**[Cite as *State v. Bleigh*, 2010-Ohio-1182.]**

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

| | | |
|---|---|---|
| | | JUDGES: |
| STATE OF OHIO | : | Hon. W. Scott Gwin, P.J. |
| | : | Hon. John W. Wise, J. |
| Plaintiff-Appellee | : | Hon. Patricia A. Delaney, J. |
| | : | |
| -vs- | : | |
| | : | Case No. 09-CAA-03-0031 |
| WILLIAM BLEIGH | : | |
| | : | |
| Defendant-Appellant | : | O P I N I O N |

| | |
|---|---|
| CHARACTER OF PROCEEDING: | Criminal appeal from the Delaware County Court of Common Pleas, Case No. 08CR-I-09-473 |
| JUDGMENT: | Affirmed in part; Reversed in part and Remanded |
| DATE OF JUDGMENT ENTRY: | March 22, 2010 |

APPEARANCES:

| For Plaintiff-Appellee | For Defendant-Appellant |
|---|---|
| DAVID A. YOST<br>Delaware County Prosecuting Attorney<br>By: Janice L. Hitzeman<br>140 North Sandusky Street<br>Delaware, OH 43015 | WILLIAM T. CRAMER<br>470 Olde Worthington Road, Ste. 200<br>Westerville, OH 43082 |

*Gwin, P.J.*

**{¶1}** Defendant-appellant William Bleigh appeals from his convictions and sentences in the Delaware County Court of Common Pleas on four counts of raping a minor (R.C. 2907.02(A) (1) (b)), three counts of gross sexual imposition (R.C. 2907.05(A) (4)), nine counts of pandering obscenity (R.C. 2907.321(A) (1)), and eight counts of using a minor in nudity oriented material (R.C. 2907.323(A) (2)). Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

**{¶2}** Appellant has four children: a 15-year-old son (CB), a 13-year-old daughter (CM, the victim), an 11-year-old daughter (AB), and a 5-year-old daughter[1]. CB and AB have the same mother, while CM has a different mother. Appellant also considered CM's younger brother to be his, although he is not actually Appellant's biological son.

**{¶3}** For the first seven years of CM's life, she lived with her mother in various locations, including outside Ohio. Appellant did not meet CM until she was five, when her mother sued for paternity and child support. When CM was seven, her mother moved back to Ohio, and Appellant began visiting her every other weekend. After living in Ohio for a short time, CM's mother decided to move to Louisiana. Appellant begged her to stay or leave CM behind, but CM's mother refused.

**{¶4}** Approximately one year later, CM's mother returned. CM's mother, CM, and her younger brother moved in with a friend and several other people; however, they

[1] For purposes of anonymity, initials designate the minor children's names. See, e.g., *In re C.C.,* Franklin App. No. 07-AP-993, 2008-Ohio-2803 at ¶ 1, n.1. Counsel has adhered to Rule 45(D) of the Rules of Supt. for Courts of Ohio concerning disclosure of personal identifiers.

were unable to reside there for any substantial period of time. CM's mother asked Appellant to take both children and signed guardianship papers granting him temporary custody of them. At the time, Appellant lived on South Henry Street.

**{¶5}** CM's mother had a few brief visits with the children, but disappeared for several months. Appellant was granted permanent custody of CM, but was not able to get permanent custody of her younger brother because there was no biological connection. CM's mother was granted visitation.

**{¶6}** In February 2006, Appellant's family moved to Richards Drive, where they stayed until August 2007. After Richards Drive, CM and Appellant moved into the Delaware Hotel for a short time. CB and AB joined them at the hotel. According to CM, Appellant did not actually stay at the hotel, but was there regularly to take them to school, make sure they had food and clothes, and make sure they were doing their homework and not fighting. The children enjoyed playing at the pool and playing with other children who were there with their families.

**{¶7}** They were only at the hotel a couple days before they moved into a house on Liberty Street, along with Max and Beth Muir, and their eight-year old son. Appellant and Max both worked in the I.T.[2] department at Pacer International. Appellant and CB stayed in rooms downstairs, while the Muirs had one room upstairs, their son had a second room, and CM and AB had a third.

**{¶8}** CM complained that Appellant was strict and unfair with his punishments. She disagreed a lot with the way he punished her and her siblings. Appellant admitted that he was a strict disciplinarian, but tried to be fair. Appellant tried to make sure the

[2] Information Technology.

children had chores to teach them responsibility. Appellant testified that his parenting philosophy was different from that of CM's mother, who was much less strict.

**{¶9}** 1. CM's Initial Report.

**{¶10}** CM had a friend named Karma, whom she met in the sixth grade. Karma told CM and another friend that her father was abusing her. Karma also told the school principal, who called children services. As a result, Karma was placed in foster care.

**{¶11}** On March 26, 2008, CM told Karma and the same friend that her father was also abusing her. Karma thought CM was playing at first, but said that CM had been acting as she acted when it was happening to her. According to CM, Karma then told the principal, who called CM into the office. On the date she disclosed these crimes to her intermediate school principal, Heidi Kegley, CM was twelve years old and a student in the sixth grade.

**{¶12}** The school principal testified during Appellant's jury trial that CM approached her and asked to come to her office to talk. CM told the principal that she had helped a friend, and asked if she could help her, too. CM then began to disclose information about Appellant and his bedroom. The principal stopped her, contacted children services, and waited for them to arrive.

**{¶13}** When children services arrived, CM provided more details. CM said that Appellant was looking at pornography on the internet in his bedroom, had her sit on his lap, and touched her legs in a manner that she felt was inappropriate. She slapped his hand and made him stop. Appellant asked her to perform oral sex and she did. When she wanted to stop, he masturbated until he ejaculated on the carpet. Afterwards, Appellant told her to lie on the bed and take off her shirt, and then he put a rag on her

head. She did not recall what happened after that. CM also indicated that Appellant occasionally asked to take pictures of her without her clothes. CM indicated that this occurred at a time when the girls had lice.

**{¶14}** At some point, after CM disclosed the abuse but while he was still at his place of employment, Appellant became aware that the children were at the Delaware Police Department. According to his own testimony at trial, he stopped at home to brush his teeth prior to driving to the police station. Appellant testified that during this time, he also entered the bedroom where his camera was located. Eventually, Appellant arrived at the police station and was interviewed by Detective Justin Herring.

**{¶15}** While Detective Herning was interviewing Appellant, officers were executing a search warrant at the residence. Officers collected multiple computers and related equipment, a bag of clothing, several disposable cameras and various evidentiary items from the residence. Officers also collected an Optimus digital camera with an SD card[3] inside. During the initial search of the residence, Sergeant John Radabaugh photographed the closet of the Appellant's bedroom. Sergeant Radabaugh noticed and photographed the black lingerie, thigh-highs and black heels in the back corner of the closet in the Appellant's bedroom. At the time, he was unaware of the relevance of these items to this case and did not seize them or place them into evidence.

**{¶16}** 2. CAC Interview and the subsequent search warrants.

**{¶17}** On April 1, 2008, CM was interviewed at Nationwide Children's Hospital Children's Advocacy Center ("CAC"). The CAC interview was recorded on DVD and

[3] Short for Secure Digital card, a solid-state memory card used in digital cameras, phones and other mobile devices. These memory cards are used to store data or pictures and are removable.

played for the jury. CM disclosed that Appellant made her watch pornography. CM disclosed that he would rub her back and proceed to touch her genitals; and she disclosed that Appellant would then ask her to perform oral sex. CM further described how Appellant would offer her money to do these things; she disclosed that his penis went in her vagina; and she disclosed that on at least one occasion, she became physically ill and had to throw up. CM disclosed that Appellant made her dress up in a black thong, black thigh-highs and black heels and he took pictures of her in his bedroom. CM further described how she felt a "scar" on Appellant's genitals with her tongue when she performed fellatio. CM further stated that Appellant told her he had been "fixed".

**{¶18}** The physical exam performed at CAC was normal and revealed that CM's hymen was intact. The doctor testified that that does not rule out sexual activity because there is often little penetration or any damage is healed. CM had no physical signs of sexual abuse, and reported no symptoms or signs typical of such abuse, like bed-wetting, anal bleeding, or behavioral changes. CM was also free of sexually transmitted diseases.

**{¶19}** Based on this information, the Delaware Police Department obtained two additional search warrants, one for the residence to obtain the black thong, lingerie and additional clothing found in the closet of the Appellant's bedroom and one for photographs of the Appellant's genitalia.

**{¶20}** On April 1, 2008, S.A.N.E.[4] nurse Heather Crosbie executed the search warrant, and with Detective Herning present, photographed Appellant's genitalia. Ms. Crosbie noted linear discoloration, consistent with scarring, on both sides of Appellant's

[4] Sexual Assault Nurse Examiner.

scrotum. Ms. Crosbie also identified a "midline ridge" which ran along the underside of Appellant's penis.

**{¶21}** CM testified during Appellant's jury trial that Appellant had her wear the high heel shoes, the lace top, and the black thong underwear. CM further testified that on another occasion, Appellant came into the bathroom and attempted to anally rape her. CM testified that Appellant touched her breast and her vagina with his mouth in his bedroom. CM further testified that Appellant did this too many times for her to count. CM testified that Appellant made her perform oral sex on him in the bathroom and made her "taste it when he spermed." CM testified that Appellant made her perform oral sex on him and more specifically testified, "it felt like the further I tried to keep my tongue away from it, the more he felt like he moved it down my throat." CM testified that Appellant asked her to use her mouth on his penis in the bedroom "several times. Too many for me to count." CM further testified that in another incident involving fellatio Appellant offered her $200 "to keep it in there while everything was coming out."

**{¶22}** CM testified at length about the "scar" that she felt with her tongue during these incidents and specifically identified what was actually the "midline ridge" that S.A.N.E. nurse Heather Crosbie photographed on Appellant's genitalia.

**{¶23}** Linda Cox, CM's therapist, testified at trial that CM had disclosed the abuse she suffered at the hands of Appellant and that CM suffers from post-traumatic stress disorder. CM disclosed the sexual abuse to the counselor, and also claimed physical abuse. CM had a hard time focusing during sessions. She was moody, depressed, and felt isolated, all of which was consistent with PTSD. CM was having nightmares, flashbacks, and thoughts of incest. For a month or so, she also had suicidal

ideations and wrote about wanting to kill herself. Although CM felt that she had memories of what happened, the counselor testified that you do not know what you can or cannot remember with PTSD. The counselor indicated that new memories may surface, but admitted that PTSD could produce false memories.

**{¶24}** 3. Photographs.

**{¶25}** CM testified that she had not seen the photographs where Appellant posed her in the black lingerie and black heels since Appellant had originally created them. However, CM was able to testify at trial in detail as to the lingerie Appellant made her wear and the position he forced her to assume on the bed prior to reviewing the photographs.

**{¶26}** CM testified that when she was wearing sparkly jeans, Appellant took some pictures of her. Appellant had her take off her clothes and change into a thong, and put on some black lipstick. Appellant put his penis in her mouth and kept taking pictures. Appellant also posed her on the bed. During this incident, Appellant touched her breast, pulled down her pants, and put his penis in her vagina.

**{¶27}** At trial, CM was able to identify herself and Appellant in each of the photographs depicting fellatio. Further, she was able to identify herself in the photographs where Appellant directed her to undress, put on the lingerie and pose on his bed. CM was able to identify the thong, thigh-highs and black heels found in Appellant's closet as those she was wearing in the photographs.

**{¶28}** Although he stated differing reasons for doing so, Appellant did admit that he put the thigh-highs, black heels and black thong underwear in a bag in the back of his closet. Both CM and Appellant identified the dresser, the bed and the bedroom of

Appellant in the photographs. CM specifically testified that her father created each photograph contained in State's Exhibits 45-61.

**{¶29}** The photographs of CM performing fellatio on Appellant's genitalia show shaved pubic hair and discoloration on the scrotum indicating vasectomy scars consistent with the photographs taken by S.A.N.E. nurse Heather Crosbie. Appellant admitted that he shaved his pubic hair in statements to Detective Herring while the photographs were being taken. Appellant admitted at trial that he had a vasectomy and specifically identified the scarring in the photographs taken by S.A.N.E. nurse Heather Crosbie.

**{¶30}** All of the photographs depicting CM were recovered from the Digital Camera, which was taken from the Appellant's bedroom during the execution of the first search warrant. Paul Hogan, a co-worker of Appellant testified that an overwhelming majority of the other photographs contained on the Digital Camera were taken at Pacer International where both Mr. Hogan and Appellant worked. Mr. Hogan further testified that the photographs appearing just prior to the photographs of CM in the thumbnails were taken during a business trip to San Jose that he took with the Appellant and several other employees on or about February 10, 2008. Appellant admitted that he owned the digital camera from which the photographs were recovered.

**{¶31}** 4. The Defense.

**{¶32}** Appellant testified in his own defense and denied everything. Appellant believed CM was lying so that she could go back to living with her mother. They had argued about that for a few years, and CM resented the fact that he had custody. CM

did not like his discipline or chores, and complained that her mother did not make her do them.

**{¶33}** Concerning the high heel shoes found in his closet, Appellant testified that when CM got good grades he offered to take her shopping. She said she wanted to buy high heels for dances or other formal occasions. He allowed it, but only if they were relatively tasteful and she could actually walk in them.

**{¶34}** With respect to the other clothing, Appellant testified he bought the thigh-highs and the lace panties for his girlfriend. The thong and the boy shorts he claimed he confiscated from CM when he saw them in her laundry basket. When he confronted her about them, she would not say where she got them.

**{¶35}** Appellant testified he was not surprise by the photos of CM because he discovered them in early 2008 when he was going through photos from a business trip. He found photos depicting CM and a male in various poses and states of undress, engaging in various sex acts. Appellant claimed he confronted CM, who did not want to answer, but eventually admitted that she had been having sex with her older half-brother, CB.

**{¶36}** Appellant did not tell anyone about the photos. He searched the other computers to see if there were more and claimed he found some on CB's laptop. Appellant wiped the laptop and used a file shredder to erase the camera.

**{¶37}** Appellant claimed that he had caught CM and CB together in the past. When they lived on Richards Drive, Appellant testified he caught them in the bathroom mostly naked. Appellant claims he told them they should not be doing things like that.

Appellant contended he did not tell anyone about this prior to trial because he was trying to protect CB.

**{¶38}** CB was called as a rebuttal witness and denied having sex with CM or taking pictures of her. CB admitted that he shaved his pubic hair, but denied that his genitals were in the photos.

**{¶39}** Appellant was charged in a 24-count indictment with four counts of raping a minor (R.C. 2907.02(A) (1) (b)), three counts of gross sexual imposition (R.C. 2907.05(A) (4)), nine counts of pandering obscenity (R.C. 2907.321(A) (1)), and eight counts of using a minor in nudity oriented material (R.C. 2907.323(A) (2)).

**{¶40}** Following the jury trial, Appellant was convicted on all counts and sentenced to a total of 81 consecutive years, as follows: the maximum of 10 years on each rape count and four years on each gross sexual imposition count, all to be served consecutively; five years for each pandering obscenity count and three years for each count of using a minor in nudity oriented material, some of which were merged and sentenced concurrently.

**{¶41}** Appellant timely appeals, setting forth the following assignments of error:

**{¶42}** "I. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED BLEIGH'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS BY DENYING BLEIGH A CONTINUANCE AFTER HE EXPRESSED NO CONFIDENCE THAT HIS ATTORNEY WAS PREPARED FOR TRIAL.

**{¶43}** "II. THE TRIAL COURT ERRED AND VIOLATED BLEIGH'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS BY PERMITTING THE PROSECUTION TO

USE PRIOR CONSISTENT STATEMENTS FROM CM'S GRAND JURY TESTIMONY AND ADMITTING INTO EVIDENCE A TRANSCRIPT OF THAT TESTIMONY.

**{¶44}** "III. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED BLEIGH'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS BY ADMITTING INTO EVIDENCE THE VIDEO RECORDING OF THE CAC INTERVIEW.

**{¶45}** "IV. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED BLEIGH'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS BY PERMITTING THE LEAD DETECTIVE TO GIVE HIS OPINION THAT THE GENITALS VISIBLE IN THE PHOTOS OF CM WERE BLEIGH'S GENITALS.

**{¶46}** "V. THE TRIAL COURT ERRED AND VIOLATED BLEIGH'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS BY ADMITTING THE OPINIONS OF CM'S SCHOOL PRINCIPAL AND THERAPIST THAT CM WAS TELLING THE TRUTH.

**{¶47}** "VI. BLEIGH WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

**{¶48}** "VII. THE CUMULATIVE EFFECT OF THE NUMEROUS ERRORS IN THIS TRIAL VIOLATED BLEIGH'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL.

**{¶49}** "VIII. THE TRIAL COURT UNLAWFULLY IMPOSED SENTENCE ON COUNTS THAT WERE TO BE MERGED."

I.

**{¶50}** In his first assignment of error, appellant argues that the trial court erred when it failed to continue the trial after he informed the trial judge by letter that he

believed that his attorney was not ready to proceed on the scheduled trial date. We disagree.

**{¶51}** The decision to grant or deny a motion to continue is a matter entrusted to the broad discretion of the trial court. *Hartt v. Munobe* (1993), 67 Ohio St. 3d 3, 9, 615 N.E.2d 617. Ordinarily a reviewing court analyzes a denial of a continuance in terms of whether the court has abused its discretion. *Ungar v. Sarafite* (1964), 376 U.S. 575, 589, 84 S.Ct. 841; *State v. Wheat,* Licking App. No. 2003-CA-00057, 2004-Ohio-2088. Absent an abuse of discretion, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748. An abuse of discretion connotes more than a mere error in law or judgment; it implies an arbitrary, unreasonable, or unconscionable attitude on the part of the trial court. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140. "A decision is unreasonable if there is no sound reasoning process that would support that decision." *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597.

**{¶52}** In evaluating whether the trial court has abused its discretion in denying a continuance, appellate courts apply a balancing test that takes into account a variety of competing considerations:

**{¶53}** "A court should note, inter alia: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a

continuance; and other relevant factors, depending on the unique facts of each case." *State v. Unger* (1981), 67 Ohio St.2d 65, 67-68, 423 N.E.2d 1078.

**{¶54}** In the case at bar, Appellant was given a hearing on his letter, which expressed a concern that his case may not be ready to go to trial. The court addressed both the Appellant and his attorney, who Appellant had retained to represent him. Appellant did not ask the court to allow him to discharge his attorney; nor did Appellant ask the court to discharge his retained attorney and appoint substitute counsel. Appellant's trial counsel was adamant that he was in fact prepared to go forward with Appellant's jury trial. Counsel noted that Appellant's concern might have arisen from counsel's disagreement with certain motions and evidence that Appellant wished to present.

**{¶55}** The Sixth Amendment does not guarantee "rapport" or a "meaningful relationship" between client and counsel. *Morris v. Slappy* (1983), 461 U.S. 1, 13-14, 103 S.Ct. 1610, 1617, 75 L.Ed.2d 610, 621; *State v. Blankenship* (1995), 102 Ohio App.3d 534, 657 N.E.2d 559; *State v. Burroughs*, 5th Dist. No. 04CAC03018, 2004-Ohio-4769 at ¶ 11.

**{¶56}** In the context of reviewing a claim by the defendant that the trial court abused its discretion by overruling the defendant's request to discharge court appointed counsel and to substitute new counsel for the defendant, the courts have taken the approach that the defendant must show a complete breakdown in communication in order to warrant a reversal of the trial court's decision. In *State v. Cowans* (1999), 87 Ohio St.3d 68, 1999-Ohio-250, 717 N.E.2d 298 the Court noted: "[e]ven if counsel had explored plea options based on a belief that Cowans might be guilty, counsel's belief in

their client's guilt is not good cause for substitution. "'A lawyer has a duty to give the accused an honest appraisal of his case. * * * Counsel has a duty to be candid; he has no duty to be optimistic when the facts do not warrant optimism.' " *Brown v. United States* (C.A.D.C.1959), 264 F.2d 363, 369 (*en banc*), quoted in *McKee v. Harris* (C.A.2, 1981), 649 F.2d 927, 932. "'If the rule were otherwise, appointed counsel could be replaced for doing little more than giving their clients honest advice.' " *McKee*, 649 F.2d at 932, quoting *McKee v. Harris* (S.D.N.Y.1980), 485 F. Supp. 866, 869." Id. at 73, 717 N.E. 2d at 304-305.

**{¶57}** In a similar vein, it has been held that hostility, tension, or personal conflicts between an attorney and a client that do not interfere with the preparation or presentation of a competent defense are insufficient to justify a change in appointed counsel. See *State v. Henness* (1997), 79 Ohio St.3d 53, 65-66, 679 N.E. 2d 686. Furthermore, "[m]erely because appointed counsel's trial tactics or approach may vary from that which appellant views as prudent is not sufficient to warrant the substitution of counsel." *State v. Glasure* (1999), 132 Ohio App.3d 227, 239, 724 N.E.2d 1165; *State v. Evans* (2003), 153 Ohio App.3d 226, 235-36, 2003-Ohio-3475 at ¶31, 792 N.E.2d 757,764; *State v. Newland*, 4th Dist. No. 02CA2666, 2003-Ohio-3230 at ¶11.

**{¶58}** The Ohio Supreme Court has recognized that if counsel, for strategic reasons, decides not to pursue every possible trial strategy, defendant is not denied effective assistance of counsel. *State v. Brown* (1988), 38 Ohio St. 3d 305, 319, 528 N.E.2d 523. When there is no demonstration that counsel failed to research the facts or the law or that counsel was ignorant of a crucial defense, a reviewing court defers to counsel's judgment in the matter. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402

N.E.2d 1189, citing *People v. Miller* (1972), 7 Cal.3d 562, 573-574, 102 Cal.Rptr. 841, 498 P.2d 1089; *State v. Wiley,* 10th Dist. No. 03AP-340, 2004-Ohio-1008 at ¶ 21.

**{¶59}** A defendant has no constitutional right to determine trial tactics and strategy of counsel. *State v. Cowans* (1999), 87 Ohio St.3d 68, 72, 717 N.E.2d 298; *State v. Conway,* 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 150; *State v. Donkers,*170 Ohio App.3d 509, 867 N.E.2d 903, 2007-Ohio-1557 at ¶ 183. Rather, decisions about viable defenses are the exclusive domain of defense counsel after consulting with the defendant. Id.

**{¶60}** In the case at bar, the trial court did not abuse his discretion by failing to grant a continuance. The court conducted a hearing and Appellant's retained counsel assured the court that he was prepared to proceed with the scheduled jury trial. Appellant did not express any concern to the trial court prior to, or during, his jury trial that his attorney was not prepared for trial.

**{¶61}** Appellant's first assignment of error is overruled.

II.

**{¶62}** In his second assignment of error, Appellant alleges that the trial court erred in allowing the state to utilize prior consistent statements from CM's grand jury testimony and in allowing the entire transcript of CM's grand jury testimony to be admitted into evidence. We disagree.

**{¶63}** In the case at bar, defense counsel, after initially objecting to the use of CM's grand jury testimony, conceded that he had implied through his cross-examination that CM had fabricated her recollection of events after she had testified before the grand jury:

**{¶64}** "[DEFENSE COUNSEL]: I think if there's an implied or an implication or accusation, recently made up material. I guess I forget the exact word. That's certainly—the State would have the opportunity to show prior consistencies, we rebut that implication.

**{¶65}** "[PROSECUTOR]: I believe if I'm not mistaken, [Defense Counsel] did ask her if stuff she remembered today she did not tell Lucas Schertzer or the CAC, Check the transcript…

**{¶66}** "[DEFENSE COUNSEL]: It's not a fabrication, I'm not saying that. I'm saying she doesn't remember it, then she remembers it now.

**{¶67}** "[PROSECUTOR]: I don't think that was the purpose of his question.

**{¶68}** "[DEFENSE COUNSEL]: Certainly an implication of a fabrication.

**{¶69}** "[PROSECUTOR]: That's correct.

**{¶70}** "THE COURT: You would concede this?

**{¶71}** "[DEFENSE COUNSEL]: I think I have to, otherwise there's no sense to me asking those questions.

**{¶72}** "THE COURT: And the Court is assuming that with the state of the evidence that's going to be the main argument in closing, correct?

**{¶73}** "[DEFENSE COUNSEL]: That's correct."

**{¶74}** 3T. at 463-464.

**{¶75}** Based upon appellant's failure to object to and bring the issue to the trial court's attention for consideration, we must address this assignment under the plain error doctrine.

**{¶76}** Two requirements must be satisfied before a reviewing court may correct an alleged plain error: first, the reviewing court must determine whether there was an "error," that is, a deviation from a legal rule, and, second, the reviewing court must engage in a specific analysis of the trial court record, a so-called "harmless error" inquiry, to determine whether the error affected substantial rights of the criminal defendant. *State v. Fisher* (Ohio, 06-11-2003) 99 Ohio St.3d 127, 789 N.E.2d 222, 2003-Ohio-2761. The defendant bears the burden of demonstrating that a plain error affected his substantial rights. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120 802 N.E.2d 643, 646. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240; *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus; *Perry*, supra, at 118, 802 N.E.2d at 646.

**{¶77}** The Supreme Court has repeatedly admonished that this exception to the general rule is to be invoked reluctantly. "Notice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. at paragraph three of the syllabus. See, also, *State v. Thompson* (1987), 33 Ohio St. 3d 1, 10, 528 N.E.2d 542; *State v. Williford* (1990), 49 Ohio St.3d 247, 253, 551 N.E.2d 1279 (Resnick, J., dissenting).

**{¶78}** Although appellant has not raised the issue of plain error in his assignments of error, this court will review it under the plain error standard. *Seaburn v. Seaburn*, Stark App. No. 2004CA00343, 2005-Ohio-4722 at ¶ 47.

**{¶79}** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). Hearsay is generally not admissible unless it falls within one of the recognized exceptions. Evid.R. 802; *State v. Steffen* (1987), 31 Ohio St.3d 111, 119, 509 N.E.2d 383.

**{¶80}** "The hearsay rule…is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements-the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine-are generally absent for things said out of court." *Williamson v. United States* (1994), 512 U.S. 594, 598,114 S.Ct. 2431, 2434.

**{¶81}** Under Evid.R. 801(D), prior statements by a witness and admissions by a party-opponent are not hearsay even though the statements or admissions are offered for their truth and fall within the basic definition of hearsay. However, Evid.R. 801(D) (1) requires that the declarant testify at trial and be subject to cross-examination concerning the statement. In the case at bar, CM testified and was subject to cross-examination during Appellant's jury trial.

**{¶82}** Pursuant to Evid.R. 801(D)(1)(b), a prior consistent statement of a witness at trial is admissible on redirect examination to rehabilitate that witness if the statement is offered to rebut an express or implied charge on cross-examination that the witness

was fabricating testimony given on direct examination. *State v. Bock* (1984), 16 Ohio App.3d 146, 474 N.E.2d 1228; *State v. Polhamus* (June 18, 1999), Montgomery App. No. 17283. The Rule permits the introduction of the declarant's consistent out-of-court statements to rebut a charge of recent fabrication, improper influence or motive only when those statements were made *before* the charged recent fabrication or improper influence or motive. *Tome v. United States* (1995), 513 U.S. 150, 167, 115 S.Ct. 696, 705. *State v. Nichols* (1993), 85 Ohio App.3d 65, 71, 619 N.E.2d 80, 84. (Citations omitted). In addition it must be emphasized that, "[p]rior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited." *Tome,* supra at 158, 115 S. Ct. at 701. The question to be addressed is whether the out-of-court statements rebutted the alleged motive to falsify testimony or the improper influence, not whether they suggested that the declarant's in-court testimony was true. The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told. *Tome,* supra at 157-158, 115 S. Ct. at 701. "If the Rule were to permit the introduction of prior statements as substantive evidence to rebut every implicit charge that a witness' in-court testimony results from recent fabrication or improper influence or motive, the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones." Id. at 165, 115 S.Ct. at 705.

**{¶83}** In the case at bar, the trial court admitted CM's entire grand jury testimony. The transcript included exhibits, questions and comments made by third parties during the testimony[5]. Apparently, the trial court accepted the prosecution's

[5] Neither party requested that the court redact the portions of the transcript not related to CM's in-court testimony.

argument that the grand jury testimony rebutted the implicit charge that CM had been coached, or that improper influence or motive was brought to bear upon her after she testified at the grand jury.

**{¶84}** Ohio courts have found where the defendant on cross-examination accuses the victim, the police, and/or the prosecutor of improperly influencing the victim's testimony, prior consistent statements made by the victim are within the parameters of Evid.R. 801(D) (1) (b). *State v. Maddox*, Hamilton App. Nos. C-07-0482, C-070483, 2008-Ohio-3477 at ¶22; *State v. Hicks,* Union App. Nos. 14007-26, 14-07-31, 2008-Ohio-3600 at ¶ 69; *State v. Potts*(Dec. 19, 1997), Trumbull App. No. 96-T-5576. However, even if we were to find the admission of CM's grand jury testimony in the case at bar was error, we would not find it to be plain error. Crim.R. 52(A), which governs the criminal appeal of a non-forfeited error, provides that "[a]ny *error* * * * which does not *affect substantial rights* shall be disregarded." (Emphasis added.)

**{¶85}** The test for determining whether the admission of inflammatory or otherwise erroneous evidence is harmless and non-constitutional error requires the reviewing court to look at the whole record, leaving out the disputed evidence, and then to decide whether there is other substantial evidence to support the guilty verdict. *State v. Riffle*, Muskingum App. No. 2007-0013, 2007-Ohio-5299 at ¶ 36-37. (Citing *State v. Davis* (1975), 44 Ohio App.2d 335, 347, 338 N.E.2d 793). Error is harmless beyond a reasonable doubt when the remaining evidence constitutes overwhelming proof of the defendant's guilt. *State v. Williams* (1988), 38 Ohio St.3d 346, 349-350, 528 N.E.2d 910.

**{¶86}** CM's grand jury testimony was cumulative of her trial testimony. In addition, appellant's trial counsel utilized the transcript during his re-cross examination

of CM to support his theory that she was changing her story. (4T. at 471-475). In the case at bar, independent evidence of the alleged crimes was introduced to the jury in the form of photographs portraying CM and Appellant involved in a sexual act. The record is replete with testimony from CM's counselors providing a basis for a finding that CM had indeed been sexually abused. CM herself was subject to cross-examination. Physical evidence in the form of the consistency of the unique attributes of the genitals of the Appellant with the genitals in the photographs, the location where the photographs were taken, the attempted erasure of the photographs, the lingerie found in the Appellant's closet, the camera, and the testimony of the Appellant himself are all evidence of the crimes committed in this case.

**{¶87}** Therefore, there was no prejudice to Appellant. *State v. Hicks,* supra 2008-Ohio-3600 at ¶71; *State v. Nichols* (1993), 85 Ohio App.3d 65, 72-73, 619 N.E.2d 80, 85-86. Accordingly, we find any error in the admission of the grand jury transcript was harmless.

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

III.

**{¶89}** In his third assignment of error, Appellant maintains that the trial court erred by admitting into evidence the DVD of CM's interview by the Children's Advocacy Center (CAC) at Children's Hospital. We disagree.

**{¶90}** Appellant's argument, consisting of one paragraph, maintains that providing transcripts of the interview to the jury was error because the jury was likely to (1) give that testimony undue weight and 2) take it out of context[6]. Appellant relies upon

[6] Appellant does not argue the admissibility of CM's statements, nor does he allege that the playing of the DVD for the jury during the state's case-in-chief was error. See, App.R. 16(A) (7).

*United States v. Rodgers* (C.A. 6, 1997), 109 F.3d 1138, 1143; and also *State v. Cox*, 12th Dist. App. No. CA2005-12-513, 2006-Ohio-6075, 118 in support of his argument. (Appellant's Brief at 25).

**{¶91}** In *Rodgers*, supra the Sixth Circuit Court of Appeals reviewed a district court's decision to provide a deliberating jury with the transcript of a law enforcement officer's trial testimony. In *Rodgers,* the Sixth Circuit discussed what it recognized as "two inherent dangers" in allowing a jury to read a transcript of a witness's testimony during deliberations: "[f]irst, the jury may accord 'undue emphasis' to the testimony"; and "second, the jury may apprehend the testimony 'out of context." Id. at 1143.

**{¶92}** In *Rodgers,* the court emphasized that the district court eliminated the inherent danger of taking testimony out of context when it provided the jury with the entire testimony of the witness. *Cox* at ¶ 17.

**{¶93}** In the case at bar, the jury did not request the transcript from the trial court. Further, there is nothing in the record or on appeal to suggest that the transcript or the DVD provided to the jury was in any way inaccurate. CM took the witness stand, as did the CAC interviewer. Both were subject to cross-examination.

**{¶94}** The Ohio Supreme Court has found that statements made by a child-victim to her mom, to her mom's friend, to a friend of her mom's friend, to a social worker, and to a clinical counselor and therapist were not testimonial statements. State v. *Muttart,* 85 Ohio St. 3d 487, 709 N.E.2d 484, 1999-Ohio-283 at ¶ 61. The Court determined that "[s]tatements made to medical personnel for purposes of diagnosis or treatment are not inadmissible under *Crawford,* because they are not even remotely related to the evils which the Confrontation Clause was designed to avoid." Id. at ¶ 63.

(Citations omitted). In the case at bar, Appellant has presented no evidence that the jury gave the transcript any undue weight. The jury saw the DVD and could certainly have relied upon its collective recollection of the interview, in addition to CM and her counselor's in-court testimony.

**{¶95}** We further reject Appellant's contention that the trial court erred by failing to give the jury a limiting instruction concerning the use of the CAC interview. We find any error in failing to issue a limiting instruction in this case would not rise to the level of plain error. In *Rodgers*, the court explained that the record failed to demonstrate that the district court's failure to give the cautionary instruction prejudicially affected the outcome of the trial or resulted in a miscarriage of justice. Id. The court therefore held that the error did not rise to the level of plain error and overruled the appellant's argument.

**{¶96}** Similar to the appellant in *Rodgers,* Appellant in the case before us has failed to demonstrate that the court's failure to provide the jury with a limiting instruction affected the outcome of the case. As we have already discussed above, we do not find appellant's contention that the jury afforded the transcript "undue emphasis" supported by the record. The jury, at no time, indicated a difficulty in reaching a unanimous verdict. Therefore, we do not find the court's failure to instruct the jury regarding the proper use or weight of the transcript to have affected the outcome of the case or created a manifest miscarriage of justice.

**{¶97}** Accordingly, Appellant's third assignment of error is overruled.

IV.

**{¶98}** In his fourth assignment of error, Appellant argues the trial court abused its discretion and violated his state and federal constitutional rights by permitting the

lead detective to give his opinion that the genitals visible in the photos of CM were appellant's genitals. Appellant maintains that the testimony failed to meet the requirements for the admission of lay opinion testimony as set forth in Evid.R. 701; that the prejudicial effect of the admission of the officer's testimony outweighed the probative valve of the testimony pursuant to Evid. R. 403; and the trial court's failure to give specific instructions to the jury concerning the purpose for which the jury could consider the detective's lay opinion testimony was prejudicial. We disagree.

**{¶99}** In the case at bar, CM disclosed to CAC and the police that Appellant had vasectomy scars on his penis. Based on this disclosure, Detective Herning obtained a search warrant in order to photograph the scars on Appellant's genitals.

**{¶100}** During trial, the prosecution questioned Detective Herning about photographs found on Appellant's camera and asked him to identify the people in the pictures. Many of the pictures only contained CM; however, some of them depict CM performing fellatio and show male genitalia. Concerning one of those photos, the detective indicated that the photo depicted CM and Appellant.

**{¶101}** Detective Herning testified that he was personally present when the photographs of the Appellant's genitals were taken and that he personally viewed Appellant's genitals. Furthermore, Detective Herning testified that he observed the vasectomy scars on the testicle of the Appellant during the photo session[7]. Appellant admitted to Detective Herning that he normally shaves his scrotum and he apologized that he was "unkempt" when the photographs were taken. Appellant's genitals had unique coloration that was more clearly observable in person than on the photographs.

[7] Appellant does not claim error in the admission of Detective's Herning's testimony concerning the photographing of Appellant's genital's or that Detective Herning was able to observe the vasectomy scars and discoloration on Appellant's genitals.

The trial court permitted the detective to identify the genitals in the photos as Appellant's.

**{¶102}** 1. Admissibility of Detective Herning's Testimony.

**{¶103}** In *Rigby v. Lake County* (1991), 58 Ohio St.3d 269, 271, 569 N.E.2d 1056, 1058, the Supreme Court reaffirmed the longstanding test for appellate review of admission of evidence:

**{¶104}** "Ordinarily, a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence. The admission of relevant evidence pursuant to Evid.R. 401 rest within the sound discretion of the trial court. E.g., *State v. Sage* (1987), 31 Ohio St. 3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus. An appellate court, which reviews the trial court's admission or exclusion of evidence, must limit its review to whether the lower court abused its discretion. *State v. Finnerty* (1989), 45 Ohio St. 3d 104, 107, 543 N.E. 2d 1233, 1237. As this court has noted many times, the term 'abuse of discretion' connotes more than an error of law; it implies that the court acted unreasonably, arbitrarily or unconscionably. E.g., *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 482, 450 N.E.2d 1140, 1142.

**{¶105}** A reviewing court should be slow to interfere unless the court has clearly abused its discretion and a party has been materially prejudiced thereby. *State v. Maurer* (1984), 15 Ohio St. 3d 239, 264, 473 N.E.2d 768, 791. The trial court must determine whether the probative value of the evidence and/or testimony is substantially outweighed by the danger of unfair prejudice, or of confusing or misleading the jury. See *State v. Lyles* (1989), 42 Ohio St. 3d 98, 537 N.E.2d 221.

**{¶106}** Evid.R. 701 provides: "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue."

**{¶107}** The distinction between lay and expert witness opinion testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which only specialists in the field can master. *State v. McKee*, 91 Ohio St.3d 292, 744 N.E.2d 737, 2001-Ohio-41.

**{¶108}** Detective Herning's testimony that the vasectomy scars on the testicle of the Appellant appeared to match the scars in the photographs depicting CM falls squarely within Evid.R. 701. Detective Herning's opinion was clearly based on his perception and it was helpful to the jury as it established that Appellant had scars on his genitals when Detective Herning observed him.

**{¶109}** We find no error in the admission of Detective Herning's testimony.

**{¶110}** 2. Probative vs. Prejudice.

**{¶111}** Evid.R. 403(A) provides that "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

**{¶112}** "Logically, all evidence presented by a prosecutor is prejudicial, but not all evidence unfairly prejudices a defendant. It is only the latter that Evid.R. 403 prohibits." *State v. Wright* (1990), 48 Ohio St. 3d 5, 8, 548 N.E.2d 923.

**{¶113}** Any lack of expertise on the part of Detective Herning goes to the weight, not the admissibility of the testimony. The testimony of Detective Herning was

based on his personal knowledge and observation of the Appellant's genitalia. There were unique qualities about the Appellant's genitals about which Detective Herning testified.

**{¶114}** There was nothing unreasonable, arbitrary, or unconscionable about the trial court's handling of the lay opinion testimony in this case. Detective Herring was in the unique position of having personally viewed the Appellant's genitalia. The scars, discoloration, shaven pubic hair and characteristics of the genitalia were unique and identifiable, and were cumulative of the photographic evidence submitted. There is noting in the record to suggest that the jury placed undue emphasis of the detective's opinion. We will not presume prejudice.

**{¶115}** 3. Jury Instruction.

**{¶116}** [A]fter arguments are completed, a trial court must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. Comen* (1990), 50 Ohio St. 3d 206, paragraph two of the syllabus.

**{¶117}** The giving of jury instructions is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Martens* (1993), 90 Ohio App.3d 338. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. Jury instructions must be reviewed as a whole. *State v. Coleman* (1988), 37 Ohio St.3d 286.

**{¶118}** Rule 30 of the Ohio Rules of Criminal Procedure provides that a party must object to an omission in the court's instructions to the jury in order to preserve the error for appeal. "A criminal defendant has a right to expect that the trial court will give complete jury instructions on all issues raised by the evidence." *State v. Williford* (1990), 49 Ohio St. 3d 247, 251-252. (Citations omitted). Where the trial court fails to give complete or correct jury instructions the error is preserved for appeal when defendant objects, whether or not there has been a proffer or written jury instruction offered by the defendant. (Id.). Even if an objection is not made in accordance with Rule 30 of the Ohio Rules of Criminal Procedure, or a written jury instruction is required to be offered by the defendant, Rule 52(B) of the Ohio Rules of Criminal Procedure, the so-called "plain-error doctrine" applies to the failure of the court to properly instruct the jury on "all matters of law necessary for the information of the jury in giving its verdict…" pursuant to Section 2945.11 of the Ohio Revised Code. *See, State v. Williford,* supra*; State v. Gideons* (1977), 52 Ohio App. 2d 70; *State v. Bridgeman* (1977), 51 Ohio App. 2d 105.

**{¶119}** In *Neder v. United States* (1999), 527 U.S. 1, 119 S.Ct. 1827, the United State Supreme Court held that because the failure to properly instruct the jury is not in most instances structural error, the harmless-error rule of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, applies to a failure to properly instruct the jury, for it does not *necessarily* render a trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

**{¶120}** In the case at bar, Appellant did not proffer jury instructions concerning lay opinion testimony or the testimony of Detective Herning. Nor did Appellant object to

the trial court's jury instructions. Accordingly, our review of the alleged error must proceed under the plain error rule of Crim. R. 52(B).

**{¶121}** The defendant bears the burden of demonstrating that a plain error affected his substantial rights. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120 802 N.E.2d 643, 646. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to 'prevent a manifest miscarriage of justice.' " *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. *Perry*, supra, at 118, 802 N.E.2d at 646.

**{¶122}** As noted in our preceding discussion of appellant's assignment of error, under the circumstances of the case at bar, there is nothing in the record to show that the Appellant was prejudiced. The jury had the photographs that were stipulated to be Appellant's genitals taken in connection with the search warrant and the picture in which CM is depicted. There is nothing in the record to suggest that the jury convicted Appellant based on Detective Herning's opinion testimony, as opposed to arriving at their own conclusion that the genitals in the photographs were from the same individual and that individual was the Appellant.

**{¶123}** Based on the foregoing, appellant's fourth assignment of error is overruled.

V.

**{¶124}** On cross-examination, the school principal, Heidi Kegley, was asked if she had told the caseworker investigating CM's allegations that she, Ms. Kegley, had noticed a pattern of CM lying. Ms. Kegley responded that she had noticed such a pattern only with respect to "friendship issues." [1T. at 45]. On re-direct, the prosecutor asked Ms. Kegley to explain what she had told the caseworker about CM lying. During her response, Ms. Kegley testified …I knew her for two years, she was not lying about this, I worked with this student."[1T. at 46]. Defense counsel objected, and the trial court sustained the objection. The court instructed the jury to disregard that portion of the testimony, "Ladies and gentlemen, the last part of the witness's answer is ordered stricken. Ms. Kegley, you cannot express an opinion as to whether or not [CM] was being truthful or not truthful. That's the jury's province to decide. You understand…Ladies and Gentlemen you will disregard that part of the answer." [Id.].

**{¶125}** The prosecutor subsequently asked the principal whether her concerns about CM lying were strictly concerning friendship issues; the principal answered affirmatively. The prosecutor then asked whether the principal had any similar concerns regarding the sexual abuse disclosures, to which the principal responded: "Absolutely none. There were specific details that she would not have had, had it not been truthful." [1T. at 47]. Defense counsel did not object to this testimony.

**{¶126}** On cross-examination Linda Cox, CM's therapist testified concerning whether it was possible for post traumatic stress disorder patients to produce false memories. [3T. at 504]. She answered, "It doesn't – I guess it could be possible." [Id.]. Prior to excusing Ms. Cox from the witness stand, the trial judge inquired, "And in your

years of experience, you ever had a client/patient had, to your knowledge, a false memory?" [3T. at 506]. The therapist responded "no." [Id.].

**{¶127}** Appellant in his fifth assignment of error asserts that the trial court erred in admitting the cited testimony of the principal and the therapist because each attested to the believability of CM's statements. We disagree.

**{¶128}** An expert cannot give an opinion of the veracity of the statements of a child declarant. *State v. Boston* (1989), 46 Ohio St.3d 108, 545 N.E.2d 1220. However, there is a difference "between expert testimony that a child witness is telling the truth and evidence which bolsters a child's credibility." *State v. Stowers,* 81 Ohio St.3d 260, 262, 1998-Ohio-0632. Thus, an expert can testify that a child's behavior is consistent with the behavior of other children who had been sexually abused. *Id.*

**{¶129}** The evidentiary admissions in the case at bar are distinguishable from the situation in *Boston.* First, this was not a situation where a witness attests to the credibility of a child-victim who had been found incompetent to testify. In addition, "*Boston* does not proscribe testimony which is additional support for the truth of the facts testified to by the child, or which assists the fact finder in assessing the child's veracity." See *State v. Stowers* (1998), 81 Ohio St.3d 260, 263, 690 N.E.2d 881.

**{¶130}** In any event, even if the statements were inadmissible, we note that any error will be deemed harmless if it did not affect the accused's “substantial rights.” Before constitutional error can be considered harmless, we must be able to “declare a belief that it was harmless beyond a reasonable doubt.” *Chapman,* supra*,* 386 U.S. at 24, 87 S.Ct. at 828, 17 L.Ed.2d at 711. Where there is no reasonable possibility that unlawful testimony contributed to a conviction, the error is harmless and therefore will

not be grounds for reversal. *State v. Lytle* (1976), 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623, paragraph three of the syllabus, vacated on other grounds in (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154.

**{¶131}** In the case at bar, independent evidence of the alleged crimes was introduced to the jury in the form of photographs portraying CM and Appellant involved in a sexual act. The record is replete with testimony from CM's counselors providing a basis for a finding that CM had indeed been sexually abused. CM herself was subject to cross-examination. Physical evidence in the form of the consistency of the unique attributes of the genitals of the Appellant with the genitals in the photographs, the location where the photographs were taken, the attempted erasure of the photographs, the lingerie found in the Appellant's closet, the camera, and the testimony of the Appellant himself are all evidence of the crimes committed in this case.

**{¶132}** Finally, with respect to the principal's statement the trial court gave a curative instruction that the jury disregard the statement. In *Bruton v. United States* (1968), 391 U.S. 123, 135-136, 88 S.Ct. 1620, the United States Supreme Court noted:

**{¶133}** "* * * Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. 'A defendant is entitled to a fair trial but not a perfect one.' * * * It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information."

**{¶134}** "A presumption always exists that the jury has followed the instructions given to it by the trial court." *Pang v. Minch* (1990), 53 Ohio St.3d 186, 187, 559 N.E.2d

1313, at paragraph four of the syllabus, rehearing denied, 54 Ohio St.3d 716, 562 N.E.2d 163, approving and following *State v. Fox* (1938), 133 Ohio St. 154, 12 N.E.2d 413; *Browning v. State* (1929), 120 Ohio St. 62, 165 N.E. 566. The Appellant has not cited any evidence in the record that the jury failed to follow the trial court's instruction. Accordingly, we find that Appellant has failed to rebut the presumption that the jury followed the trial court's instructions to disregard the statement.

**{¶135}** Because we find there is no reasonable possibility that testimony cited as error by Appellant contributed to a conviction, any error is harmless. *State v. Kovac*, 150 Ohio App.3d 676, 782 N.E.2d 1185, 2002-Ohio-6784 at ¶ 42; *State v. Morrison*, Summit App. No. 21687, 2004-Ohio-2669 at ¶66.

**{¶136}** Based upon the foregoing, Appellant’s fifth assignment of error is overruled.

VI.

**{¶137}** In his sixth assignment of error, appellant argues that he was denied effective assistance of trial counsel. We disagree.

**{¶138}** A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

**{¶139}** To prevail on this claim, appellant must meet both the deficient performance and prejudice prongs of *Strickland* and *Bradley*. *Knowles v. Mirzayance* (2009), --- U.S. ----, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251.

**{¶140}** To show deficient performance, appellant must establish that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, at 688. In light of "the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant," the performance inquiry necessarily turns on "whether counsel's assistance was reasonable considering all the circumstances." Id., at 688–689. At all points, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id., at 689.

**{¶141}** Appellant must further demonstrate that he suffered prejudice from his counsel's performance. See *Strickland*, 466 U. S., at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment"). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694.

**{¶142}** The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley* at 143, quoting *Strickland* at 697.

**{¶143}** In the case at bar, Appellant argues that his trial counsel was ineffective because, “On numerous occasions, Bleigh's trial counsel failed to object or renew objections to the errors detailed in the foregoing assignments of error. As explained above, each of these errors were obvious and should have provoked an objection.” [Appellant’s Brief at 40].

**{¶144}** “‘The failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel.’ ” *State v. Fears* (1999), 86 Ohio St.3d 329, 347, 715 N.E.2d 136, quoting *State v. Holloway* (1988), 38 Ohio St.3d 239, 244, 527 N.E.2d 831.

**{¶145}** In light of our discussion of Appellant’s assignments of error, Appellant's claim of ineffective assistance of counsel must fail under the second prong of the *Strickland* test. Even if trial counsel's performance fell below an objective standard of reasonable representation, which we do not decide, we find any error was harmless.

**{¶146}** We acknowledge the standard for harmless error in the admission of inflammatory or otherwise erroneous evidence is different from the standard under an ineffective assistance of counsel analysis. However, for the same reasons advanced in our discussion of the Appellant’s assignments of error, we cannot find the result of the trial was unreliable or the proceeding was fundamentally unfair because of the performance of trial counsel. *State v. Boucher* (Dec. 23, 1999), Licking App. No. 99 CA 00045.

**{¶147}** Appellant's sixth assignment of error is overruled.

VII.

**{¶148}** In his seventh assignment of error, Appellant asserts that the cumulative effect of the errors alleged in his previous assignments of error warrant a reversal. We disagree.

**{¶149}** Pursuant to the doctrine of cumulative error, a judgment may be reversed where the cumulative effect of errors deprives a defendant of his constitutional rights, even though the errors individually do not rise to the level of prejudicial error. *State v. Garner* (1995), 74 Ohio St.3d 49, 64, 656 N.E.2d 623, certiorari denied (1996), 517 U.S. 1147, 116 S.Ct. 1444, 134 L.Ed.2d 564.

**{¶150}** Because we have found no instances of error in this case, the doctrine of cumulative error is inapplicable.

**{¶151}** Therefore, Appellant's seventh assignment of error is overruled.

VIII.

**{¶152}** In his eight assignment of error, Appellant notes that he trial court merged counts 8 and 9, 11 and 12, 13 through 16, 17 through 20, and 21 through 23 by running the sentences concurrently. Appellant argues that the sentences on the merged counts (counts 12, 14 through 16, 18 through 20, 22, through 23) must be stricken because R.C. 2941.25 prohibits multiple sentences for allied offenses of similar import. We agree, in part.

**{¶153}** In cases in which the imposition of multiple punishments is at issue, R.C. 2941.25(A)'s mandate that a defendant may only be “convicted” of one allied offense is a protection against multiple *sentences* rather than multiple *convictions.* See, e.g., *Ohio v. Johnson* (1984), 467 U.S. 493, 498, 104 S.Ct. 2536, 81 L.Ed.2d 425. A defendant

may be indicted and tried for allied offenses of similar import, but may be sentenced on only one of the allied offenses. *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 42, citing *Geiger,* 45 Ohio St.2d at 244, 74 O.O.2d 380, 344 N.E.2d 133. Because R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing. *State v. Whitfield* (Jan. 5, 2010), Ohio Sup. Ct. Case No. 2008-1669, 2010-Ohio-2 at ¶27. Thus, the trial court should not vacate or dismiss the guilt determination on each count. Id.

**{¶154}** We note that in the case at bar, the allied offenses are the same conduct, i.e. photographing the minor. The trial court merged together photographs taken at the same time.[8] In other words, each charge related to a different photograph of the minor. While we would be inclined to utilize our authority contained in Section 3(B) (2), Article IV of the Ohio Constitution and R.C. 2953.07 to correct this error, we are bound to follow the dictates of the Ohio Supreme Court,

**{¶155}** "If, upon appeal, a court of appeals finds reversible error in the imposition of multiple punishments for allied offenses, the court must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant. On remand, trial courts must address any double jeopardy protections that benefit the defendant…" *Whitfield,* supra at ¶ 25.

**{¶156}** The seventh assignment of error is sustained.

[8] Appellee did not file a cross-appeal contending that the trial court erred by finding the offenses to be offenses of similar import. See, App.R. 3(C).

**{¶157}** Accordingly, the judgment of the Delaware County Court of Common Pleas is affirmed, in part and reversed, in part. In accordance with the Ohio Supreme Court's decision in *Whitfield,* we remand this case to the trial court for further proceedings consistent with that opinion. This decision in no way affects the guilty verdicts issued by the jury. It only affects the entry of conviction and sentence. Appellant's convictions are affirmed.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

_____
HON. W. SCOTT GWIN

_____
HON. JOHN W. WISE

_____
HON. PATRICIA A. DELANEY

WSG:clw 0219

**[Cite as *State v. Bleigh*, 2010-Ohio-1182.]**

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

| | | |
|---|---|---|
| STATE OF OHIO | : | |
| Plaintiff-Appellee | : | |
| -vs- | : | JUDGMENT ENTRY |
| WILLIAM BLEIGH | : | |
| Defendant-Appellant | : | CASE NO. 09-CAA-03-0031 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Delaware County Court of Common Pleas is affirmed, in part and reversed, in part; we remand this case to the trial court for further proceedings consistent with this opinion.

_____
HON. W. SCOTT GWIN

_____
HON. JOHN W. WISE

_____
HON. PATRICIA A. DELANEY