ 65} "[A] weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." *State v. Wilson,* Montgomery App. No. 22581, 2009-Ohio-525, at ¶12. When evaluating whether a conviction is contrary to the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must

be reversed and a new trial ordered." *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 66} All of the counts in the indictment alleged offenses committed against B.B. and D.D. B.B. was under the age of thirteen at the time of all the offenses, and D.D. was under the age of ten.

{¶ 67} The State presented the following evidence at trial:

{¶ 68} B.B. testified that Ross was his grandmother's former boyfriend and that Ross had been like a grandfather to him when he was younger. When B.B. was in third grade, he visited Ross's house on weekends and sometimes spent the night. Occasionally, a friend or a cousin would accompany B.B. These visits were initiated by Ross, and Ross provided the transportation. Ross had toys at the house, and he would pay the boys for doing chores. No other adults, including B.B.'s grandmother, were usually there. Sometimes B.B. went to Ross's house alone, and sometimes other boys were there too. The other boys who had been at the house with B.B. included D.D., B.W., M.K., and J.P.

{¶ 69} B.B. testified that, when he visited Ross's house, Ross would play "dirty" pornographic movies that he kept in a closet in his kitchen and engage in sexual acts with him and the other boys. Ross told the boys to take off their clothes, and he touched their "private areas." More specifically, B.B. testified that

Ross had put his mouth on B.B.'s penis, had put his own penis in B.B.'s mouth, and had touched B.B.'s penis with his hand. According to B.B., Ross had engaged in similar activity with other boys. The boys and Ross would also masturbate simultaneously. Ross provided lotion to use during masturbation. B.B. recounted that, on one occasion, Ross told him and M.K. to touch each other's penises with their hands and mouths. Ross had also provided marijuana, beer, and cigarettes. B.B. saw cocaine on Ross's kitchen table and saw him sniff it through a straw, but B.B. was not aware of any of the boys' using cocaine. Ross took Polaroid pictures of the boys, but then Ross cut them up.

{¶ 70} After B.B. disclosed the abuse to his mother and grandfather, he was interviewed at CARE House by Detective Brad Daugherty. At trial, B.B. admitted that he had not told Detective Daugherty everything that had happened at Ross's house during their initial interview because he was embarrassed. For example, B.B. did not admit that D.D. had been at Ross's house, because he did not want D.D. to get in trouble, or that he (B.B.) had engaged in sexual conduct with M.K. at Ross's house.

{¶ 71} D.D., who was B.B.'s cousin, also testified that Ross had been like a grandfather to him and that he had gone to Ross's house many times alone or with other boys, including B.B. and B.W., when he was in second and third grade. D.D. said that the boys watched "nasty" movies with Ross, smoked cigarettes provided by Ross, and were made to take off their clothes. Ross took pictures in which the boys were sometimes clothed and sometimes not. D.D. saw beer and cocaine at Ross's house, but did not use either. D.D. recounted that Ross had used his

mouth and hands to touch him in his "private areas," including the "front part" and the "back part," when D.D. was in the second and third grade. Sometimes B.B. was there when this activity occurred; D.D. never touched B.B. himself, but he saw Ross touch B.B. more than five times, when B.B.'s clothes were off and Ross's clothes were on. According to D.D., B.W. was also there on two occasions. D.D. used his hands and mouth to touch Ross on the "front" on multiple occasions, and something came out of Ross's penis. D.D. testified that no other adults came by Ross's house while he was there.

{¶ 72} D.D. denied engaging in sexual acts with any of the other boys and denied touching himself, but he claimed that other boys and Ross had touched themselves. D.D. testified that Ross had touched his behind with his "private," but he did not specify whether one or both of them had been dressed at the time. D.D. did not tell anyone about Ross's behavior because he was afraid of Ross.

{¶ 73} M.K. testified that he had gone to Ross's house only one time, with B.B. M.K. testified that Ross had driven them to the house, that the boys drank beer provided by Ross, that Ross sniffed cocaine and offered some to the boys, who did not take it, and that they watched pornographic movies. M.K. also testified that Ross photographed the boys with a Polaroid camera while they were naked or only partially clothed, then cut up the pictures. M.K. denied that he and B.B. had engaged in any sexual conduct while watching pornography.

{¶ 74} J.P. testified that he had gone with B.B. to B.B.'s "grandfather's house" two times, that Ross drove the boys to the house, that they watched pornography and played games with guns and knives. J.P. saw cocaine at the

house, and he stated that Ross took pictures of the boys.

{¶ 75} B.W. testified that he went to Ross's house with D.D. numerous times when B.W. was in the sixth grade. Ross had picked the boys up at D.D.'s house, and B.B. had sometimes been with them at Ross's house too. According to B.W., the boys smoked marijuana and cigarettes and watched pornographic movies involving oral sex. Ross did not expressly ask the boys to take their clothes off during the movies, but B.W., B.B., and D.D. did take their clothes off and masturbate in Ross's presence, during which time Ross put his hands down his own pants. Ross used cocaine and offered cocaine to B.W., but B.W. did not use any. Ross told the boys not to tell anyone what they were doing at his house. B.W. remembered Ross's taking photos while the boys were dressed, but not while they were naked. B.W. testified that no one else had touched him at Ross's house, but that he had observed Ross touching D.D. three times and touching B.B. two times. B.W. did not observe boys touching each other, and he never saw anyone ejaculate.

{¶ 76} During the search of Ross's home and car, sheriff's deputies found cocaine, marijuana, cigarettes, pornographic videos in the kitchen closet, and boys' underwear.

{¶ 77} The parties stipulated that, when the boys were examined by Dr. Lori Vavul-Roediger, no evidence of injuries was found.

{¶ 78} Dr. Miceli, an expert on child psychology and child sexual abuse, testified that secrecy is typically a significant component of child sexual abuse and that children often give incomplete information when they disclose sexual abuse

because they are "not always sure what adults are looking for, what information we need to get from them [so they] may only give parts of it." She also testified that there is some evidence that boys have a harder time disclosing sexual abuse than girls do.

{¶ 79} B.B. and D.D.'s grandmother, J.B., testified that she had known Ross for many years and that they had dated for a time, but that their relationship had ended two to three years before the alleged sexual abuse. J.B. testified that Ross married someone else in 2005, but that his wife did not live with him.

{¶ 80} Detective Daugherty testified that, when he went to interview Ross after talking with B.B. and D.D., Ross spontaneously stated, "Does this have anything to do with my grandkids who are not really my grandkids?" before asking for a lawyer. Daugherty also testified that, when he questioned D.D., D.D. denied any improper touching several times. D.D. began to cry when Detective Daugherty told him that B.B. had already revealed what had happened at Ross's house. D.D. then disclosed inappropriate touching by Ross and that D.D. had touched his own penis in Ross's presence.

{¶ 81} Ross presented testimony from several witnesses and testified on his own behalf. Ross presented several character witnesses. These witnesses testified that, although they knew Ross to use cocaine, marijuana, and beer, they had never seen him do so in front of children or offer such items to children. They also testified that Ross had a reputation for truthfulness and that his mobility was limited due to his prosthesis on one leg. These witnesses testified to Ross's good relationship with the kids who came to his house, that children were often present

there, and that the children did not seem fearful of Ross.

{¶ 82} Ross's wife, Darlene, testified that, although she did not live with Ross, she spent several nights per week at his house. She stated that she did not stay when Ross's grandchildren were there because she did not like the commotion. However, she recalled that she had stayed with Ross over Labor Day weekend in 2006.[4]

{¶ 83} Ross, who was 63 at the time of trial, testified about his relationship with B.B. and D.D.'s family, and that J.B.'s children and grandchildren had been like his own. He maintained a relationship with the children, particularly the grandchildren, even after his relationship with their grandmother ended. Ross testified that the children regularly visited him and spent the night. He denied that he had ever offered the children cigarettes, beer, marijuana, or cocaine, but he stated that he had caught the kids sneaking cigarettes or sips of beer on occasion. He also denied that he had ever shown the children pornography and that he had ever touched the boys for sexual gratification. He stated that he had put salve on D.D.'s penis on one occasion due to irritation. Ross denied that he had ever engaged in oral sex with the boys, that he had ever touched D.D.'s anus, and that D.D. had ever sat on his lap. He stated that he was unaware of the boys engaging in any sex acts at his house and that he had never taken pictures of the boys or cut them up. Ross described suffering from numerous disabilities or physical limitations, including the use of a prosthesis on one leg and having had a knee

[4] B.B.'s testimony suggested that the last incident of sexual abuse occurred at Ross's house on Labor Day weekend, 2006. B.B. disclosed the abuse approximately

replacement in the other leg, arthritis in his back, and the use of glasses and a hearing aid.

{¶ 84} The jury was charged with observing and listening to the testimony presented at trial and with determining which testimony was the most credible. Based on the evidence presented, the jury could have reasonably found that Ross had committed gross sexual imposition and rape and that he had possessed cocaine. The children's testimony was generally consistent, although there were some discrepancies. We cannot conclude that 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." *Thompkins,* 78 Ohio St.3d at 387. Ross's conviction was not against the manifest weight of the evidence.

{¶ 85} The sixth assignment of error is overruled.

VIII

{¶ 86} Ross's seventh assignment of error states:

{¶ 87} "THE TRIAL COURT ERRED IN FAILING TO DISMISS THE POSSESSION OF COCAINE CHARGE AGAINST ROSS BASED ON HIS SPEEDY TRIAL RIGHT, RESULTING IN SUBSTANTIAL PREJUDICE TO THE DEFENDANT AT TRIAL."

{¶ 88} Ross claims that his right to a speedy trial was violated, because "the State knew cocaine was present when [he] was initially indicted on rape and sexual imposition charges" in October 2006, but it did not indict him on possession of cocaine until April 2007. Ross claims that his speedy trial time on the possession

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three weeks later.

charge should have started to run when he was initially indicted on the sex offenses because the State knew about the cocaine at that time. The State contends that the speedy trial time did not begin with the initial indictment, because the drug offenses arose out of different facts than the sex offenses, and some of these facts – particularly the lab results confirming that the suspected substance was cocaine – were not immediately known to the State.

{¶ 89} The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Section 10, Article I of the Ohio Constitution. "The speedy trial provision is 'an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.'" *State v. Adams* (1989), 43 Ohio St.3d 67, 68, citing *United States v. Ewell* (1966), 383 U.S. 116, 120, 86 S.Ct. 773, 15 L.Ed.2d 627. The States are free to prescribe a reasonable period consistent with constitutional standards. Id., citing *Barker v. Wingo* (1972), 407 U.S. 514, 523, 92 S.Ct. 2182, 33 L.Ed.2d 101.

{¶ 90} In Ohio, the legislature has prescribed that a person against whom a felony charge is pending must be brought to trial within 270 days after his arrest. R.C. 2945.71(C). Ross was arrested and his house was searched on September 25, 2006. Officers discovered what they believed to be cocaine and marijuana in the house and sent the drugs to the lab for identification. On October 2, 2006, Ross was indicted on six counts of rape and four counts of gross sexual imposition. The State received the lab tests confirming that one of the substances found in

Ross's house was cocaine later in October 2006.

{¶ 91} Ross was indicted for possession of cocaine on April 25, 2007. Ross was not in jail at this time. On May 7, 2007, Ross filed a motion to dismiss the "B" indictment and to suppress the drug evidence. The motions were set to be heard on June 5, 2007, but Ross sought a continuance. On August 17, 2007, Ross filed a Waiver of Time Requirements on all the charges (to be applied prospectively only). Ross was tried in March 2008. Due to his waiver of time, Ross clearly was not denied his right to a speedy trial unless the time should have been calculated from the date of the "A" indictment.

{¶ 92} The State relies on *State v. Baker*, 78 Ohio St.3d 108, 1997-Ohio-229, in support of its argument that the April 2007 indictment for possession of cocaine did not violate Ross's right to a speedy trial. In *Baker*, the defendant, a pharmacist, was arrested because he sold prescription drugs to police informants. The same day, police officers seized numerous financial records from two pharmacies owned by Baker. Baker was indicted on the offenses arising from the controlled drugs buys one week after his arrest. While those charges were pending, state officials audited financial records seized from Baker's pharmacies. The audits, which were completed approximately three months after the initial indictment, turned up additional evidence of drug trafficking and Medicaid fraud. The State obtained an indictment on the additional charges against Baker nine months after the audits of the pharmacy records were completed and almost one year after his arrest and initial indictment.

{¶ 93} The supreme court rejected Baker's argument that the statutory period

for bringing him to a speedy trial on the charges in the second indictment had begun when he was arrested and that his speedy trial rights had been violated. It concluded that the additional charges against Baker did not arise from the same facts as the charges contained in the initial indictment and that the State did not know of the facts underlying the additional charges at the time of the initial indictment. The Court held that, "[s]ince the charges in the second indictment stem from additional facts which the state did not know of before the audits, the state should be accorded a new 270-day period beginning from the time when the second indictment was returned ***." Id. at 111-112. To hold otherwise, the court concluded, "would undermine the state's ability to prosecute elaborate or complex crimes." Id. at 111.

{¶ 94} We have applied *Baker* in other cases where the facts are more similar to those in Ross's case. For example, in *State v. Dalton*, Greene App. No. 2003 CA 96, 2004-Ohio-3575, the defendant was arrested on suspicion of burglary and sexual assault. When he was taken to jail, the police found a bag of white powder in his pocket, and when the police looked in the window of the defendant's van, which was parked near the victim's home, they found pills, glassware, and chemicals that they believed were contraband. A few weeks after Dalton had been indicted for burglary, rape, gross sexual imposition, and kidnapping, lab reports confirmed that Dalton had been in possession of methamphetamine and hydrocodone at the time of his arrest and that equipment found in his van had been used to make methamphetamine. Six months after the initial indictment, the State reindicted Dalton on the original counts and additional counts of aggravated

possession of drugs and illegal assembly or possession of chemicals for the manufacture of drugs. The trial court overruled Dalton's motion to dismiss the additional counts on speedy trial grounds. In affirming the trial court's decision, we held that "the facts supporting the additional charges of illegal possession of methamphetamine and hydrocodone, and illegal possession of chemicals with which to manufacture methamphetamine were not known to the State until *** after the initial indictment ***. Therefore, pursuant to *Baker*, the speedy trial timetable does not run from this initial indictment date." Id. at ¶13.

{¶ 95} We have also held that an initial charge of driving under the influence of alcohol did not create a speedy trial problem when, based on lab results, the police subsequently filed charges for driving with a prohibited concentration of alcohol. *State v. Lekan* (June 27, 1997), Montgomery App. No. 16108; *State v. Cantrell* (Sept. 7, 2001), Clark App. No. 00CA0095. We concluded that these operative facts were "indistinguishable from the operative facts in *Baker,*" and we rejected the defendants' arguments in *Lekan* and *Cantrell* that the statutory speedy trial period must be calculated from the time of the first indictment or charge.

{¶ 96} We conclude that, insofar as the State had not received the lab results on the suspected cocaine when the initial indictment was filed, the speedy trial period for the possession charge must be calculated from the date of the "B" indictment, and the trial court did not err in refusing to dismiss this count on speedy trial grounds.

{¶ 97} The seventh assignment of error is overruled.

IX

{¶ 98} Ross's eighth assignment of error states:

{¶ 99} "THE TRIAL COURT ERRED IN FAILING TO SEVER TOM ROSS' TRIAL FOR CRIMINAL POSSESSION FROM HIS TRIAL FOR ALLEGED SEXUAL ABUSE."

{¶ 100} Ross contends that he should have been tried separately for possession of cocaine because that offense occurred on a single day, whereas the alleged sexual abuse occurred over a substantial period of time. He claims that the evidence that he had possessed cocaine suggested to the jury that he was prone to committing crimes.

{¶ 101} Crim.R. 14 provides for relief from the prejudicial joinder of offenses. A defendant claiming error in the joinder of multiple counts in a single trial must make an affirmative showing to the trial court that his rights would be prejudiced. *State v. Torres,* 66 Ohio St.2d 340, 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.

{¶ 102} Ross was charged with only one count of possession of cocaine, which occurred on September 25, 2006, the day his house was searched following B.B.'s and D.D.'s disclosures of sexual abuse. However, the boys and Ross's own witnesses testified that his cocaine use was a common occurrence, and one of the

boys, M.K., testified that Ross had offered him cocaine. The evidence related to the drug possession was simple and direct, and the jury could have easily separated that evidence from the evidence related to sexual abuse. Moreover, Ross cannot demonstrate that he was prejudiced by the trial court's refusal to sever the drug charge from the other counts because, in light of M.K.'s testimony that Ross offered him cocaine, evidence of Ross's possession of cocaine would likely have been admitted at a trial on the sexual abuse charges even if that offense had been tried separately. The trial court did not abuse its discretion in refusing to sever the count of possession of cocaine from the charges of gross sexual imposition and rape.

{¶ 103} The eighth assignment of error is overruled.

X

{¶ 104} Ross's ninth assignment of error states:

{¶ 105} "THE CULMINATION OF PREJUDICIAL ERROR AND PROSECUTORIAL MISCONDUCT DURING THE TRIAL COMBINED TO UNLAWFULLY CONVICT DEFENDANT ROSS."

{¶ 106} Ross claims that cumulative error and prosecutorial misconduct deprived him of a fair trial. He cites numerous examples.

{¶ 107} Misconduct of a prosecutor at trial will generally not be grounds for reversal unless the misconduct is so pervasive as to deprive the defendant of a fair trial. *State v. Braxton* (1995), 102 Ohio App.3d 28, 41. A prosecutor is afforded wide latitude in closing argument, and closing remarks must be viewed in their entirety to determine whether the disputed remarks were unfairly prejudicial. *State*

v. Lott (1990), 51 Ohio St.3d 160, 165, citing *State v. Stephens* (1970), 24 Ohio St.2d 76, 82. "[When] deciding whether a prosecutor's conduct rises to the level of prosecutorial misconduct, a reviewing court must determine if the remarks were improper, and, if so, whether they actually prejudiced the substantial rights of the defendant. *** [An] appellant must demonstrate that there is a reasonable probability, that, but for the prosecutor's misconduct, the result of the proceeding would have been different." *State v. Wharton*, Summit App. No. 23300, 2007-Ohio-1817, at ¶16. "The touchstone of analysis is 'the fairness of the trial, not the culpability of the prosecutor.'" *Braxton,* 102 Ohio App.3d at 42, quoting *State v. Underwood* (1991), 73 Ohio App.3d 834, 840-841.

{¶ 108} First, Ross contends that he was prejudiced by the prosecutor's use of leading questions. Ross objected to the State's questions on several occasions. While the prosecutor did ask some leading questions of the State's witnesses, some of the "leading questions" cited in Ross's brief and to which he objected at trial were not, in fact, leading questions. For example, the State asked B.B. whether anything came out of Ross's penis when B.B. was forced to touch it, and B.B. answered "yes." The prosecutor then asked, "What did you see come out?" B.B. responded "sperm." Because the questions did not suggest the answers, these were not leading questions. To the extent that the prosecutor did ask leading questions, the trial court repeatedly sustained defense objections. As a part of the instructions, the jury was told to disregard the answers to any questions to which an objection had been sustained. Moreover, Ross has failed to demonstrate how the leading questions created an unfair trial or affected his

substantial rights.

{¶ 109} Ross also contends that the prosecutor's improper trial tactics, particularly the number of leading questions, were so pervasive that his attorney would have been like a "jack-in-the-box" to object to each one, which deprived him of a fair trial. He relies on *State v. Poling*, Portage App. No. 2004-P-0044, 2006-Ohio-1008, wherein a conviction was reversed based on prosecutorial misconduct, including the use of leading questions. In *Poling*, however, the use of leading questions was pervasive and egregious. The appellate court observed that eleven witnesses were presented, leading questions – often supplying testimony – were asked of eight witnesses, and the leading questions were not buttressed by information elicited in the normal manner. "These questions, with their answers, often formed a substantial part of the witness' performance. The prosecution would persist in leading, following objections (often sustained) by the trial court. The prosecution did this with mature, experienced witnesses, such as [a detective]. It did this with its own investigator, ***. It did this the [the victim's mother], providing her with an answer following a sustained objection. *** The prosecution relied so heavily on leading its witnesses, and supplying them with answers, that we cannot see how appellant's conviction could otherwise have been obtained." Id. at ¶27, 29. The isolated instances of leading questions asked by the prosecutor at Ross's trial were not analogous to *Poling*.

{¶ 110} Thus, we find that the prosecutor's use of leading questions did not rise to a level which adversely affected Ross's substantial rights and did not deprive him of a fair trial.

{¶ 111} Second, Ross claims that the trial court erred in permitting the use of inflammatory pornographic videos at trial. He asserts that this was improper other acts evidence and that, because the pornography "was female-on-male and adult-on-adult content ***[it] was not indicative of a tendency toward pedophilia." The State claims that the trial court acted within its discretion in allowing the videos because they showed Ross's intent, preparation, or plan for committing the charged offenses.

{¶ 112} The boys testified that Ross played videos that he kept in his kitchen closet during the alleged sexual activity, and these videos seem to have played a role in the arousal of the boys and Ross during the alleged offenses. The boys recounted watching "nasty" or "dirty" videos, but they did not provide detailed accounts of the content. The trial court permitted the State to play three one-minute segments of video for the jury, which were intended to illustrate the content of the videos, and it permitted Ross to participate in the selection of those segments. Ross does not allege that his possession of the pornographic videos demonstrated any illegal conduct on his part which would have required the exclusion of the videos as other acts evidence. He also did not request a limiting instruction on other acts evidence when the videos were played or in the court's final instructions to the jury. Considering the role that the videos played in the offenses and their corroboration of various parts of the testimony, the trial court did not abuse its discretion in permitting the State to present a small, representative samples of these videos.

{¶ 113} Ross also alleges that numerous instances of prosecutorial

misconduct during closing argument deprived him of a fair trial.

{¶ 114} First, Ross asserts that the prosecutor reserved an excessive amount of time for rebuttal and then unfairly used that time to present new arguments. He claims that the rebuttal closing argument was "filled with emotional appeal and inappropriate comments," such as accusations that defense counsel coached Ross in the hall during his testimony and that defense counsel intentionally mistreated and confused the child-witnesses.

{¶ 115} The amount of time reserved by the State for rebuttal was not, in itself, prejudicial to Ross, and he did not object to it. Any prejudice must be demonstrated by reference to a specific argument or specific conduct. Ross claims that the prosecution used its rebuttal "to present new arguments and attack the Defense position without response." We will address these arguments to the extent that Ross had specifically identified them, keeping in mind that we must be convinced that Ross would not have been convicted but for the alleged misconduct in order to reverse his conviction.

{¶ 116} Ross objected to a comment from the prosecutor about coaching of witnesses. The prosecutor pointed out that, although Ross's attorney had strongly suggested that the children had been "coached," there was no evidence of coaching. The prosecutor then stated, "And they want to talk about coaching? This defendant couldn't get through his direct examination without meeting with his attorney in the hallway during the break." The defense objected to this statement, and the trial court sustained the objection, stating "Not in evidence." The trial court could have provided a more thorough instruction for the jury to ignore this remark,

although none was requested by Ross, but we are unpersuaded that the comment affected the outcome of the trial.

{¶ 117} The prosecutor's comment that defense counsel was attempting to mislead or confuse the child-witnesses was a fair comment on counsel's intense cross-examination of the victims about internal inconsistencies in their testimonies and inconsistencies between the victims' testimonies.

{¶ 118} Ross also claims that the prosecutor's comments improperly attacked his expert witness on the basis that the witness did not claim that the children had been lying about the abuse when, in fact, the witness was not permitted to comment on the children's truthfulness. The portion of the argument to which Ross refers was the prosecutor's attempt to rebut defense counsel's assertion, during Ross's closing argument, that the alleged victims had been coached into their version of events. The prosecutor stated:

{¶ 119} "And as far as coaching, what evidence was there of that? Their own expert did not say that. He didn't like the way some of the questions were asked. He thought there were some leading questions in the CARE House interview, but he did not say that [D.D.] was coached. And what else did he not say? He didn't say anything about [B.B.] and [B.W.]'s interviews. He only talked about [D.D.]'s. He never said that these kids were coached. He did not say these kids were not molested. He did not say these kids were lying. That's their expert. And they want to talk about coaching. ***"

{¶ 120} Defense counsel talked at length about coaching of the child-victims in his closing argument, although no witness had testified to this fact. Although it

was arguably improper for the State to mention that Ross's expert did not accuse the children of lying, when such testimony would not have been permitted, the comment was not unfairly prejudicial in light of its context. The prosecutor was entitled to some latitude in rebutting Ross's argument that the children had been coached. Moreover, the defense did not specifically object to the comment. This comment did not deprive Ross of a fair trial.

{¶ 121} Ross also contends that the prosecutor improperly vouched for the truthfulness of the alleged victims. The context of the comment was as follows:

{¶ 122} "***[D]efense counsel [was] tough on these kids. That's his job. But I am going to point out that these kids held their own.

{¶ 123} "How many questions were they asked on cross-examination? How many hours did [B.B.] sit up there being cross-examined about every syllable he uttered a year and a half ago? And he [defense counsel] couldn't crack him. That's because they told you the truth."

{¶ 124} Although we acknowledge that the prosecutor should not have commented on the truthfulness of the witnesses, it was proper in closing argument to point out that the State's witnesses, particularly the children, had been consistent about their stories despite intense and lengthy cross-examination. Such an argument is based more on the credibility of the witnesses than on the prosecutor's personal belief in the truthfulness of the testimony. For that reason, we are unpersuaded that Ross was unfairly prejudiced by this comment.

{¶ 125} Next, Ross argues that the prosecutor appealed to the jurors' emotions by asking them to imagine that their children were involved.

{¶ 126} In *State v. Southall*, Stark App. No. 2008CA00105, 2009-Ohio-768, the prosecutor in closing argument told the jury to "ask yourself if after hearing this evidence would you allow those children ['your own children, your own grandchildren'] to be alone with this defendant?" The State conceded this was improper, and the court agreed, citing *State v. Robinson* (June 23, 1992), Stark App. No. 5828, for the rule that "*** arguments by counsel suggesting to jurors that they place themselves in the position of a party to the cause *** are usually improper, and reversibly erroneous." Id. at ¶112. However, such a "golden rule" comment during closing argument is not per se prejudicial so as to warrant a new trial; rather, the test is whether it prejudicially affected substantial rights of the defendant. Id. at 115. (internal citations omitted.)

{¶ 127} In Ross's case, the prosecutor did not ask the jurors to imagine that their children were the victims of sexual abuse. Rather, she made an analogy to the CARE House interview and asked the jurors to consider how they would respond if, when they asked one of their own children how his day was, he said it was fine but broke down crying. The prosecutor should not have asked the jurors to imagine themselves in a situation similar to one described at trial. However, the prosecutor's comment seems to appeal more to the jurors' common sense than to their emotions. She was making the point that anyone in a similar situation with a child would follow up with additional questions, just as Detective Daugherty did, because something was clearly wrong. In this context, the prosecutor's comment that jurors should consider how they would respond in a similar situation did not encourage them to be unduly emotional in their decision. Additionally, there was

no objection and the court's instructions told the jury that closing argument is not evidence.

{¶ 128} Ross also claims that the prosecutor "distorted" the testimony of the State's expert witness, Dr. Miceli. The prosecutor said that, according to Dr. Miceli, "false accusations [of sexual abuse] are very rare, and on the rare occasion the child would recant or when confronted they would recant. That didn't happen here." Actually, Dr. Miceli responded to a question about how false allegations are usually discovered by saying that "it happens pretty infrequently," and that "[o]ccasionally, a child will take back things that they have said." The inconsistencies in these statements, if any, could not have affected the outcome of the trial.

{¶ 129} Ross asserts that the prosecutor made "a blatant emotional appeal" to the jurors by suggesting that a not guilty verdict would punish the alleged victims. The prosecutor stated that the jury did not have to "punish these kids [the victims]" because adults made errors in how they conducted interviews with the children or suggested to authorities that there might have been a type of abuse that the children's own testimony did not substantiate. This comment was directed to the credibility of the children's statements and the alleged inconsistencies upon which the defense had placed great emphasis. In our view, it was not an emotional appeal for the jurors to convict Ross for the benefit of the children.

{¶ 130} Ross further contends that the prosecutor improperly suggested in closing argument that the children disclosed the abuse because it was about to escalate, a claim about which no evidence had been presented. Dr. Miceli testified

that purposeful (as opposed to accidental) disclosures of abuse by children can be affected by many factors, one of which can be that the abuse changes, for example, fondling evolves into more intrusive acts like penetration. In closing argument, the prosecutor stated: "Dr. Miceli told you that sometimes when kids disclose – what triggers a disclosure is when abuse changes or it escalates or maybe when it's about to escalate. So remember that when you remember what's been said in here." This comment did improperly suggest that the jury speculate as to whether the abuse might have escalated in the future. However, we are unpersuaded that this comment affected the jury's verdict or denied Ross a fair trial.

{¶ 131} Similarly, the prosecutor made the following comment in discussing reasonable doubt:

{¶ 132} "Reasonable doubt. In every trial it just seems defense attorneys leave this impression like it's just this impossible burden, that it's just impossible to meet. It does not mean beyond all doubt. It does not mean beyond a shadow of a doubt. There can be possible doubt and still convict. The question is would you rely on this evidence in making a very important decision? Reasonable doubt has to be based on reason and common sense, and reason and common sense all point to his [Ross's] guilt. *And if there's a creepy feeling in your soul, I'd submit to you it's not from the kids. It's from someone else in here*." (Emphasis added.)

{¶ 133} The defense did not object to this comment at trial, but we agree with Ross that it was inappropriate. The State 's comment that Ross was "creepy" was inflammatory and had no evidentiary value. In the context of the entire trial,

however, it is unlikely that the improper comment in a lengthy closing argument prejudiced Ross to the point that it altered the outcome of his trial.

{¶ 134} Further, Ross asserts that the prosecutor commented on his right to remain silent and disparaged him for confronting his accusers. Ross states in his brief that "the disparaging remarks regarding the invocation of the right to remain silent are enough to necessitate a new trial." He does not identify the comments to which he objects, however, and Ross did testify at trial. With respect to disparaging his accusers, Ross points to a comment by the prosecutor that defense counsel had asked B.B. whether he said "no" to Ross, after which the prosecutor asked why B.B. would have needed to say no if nothing had happened, as Ross claimed. Viewed in the context of the whole trial, these alleged improper comments did not affect the fairness or the outcome of the trial.

{¶ 135} Finally, Ross asserts that the prosecutor unfairly appealed to the jurors' emotions by crying during closing argument. The trial court record, however, does not contain any indication that the prosecutor cried during closing argument. There was no objection on that basis, and neither the court reporter nor the judge noted such behavior. We further note that any crying, if it did occur, was so unobtrusive that defense counsel was apparently not aware of it during the trial. See, e.g., *Coburn v. State* (Ind. App. 2nd Dist, 1984), 461 N.E.2d 1154. Several months after trial, Ross filed affidavits in the trial court in an effort to substantiate this claim, but as such affidavits are not a part of the trial court record, we cannot rely on them. *State v. Combs*, Montgomery App. No. 22712, 2009-Ohio-1943, ¶19, citing *State v. Madrigal*, 87 Ohio St.3d 378, 390-392. We reject Ross's claim

that the prosecutor was crying during closing argument because there is no evidence to support that claim and no showing of prejudice.

{¶ 136} We are convinced that the prosecutor's actions, either individually or cumulatively, did not deprive Ross of a fair trial.

{¶ 137} The ninth assignment of error is overruled.

XI

{¶ 138} Ross's tenth assignment of error states:

{¶ 139} "THE TRIAL COURT ERRED WHEN IT FAILED TO DISMISS TOM ROSS'S INDICTMENT."

{¶ 140} Ross contends that the A indictment contained "boilerplate" language that failed to distinguish the charges against him. Near the end of the trial, he moved to dismiss the case on this basis. The trial court found that the case upon which Ross relied, *Valentine v. Konteh* (C.A.6, 2005), 395 F.3d 626, was distinguishable and that Ross's motion to dismiss the indictment was untimely. The court overruled the motion to dismiss.

{¶ 141} Ross did not move to dismiss the indictment prior to trial. Rather, he requested this remedy after the State had rested its case and more than a year after the bill of particulars had been provided to the defense. In overruling the motion, the trial court concluded that the bill of particulars had contained very specific factual allegations which put the defense on notice of the allegations against Ross. Further, the trial court ruled that "the motion to dismiss is overruled on an independent basis that it is not a timely filed motion to dismiss. The defense had the bill of particulars since February 16, 2007. An entire one year before this

trial started. If the defense thought that it had been provided insufficient notice to prepare for the defense, the defense could have filed a motion to acquire even more particulars that they have been provided, but it didn't happen. We went to trial without any complaint from the defense. And now after the State has rested, now the defense is claiming that it did not have sufficient notice to defend against these claims. And the Court simply finds this motion is not a timely filed motion to dismiss."

{¶ 142} The trial court did not abuse its discretion in finding that Ross's motion to dismiss the indictment for lack of specificity was without merit and was untimely.

{¶ 143} Moreover, the bill of particulars and the evidence presented at trial did differentiate among the charges in that evidence was offered about different victims, different time periods, and different circumstances as to each count in the indictment. Ross's indictment differed from the indictment at issue in *Valentine*. In *Valentine*, no bill of particulars was requested, and the prosecution did not attempt to lay out the factual bases of the numerous separate incidents that were alleged. Instead, the 8-year-old victim described "typical" abusive behavior by Valentine and then testified that the "typical" abuse occurred twenty or fifteen times. Id. at 632-633. Outside of the victim's estimate, no evidence as to the number of incidents was presented. Id. The court noted that, in such circumstances, "the defendant has neither adequate notice to defend himself, nor sufficient protection from double jeopardy." However, the court also observed that "[i]mportantly, the constitutional error in this case is traceable not to the generic language of the

individual counts of the indictment but to the fact that there was no differentiation among the counts." Thus, *Valentine* does not stand for the proposition that the indictment must contain detailed allegations about the nature of each offense.

{¶ 144} Furthermore, a defendant waives his right to object to an indictment on the ground that the description of the sexual conduct was not sufficient to put him on notice of the specific rape offenses for which he was charged if he fails to raise the issue before trial. *State v. Strickland* (Dec. 12, 1988), Montgomery App. No. 10968. *Strickland* is factually similar to Ross's case; Strickland's indictment alleged "sexual conduct" and, after the State had rested its case at trial, Strickland moved to dismiss the charge because it failed to specify the type of sexual conduct in which he had allegedly engaged. We held that the trial court had not erred in overruling Strickland's motion to dismiss. Likewise, we conclude that the trial court did not abuse its discretion in overruling Ross's untimely motion to dismiss for lack of specificity.

{¶ 145} The tenth assignment of error is overruled.

XII

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

. . . . . .

FAIN, J. and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).
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