[Cite as *State v. Meeks*, 2015-Ohio-1527.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 2014CA00017
	:	
STEVEN M. MEEKS II	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2013CR1142
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	April 16, 2015

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
SPECIAL PROSECUTOR DEAN HOLMAN MEDINA CO. PROSECUTOR MATTHEW A. KERN 72 Public Square Medina, OH 44256	GEORGE URBAN 116 Cleveland Ave. North Canton, OH 44702

Delaney, J.

{¶1} Defendant-appellant Steven M. Meeks II appeals from the judgment entry of the Stark County Court of Common Pleas convicting and sentencing him upon two counts of rape, two counts of sexual battery, one count of unlawful sexual conduct with a minor, and one count of gross sexual imposition. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arose from allegations of two separate instances of rape.

P.K.'s Account

{¶3} The following facts are adduced from P.K.'s testimony at trial, her taped interview with police (Appellee's Exhibit 4), and her one-party consent call to appellant (Appellee's Exhibit 5).

{¶4} In April 2012, P.K. was 19 years old and lived in Jackson Township, Stark County, Ohio, where she previously attended a local high school. P.K. was enrolled at a local college and had recently quit a job at Panera Bread. She was friends with appellant since high school. They talked or texted daily, worked the same shift at Panera, and socialized frequently with the same group of friends.

{¶5} On April 28, 2012, around 10:00 p.m., P.K. asked appellant if he wanted to go to a bar in Akron because she wanted to drink. Appellant agreed and he drove them to a bar called Euro Gyro along with their friend Ian Cameron. Appellant drove his truck. Neither appellant nor Cameron drank that night but P.K. had several cans of "Bud Light Platinum" in her purse which she drank during the 30-minute drive to the bar. She continued to drink at the bar despite being underage. The three were at the bar for

a few hours and P.K. eventually felt "pretty intoxicated." She indicated she wanted to go home.

{¶6} P.K. remembered getting into appellant's truck but didn't remember the drive home. She remembered appellant being with her at her front door and assumed he would leave and go home. P.K. fell asleep in her own bedroom in her bed; she was wearing panties, a tank top, and the fleece "hoodie" she wore earlier that night.

{¶7} At some point during the night, P.K. thought she was dreaming when she felt a hand touching her bottom and her genital area. She was unable to speak and felt like a "rag doll." She was penetrated digitally and then flipped over from her side onto her stomach and pulled on top of someone, whom she discovered to be appellant. Appellant pulled her underwear aside and placed his penis in her vagina. Throughout this encounter, P.K. felt "like some stupid passed-out girl that couldn't move." The last thing she remembered was appellant having sex with her.

{¶8} P.K. woke up around 7 the next morning, alone, with a headache. She recalled what happened the night before and told a friend, Dan Moll, what happened. Moll's response was "the rumor was legitimate;" he told her about an earlier rape appellant was said to have committed of an underage girl. Moll suggested that P.K. text appellant to find out how he would respond. Moll photographed the resulting text conversation between P.K. and appellant, which was also turned over to police and became evidence at trial.

{¶9} Appellant asked P.K. whether she was all right and P.K. responded "Why?" Appellant said she was responding "weird" and P.K. told him she wasn't going to be O.K. because she had trusted him. Appellant asked what she meant and P.K.

said even though she was drunk she remembered what happened. Appellant asked what she meant and she said "Your hands never touched me?" Appellant responded P.K. had put his arm around her and they slept. After P.K. stated again that drunk people can still remember, appellant texted the following as read by P.K. at trial:

> [P.K.], I will admit to it. I do apologize for what happened. I had thought about that for weeks, the feeling of being with you. I felt horrible after I did it. I know you will never trust me the same way again or never at all. It has bothered me ever (*sic*) second since it happened. I know you'll always think that, A, if it happens once, why wouldn't it happen again, but I'm sorry. I haven't done anything to ever hurt you. I'm sorry for the pain I'm currently causing you and I don't ever expect you to forgive me. But please so (*sic*) know that you do mean a lot to me, but I wasn't thinking. I acted without thoughts or the aftermath. [P.K.], I'm fully aware of what happened and I understand if you don't want to be friends. I messed up in the biggest way possible and no apology can fix what I've done. I'm truly sorry from the bottom of my heart.
>
> (Appellee's Exhibits 1 and 3.)

{¶10} P.K. was at first afraid to go to the police because she thought no one would believe her. She was also close with appellant's family and did not want to "ruin" them. She resolved to tell appellant's parents hoping they would get "help" for him. The next day, P.K. went to appellant's parents' home with a friend, Kenny Freda, and showed them the texts. Appellant's parents were upset and indicated to P.K. they

would "take action." P.K. later learned they only grounded appellant for a week and she saw him out around Stark County; she then decided to go to the police.

The Investigation

{¶11} On May 10, 2012, P.K. reported the incident to the Jackson Township Police Department and the matter was forwarded to the detective bureau for investigation. Sgt. Jason Collins, then a detective, interviewed P.K. the next day; this interview was recorded and played as Appellee's Exhibit 4. During the meeting with P.K., Collins arranged a one-party consent call placed by P.K. to appellant. The recording of this call was played at trial as Appellee's Exhibit 5.

{¶12} In response to questions from P.K., appellant said he understood why she was mad but she had invited him to spend the night on the way home and at her door. They went to sleep and he was awakened later by what he thought were her "signals," backing up into him. He said they talked and he asked her if she was O.K. with "this." He said he apologized in the earlier text conversation because he felt bad for interfering in her relationship with her boyfriend. He meant he liked her for a long time and wanted to be with her, but if he had known she was "not in the right state of mind," he would not have done it. Finally, when asked if she needed to worry about pregnancy, appellant said no, he didn't "go in [her] at all" but pinched his urethra and went into the bathroom. When pressed by P.K., he acknowledged he was inside her but said she responded normally based upon the last girl he was with.

{¶13} Collins asked P.K. if she was aware of any similar incidents and she said a rumor existed that one night at a party, a freshman girl had too much to drink. R.J. Holliday and his then-girlfriend allegedly saw appellant put the girl over his shoulder,

carry her into a bedroom, and lock the door. Appellant allegedly refused to come out when people banged on the door, but eventually did come out when the girl threw up and she was observed to be naked. P.K. did not know when or where this happened but provided names of witnesses. Collins contacted R.J. Holliday and learned the identity of the rumored victim: K.M., who was age 14 and a high-school freshman at the time of the alleged rape.

{¶14} Police collected a comforter and a fitted sheet from P.K., among other items. A semen stain consistent with appellant's D.N.A. was found on the comforter. Other semen stains were consistent with a single source other than appellant. P.K. identified this source as her boyfriend.

{¶15} Collins went to K.M.'s house and spoke with her privately and then also with her mother. K.M. told him about a party that happened on March 5, 2011, after a high school winter dance.

K.M.'s Account

{¶16} The following evidence is adduced from K.M.'s testimony at trial.

{¶17} K.M. went to the dance with her friend A.F., also a 14-year-old freshman. After the dance they returned to K.M.'s house and A.F. was texted by Mike Schuller, a senior and friend of appellant, who wanted to "hang out." K.M. and A.F. snuck out of the house around 11:00 p.m. and were picked up by appellant and Schuller a few houses away. The girls were brought to a party already in progress in the basement of Schuller's house.

{¶18} Present at the party were appellant, Schuller, R.J. Holliday, Holliday's then-girlfriend Breanne Newcomb, and Ian Cameron. K.M. had never consumed

alcohol before but started drinking vodka upon her arrival at the party, as did A.F. Everyone at the party was drinking except for appellant and Cameron in particular was already very drunk.

{¶19} K.M. continued to drink liquor from red Solo cups. She began to "black out" and woke up in a dark room, very sick, with appellant beside her on a bed. She didn't know how she got into the room. She was naked and did not remember taking her clothes off. She knew she had sex with appellant and she did not agree to it. She said appellant ran from the room when Newcomb and Holliday broke in.

{¶20} K.M. was throwing up when the door opened and Holliday came in; she told him to get out. Newcomb came in and K.M. told her she "lost her virginity." Newcomb helped her get dressed and took her to a bathroom to clean up. She had thrown up on herself so she took a shower, as did A.F. K.M. felt very sick and continued to throw up.

{¶21} Appellant and Schuller drove K.M. and A.F. home in appellant's parents' car.

{¶22} K.M. did not tell her mother or anyone about sexual intercourse with appellant because she was scared and didn't want to get in trouble for sneaking out of the house and drinking. She felt she was responsible for what happened. She unequivocally testified she was drunk that night, appellant was sober, he took advantage of her, and she did not consent to sexual intercourse.

{¶23} At trial K.M. said she had been reluctant to tell Collins what happened when he appeared at her home to investigate. She told him she was drinking at the party and woke up naked and vomiting; if sexual intercourse happened, she did not

agree to it but she did not have a different feeling or pain in her genitals afterward, although at trial she admitted this was not true. At trial, K.M. said was physically aware she had sexual intercourse. Under cross-examination she said she felt pain but knew it was not a medical condition that required the attention of a doctor and would go away.

{¶24} K.M. said she was not trying to blame anyone. She called appellant after the incident and said people were saying things he should know about, meaning the rumor he had raped her. Appellant went to Dairy Queen once with K.M. and A.F. after the incident. She did not feel hostility toward appellant but the fact remained he took advantage of her when she was 14 and drunk.

The Witnesses' Testimony

Ian Cameron

{¶25} Ian Cameron, a friend of appellant and the other witnesses, was the sole witness who was present during portions of both incidents. During the 2011 party at Schuller's house, Cameron was extremely intoxicated before K.M. and A.F. arrived and testified he was getting sick in the bathroom while most of the events took place. He was aware of rumors around school afterward about what happened but did not ask appellant about it.

{¶26} Cameron also worked at Panera, knew P.K., and accompanied her and appellant to Akron on the evening of April 28, 2012. Appellant drove the three to Euro Gyro in his pickup truck with a single bench seat. P.K. sat between appellant and Cameron; he testified P.K. drank two or three Bud Light Platinum beers on the way to Akron and was "tipsy" but not drunk.

{¶27} At Euro Gyro, the three went upstairs to the bar area where P.K. continued to consume mixed drinks. Cameron testified P.K. was very drunk by the time the three left the bar together around 1:00 or 2:00 a.m. and was falling asleep on the way home. They stopped briefly at appellant's house for him to pick up his clothes for the next day then dropped Cameron at his house.

{¶28} Cameron testified he did not think it was unusual for appellant to spend the night at P.K.'s house when he had to work early the next day. He thinks they discussed appellant spending the night while still at the bar. Cameron observed no kissing or intimate behavior between appellant and P.K., stating it was well-known the two were just friends. When appellant dropped Cameron off, P.K. was asleep in the truck. Cameron testified she was very drunk; he and appellant did not drink because appellant doesn't drink and Cameron had to work early the next day.

Dan Moll

{¶29} Dan Moll, another mutual friend of P.K. and appellant, was contacted by P.K. the day after the rape. P.K. was crying and upset. She came over to Moll's house, told him what happened, and said she didn't know what to do about it. She wondered if she should talk to appellant and Moll suggested that she text him. While they were having this conversation, appellant texted Moll and Moll said he knew what happened; Moll testified appellant "sort of like apologized to [him]" and P.K. then texted appellant herself. Moll read the texts and photographed them with his phone.

Breanne Newcomb

{¶30} Breanne Newcomb was dating R.J. Holliday in March 2011. On March 5, 2011, Newcomb and Holliday attended the winter dance with appellant, Schuller, and

Cameron, each of whom had dates that night. After the dance the group went to Schuller's house and all of the dates except Newcomb left. K.M. and A.F. appeared at the party but Newcomb did not know how they got there. She knew they were freshmen.

{¶31} Everyone at the party was drinking heavily, except appellant. Newcomb told appellant not to kiss K.M. or "do anything" with her because she was so young. Holliday told Newcomb appellant carried K.M. into the bedroom; Newcomb was angry at appellant and Holliday because she specifically warned them not to let anything happen. Appellant came out of the bedroom and said K.M. was throwing up. Newcomb thought Holliday went into the bedroom first and came out to get her because K.M. didn't want him in there.

{¶32} Newcomb entered the bedroom and found K.M. naked, sitting on the side of the bed, throwing up. Newcomb observed she seemed even more intoxicated than she had been before. Newcomb helped her get dressed because she was unable to. Newcomb asked K.M. if she had sex with appellant and K.M. replied, "I think so."

R.J. Holliday

{¶33} Robert "R.J." Holliday was Newcomb's boyfriend at the time and also friends with appellant. He was present at the party at Schuller's house and was drinking and playing "liquor pong." He testified K.M. became "obviously intoxicated;" she was unable to walk on her own. Holliday witnessed appellant pick her up and carry her into the basement bedroom. He described her condition at the time as "lifeless."

{¶34} The lights in the bedroom were off and the door was locked. The doors of the bedroom were glass French doors but witnesses were unable to see into the room

because it was dark. Holliday confirmed Newcomb was angry and told him to get K.M. and appellant out of the bedroom. He banged on the locked door but there was no response. When he was unable to get the door open he gave up and "everyone went their separate ways." Newcomb went to bed, Cameron passed out on the sofa, and Schuller and A.F. were together on a futon. Holliday fell asleep and was awakened by Cameron throwing up. He put Cameron in the shower and banged on the bedroom door again to ask appellant for help cleaning up because he knew appellant hadn't been drinking. A.F. started throwing up.

{¶35} Suddenly appellant came out of the bedroom "with throw up on him," saying that K.M. was getting sick. Holliday went into the bedroom and saw her sitting on the side of the bed, naked and throwing up; she did not seem to know where she was. Newcomb then came into the bedroom to help K.M. and Holliday left the bedroom.

{¶36} Holliday testified he discussed the events with appellant. He asked appellant if he had sex with K.M. and appellant said yes; he asked appellant what protection he used and appellant told him he "pinched it off," which Holliday understood to mean he held his penis in his hand and "pinched" his urethra to prevent himself from ejaculating. Holliday never saw appellant with his clothes off.

{¶37} Holliday and appellant later had a falling-out because Holliday wanted appellant to take his sister to the prom and appellant took someone else. Appellant also told someone Holliday was dating he was interested in someone else. Holliday denied that his testimony was intended to "get even" with appellant over these issues. Holliday did not go to the police; they came to him after P.K. gave them his name as a witness to

the incident after the Winter Formal. Holliday provided the name of the freshman involved to P.K.

Appellant's Testimony

{¶38} The following is adduced from appellant's testimony at trial.

{¶39} Appellant said he spent the night at P.K.'s house, including in her bed, many times because she "didn't like to sleep alone" and would let him sleep there when he had to be at Panera early for work the next day. On Saturday, April 28, he and P.K. went to lunch together and planned to go to separate parties that night. After the parties, P.K. texted appellant and asked if he and Ian Cameron wanted to go out in Akron with her. P.K. suggested Euro Gyro. Appellant and Cameron picked up P.K. in the Wal-Mart parking lot; neither of them had been drinking. P.K. drank one beer from her purse during the drive.

{¶40} At the bar, appellant said P.K. finished a quarter of a bottle of someone else's beer and had another herself. She saw he was tired and asked if he wanted to spend the night at her house since he had to be at work early. According to appellant, P.K. then sipped on a mixed drink she never finished and they left about 20 minutes later. Appellant said Cameron was wrong when he said P.K. was intoxicated.

{¶41} Appellant said both P.K. and Cameron were asleep on the way home. He stopped at his own house first and got clothes for the next day. Then he dropped off Cameron and drove to P.K.'s house. Together they went straight into P.K.'s bedroom. She did not change her clothes; she only removed her jeans and got into bed wearing her hoodie and underpants. Appellant hung up his own clothes for the next day, went into the bathroom and changed into shorts, and got in bed with P.K.

{¶42} Appellant said they lay together for about 5 minutes when P.K. mumbled something about "protect me from the bad people," grabbed his arm, and put it around her. They fell asleep facing away from each other on opposite sides of the bed and slept for several hours. He awoke when he felt someone rubbing his back and butt. He turned over and P.K. began "grinding" her butt into his genitals. Nothing "physical" had ever happened between them before and appellant asked P.K. what she was doing. She did not respond but continued what she was doing and he became aroused. He asked her "Do you really want to do this?" and again there was no verbal response but she turned onto her back, slid down her underwear, turned on her side and lifted her leg up over his. Appellant proceeded to engage in sexual intercourse with P.K., although he said he did not ejaculate; instead, "[he] pulled out and [he] rubbed it out in the bathroom." Appellant said he put his shorts back on and laid down, only to be approached by P.K. again. He asked "are we doing this again" and P.K. climbed on top of him and they had intercourse again. Appellant said this time he pulled out and ejaculated on the sheets and comforter.

{¶43} Appellant said after the second sex act he only had a few minutes before he had to leave for work. He got up, brushed his teeth and dressed for work. P.K. smiled at him as he left.

{¶44} Appellant did not text P.K. that morning because he was working. She later texted him and was "short" with him. He asked if she was O.K. and based on her responses, he assumed she told her boyfriend what they did. Appellant said the ensuing text conversation was his attempt to comfort P.K. and make it seem like she did nothing wrong by cheating on her boyfriend and it was "all on him." His regret and

apologies meant he felt bad he interfered in their relationship and "jump-started" a physical relationship with P.K. faster than they should have. When he said he had been thinking about this for weeks, he meant he thought about having a relationship with P.K.

{¶45} Appellant said he thought P.K.'s signals gave him the green light to have sex with her, specifically, "grinding her a** on his d*ck." Earlier that day at lunch they had talked about P.K.'s boyfriend and appellant said "If you ever break up, I want next dibs" and P.K. responded "Don't worry, you've got next dibs."

{¶46} When P.K. called him during the one-party consent call, appellant had no idea an investigation was in progress. He said the tape was accurate but P.K. kept cutting him off when he tried to say she initiated sexual contact and he thought her accusations were "odd."

{¶47} Appellant became aware of the rumor he raped K.M. while he was working at Panera. He said R.J. Holliday started the rumor because he was mad appellant didn't take his sister to the prom and also because he told Holliday's girlfriend he was cheating on her.

{¶48} Appellant said he was at the party at Schuller's house after the Winter Formal. His date left the party early and he was sitting in the basement when K.M. and A.F. appeared. He didn't know how they got there and had no part in picking them up. Holliday poured the girls several drinks and appellant told him to stop. Holliday purportedly said the girls needed to have fun and keep playing the liquor pong game. Appellant noticed K.M. looked "flushed of color" and he thought she needed to lie down. He led K.M. into the bedroom so she could lie down and it was Holliday who slammed

the door shut because he was mad appellant prevented him from giving K.M. more to drink. Appellant denied locking the bedroom door.

{¶49} Appellant said K.M. sat down on the bed and put her arms around him. He heard Holliday pounding on the bedroom door, saying Cameron was throwing up and asking for appellant's help. He got up to leave the room and K.M. started throwing up on her own clothes and on his shirt. He told her to take off whatever had vomit on it, then opened the door, left the room, and asked Newcomb to take care of K.M. while he went to get a trash can. He helped clean up the basement while Newcomb put K.M. in the shower.

{¶50} Appellant stated while Cameron, K.M., and A.F. were in the shower, he washed and dried their clothing. He and Holliday then drove K.M. and A.F. home to K.M.'s house where they dropped the girls off at the end of her driveway.

{¶51} Appellant said he didn't have sex with K.M. and didn't tell anyone he did. He took his shirt off to change into a spare shirt because K.M. had thrown up on it. He was in the bedroom with K.M. for less than a minute, not enough time to have had sex. He never saw her naked; she was beginning to take her hoodie off but was fully clothed when he left the room. He continued to have contact with K.M. after the party; he said they spoke and texted each other and went out to eat at Dairy Queen once. Appellant went to her house but, according to him, her stepfather thought it was inappropriate for a senior to be hanging around a freshman so they didn't talk much after that.

{¶52} During cross examination, appellant spontaneously stated he was familiar with a phenomenon known as "drunken recall" from watching a History Channel documentary on the topic. In his understanding, a person does not remember things

they did when they were drunk once they become sober; however, once they are drunk again, the memory of those drunken activities comes back.

{¶53} Appellant acknowledged P.K. confronted his parents about the incident although he denied she showed them the texts. He said he explained what happened and his parents told him to stay away from P.K. Based upon P.K.'s conversation with his parents, he was aware she was "starting to fabricate something." Appellant concluded P.K. fabricated the rape allegations as a cover story to her boyfriend and K.M. fabricated the allegations because Holliday put her up to it.

Appellant's Witnesses

{¶54} Mike Schuller testified on appellant's behalf and said the group was at his house for parties "hundreds of times" but he did not recall a party after the Winter Formal specifically and knew nothing of these events until he was contacted by Jackson police. He acknowledged he told the prosecutor he didn't want to be involved. Despite his claim he was no longer friends with appellant and hadn't spoken to him in a long time, he admitted he solicited appellant's help in obtaining an internship at appellant's workplace a little over a year before trial.

{¶55} A number of other witnesses testified on appellant's behalf and stated generally appellant is a reputedly truthful person and P.K. is a reputedly untruthful person. A Panera manager testified P.K. told her she woke up in the truck on the way home from the bar to discover appellant unfastening her jeans.

Indictment and Motion to Sever

{¶56} Appellant was charged by indictment as follows: Count I, rape pursuant to R.C. 2907.02(A)(1)(c), a felony of the first degree; Count II, sexual battery pursuant to R.C. 2907.03(A)(2), a felony of the third degree; Count III, rape pursuant to R.C. 2907.02(A)(1)(c), a felony of the first degree; Count IV, sexual battery pursuant to R.C. 2907.03(A)(2), a felony of the third degree; Count V, unlawful sexual conduct with a minor pursuant to R.C. 2907.04(A), a felony of the fourth degree; and Count VI, gross sexual imposition pursuant to R.C. 2907.05(A)(5), a felony of the fourth degree. Appellant entered pleas of not guilty and the matter was set for trial.

{¶57} On November 5, 2013, appellant moved to sever Counts I and II from Counts III, IV, and V because trying the two incidents of rape together would lead the jury to convict him based upon an alleged propensity to commit criminal acts. Appellee responded with a motion in opposition and a hearing was held on November 20, 2013. In a written decision, filed December 17, 2013, the trial court overruled appellant's motion to sever. The trial court found the charges would be admissible as "other acts" evidence in separate trials and the evidence was "simple and direct" as to each victim.

Trial, Verdict, Post-Trial Proceedings, and Sentence

{¶58} The case proceeded to trial by jury. Appellant moved for judgment of acquittal pursuant to Crim.R. 29(A) at the close of appellee's evidence and at the close of all of the evidence. The motions were overruled. Appellant also renewed his motions to sever charges related to the two separate incidents; the motions were overruled.

{¶59} During the trial, outside the presence of the jury, the bailiff said she was approached by Juror 53 who said based upon her training as a chef some of the

statements by defense counsel about the effects of alcohol consumption were not true. Defense trial counsel moved to excuse the juror, the state objected, and Juror 53 was brought in for voir dire. Juror 53 stated she learned it takes an hour for alcohol to take effect once consumed, therefore the defense argument that P.K. would have had a hard time walking out of the bar was not necessarily true because the alcohol may not have yet taken effect. She stated she did not share this information with the other jurors and was able to remain fair and impartial, she had not formed an opinion on the ultimate issues in the case, and would decide the case based solely upon the evidence. Upon questioning by appellee, she further acknowledged she has experience of consuming alcoholic beverages and understood she was allowed to bring her "common experiences" into the courtroom but was not an expert. Appellant renewed his request to have Juror 53 excused and the trial court overruled the request. (T. 803-816).

{¶60} Appellant was found guilty as charged. The jury verdict was reached on Friday, January 17, 2014 and the jurors were released from the trial court's instructions at approximately 5:30 p.m.

{¶61} On January 22, 2014, appellant filed a Motion for Hearing on Potential Juror Misconduct alleging Juror 53 was a social media contact with P.K. on Twitter and "actually 'liked' a status posted by [P.K.] relating to the trial, alleged (*sic*) while the jury was still deliberating."

{¶62} On the date of sentencing, the trial court recalled the jurors and a hearing was held on appellant's motion. Juror 53 testified that after the trial, around 7:30 p.m. while she was attending a basketball game, she Googled the parties and witnesses in the case on her phone. Google led her to social media sites including P.K.'s Twitter

account. She "favorited" a tweet by P.K. which said "I get the answer soon. I'm going to throw up." Juror 53 testified she did not know when P.K. posted the tweet; she did not find the tweet, or look for it, until Friday evening. She discovered the tweet and favorited it after the jury reached its verdict and after she was released from the instructions of the trial court.

{¶63} Juror 53 was asked to bring her phone into the courtroom for examination and did so. She testified she did not share the information with anyone else.

{¶64} The rest of the jurors were then brought in individually and questioned whether any outside information was brought into deliberations by any other juror and the jurors all said no.[1]

{¶65} Three paper exhibits were entered into evidence at the hearing. Defendant's Exhibit A shows a tweet from "[P.K.]" stating "I get the answer soon. I'm going to throw up." The tweet reflects "1 Favorite" and a time stamp below the tweet states "9:40 a.m. – 17 Jan 2014." State's Exhibit 1 shows the same tweet, with no "Favorite" but a time stamp of "12:40 p.m. – 17 Jan 14." A handwritten notation on State's Ex. 1 says "photo from phone actual time." Finally, State's Exhibit 2 shows the same tweet, with one "Favorite," and a time stamp of "5:40 p.m. Fri., Jan.17." A handwritten notation on State's Ex. 2 says, "From computer GMT." None of these exhibits indicates the identity of the person who favorited the tweet. Defendant's Exhibit A shows a photo of an unknown person beside "1 Favorite."

{¶66} The trial court found no juror misconduct occurred.

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[1] Juror 38 also said no outside information was brought in during deliberations but stated "My impression, it was something along the lines that they had studied in the past or something they were aware of during the trial." When asked if this was by Juror 53, he responded "To my knowledge, yeah." (T. 42-44).

{¶67} Counts I and II merged for purposes of sentencing and appellant received a prison term of six years, consecutive to a prison term of eight years on Count III, for a total aggregate prison term of 14 years. Counts IV, V, and VI merged with Count III. Appellant was determined to be a Tier III sex offender.

{¶68} Appellant now appeals from the judgment entry of conviction and sentence and the judgment entry overruling his motion to sever.

{¶69} Appellant raises five assignments of error:

ASSIGNMENTS OF ERROR

{¶70} "I. APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

{¶71} "II. APPELLANT WAS DENIED A FAIR TRIAL WHERE THE TRIAL COURT PERMITTED THE TRIAL OF BOTH INCIDENTS TOGETHER, WHICH ONLY SERVED TO INFLAME THE JURY WITH IMPROPER TESTIMONY."

{¶72} "III. APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT, WHERE THE STATE PROCEEDED ON THE THEORY THAT APPELLANT WAS USING INTOXICATION AS HIS MEANS TO TAKE ADVANTAGE OF WOMEN AND WHEN THE PROSECUTOR PROVIDED TESTIMONY THROUGHOUT THE CASE."

{¶73} "IV. APPELLANT WAS DENIED HIS RIGHTS TO DUE PROCESS AND OF ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE."

{¶74} "V. APPELLANT WAS DENIED DUE PROCESS OF LAW AND HIS RIGHT TO A FAIR TRIAL DUE TO INAPPROPRIATE COMMUNICATIONS BETWEEN THE JURY AND OUTSIDE SOURCES ON AT LEAST TWO OCCASIONS."

ANALYSIS

I.

{¶75} In his first assignment of error, appellant argues his convictions are against the manifest weight and sufficiency of the evidence. We disagree.

{¶76} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

{¶77} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence,

the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶78} Appellant was found guilty of two counts of rape pursuant to R.C. 2907.02(A)(1)(c);[2] two counts of sexual battery pursuant to R.C. 2907.03(A)(2);[3] one count of unlawful sexual conduct with a minor pursuant to R.C. 2907.04(A);[4] and one count of gross sexual imposition pursuant to R.C. 2907.05(A)(5).[5] He argues here both victims were not credible; instead, he asserts, the evidence supports a consensual encounter with P.K. and no sexual encounter with M.K. We disagree.

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[2] R.C. 2907.02(A)(1)(c), rape, states in pertinent part: "No person shall engage in sexual conduct with another * * * when any of the following applies: The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age."

[3] R.C. 2907.03(A)(2), sexual battery, states in pertinent part: "No person shall engage in sexual conduct with another * * * when any of the following apply: The offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired."

[4] R.C. 2907.04(A), unlawful sexual conduct with a minor, states: "No person who is eighteen years of age or older shall engage in sexual conduct with another * * * when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard."

[5] R.C. 2907.05(A)(5), gross sexual imposition, states in pertinent part: "No person shall have sexual contact with another * * * when any of the following applies: The ability of the other person to resist or consent or the ability of one of the other persons to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the ability to resist or consent of the other person or of one of the other persons is substantially impaired because of a mental or physical condition or because of advanced age."

{¶79} Appellant argues the charges involving P.K. are not supported by sufficient evidence and are against the manifest weight of the evidence because it was P.K.'s word against his that the sexual encounter was not consensual. It is axiomatic that both the weight of the evidence and the credibility of the witnesses are determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 231, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79.

{¶80} It was thus up to the jury to evaluate the credibility of P.K. versus appellant, but appellee buttressed P.K.'s testimony in a variety of significant ways. The text conversation between appellant and P.K. does not support appellant's testimony or his argument here. Appellant did not acknowledge one, much less two, consensual sexual encounters, admitting he felt horrible for what he did and acknowledging she could never trust him again. Appellant alleges P.K. "is on a witch hunt with her boyfriend in tow…," a statement which is not supported by evidence demonstrating P.K. was reluctant to go to police, went to appellant's family first, and only reported the rape when it was evident appellant and his family did not take her allegations seriously. Nor is there any evidence P.K. was "scorned by [appellant's] inattentive behavior after sex;" the most striking counterpoint to appellant's claims of a consensual encounter are his own statements during the text conversation, which indicate a consciousness of guilt, and the one-party consent phone call. His replies to P.K. varied from his testimony at trial and the jury could reasonably find appellant's own statements cannot be reconciled with his version of events at trial.

{¶81} Regarding the charges related to M.K., appellant argues M.K. was not credible and "provides no independent corroborative evidence of the sex…" We are

mindful, however, that "[c]orroboration of victim testimony in rape cases is not required." *State v. Cuthbert*, 5th Dist. Delaware No. 11CAA070065, 2012-Ohio-4472, ¶ 28, citing *State v. Johnson,* 112 Ohio St.3d 210–217, 2006–Ohio–6404 at ¶ 53.

{¶82} Moreover, appellant's argument of uncorroborated victim testimony is inconsistent with the trial record. K.M. testified Breanne Newcomb came into the room as she was throwing up and she told Breanne she lost her virginity. R.J. Holliday testified he looked into the bedroom after appellant ran out and observed K.M., naked, on the side of the bed. Newcomb also testified she went into the room and found K.M. naked sitting on the side of the bed. Newcomb asked her if she and appellant had sex and K.M. stated "I think so." Holliday testified he asked appellant that night if he had sex with K.M. and what he used for contraception because there were no condoms available. Appellant replied he "pinched it off," which Holliday interpreted as he prevented himself from ejaculating into K.M.

{¶83} Appellant claimed to have no idea how K.M. and her friend got to the party and they simply appeared in the basement. Other party guests testified appellant and Schuller drove to pick the girls up.[6] Appellant's own testimony established despite everyone but him being drunk to the point of vomiting, it was only K.M. whom he took a special interest in, deciding she needed to "lay down" in the bedroom. He therefore personally escorted her into the bedroom, they sat on the bed, and K.M. put her arms around him. He told K.M. to take her clothes off because she had thrown up on them although he only saw her beginning to take off her hoodie. He was the only party guest

[6] Schuller testified that he did not recall the party at all and to his knowledge he did not "hook up" with A.F.

to testify that while K.M. was in the shower, he assisted in doing her laundry: he washed and dried her clothing and that of two other party guests.

{¶84} Appellant points to a number of statements by the victims which were contradicted by his testimony or by that of other witnesses. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Burden*, 5th Dist. Stark No. 2011-CR-1447, 2013-Ohio-1628, ¶ 80, citing *State v. Craig,* 10th Dist. 99AP–739, 2000 WL 297252 (Mar 23, 2000).

{¶85} Upon reviewing the trial record, we find this is not an exceptional case in which the evidence weighs heavily against the convictions and the jury did not create a manifest injustice by concluding that appellant was guilty of the crimes charged in the indictment. The jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt. We find appellant's convictions are not against the manifest weight of the evidence and are supported by sufficient evidence.

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

II.

{¶87} In his second assignment of error, appellant argues the trial court abused its discretion in declining to sever the two incidents, thereby allowing introduction of inadmissible evidence. We disagree.

{¶88} Joinder of offenses is governed by Crim. R. 8(A); offenses may be joined if they are of the same or similar character, are based on the same act or transaction, or are based on two or more acts or transactions connected together or part of a common

scheme or course of criminal conduct. Joinder is liberally permitted to conserve judicial resources, reduce the chance of incongruous results in successive trials, and diminish inconvenience to witnesses. See, *State v. Torres*, 66 Ohio St.2d 340, 343, 421 N.E.2d 1288 (1981). Joinder is appropriate where the evidence is interlocking and the jury is capable of segregating the proof required for each offense. *State v. Czajka,* 101 Ohio App.3d 564, 577–578, 656 N.E.2d 9 (8th Dist.1995).

{¶89} If similar offenses are properly joined pursuant to Crim. R. 8(A), the accused may move to sever the charges pursuant to Crim. R. 14, wherein the burden is on the defendant to demonstrate his rights would be prejudiced by joinder. *State v. Strobel*, 51 Ohio App.3d 31, 33, 554 N.E.2d 916 (3rd Dist.1988). Appellant argues the trial court erred in overruling his motion to sever. To prevail on such a claim, the defendant has the burden of demonstrating: 1) his rights were actually prejudiced; 2) at the time of the motion to sever, the defendant provided the trial court with sufficient information so that it could weigh the considerations favoring joinder against the potential prejudice the defendant's right to a fair trial; and 3) given the information provided to the court, the court abused its discretion in refusing to sever the charges. *State v. Schaim,* 65 Ohio St.3d 51, 59, 600 N.E.2d 661(1992), citing *State v. Hamblin,* 37 Ohio St.3d 153, 158–159, 524 N.E.2d 476 (1988) and *Drew v. United States,* 331 F.2d 85 (D.C.Cir.1964). A defendant has not demonstrated prejudice where: (1) if the counts were severed, evidence of alleged misconduct from each count would be admissible in separate trials, and (2) if such evidence would not be admissible, the evidence of each count is simple and distinct. Id.

{¶90} "If the evidence of other crimes would be admissible at separate trials, any 'prejudice that might result from the jury's hearing the evidence of the other crime in a joint trial would be no different from that possible in separate trials,' and a court need not inquire further." *Schaim*, supra, 65 Ohio St.3d at 59, internal citation omitted. Accordingly, we must determine the extent to which evidence of each of these crimes would be admissible in other trials if the counts were severed. *State v. Markwell*, 5th Dist. Muskingum No. CT2011-0056, 2012-Ohio-3096, ¶ 46.

{¶91} We recognize the admission of other-acts evidence is limited because of the substantial danger a jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment, and this danger is especially high in a case "of an inflammatory nature" such as this one. *Schaim*, supra, 65 Ohio St.3d at 59, citing *State v. Curry*, 43 Ohio St.2d 66, 68, 330 N.E.2d 720 (1975). However, "[a]s long as used for purposes other than proving that the accused acted in conformity with a particular character trait, Evid.R. 404(B) permits the admission of 'other acts' evidence if it is 'related to and share[s] common features with the crime in question.'" *State v. Markwell*, supra, 2012-Ohio-3096, at ¶ 45, citing *State v. Lowe,* 69 Ohio St.3d 527, 634 N.E.2d 616 (1994), paragraph one of the syllabus.

{¶92} Appellee argues the evidence of each offense would have been admissible at separate trials pursuant to Evid.R. 404(B), which states in pertinent part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible

for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. * * * *." The Rule is in accord with R.C. 2945.59, which states:

> In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

{¶93} Appellee argues appellant "actively sought out opportunities when women were intoxicated to engage in sexual acts" and the similarity of the acts charged here established appellant's "behavioral footprint and tended to prove that he committed both rapes." In *State v. Curry*, 43 Ohio St.2d 66, 330 N.E.2d 720 (1975), the Ohio Supreme Court held "other acts" testimony, in order to be admissible under the scheme or plan exception, must: (1) illustrate the immediate background of the crime charged, such that without this testimony it would be virtually impossible to prove that the accused committed the crime; or (2) establish the identity of the perpetrator. Neither is the case here. However, the Court has subsequently limited its holding in *Curry*: "Pursuant to Evid.R. 404(B), * * * evidence of other crimes, wrongs, or acts of an accused may be admissible to prove intent or plan, even if the identity of an accused or the immediate

background of a crime is not at issue." *State v. Williams*, 134 Ohio St.3d 521, 522, 2012-Ohio-5695, 983 N.E.2d 1278, 1280, ¶ 2 (2012).

{¶94} *Williams* gives us a framework within which to evaluate the other-acts evidence:

> The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *See* Evid.R 403.
>
> *State v. Williams*, 134 Ohio St.3d 521, 526, 2012-Ohio-5695, 983 N.E.2d 1278, 1283, ¶ 20 (2012).

{¶95} The circumstances surrounding each rape in this case are relevant in making it more likely appellant had sex with an unwilling intoxicated victim. The evidence pertaining to each offense does have the tendency to prove appellant engaged in a similar plan or method of conduct with both victims and to prove his motive, intent, or plan. The immediate similarity between both rapes charged here are an intoxicated victim and a sober assailant. Both assaults have further similarities:

appellant helped facilitate the drunkenness of the victims, recognized the intoxication of the victims, separated and isolated the victims, and engaged in sex with the victims as they were in and out of sentience.

{¶96} The third step in the analysis is whether the probative value of each incident is outweighed by the prejudice risked in its admission. Unfair prejudice is that quality of evidence which might result in an improper basis for a jury decision. *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302 ¶ 24. Because fairness is subjective, the determination whether evidence is unfairly prejudicial is left to the sound discretion of the trial court and will be overturned only if the discretion is abused. Id., citing *State v. Robb*, 88 Ohio St.3d 59, 68, 723 N.E.2d 1019 (2000). We note the trial court gave a limiting instruction that evidence of other wrongs and acts was not being offered to prove the appellant's character and we presume the jury followed those instructions. See*, Williams*, supra, 2012-Ohio-5695 at ¶ 23, citing *State v. Garner,* 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995) and *Pang v. Minch,* 53 Ohio St.3d 186, 195, 559 N.E.2d 1313 (1990).

{¶97} Consequently, evidence that appellant engaged in non-consensual sex with an intoxicated victim on another occasion may be admissible to prove he had a plan to target vulnerable intoxicated females. *Williams*, supra, 2012-Ohio-5695 at ¶ 2; see also, *State v. Musgrave*, 5th Dist. Stark No. 97-CA-0135, 1998 WL 818067, *3 (Oct. 26, 1998); *State v. Markwell*, 5th Dist. Muskingum No. CT2011-0056, 2012-Ohio-3096, supra; *State v. Brown*, 5th Dist. Delaware No. 2005CAA010002, 2005-Ohio-5639.

{¶98} We find the trial court did not abuse its discretion in denying appellant's motion to sever on that basis.

{¶99} We disagree with appellant's underlying premise that each rape case was too weak to stand on its own and convictions resulted only because the incidents were tried together. Even if we were to find the other-acts evidence inadmissible in separate trials, evidence of each crime is simple and distinct. The jury was capable of separating the proof of multiple charges where, as here, the evidence of each crime is uncomplicated. *State v. Hamblin*, 37 Ohio St.3d 153, 159, 524 N.E.2d 476 (1988). Each victim testified separately and the prosecution introduced evidence of each distinct crime. The separate offenses, one year apart, were clearly laid out for the jury and the jury was instructed that each count and victim should be considered from its own evidence.

{¶100} We conclude the trial court did not abuse its discretion in overruling the motion to sever. Appellant's second assignment of error is overruled.

III.

{¶101} In his third assignment of error, appellant argues he was denied a fair trial due to prosecutorial misconduct premised upon appellee's theory of the case. We disagree.

{¶102} The test for prosecutorial misconduct is whether the prosecutor's remarks and comments were improper and if so, whether those remarks and comments prejudicially affected the substantial rights of the accused. *State v. Lott,* 51 Ohio St.3d 160, 555 N.E.2d 293 (1990), cert. denied, 498 U.S. 1017, 111 S.Ct. 591, 112 L .Ed.2d 596 (1990). In reviewing allegations of prosecutorial misconduct, we must review the complained-of conduct in the context of the entire trial. *Darden v. Wainwright,* 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Prosecutorial misconduct will not provide

a basis for reversal unless the misconduct can be said to have deprived appellant of a fair trial based on the entire record. *Lott*, supra, 51 Ohio St.3d at 166.

{¶103} Appellant contends that appellee's case was not supported by any "extrinsic evidence" in the case of P.K. or any "physical evidence" in the case of K.M. which would corroborate the victims' allegations, therefore appellee's theory that appellant is a sexual predator "laying in the weeds" constitutes prosecutorial misconduct because the argument is inflammatory in appellant's estimation. Appellant fails to point to any improper statement by the prosecutor which is not arguably supported by appellee's evidence. In closing argument, a prosecutor may comment on "what the evidence has shown and what reasonable inferences may be drawn therefrom." *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990).

{¶104} Appellant argues the prosecutor inserted himself as a witness in the case and misstated the evidence but we disagree with his characterizations of the record. Upon our review, we find the cited comments to be fair argument.

{¶105} Finally, appellant has failed to demonstrate prejudice based upon any of the prosecutor's comments he cites. "Appellant does not identify any connection between the alleged misconduct and his conviction. * * * *. [T]he trial court clearly believed, and the record reflects, that the prosecutor's theory of the case was relevant as to certain issues. Appellant's pure speculation as to how the jury might overreact to this evidence is not the kind of 'but for' argument that will support a finding of misconduct." *State v. Carmichael*, 7th Dist. Columbiana No. 11 CO 23, 2013-Ohio-2178, ¶ 14. None of the evidence or arguments cited by appellant are improper, and appellant cannot demonstrate, even if they were improper, "but for" the evidence and arguments

he would not have been convicted. Having failed to demonstrate a causal connection between the alleged misconduct and his resulting convictions, appellant cannot demonstrate reversible error.

{¶106} Appellant's third assignment of error is overruled.

IV.

{¶107} In his fourth assignment of error, appellant argues he received ineffective assistance of trial counsel. We disagree.

{¶108} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. *See*, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689, citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

{¶109} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland,* 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690.

{¶110} Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the 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." *Strickland,* 466 U.S. at 694.

{¶111} 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*, supra at 143, quoting *Strickland* at 697. Accordingly, we will direct our attention to the second prong of the *Strickland* test.

{¶112} Appellant alleges a number of general instances of trial counsel's failure to object and does not state what the basis for objection might have been. None of the cited examples are necessarily objectionable and trial counsel's decision to ignore them may be reasonably attributed to trial strategy. Trial strategy and even debatable trial tactics do not establish ineffective assistance of counsel. *State v. Conway,* 109 Ohio St.3d 412, 2006–Ohio–2815, ¶ 101. Strategic choices made after substantial investigation "will seldom if ever" be found wanting. *Strickland,* supra, 466 U.S. at 681. Moreover, the failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel. *State v. Crawford,* 5th Dist. No. 07 CA 116, 2008–Ohio–6260, ¶ 72, appeal not allowed, 123 Ohio St.3d 1474, 2009–Ohio–5704, 915 N.E .2d 1255, citing *State v. Fears,* 86 Ohio St.3d 329, 347, 715 N.E.2d 136 (1999). Ultimately we find no reasonable probability the outcome of the trial would have been different had such objections been raised. See, *State v. Graber,* 5th Dist. No.2002CA00014, 2003–Ohio–137, ¶ 154, appeal not allowed, 101 Ohio St.3d 1466, 2004–Ohio–819, 804 N.E.2d 40.

{¶113} Appellant's fourth assignment of error is overruled.

V.

{¶114} In his final assignment of error, appellant argues he was denied a fair trial because of juror misconduct. We disagree.

{¶115} The analysis of a case involving alleged juror misconduct requires a two-tier inquiry. First, it must be determined whether there was juror misconduct. Second, if juror misconduct is found, it must then be determined whether the misconduct materially affected appellant's substantial rights. *State v. Taylor*, 73 Ohio App.3d 827, 833, 598 N.E.2d 818 (4th Dist.1991).

{¶116} Appellant alleges two instances of juror misconduct: Juror 53's statement to the bailiff regarding the effects of alcohol consumption and her "favoriting" of P.K.'s tweet stating "I get the answer soon. I'm going to throw up." In both instances, the trial court and the parties voir dired Juror 53; in the second instance, the entire panel was voir dired to determine whether there had been any improper influence upon the panel. The jurors unanimously stated there was no improper influence. The trial court determined no misconduct occurred.

{¶117} In cases involving outside influences on jurors, trial courts are granted broad discretion in dealing with the contact and determining whether to declare a mistrial or to replace an affected juror. *State v. Phillips*, 74 Ohio St.3d 72, 89, 1995-Ohio-171, 656 N.E.2d 643, 661, citing *United States v. Daniels*, 528 F.2d 705, 709–710 (C.A.6, 1976); *United States v. Williams*, 822 F.2d 1174, 1189 (C.A.D.C.1987); Annotation, 3 A.L.R.5th 963, 971, Section 2 (1992). A trial judge's determination of possible juror bias should be given great deference only upon the appellate court's satisfaction that the trial judge exercised sound discretion in determining whether juror

bias existed and whether it could be cured. *State v. Gunnell*, 132 Ohio St.3d 442, 2012-Ohio-3236, 973 N.E.2d 243, ¶ 29.

{¶118} In this case, we are convinced the trial court did not abuse its discretion in finding no juror misconduct occurred. Juror 53 stated she could remain open minded after she approached the bailiff about the statements regarding alcohol consumption. A juror's belief in his or her own impartiality is not inherently suspect and may be relied upon by the trial court. *State v. Phillips*, 74 Ohio St.3d 72, 89, 1995-Ohio-171, 656 N.E.2d 643. She further testified she did not look for witnesses' profiles on social media or "favorite" P.K.'s tweet until after the verdict was reached and she was released from instructions; the rest of the panel confirmed no outside evidence was brought into its deliberations. "Unless an appellant demonstrates otherwise, we should assume that the members of the jury followed their oaths and deliberated only upon the evidence adduced at trial." *Gunnell*, supra, 2012-Ohio-3236 at ¶ 32, citing *State v. Durr,* 58 Ohio St.3d 86, 91, 568 N.E.2d 674 (1991).

{¶119} Nor did the trial court err in limiting jurors' testimony when it reached beyond the scope of the hearing. Ohio Evid. R. 606(B) states in pertinent part:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was

> improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. * * * *.

{¶120} Appellant has not demonstrated any evidence that would contradict the jurors' testimony that they deliberated only upon evidence presented at trial. The trial court's finding that no juror misconduct occurred was not unreasonable, arbitrary or unconscionable.

{¶121} Appellant's fifth assignment of error is overruled.

CONCLUSION

{¶122} Appellant's five assignments of error are overruled and the judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J. and

Baldwin, J., concur;

Hoffman, P.J., concurs separately

Hoffman, P.J., concurring

{¶122} I concur in the majority's analysis and disposition of Appellant's first, third, fourth and fifth assignments of error. I further concur in the majority's disposition of Appellant's second assignment of error but differ, in some regards, in my reasons for doing so.

{¶123} After twenty-four years on the Appellate Court, I still cringe a bit when the admissibility of other-acts evidence is an issue in an appeal. I confess my understanding of the proper interpretation and application of Evid.R. 404(B) and its legislative counterpart, R.C. 2945.59, remains unclear.

{¶124} While the rule and statute quite clearly prohibit evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith, the exceptions to the rule are numerous and stated in broad, undefined terms. Trial courts often struggle to determine whether a specific fact pattern fits into one or more of the general exceptions. My review of appellate case law seems to echo that struggle. The fact other-acts evidence is relevant does not automatically render it admissible. Application of the exceptions should be strictly construed to effectuate the purpose of the rule/statue and to insure the other-acts evidence is not misused by the jury as propensity evidence.

{¶125} Despite the Ohio Supreme Court's recognition the admission of other acts evidence must be limited because of the substantial danger a jury will convict a defendant solely because it assumes a defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime

charged[7], from my perspective, it appears admission of such other acts evidence has not been limited in practice and the liberal application of the exceptions has, in large part, swallowed the rule. And, as the Ohio Supreme Court further recognized, the danger of jury misuse of other acts evidence is especially high in cases of an inflammatory nature.[8] Where, as in the case of sub judice, the charges include sexual allegations involving a child and a young adult girl, the possibility jurors may bootstrap the evidentiary strength of one charge to support a guilty verdict on another charge where the evidence is less persuasive is both real and substantial.

{¶126} I now turn to the question of which, if any, of the other acts exceptions apply to this case. I agree with my colleagues the scheme or plan [or system] exceptions do not apply here for the reasons set forth in the majority opinion. I do not find the other-acts evidence admissible as proof of motive because it is clear Appellant's sexual gratification was the motive in both cases. I also find there was no question as to Appellant's identity or the absence of mistake or accident regarding the charged crimes. Likewise, the preparation exception is not applicable.[9] As to intent, like motive, I find there is no dispute as to Appellant's intent in regards to either charge. The intent was to have sex [consensual or otherwise] with both victims.[10]

{¶127} What remains is whether the evidence of the other crimes is admissible to show either opportunity or knowledge. I find it satisfies both purposes here. The

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[7] *State v. Schaim*, 65 Ohio St.3d 51, 59 (1992).
[8] *Id.* at 59.
[9] An example of the application of the preparation exception would be had Appellant illegally purchased and provided alcohol to the victims, evidence of this prior illegal purchase or furnishing would be admissible in the trial for rape.
[10] An example of the proper application of the intent exception would be admission of evidence of a defendant's prior threat to kill a person (aggravated menacing) in a subsequent trial for the murder of that person.

"opportunity" to commit the crimes came about because of the mutual condition of extreme intoxication of each victim. In a similar vain, the circumstances of intoxication surrounding each crime is relevant to Appellant's knowledge (appraisal) of each victim's ability to resist or consent, and whether each victim's judgment was substantially impaired.

{¶128} Accordingly, I agree with my colleagues the trial court properly admitted the other acts evidence in this case. Having done so, this Court need not inquire further.[11] However, both the majority and the trial court did go further and also found joinder was permissible because the evidence as to each crime was both simple and distinct. I agree.

{¶129} Having already ventured further than needed, I elect to take yet another "unnecessary" step to express my reservation with the simple and distinct test. While conservation of judicial resources, reduction of incongruous results in successive trials and inconvenience to witnesses are legitimate concerns supporting joinder of offenses, the fundamental requirement of affording a defendant a fair trial is paramount. In this case, outside law enforcement personnel,[12] only one witness would have been inconvenienced by having to appear at both trials, Ian Cameron. Because the evidence as to each crime was simple and distinct and involved only one defendant, I find no risk of incongruous results in successive trials.

{¶130} I advocate applying the third step in the analysis of the other acts evaluation set forth in *Williams,* to the simple and distinct test. Even if the evidence of each crime is simple and distinct, I believe the trial court should still weigh the benefit of

[11] *Id*. at 59.
[12] I consider trial appearance part of the job of law enforcement personnel.

joinder against the danger of unfair prejudice to the defendant if the charges are tried together. The majority concludes, even if we were to find the other acts evidence inadmissible, because evidence of each crime is simple and distinct, joinder was permissible. The question I would then pose is, does the danger of unfair prejudice outweigh the benefit of joinder, which as previously noted, I would find in this case to be based only upon conservation of judicial resources. I would answer it does not and it would have been an abuse of discretion not to sever the charges for trial. But was the error prejudicial? In light of the persuasive strength of the evidence as to each individual charge in this appeal, I would find it was not.

{¶131} Accordingly I concur in the majority's disposition of Appellant's second assignment of error.