[Cite as *State v. Gresh*, 2010-Ohio-5814.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	
-vs-	:	
	:	Case No. 09-CAA-012-0102
SHANNON G. GRESH	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Delaware County Court of Common Pleas, Case No. 09CRI08411
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 29, 2010
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
DAVID A. YOST DELAWARE COUNTY PROSECUTOR BY: BRENDAN INSCHO 140 North Sandusky Street Delaware, OH 43015	JOHN R. CORNELY 21 Middle Street, P.O. Box 248 Galena, OH 43021-0248

Gwin, J.

{¶1} Defendant-appellant Shannon G. Gresh appeals from his conviction and sentence in the Delaware County Court of Common Pleas on two counts of raping a minor in violation of R.C. 2907.02(A) (1) (b) and two counts of gross sexual imposition in violation of R.C. 2907.05(A) (4). Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} Nine-year-old H. S.[1] testified that on April 27, 2008 appellant placed his finger inside her vagina and anus on two occasions while she was at the Gresh residence. She stated that on the first occasion he touched her in Ms. Gresh's bedroom, and the second time he touched her on his bed in the basement.

{¶3} H.S. was at the Gresh residence because appellant's sister, Sheryl Gresh, was babysitting. H.S. testified that appellant touched her only after Ms. Gresh left the residence.

{¶4} Eleven-year-old E.H. testified that the Gresh's used to live near her family. She testified that she would go over and play with Ms. Gresh's son. She testified that sometimes she played a "tickle game" with appellant on the couch at the residence. She testified that appellant would play the "tickle game" with her brother, Ms. Gresh's son and her. She testified that he touched her on her feet and armpits. She was unable to identify appellant in court.

{¶5} On April 29, 2008, the Delaware Ohio Police Department filed a complaint charging appellant with one count of rape in violation of Ohio Revised Code 2907.02(A) (1) (b). Appellant was arrested the same day.

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[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 should adhere to Rule 45(D) of the Rules of Supt. for Courts of Ohio concerning disclosure of personal identifiers.

{¶6} The Grand Jury for Delaware County returned a five count Indictment against appellant on May 8, 2008. The Indictment was filed in Delaware County, Ohio Common Pleas Court Case Number 08 CR I 05 0234. Counts 1 through 4 charged appellant with Rape in violation of R.C. 2907.02(A)(1)(b). Count 5 charged appellant with Gross Sexual Imposition in violation of R.C. 2907.05(A)(4).

{¶7} Appellant filed a Written Plea of Not Guilty by Reason of Insanity and a Suggestion of Incompetency. On May 16, 2008, the Trial Court ordered evaluations of appellant to determine his competency to stand trial and the validity of his plea of not guilty by reason of insanity.

{¶8} On July 18, 2008, the Trial Court found appellant incompetent to stand trial and ordered that appellant undergo treatment at Twin Valley Behavioral Healthcare Center to be restored to competency.

{¶9} On January 15, 2009, the Trial Court held a hearing and found that appellant had been restored to competency. The Trial Court filed its Judgment Entry finding that appellant had been restored to competency on April 10, 2009.

{¶10} On April 8, 2009, the Trial Court held a hearing on the report regarding appellant's plea of not guilty by reason of insanity. On April 10, 2009, the Trial Court found that within a reasonable degree of psychological certainty that appellant was able to know the wrongfulness of his actions and that the defense of not guilty by reason of insanity was not available to him.

{¶11} Appellant filed a Motion to Suppress on April 14, 2009. The State of Ohio did not file a response. On April 21, 2009, the Trial Court conducted a hearing on

appellant's motion to suppress. By Judgment Entry filed April 27, 2009, the Trial Court denied the motion.

{¶12} On April 24, 2009, appellant renewed his motion for a competency evaluation. The Trial Court granted this request on May 29, 2009. On June 22, 2009, the Trial Court again found appellant competent to stand trial.

{¶13} Appellant in open court and in writing on June 22, 2009 waived his right to a jury trial. The Trial Court set a bench trial for August 24, 2009.

{¶14} On August 21, 2009, the Delaware County grand jury returned a second indictment against appellant. This indictment charged him in Counts 1 through 4 with Rape in violation of R.C. 2907.02(A)(1)(b). Count 5 charged appellant with Gross Sexual Imposition in violation of R.C. 2907.05(A)(4). This indictment was filed in Case Number 09 CR I 08 0411. All five counts charged him for the same acts as the Indictment in Case Number 08 CR I 05 0234. Counts 1 through 4 added the enhancing factor that the victim was under ten years of age.

{¶15} Appellant was arraigned on August 21, 2009, and trial was set for August 24, 2009. Appellant entered a waiver of jury trial in this case on August 21, 2009.

{¶16} On August 24, 2009, a bench trial was held. The state proceeded on Counts 1 through 4 as charged in Case Number 09 CR I 08 0411, and Count 5 in Case Number 08 CR I 05 0234. The state proceeded in this manner because Count 5 as charged in Case Number 09 CR I 08 0411 contained a typographical error concerning the date of the offense.

{¶17} On August 24, 2009, the Trial Court found appellant guilty in Case Number 09 CR I 08 0411 on Counts 1 and 3 to the rape charges, and guilty of the

lesser-included offense of Gross Sexual Imposition on Counts 2 and 4. The Trial Court dismissed Count 5 in Case Number 08 CR I 05 0234 pursuant to Crim. R. 29 at the close of the state's case.

{¶18} The Trial Court sentenced appellant as to Count 1 to an indefinite prison term of fifteen years to life; Count 2 to a prison term of four years; Count 3 to an indefinite prison term of fifteen years to life, and Count 4 to a prison term of four years. Counts 1 and 3 were ordered to be served concurrent and Count 2 and 4 were ordered to be served consecutive to the other counts. This resulted in a total sentence of twenty-three years to life in prison.

{¶19} Appellant timely appealed and raises the following two assignments of error for our consideration:

{¶20} "I. THE TRIAL COURT ERRED IN HEARING INADMISSIBLE TESTIMONY OVER THE OBJECTION OF APPELLANT.

{¶21} "II. APPELLANT WAS DENIED THE RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION, BY THE INEFFECTIVE REPRESENTATION OF HIS TRIAL COUNSEL."

I.

{¶22} In his first assignment of error, appellant contends that he was prejudiced by the admission of Officer Parker's testimony concerning what HS told him when he responded to her home. The Trial Court ruled that Officer Parker's testimony was not offered for the truth of the matter asserted, but to explain his investigative steps.

{¶23} 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:

{¶24} "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 rests 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 that 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."

{¶25} 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.

{¶26} In the case at bar Officer Matthew Parker testified that H. S. said, "...Shannon asked her to come over and sit next to him, then he proceeded to insert his hand down her shirt." (T. at 35). Counsel for appellant objected to the testimony and

the Trial Court overruled the objection. The Trial Court permitted the testimony finding that "He's not submitting it for the truth of the matter, he's submitting it for or to explain what he did or did not do." (Id.).

{¶27} Officer Parker then went on to testify that, "[H.S.] explained that Shannon inserted his hand down her shirt, she told him to stop at least one time. She commented to me that what he did to her was wrong and it was inappropriate." (T. at 35).

{¶28} "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.

{¶29} "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.

{¶30} Generally, a law enforcement officer is permitted to testify as to the underlying reasons for his conduct, even if that testimony includes statements made by a third party. *State v. Thomas* (1980), 61 Ohio St.2d 223, 232, 400 N.E.2d 401. In *State*

v. Blevins (1987), 36 Ohio App.3d 147, 521 N.E.2d 1105, the Tenth Appellate District set forth the test for the admissibility of such testimony: "[t]he conduct to be explained should be relevant, equivocal and contemporaneous with the statements. * * * Additionally, such statements must meet the standard of Evid.R. 403(A)." Evid.R. 403(A) states "[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." See, *State v. Trent* (Oct. 31, 2005), Stark App. No. 2004CA00360 at ¶13. Accordingly, a trial court must exercise caution when determining the admissibility of a third party's out-of-court statements to explain the officer's conduct. This is so because where out-of-court statements are admitted merely to explain a police officer's conduct during the course of an investigation, "the potential for abuse in admitting such statements is great." *State v. Blevins* (1987), 36 Ohio App .3d 147, 149. Specifically, a prosecutor might use a police officer's testimony regarding his investigative activities as a pretext to introduce a number of highly prejudicial out-of-court statements, justifying their admission on the grounds that the statements are being offered merely to explain the police officer's conduct, rather than for their truth.

{¶31} That is precisely what occurred in the case at bar. Upon consideration of the above law and the facts in the case sub judice, this Court finds that in this instance the prosecution elicited statements that went beyond what was necessary to establish a foundation for the officer's subsequent actions. As in *Blevins,* the statement of which appellant complains "clearly [went] to an element of the offense, and * * * should have been excluded." Therefore, we agree with appellant that the statements of H.S. as testified to by Officer Parker were improperly admitted into evidence. *State v. Turner*

(Nov. 2, 2001), 11th Dist. No.2000-T-0074; *State v. Oliver* (June 5, 1998), 6th Dist. No. L-96-298.

{¶32} However, this does not end our inquiry. We find the admission of this evidence under the facts of the case at bar did not affect appellant's substantial rights.

{¶33} In *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, the Ohio Supreme Court recognized that "[i]n *Arizona v. Fulminante* (1991), 499 U.S. 279, 306-312, 111 S.Ct. 1246, 113 L.Ed.2d 302, the United States Supreme Court denominated the two types of constitutional errors that may occur in the course of a criminal proceeding--'trial errors,' which are reviewable for harmless error, and structural errors, which are per se cause for reversal. * * * Trial error is error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. * * * Structural errors, on the other hand, defy analysis by 'harmless error' standards because they affect the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself. [*Fulminante*] at 309 and 310, 111 S.Ct. 1246, 113 L.Ed.2d 302. Consequently, a structural error mandates a finding of per se prejudice." *Fisher* at ¶ 9. (Internal quotation marks omitted). See, also, *State v. Wamsley*, 117 Ohio St.3d 388, 884 N.E.2d 45, 2008-Ohio-1195 at ¶ 15. In *Wamsley*, the Ohio Supreme Court noted,

{¶34} "We have previously held that if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional[l] errors that may have occurred are subject to harmless-error analysis. *State v. Hill* (2001), 92 Ohio St.3d 191, 197, 749 N.E.2d 274), quoting *Rose v. Clark* (1986), 478

U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460. Moreover, as we stated in *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, [c]onsistent with the presumption that errors are not structural, the United States Supreme Court ha[s] found an error to be structural, and thus subject to automatic reversal, only in a very limited class of cases. *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel)); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction).” *Perry,* 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 18, quoting *Neder v. United States* (1999), 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35.” *State v. Wamsley*, supra 117 Ohio St.3d at 391-392, 884 N.E.2d at 48-49, 2008-Ohio-1195 at ¶ 16. [Internal quotation marks omitted].

{¶35} In *Wamsley*, supra, the Ohio Supreme Court further noted, “this court has rejected the concept that structural error exists in every situation in which even serious error occurred. See *State v. Hill*, 92 Ohio St.3d at 199, 749 N.E.2d 274, quoting *Johnson v. United States*, 520 U.S. at 466, 117 S.Ct. 1544, 137 L.Ed.2d 718.

{¶36} In Ohio, Crim.R. 52 gives appellate courts narrow power to correct errors that occurred during the trial court proceedings. 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.) Thus, Crim.R. 52(A) sets forth two requirements that must be satisfied before a reviewing court may correct an alleged error. First, the reviewing court must determine whether there was an "error"-i.e., a "[d]eviation from a legal rule." *United States v. Olano* (1993), 507 U.S. 725, 732-733, 113 S.Ct. 1770, 123 L.Ed.2d 508. 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 "affect[ed] substantial rights" of the criminal defendant. In *United States v. Dominguez Benitez*, 542 U.S. 74, 124 S.Ct. 2333, the Court defined the prejudice prong of the plain error analysis. "It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that even preserved error requires reversal without regard to the mistake's effect on the proceeding. See *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991) (giving examples). Otherwise, relief for error is tied in some way to prejudicial effect, and the standard phrased as 'error that affects substantial rights,' used in Rule 52, has previously been taken to mean error with a prejudicial effect on the outcome of a judicial proceeding. See *Kotteakos v. United States,* 328 U.S. 750 (1946). To affect "substantial rights," …, an error must have "substantial and injurious effect or influence in determining the ... verdict." *Kotteakos,* supra, at 776." *United States v. Dominguez Benitez*, supra 542 U.S. 74, 81, 124 S.Ct. at 2339. See, also, *State v. Barnes* (2002), 94 Ohio St.3d 21, 759 N.E.2d 1240; *State v. Fisher,* 99 Ohio St.3d 127, 129, 2003-Ohio-2761 at ¶ 7, 789 N.E.2d 222, 224-225. Thus, a so-called "[t]rial error" is "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other

evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 307-308, 111 S.Ct. 1246, 113 L.Ed.2d 302. *State v. Naugle* (2009), 182 Ohio App.3d 593, 913 N.E.2d 1052, 2009-Ohio-3268 at ¶ 16. (Citing *State v. Ahmed*, Stark App. No. 2007-CA-00049, 2008-Ohio-389).

{¶37} The application of the harmless error rule is simple if, in the absence of all erroneously admitted evidence, there remains "overwhelming" evidence of guilt. *State v. Morris*, Medina App. No. 09CA0022-M, 2010-Ohio-4282 at ¶36. Where evidence has been improperly admitted in derogation of a criminal defendant's constitutional rights, the admission is harmless "beyond a reasonable doubt" if the remaining evidence alone comprises "overwhelming" proof of defendant's guilt. *State v. Williams,* 6 Ohio St.3d 281, 290, 452 N.E.2d 1323 (1983) (quoting *Harrington v. California,* 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

{¶38} In the case at bar, appellant admitted to the conduct forming the basis of the indictment against him. Specifically, the following conversation took place during appellant's interview:

{¶39} "Interviewer: Tell me what happened.

{¶40} "[Appellant]: I don't know. She leaned up against me and then, um, and then I put my hands on her legs and then it just didn't feel right and I got up, walked out of the room . . . And then I was downstairs watching' television. She came down ...and then it was just like I put my hand on her leg again and she told me no and then I stood up and I walked out. And then it just got to a point where it was like the voice in my head said, "Do it; do it."

{¶41} "Interviewer: More happened that that. I mean she remembers you actually puttn' your hand up her shirt at one point.

{¶42} "[Appellant]: No; I never when up her shirt. No.

{¶43} "Interviewer: What about down the back of her pants?

{¶44} "[Appellant]: Yeah; one time." State's Exhibit 32 at 15.

{¶45} Later in the interview, appellant specifically mentioned each room in the house where the sexual abuse occurred.

{¶46} "Interviewee: There was, yeah, once upstairs, once in the kitchen, and once in the living room.

{¶47} "[Appellant]: Was there any more times than that?

{¶48} "Interviewee: Or and there was once in the basement.

{¶49} "[Appellant]: The basement, living room, kitchen and bedroom.

{¶50} "Interviewee: Yeah." State's Exhibit 32 at 18.

{¶51} Further, HS testified at trial in detail as to how and where the appellant touched her.

{¶52} We have reviewed the record and we find there is no reasonable probability that the improperly admitted evidence actually contributed to the accused conviction. Accordingly, appellant's substantial rights were not violated by the admission of H.S. statement's during the testimony of Officer Parker.

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

II.

{¶54} In his second assignment of error, appellant maintains that trial counsel was ineffective for not filing a motion to sever E.H.'s counts from H.S.'s counts at trial. We disagree.

{¶55} 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.

{¶56} 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.

{¶57} 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.

{¶58} 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.

{¶59} 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.

{¶60} Crim. R. 14 governs relief from prejudicial joinder and states the following in pertinent part:

{¶61} "If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, information or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires."

{¶62} Crim. R. 8(A) governs joinder of offenses and states the following:

{¶63} "Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct."

{¶64} "It is well-established that the law favors joinder because the avoidance of multiple trials conserves time and expense and minimizes the potentially incongruous outcomes that can result from successive trials before different juries." *State v. Glass* (March 9, 2001), Greene App. No.2000 CA 74, at 2, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, 86-87; *State v. Torres* (1981), 66 Ohio St.2d 340, 343; and *State v. Thomas* (1980), 61 Ohio St.2d 223, 225.

{¶65} When a defendant claims that he or she was prejudiced by the joinder of multiple offenses, the court must determine (1) whether evidence of the other crimes would be admissible even if the counts were severed; and (2) if not, whether the evidence of each crime is simple and distinct. *State v. Schaim* (1992), 65 Ohio St.3d 51, 59, 600 N.E.2d 661, citing *State v. Hamblin* (1988), 37 Ohio St.3d 153, 158-159, 524 N.E.2d 476 and *Drew v. United States* (C.A.D.C.,1964), 331 F.2d 85. See also, *State v. Pryor*, Stark App. No. 2007-CA-00166, 2008-Ohio-1249 at ¶ 61.

{¶66} Assuming, *arguendo*, that the evidence did not fit the "other acts" exception, it nevertheless fits the second prong of the *Schaim* test which requires the evidence of the crime under each indictment to be simple and distinct, 65 Ohio St.3d at 59. In *State v. Decker* (1993), 88 Ohio App.3d 544, the court found that the evidence was simple and distinct. The evidence achieved these characteristics in part because the crimes involved contained different victims and different witnesses, and therefore, the jury was able to segregate the facts that constituted each crime. *Decker*, 88 Ohio App.3d at 549; *State v. Pryor,* supra, ¶67.

{¶67} In examining the record to determine this issue, we may give weight to the fact that the error occurred in a trial to the court, rather than in a jury trial. *State v. White*

(1968), 15 Ohio St.2d 146, 151, 239 N.E.2d 65; *State v. Austin* (1976), 52 Ohio App.2d 59, 70, 368 N.E.2d 59. Indeed, a judge is presumed to consider only the relevant, material and competent evidence in arriving at a judgment, unless the contrary affirmatively appears from the record. *State v. White*, supra, 15 Ohio St.2d at page 151, 239 N.E.2d 65; .*State v. Eubank*, 60 Ohio St.2d 183, 187, 398 N.E.2d 567, 569-570; *Columbus v. Guthmann* (1963), 175 Ohio St. 282, 194 N.E.2d 143, paragraph three of the syllabus.

{¶68} There is no showing in the record that the trial court relied upon the fact that appellant had been charged in two separate cases involving two different victims in arriving at its verdicts. Indeed in the case at bar, E.H. failed to disclose any sexual abuse at trial and the court dismissed her count pursuant to Crim R. 29. Thus, there was no prejudice to the appellant in consolidating the allegations. As appellant fails to establish prejudice, his claim of ineffective assistance of counsel must fail.

{¶69} Appellant's second assignment of error is overruled.

{¶70} For the foregoing reasons, the judgment of the Delaware County Court of Common Pleas, Ohio, is affirmed.

By Gwin, J.,

Edwards, P.J., and

Hoffman, J., concur

_____
HON. W. SCOTT GWIN

_____
HON. JULIE A. EDWARDS

_____
HON. WILLIAM B. HOFFMAN

WSG:clw 1018

[Cite as *State v. Gresh*, 2010-Ohio-5814.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
SHANNON G. GRESH	:	
Defendant-Appellant	:	CASE NO. 9-CAA-010002

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Delaware County Court of Common Pleas, Ohio, is affirmed. Costs to appellant.

_____
HON. W. SCOTT GWIN

_____
HON. JULIE A. EDWARDS

_____
HON. WILLIAM B. HOFFMAN