[Cite as *State v. Ridley*, 2013-Ohio-1268.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio	Court of Appeals No. L-10-1314
Appellee	Trial Court No. CR0200903404
v.	
George Ridley	**DECISION AND JUDGMENT**
Appellant	Decided: March 29, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
Gwen Howe-Gebers, Chief Assistant Prosecuting Attorney,
Aaron T. Lindsey and David E. Romaker, Jr., Assistant
Prosecuting Attorneys, for appellee.

Tim A. Dugan, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, George Ridley, appeals his conviction for felonious assault, a violation of R.C. 2903.11(A)(2), a second degree felony. In an October 8, 2010 judgment entry, following a jury trial, the Lucas County Court of Common Pleas

sentenced appellant to serve an eight-year prison term. For the reasons that follow, we affirm.

{¶ 2} The relevant facts of this case are as follows. On December 18, 2009, appellant was indicted on three counts (1) kidnapping, in violation of R.C. 2905.01(A)(3) and (C), a first degree felony, (2) kidnapping, in violation of R.C. 2905.01(B)(2) and (C), a first degree felony, and (3) felonious assault, in violation of R.C. 2903.11(A)(2), a second degree felony. Additionally, on February 19, 2010, appellant was indicted for one count of rape, in violation of R.C. 2907.02(A)(2), a first degree felony. On March 3, 2010, the counts were consolidated. The charges stem from an incident that took place the evening of November 16, 2009, and into the following morning, in which the victim suffered knife wounds to her hand and body and other injuries. Appellant entered a plea of not guilty to the charges.

{¶ 3} On February 9, 2010, appellant filed a pro se motion to remove his court appointed counsel, Daniel Arnold, which was granted by the trial court and attorney Kurt Bruderly was assigned. On March 15, 2010, upon motion by the state, appellant was ordered to undergo a competency evaluation after filing another pro se motion to remove Bruderly as his counsel. Subsequently, the trial judge referred the case to the Ohio Supreme Court for reassignment due to conflicts arising from appellant's actions towards the county prosecutor and the court. Appellant's third counsel, David Klucas, was appointed on April 20, 2010, at which point appellant was also deemed to be competent to stand trial. Judge Michael Corrigan was appointed as visiting judge and special

prosecutors from Wood County were appointed on April 27, 2010. Klucas was granted a motion to withdraw as counsel at appellant's request on June 25, 2010, and appellant's fourth appointed counsel, Charles McKinney, was assigned on July 2, 2010.

{¶ 4} A jury trial commenced on October 4, 2010, and the following evidence was presented. Officer Rebecca Kincaid testified that on November 17, 2009, in Toledo, Lucas County, Ohio, she was dispatched to St. Vincent's Hospital to take an assault report from the victim. Kincaid testified that the victim had a black eye, multiple cuts on her forehead, legs, knees and arms including one on her hand that was down to the bone. Kincaid stated that these injuries were consistent with wounds sustained from a knife and that the victim appeared terrified during initial questioning. After being reluctant to give Kincaid any information, Kincaid testified the victim described the events that led to her injuries. Kincaid provided testimony on photographs taken at the hospital of all the victim's injuries. Kincaid then testified that she went to Pinebrook Apartments, the location of the assault, and found bloody and torn clothing in a nearby dumpster. These possessions were identified as belonging to the victim.

{¶ 5} Sexual assault nurse examiner ("SANE"), Tracey Hinkle, testified next. Hinkle testified that she originally triaged the victim when she arrived at the hospital. Hinkle presented evidence of her notes from November 17, 2009, and testified that the victim described the entire sequence of events to her for purposes of conducting a medical history and rape-kit after the victim had spoken with Toledo Police. Hinkle testified that, over objection from appellant's counsel, the victim stated that appellant had

attacked her with a knife and beat her with his fists in a physical altercation. Hinkle also stated that the victim told her that the appellant also tore up her bloody clothing, purse and other possessions with the knife. Hinkle testified that, according to the victim, this altercation took place in the early morning hours of November 17, 2009. Lastly, Hinkle testified that the victim did not receive medical treatment in the way of bandages or sutures for her wounds until after she had spoken to police and provided the history of the events to Hinkle.

{¶ 6} Toledo Police Detective John Rose, the lead investigator for the case, presented testimony concerning conversations with the victim on November 18, 2009. Detective Rose testified that the victim was scared of appellant and had created a story about being jumped by a group of girls in order to get away from appellant and seek medical help.

{¶ 7} After much debate, the trial court allowed the state to present the testimony of Officer David Vasquez, who investigated a prior assault incident involving appellant, and Danella Torres, who testified that she was the victim of an assault perpetrated by appellant. The substance of the testimony will be discussed, in detail, below.

{¶ 8} The defense called several witnesses who testified that appellant and the victim were together on the night of the incident. Derrick Murphy testified that he saw an altercation between the victim and a group of girls during the early morning hours of November 17, 2009, although he did not report the fight to police at the time and had previously never given a statement about what he saw. Walter Holston, appellant's

nephew, also testified that he saw appellant take a knife away from the victim during a verbal altercation between appellant and the victim on the night of the incident. His testimony indicated, however, that he did not witness the victim actually injured by the knife.

{¶ 9} Appellant testified at the close of the trial. Appellant testified that he and the victim were together on the night of November 16, 2009, and into November 17, 2009. Appellant also testified that upon Holston entering their room at some point in the night, the victim suffered a knife wound to her hand when appellant accidently cut her while attempting to take the knife from her. Appellant stated that he also cut off a portion of the victim's hair with scissors and also cut articles of the victim's clothing and other possessions. Appellant then testified when he and the victim were leaving his apartment during the afternoon of November 17, 2009, a group of three to four girls attacked them. According to appellant, during this altercation, the victim suffered additional wounds.

{¶ 10} Following trial and deliberations, the jury found appellant guilty of felonious assault and not guilty of kidnapping and rape. The court sentenced appellant to eight years of imprisonment. This appeal followed.

{¶ 11} Appellant now raises the following six assignments of error for our consideration:

1. The Trial Court violated appellant's right to a speedy trial.

2. Appellant's conviction was not supported by legally sufficient evidence.

3. Appellant's conviction fell against the manifest weight of the evidence.

4. The Trial Court erred by allowing appellee to present evidence of other acts under 404(B) to the jury.

5. The Trial Court erred by allowing appellee to present hearsay testimony to the jury.

6. The cumulative effect of all the errors committed by the Trial Court deprived appellant of a fair trial.

{¶ 12} In his first assignment of error, appellant contends that his constitutional right to a speedy trial was violated and asks for a dismissal of the charges of which he was convicted. The right to a speedy trial is guaranteed by the United States and Ohio Constitutions. *State v. Adams*, 43 Ohio St.3d 67, 68, 538 N.E.2d 1025 (1989). Pursuant to R.C. 2945.71(C)(2), a person charged with a felony shall be brought to trial within 270 days of his arrest. Further, each day an accused is held in jail in lieu of bail on the pending charge is counted as three days for purposes of computing the time limit. R.C. 2945.71(E). Therefore, if an accused is held in jail solely on the pending charge for the entire time from arrest to trial, he must be brought to trial within 90 days.

{¶ 13} The time by which an accused must be brought to trial, however, may be tolled under certain conditions, including:

(B) Any period during which the accused is mentally incompetent to stand trial or during which his mental competence to stand trial is being determined

* * *.

(E) Any period of delay necessitated by reason of a * * * motion, proceeding, or action made or instituted by the accused[.] R.C. 2945.72.

{¶ 14} "It is well established that once an accused has demonstrated that the applicable speedy-trial time has expired, he or she has established a prima facie case for dismissal, and the burden shifts to the state to demonstrate any tolling or extensions of time permissible under the law." *State v. McDonald*, 153 Ohio App.3d 679, 2003-Ohio-4342, 795 N.E.2d 701, ¶ 27 (8th Dist.). The remedy for the violation of an accused's right to a speedy trial is a dismissal of the charge. *State v. Major*, 180 Ohio App.3d 29, 2008-Ohio-6534, 903 N.E.2d 1272, ¶ 25 (6th Dist.), citing *Barker v. Wingo*, 407 U.S. 514, 522, 92 S.Ct. 2182, 33 L.E.2d 101 (1972); R.C. 2945.73(B).

{¶ 15} Here, appellant was arrested on December 8, 2009 and trial in this case began on October 4, 2010, a total of 300 days of incarceration. It is undisputed that numerous tolling events took place between those two dates, all of which were properly counted against appellant's speedy trial computation. Appellant, however, claims that by April 16, 2010, over 90 untolled days had passed since his arrest and the charges against him should have been dismissed by the trial court. Appellant argues specifically that a discovery motion filed on February 11, 2010, and the subsequent 11 days it took for a

response to be filed by the prosecutor should not be tolled against him. Further, appellant argues the 31 days to perform a competency evaluation at the suggestion of the state should not be tolled against him since the trial court abused its discretion in ordering the evaluation.

{¶ 16} Appellant's first argument that the period from February 11, 2010, when a second discovery motion by appellant was filed, to February 22, 2010, when the prosecutor responded to the motion, should not be tolled against him is not well-founded. Generally, a defendant's demand for discovery or bill of particulars is a tolling event pursuant to R.C. 2945.72(E). *See State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, 781 N.E.2d 159. In arguing that the discovery motion made here is not a tolling event, appellant alleges that the motion filed on February 11, 2010, was "duplicative" and submitted against appellant's wishes.

{¶ 17} No case law exists to suggest that discovery motions beyond the first filed in a case, particularly when made after the dismissal of counsel as here, do not toll time under the speedy trial provisions. Discovery motions impose a burden on the prosecution since such motions necessitate a timely response and draw the prosecutor's attention away from preparing the case for trial. *Brown* at ¶ 23. Since appellant's first counsel had been dismissed from the case, largely due to appellant's own actions, the discovery motion made on February 11, 2010, by appellant's next counsel was customary to ensure that counsel was appropriately up to speed on the case and had all the materials he needed to proceed to trial.

{¶ 18} Furthermore, there is no case law to suggest that simply because appellant disagreed with his counsel's decision to submit a motion for discovery on February 11, 2010, the time does not toll against him for speedy trial purposes. Not tolling time based on disagreements between criminal defendants and their counsel on discovery motions would lead to every defendant claiming that counsel went against their advice on submitting such motions to ensure their trials went past the statutorily proscribed time limits. Therefore, there is nothing in the record to overturn the well-founded fact that discovery requests made by defendants toll time under R.C. 2945.72(E). Thus, the time taken to respond to appellant's motion for discovery on February 11, 2010, was properly tolled against appellant by the trial court.

{¶ 19} Appellant next argues that the competency request made by the state was improperly tolled against him. R.C. 2945.72(B) states that "any period during which the accused is mentally incompetent to stand trial or during which his mental competence to stand trial is being determined" is a tolling event for the sake of the speedy trial provision. The Ohio Supreme Court has noted this language is "broadly worded to include *any period* in which the accused's mental competency is being determined." (Emphasis added.) *State v. Palmer*, 84 Ohio St.3d 103, 106, 702 N.E.2d 72 (1998). Therefore, even competency motions first suggested or made by the prosecutor or judge would toll time against a defendant. So long as the trial court did not abuse its discretion in ordering the competency evaluation in the first place, the time taken for such an evaluation to take place is properly tolled. *State v. Patton*, 2d Dist. No. 08AP-800, 2009-

Ohio-1382, ¶ 10. An abuse of discretion only occurs when the trial court's decision was arbitrary, unreasonable, or unconscionable. *Id*.

{¶ 20} It is clear from the record that the trial court's decision to order a competency evaluation was not arbitrary or unreasonable in this case. To evaluate whether a trial court abused its discretion in ordering a competency evaluation, the following factors must be evaluated (1) doubts expressed by defendant's counsel as to the defendant's competence, (2) evidence of irrational behavior, (3) the defendant's demeanor at trial, and (4) prior medical opinion related to competence at trial. *State v. Rubenstein*, 40 Ohio App.3d 57, 60, 531 N.E.2d 732 (8th Dist.1987).

{¶ 21} Appellant's counsel at the time did voice concerns about appellant's competence to stand trial by indicating to the trial court that appellant had previously been treated for bipolar disorder, which appellant denied in court. There is also ample evidence within the record of appellant's irrational behavior both inside and outside of the courtroom and questions existed as to whether he understood the nature of trial. Appellant in several recorded phone conversations indicated that he would hurt his defense counsel and that appellant felt his rights were being "rail-roaded." Appellant often accused his own counsel of working for the prosecutor and argued that the trial court was conspiring against him. As the court found in *Patton, supra,* appellant's "recidivism and contacts with the justice system," when coupled with the allegations against him in the current case, "formed a sufficient basis for the trial court to believe an evaluation was necessary" in this case. *Id.* at ¶ 10.

{¶ 22} Based on the foregoing, we find that the trial court did not abuse its discretion in ordering a competency evaluation of appellant. The 31 days that passed in order for the evaluation to take place were properly tolled against appellant's speedy trial time. Since appellant's discovery motion made on February 11, 2010, and the competency evaluation ordered on March 15, 2010, were tolling events under R.C. 2945.72, appellant's speedy trial right was not violated by the trial court since only 74 untolled days passed between appellant's arrest and April 16, 2010. The first assignment of error is not well-taken.

{¶ 23} In his second and third assignments of error, appellant argues that his conviction for felonious assault is not supported by sufficient evidence and is against the manifest weight of the evidence. Sufficiency of the evidence and manifest weight of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Sufficiency of the evidence is purely a question of law. *Id*. At its core, sufficiency of the evidence is a determination of adequacy and a court must consider whether the evidence was sufficient to support the conviction as a matter of law. *Id*. The proper analysis 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.'" *State v. Williams*, 74 Ohio St.3d 569, 576, 660 N.E.2d 724 (1996), quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 24} In contrast, a manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins* at 387. In making this determination, the court of appeals sits as a "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 reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 25} Appellant was convicted of one count of felonious assault, R.C. 2903.11(A)(2), which required that the state prove that appellant knowingly caused, or attempted to cause, physical harm to another by means of a deadly weapon. It is undisputed that the victim suffered wounds as the result of a knife, a deadly weapon under the statute. The central issues concerned whether appellant knowingly caused or attempted to cause this physical harm and whether other parties inflicted the harm upon the victim. Upon review of the record, we find that there was sufficient evidence that appellant knowingly caused physical harm to another by means of a deadly weapon and that his conviction was not against the manifest weight of the evidence.

{¶ 26} Looking at the evidence in a light most favorable to the state, at trial testimony was presented showing that appellant and the victim were together at appellant's niece's apartment during the evening of November 16, 2009, and the morning of November 17, 2009. The victim suffered multiple injuries during this time, including deep cuts to her hands and other cuts to her arms and legs consistent with wounds from a knife, burn marks on her forehead and other parts of her face, massive bruising and swelling around her eyes and lips and had a large portion of hair ripped or cut off her head. Evidence of the victim's bloodied clothing and belongings cut up by a knife were found near the apartment where appellant and the victim were located during the time of her injuries. SANE nurse Tracey Hinkle testified that the victim told Hinkle during examination of her wounds that appellant inflicted the wounds and threatened her family if the victim told anyone. Officer Kincaid also testified to the nature of the wounds and the victim's story about who perpetrated the assault. Photographs of the wounds were admitted into evidence. There was sufficient evidence by a rational juror to find that appellant knowingly caused physical harm to the victim with a knife.

{¶ 27} Appellant argues that the jury lost its way in convicting him since evidence was presented that showed the victim received her injuries from an individual or individuals other than appellant. Testimony presented by appellant on this issue, however, was contradictory at best. Appellant testified that an attack by a group of girls in the early afternoon of November 17, 2009, resulted in the victim's wounds. Appellant further testified upon cross-examination, however, that he and the victim had gotten into

an altercation that evening during which the victim was cut with a knife and burned by a cigarette. Another defense witness, Derrick Murphy, testified that he saw a group of females attacking the victim in the early morning hours of November 17, 2009. The victim also indicated to SANE nurse Hinkle that she had been attacked by a group of girls, but Hinkle also testified that it was not unusual for victims to not be completely forthcoming at first. Detective Rose later testified that the victim told him that she had invented the story about the girls attacking her so that appellant would let her seek treatment for her wounds.

{¶ 28} All told, there was ample direct and circumstantial evidence, particularly given appellant's history and behavior, tending to show that the appellant inflicted the wounds upon the victim. The evidence to the contrary was contradictory and from unreliable sources. Weighing all of the evidence and considering the credibility of the witnesses, we cannot say that the jury lost its way and created a manifest injustice.

{¶ 29} Accordingly, we find that appellant's convictions were supported by sufficient evidence and that the jury did not lose its way and create a manifest miscarriage of justice. Appellant's second and third assignments of error are not well-taken.

{¶ 30} In his fourth assignment of error, appellant contends that the trial court erred in admitting into evidence certain testimony about appellant's past actions. Specifically, appellant argues that the testimony of Danella Torres and Officer David Vasquez was inadmissible as evidence of "other acts" of appellant. Appellant further asserts that the probative value of this evidence was outweighed by its prejudicial effect

on the jury. Our standard of review regarding the admissibility of evidence is abuse of discretion. *State v. Chandler*, 8th Dist. Nos. 93664, 93665, 2011-Ohio-590, ¶ 40, citing *State v. Montgomery*, 61 Ohio St.3d 410, 575 N.E.2d 167 (1991).

{¶ 31} Evidence of other acts which are wholly independent of the crime charged is generally inadmissible. *State v. Thompson*, 66 Ohio St.2d 496, 497, 422 N.E.2d 855 (1981). In that vein, Evid.R. 404(B) provides: "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." Accordingly, evidence of other crimes committed by the accused either before or after the crime charged is inadmissible to show a propensity to commit crimes, but may be relevant and admissible to show motive or intent, the absence of mistake or accident, or a scheme, plan or system in committing the act in question. *State v. Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988), paragraph one of the syllabus. Evidence of an accused's other acts is thus admissible only when it "tends to show" one of the material elements in the charged offense and only when it is relevant to the proof of the accused's guilt for such offense. *State v. Curry*, 43 Ohio St.2d 66, 68-69, 330 N.E.2d 720 (1975). Generally, Evid.R. 404(B) "affords broad discretion to the trial judge regarding the admission of other acts evidence." *See State v. Williams*, 2012-Ohio-5695, ¶ 17, --- N.E.2d ---.

{¶ 32} During the course of the trial, two state witnesses testified to prior incidents involving appellant. Officer David Vasquez testified that in 2008, he responded to the scene of an alleged assault involving appellant. Upon reaching the scene, Vasquez stated that he found appellant and a woman who had multiple injuries and bruising to her face, including around her eyes and mouth. Vasquez further testified that appellant blamed the incident on another, unidentified woman. Danella Torres, an ex-girlfriend of appellant and mother of two of his children, also testified to a prior incident involving the appellant. Torres testified that in 2004, she had an altercation with appellant in which appellant pulled her hair, punched her repeatedly in the face and attempted to strangle her. The incident left Torres, she described, with bruising on her face. In addition, Torres testified that after the incident, appellant threatened her if she went to the police.

{¶ 33} In determining whether the trial court abused its discretion in allowing Vasquez and Torres to testify about appellant's prior acts, we must use the three-step analysis determined recently by the Ohio Supreme Court:

> 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. *Williams* at ¶ 20.

{¶ 34} The state offered the testimony of Vasquez and Torres to demonstrate identity, intent and absence of mistake or accident. "Other acts may also prove identity by establishing a modus operandi applicable to the crime with which a defendant is charged." *State v. Lowe*, 69 Ohio St.3d 527, 531, 634 N.E.2d 616 (1994). By showing that the defendant had a "behavioral fingerprint" in other similar circumstances, the other acts evidence can show not that a defendant is a criminal but that they are the perpetrator of the crime in question. *Id.* So long as the other acts evidence is "related to and share[s] common features with the crime in question," such evidence can be admitted. *Id*.

{¶ 35} Here, the testimony of Vasquez and Torres established firmly that appellant had a "behavioral fingerprint" of acting as he was alleged to have acted in this case. Both Vasquez and Torres testified that appellant had previously assaulted a woman in such a way so as to leave significant bruising around the victim's eyes and mouth. Torres also testified that appellant attempted to strangle her and threatened her life if she went to the police. Vasquez added that appellant blamed the prior injuries on a mystery ex-girlfriend. All of this evidence is closely related to and shares common features with the actions of which appellant was accused in this case. The victim suffered bruising to her face, marks consistent with strangulation and told others that the appellant threatened her repeatedly if she reported the incident. The appellant also attempted to place blame for

the victim's injuries on an ex-girlfriend or a group of girls. These facts tended to show that appellant had established a modus operandi for assaulting his girlfriends in a particular manner and attempting to avoid charges by blaming others. This evidence was highly relevant since it tended to show that appellant knowingly caused physical harm to another.

{¶ 36} Further, by the appellant's own evidence presented at trial, there were considerable questions as to intent or accident. The Second Appellate District has found that where a criminal defendant presented evidence suggesting a victim received injuries by accident, the state may present "other acts" evidence to prove intent and the lack of accident. *State v. Grubb*, 111 Ohio App.3d, 277, 282, 675 N.E.2d 1353 (2d Dist.1996). In this case, appellant's testimony raised an issue regarding whether the victim's injuries were caused by accident and not by any intentional misconduct on his part. Therefore, the state was able to rebut this allegation by presenting contrary evidence that appellant had previously caused similar injuries intentionally and not through any accident. This evidence was relevant to a genuine issue in the case and passes the first-step established by *Williams, supra*.

{¶ 37} Appellant argues that the testimony of Torres was too dated to be relevant to this case. Although Ohio law does require a "'temporal, modal and situational relationship' between an alleged crime and other acts, 'temporal issues are not solely determinative in consideration of other acts evidence.'" *State v. Zich*, 6th Dist. No.

L-09-1184, 2011-Ohio-6505, ¶ 101, quoting *State v. Brooks*, 7th Dist. No. 07-MA-79, 2008-Ohio-6600, ¶ 36. (Citation omitted.) Instead, the probative value of such conduct "'lies in its peculiar character rather than its proximity to the event at issue.'" *State v. McAdory*, 9th Dist. No. 21454, 2004-Ohio-1234, ¶ 18, quoting *State v. DePina*, 21 Ohio App.3d. 91, 92, 486 N.E.2d 1155 (9th Dist.1984). Since appellant's behavior in this case mirrored so closely the testimony given by Torres regarding appellant's prior actions, the six-year difference between the actions does not defeat its probative value in this case.

{¶ 38} In *Williams*, *supra*, the next step relates to whether the evidence is presented to prove the accused's character in order to show that the conduct was in conformity with that character. In this case, the state did not present the evidence to prove that appellant acted in conformity with a certain trait or characteristic. In fact, the trial court gave three limiting instructions that the testimony by Vasquez and Torres was not being offered to prove appellant's character—one during each of their respective testimonies and one prior to deliberation. We presume the jury followed those instructions. *See State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995); *Pang v. Minch*, 53 Ohio St.3d 186, 195, 559 N.E.2d 1313 (1990).

{¶ 39} Finally, we consider whether the probative value of the other acts evidence as described by Vasquez and Torres is substantially outweighed by the danger of unfair prejudice. The testimony of Vasquez and Torres was not unduly prejudicial, because the trial court instructions lessened any prejudicial effect of the testimony. *See Williams*, 2012-Ohio-5695, at ¶ 23-24. Furthermore, the trial court limited any prejudicial effect by

severely restricting the testimony of Vasquez and Torres. Even after cross-examination may have opened the door to further inquiry into the incident described by Vasquez, the trial court stated that the state could not walk through that door in fear of the potential prejudice to the jury. The evidence presented by Vasquez and Torres tended to show identity, intent and absence of mistake or accident and not that appellant had acted in conformity with a certain character trait.

{¶ 40} In addition, contrary to appellant's contention, there is no evidence that appellant was actually prejudiced by the admission of the testimony. The jury found appellant not guilty as to two of the three counts before it. Thus, the evidence of appellant's past acts did not prejudice the jury against the appellant before all the testimony was heard in the case.

{¶ 41} Therefore, we find that the trial court did not abuse its discretion in allowing limited testimony concerning other acts by appellant since they were introduced to show identity, intent and lack of accident or mistake. Appellant's fourth assignment of error is not well-taken.

{¶ 42} In his fifth assignment of error, appellant contends that the trial court erred by allowing hearsay testimony into evidence. Specifically, appellant argues that portions of testimony by SANE Nurse Tracey Hinkle relating to statements made by the victim should not have been allowed into evidence under the exceptions allowed for testimony of excited utterances or statements necessary for medical treatment or diagnosis.

{¶ 43} "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offering in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Hearsay is not admissible into evidence unless permitted by constitution, statute, or rule. Evid.R. 802. Nevertheless, the rules of evidence provide numerous categories of testimony which are declared either as "not hearsay" or are within exceptions to the hearsay rule. Evid.R. 801(D), 803, 804. Included in these exceptions are statements that are deemed to be "excited utterances" of the declarant or statements made for the purposes of medical diagnosis or treatment. Evid.R. 803(2), 803(4).

{¶ 44} The determination of whether hearsay statements are subject to exception rests within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *State v. Hand*, 107 Ohio St.3d 378, 393, 2006-Ohio-18, 840 N.E.2d 151, ¶ 92. An abuse of discretion occurs when the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 45} Appellant complains that the trial court erred when it allowed into evidence, over objection from counsel, hearsay testimony of SANE nurse Tracey Hinkle concerning statements made by the victim. Specifically, Hinkle testified to the history of the incident given to her by the victim while at the hospital. Hinkle was acting under her capacity as a SANE nurse and spoke with the victim after the victim had been questioned by police. Hinkle contemporaneously wrote notes on her discussion with the victim and

testified both to the content of what the victim said and what her notes indicated. Appellant also raises issues with the portions of Hinkle's testimony in which Hinkle stated that the victim identified her boyfriend as the perpetrator of the assault. While we agree with appellant that the statements do not meet the standards for hearsay exception under excited utterances, we find the testimony permitted under the hearsay exception pertaining to statements made for medical diagnosis or treatment.

{¶ 46} An "excited utterance" is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Evid.R. 803(3). In order for testimony to be allowed into evidence under the excited utterance exception, the follow elements must be met "(1) there was an event startling enough to produce a nervous excitement in the declarant, (2) the statement must have been made while under the stress of excitement caused by the event, (3) the statement must relate to the startling event, and (4) the declarant must have had an opportunity to personally observe the startling event." *State v. Boles*, 190 Ohio App.3d 431, 2010-Ohio-5503, 942 N.E.2d 417, ¶ 34 (6th Dist.), citing *State v. Duncan*, 53 Ohio St.2d 215, 373 N.E.2d 1234. A central requirement for a statement to be deemed an excited utterance is that the statement "may not be a result of reflective thought." *State v. O'Neal*, 87 Ohio St.3d 402, 411, 721 N.E.2d 73, quoting *State v. Taylor*, 66 Ohio St.3d 295, 303, 612 N.E.2d 316 (1993). In addition, there is "no per se amount of time after which a statement can no longer be considered to be an excited utterance." *Taylor* at 303.

{¶ 47} In the current case, we cannot say that the victim's statements were not the result of reflective thought both due to the time that had elapsed between the startling event, the assault at issue here, and Hinkle's questioning of the victim and the prior questioning that had taken place before Hinkle received the victim's medical history. Hinkle provided testimony of her conversation with the victim that took place fourteen hours after the victim was initially assaulted. Hinkle also testified that she observed the victim pacing around the room on her cell phone and had previously spoken with police while Hinkle was in the room. While the time between the startling event and the victim's statements are not dispositive, when the time element is taken together with the victim's ability to speak previously with other unknown individuals and to the police it is clear that the victim's statements may have been the result of reflective thought. Even though the victim was described as "disheveled," "crying," and "upset," those characteristics do not necessarily mean her statements were excited utterances. *Id.* at 303. Due to the large amount of time that elapsed between the assault and the victim's statements to Hinkle and the victim's prior conversations, we cannot find that the victim was still under the stress of excitement caused by the assault. Therefore, the statements cannot be admitted under the hearsay exception for excited utterances.

{¶ 48} Nevertheless, we do not find that the trial court abused its discretion since the statements were properly admissible as statements used for medical diagnosis and treatment. So long as the evidentiary basis on which an appellate court decides a legal issue was adduced before the trial court and made a part of the record thereof, an

appellate court can decide an issue on grounds different from those determined by the trial court. *State v. Peagler*, 76 Ohio St.3d 496, 501, 668 N.E.2d 489 (1996). This court has previously held that when reviewing evidence subject to hearsay exceptions, an appellate court may decide the testimony falls within another exception than the one given by the trial court. *Boles, supra,* at ¶ 36.

{¶ 49} Evid.R. 803(4) provides that "statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Statements admissible under Evid.R. 803(4) are understood to be reliable because "(1) the effectiveness of treatment frequently depends upon the accuracy of the information related to the physician and (2) such statements are 'reasonably relied on by a physician in treatment or diagnosis.'" *State v. Cockrell*, 10th Dist. No. 04AP-487, 2005-Ohio-2432, ¶ 31, quoting *State v. Dever*, 64 Ohio St.3d 401, 411, 596 N.E.2d 436 (1992). So long as "the declarant's motive is consistent with that of a patient seeking treatment" and "it is reasonable for the physician to rely on the information in diagnosis and treatment," hearsay statements are admissible under Evid.R. 803(4). *State v. Clary*, 73 Ohio App.3d 42, 52, 596 N.E.2d 554 (10th Dist.1991).

{¶ 50} We are convinced from the record that both *Clary* factors are present here. Hinkle's questioning of the victim was clearly within her capacity as a SANE nurse to properly diagnose and treat the victim. Even though Hinkle had previously triaged the

victim when she first arrived at the hospital, the full extent of her wounds were unknown when the victim made the statements in question and Hinkle's interview of her was based on the possibility of a sexual assault, which was only revealed after the initial triage. The victim's wounds had yet to be bandaged or sutured in any way. Based on the information that Hinkle gained during her conversation with the victim, Hinkle was able to appropriately treat the victim and describe the procedure for the application of a rape kit, to which the victim later agreed.

{¶ 51} Further, there is substantial precedent for allowing a victim's statements to a nurse or other medical provider into testimony as an exception to hearsay despite the fact that the victim had previously spoken with police. *State v. Stahl*, 9th Dist. No. 22261, 2005-Ohio-1137. In *Stahl*, a victim's statements to a specialist belonging to the Developing Options for Violent Emergencies (DOVE) unit, analogous in many ways to the SANE nurse program, were allowed even though the victim had already given a statement to a police officer. *Id*. The Ninth Appellate District reasoned that the differences in circumstances and intent of the questioning between the police questioning and the specialist's questioning were so dramatic as to make clear that the statements to the nurse were for "aid and treatment," not "prosecution." *Id*. at ¶ 19. Similarly, Hinkle was documenting the injuries that the victim had suffered and interviewed her for the purpose of ensuring the victim received adequate care and comfort. *See State v. Hicks*, 6th Dist. No. L-83-074, 1991 WL 156534 (Aug. 16, 1991). It is clear from the evidence that the statements made to Hinkle were for the purposes of medical diagnosis and

treatment and such statements are permissible as exceptions to the general prohibition against hearsay.

{¶ 52} Appellant also argues that the victim's statements to Hinkle identifying the assailant or cause of her wounds were not properly admissible under the medical treatment and diagnosis exception. However, under the rules of evidence, "a description of the encounter and even identification of the perpetrator are within the exception, as statements made for purposes of diagnosis or treatment." *Stahl* at ¶ 15. In the victim's statements to Hinkle, the victim only identified the perpetrator of the assault as her "boyfriend." In addition, the victim's statements merely identified the "cause or external source" of her pain and the alleged sexual assault, highly pertinent and relevant information for Hinkle's diagnosis and treatment. *See Cockrell, supra,* at ¶ 33. Therefore, we do not find that the victim's statements identifying the appellant as the assailant defeats the admissibility of those statements based upon the hearsay exception for medical diagnosis and treatment. Appellant's fifth assignment of error is not well-taken.

{¶ 53} In his sixth assignment of error, appellant contends that the cumulative errors in this case deprived him of a fair trial. We have stated that "although a particular error by itself may not constitute prejudicial error, the cumulative effect of the errors may deprive a defendant of a fair trial and may warrant the reversal of his conviction." *State v. Hemsley*, 6th Dist. No. WM-02-010, 2003-Ohio-5192, ¶ 32, citing *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus. "'However,

in order even to consider whether "cumulative" error is present, we would first have to find that multiple errors were committed in this case.'" *Id.*, quoting *State v. Madrigal*, 87 Ohio St.3d 378, 398, 721 N.E.2d 52 (2000). Upon review of appellant's preceding five assignments of error, we cannot say that there were multiple instances of harmless error; accordingly, there can be no cumulative error. Appellant's sixth assignment of error is not well-taken.

{¶ 54} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE