[Cite as *State v. Wilson*, 2010-Ohio-550.]

[For original opinion, please see 2010-Ohio-144.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92148

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERIC R. WILSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506395

BEFORE: Cooney, P.J., McMonagle, J., and Boyle, J.

RELEASED: February 18, 2010

JOURNALIZED: February 18, 2010

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ON RECONSIDERATION[1]

COLLEEN CONWAY COONEY, P.J.:

{¶ 1} Defendant-appellant, Eric Wilson ("Wilson"), appeals his convictions and sentence. Finding some merit to the appeal, we affirm in part and reverse in part pursuant to *State v. Singleton*, Slip Opinion No. 2009-Ohio-6434.

[1] The original announcement of decision, *State v. Wilson*, Slip Opinion No. 2010-Ohio-144, released January 21, 2010, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See App.R. 22(C); see, also, S.Ct.Prac.R. 2.2(A)(1).

{¶ 2} In 2008, Wilson was charged with four counts of rape, two counts of kidnapping, and one count of gross sexual imposition, involving A.L.[2] The matter proceeded to a jury trial, at which he was found guilty of all counts. He was sentenced to an aggregate of 20 years in prison.

Trial Testimony

{¶ 3} Wilson was convicted upon the following trial testimony. According to the victim, A.L., on the evening of November 23, 2004, she took a bus from her home to a store on the west side of Cleveland, with the hope of meeting her ex-boyfriend at the store and getting her car from him. She was at the store for several hours, but did not see him. At some point, Wilson pulled up in a vehicle as she stood outside smoking a cigarette. Wilson offered her a ride home, which she accepted.

{¶ 4} A rear seat passenger was in Wilson's car. Wilson drove to a nearby tavern, told A.L. that he had to go inside momentarily, and asked his other passenger to "keep an eye" on her. The victim testified that she tried to get out of the car while Wilson was in the tavern, but the other male passenger prevented her from doing so.

[2]Each count carried a sexually violent predator specification. The specifications were dismissed by the State prior to trial. The journal entry of conviction, however, includes these specifications.

{¶ 5} Wilson returned to the car and drove to an east side apartment complex. He told A.L. to get out of the car, and he, the other passenger, and A.L. went into one of the apartment units. Inside the apartment, several females were in a hot tub smoking marijuana. Two dogs were also in the apartment. The victim testified she was afraid of dogs and Wilson was "siccing" them on her. A.L. told Wilson she had to get back home.

{¶ 6} Wilson, A.L., and the other passenger eventually left the apartment. After Wilson dropped the other passenger off, he got on Interstate 90, and as they were approaching the area known as "dead man's curve," Wilson demanded that A.L. perform oral sex on him. A.L. testified that she refused, and Wilson grabbed her by her hair and banged her head into the passenger window. A.L. further claimed that Wilson had a gun. The victim testified that she submitted to his demand because she feared for her life.

{¶ 7} Wilson then demanded that the victim remove all of her clothing, and she complied. Wilson drove to an area near NASA on the west side of Cleveland and parked on a gravel road near a hotel. A.L. told Wilson that she needed to use a bathroom and he told her to go outside. Wilson ordered her back in the car, and again upon his demand, she performed oral sex on him. Wilson then vaginally raped A.L. while kissing her neck and breasts.

{¶ 8} Wilson then drove back to the east side of Cleveland, where he parked in an unknown location and again vaginally raped A.L. The victim testified that Wilson still had a gun, and fearing for her life, she pretended to be enjoying herself. She conversed with him and he told her that he had been to prison and hated women.

{¶ 9} After these acts, Wilson drove A.L. home, told her that she needed to "firm up" if she wanted to work in his escort business, and gave her his cell phone number.

{¶ 10} A.L. called the police later that morning and was taken to the hospital where a rape kit was administered. Wilson's DNA matched the DNA collected as part of the rape kit.

{¶ 11} Wilson now appeals, raising ten assignments of error for our review.

Motion for Mistrial

{¶ 12} In his first assignment of error, Wilson challenges the trial court's denial of his request for a mistrial, which was based on A.L.'s testimony, over the defense's objection, that Wilson told her that he had been in prison. The standard of review for evaluating the trial court's decision on a motion for a mistrial is an abuse of discretion. *Cleveland v. Gonzalez*, Cuyahoga App. No. 85070, 2005-Ohio-4413, ¶44, citing *State v. Sage* (1987), 31 Ohio St.3d 173, 182, 510 N.E.2d 343. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 13} A mistrial should not be ordered in a criminal case merely because some error or irregularity has occurred, unless the substantial rights of the accused or the prosecution are adversely affected, and this determination is made at the discretion of the trial court. *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33, 550 N.E.2d 490. The granting of a mistrial is only necessary when a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, 580 N.E.2d 1, citing *Illinois v. Somerville* (1973), 410 U.S. 458, 462-463, 93 S.Ct. 1066, 35 L.Ed.2d 425. Thus, the essential inquiry on a motion for mistrial is whether the substantial rights of

the accused or the prosecution are adversely or materially affected. *State v. Goerndt*, Cuyahoga App. No. 88892, 2007-Ohio-4067, ¶21.

{¶ 14} Wilson contends that the victim's statement about his having been in prison was "other bad acts" evidence that was substantially prejudicial when compared to its probative value. The State cites two cases in support of the court's allowing the victim's statement.

{¶ 15} In the first case, *State v. Rupp*, Mahoning App. No. 05 MA 166, 2007-Ohio-1561, the Seventh Appellate District addressed a situation where a rape victim testified that, in the moments leading up to the crime, the defendant told her that he was on parole for helping another well-known defendant elude the police during a national manhunt. The defendant also told the victim that he had been in prison for shooting a convenience store clerk, he was not sorry for doing it, and would do it again.

{¶ 16} The *Rupp* court, relying on Evid.R. 404(B) and R.C. 2945.59, which provide for the admission of other acts to demonstrate such purposes as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, held that the evidence tended to show the defendant's intent to act to overcome the victim's will by fear and duress. The court also found that the defendant's statements to the victim provided an opportunity for him to advance on the victim without much resistance.

Additionally, the court found that the defendant's statements established a plan or scheme on the part of the defendant to affect the victim's state of mind. Finally, the *Rupp* court cited Evid.R. 801(D)(2), which provides that an admission by a party-opponent is not hearsay.

{¶ 17} In the second case cited by the State, *State v. Williams*, Franklin App. No. 03AP-287, 2003-Ohio-6663, the Tenth Appellate District addressed a similar situation in which a rape victim testified that the defendant told her that he had just been released from prison. The court held that the defendant's statement was admissible as an admission by a party-opponent under Evid.R. 801(D)(2). The court also found it admissible under Evid.R. 404(B) for the purpose of identification. The *Williams* court further addressed the statement vis-a-vis the defendant's right to remain silent:

{¶ 18} "While a defendant's right to refrain from testifying is well-established, we are aware of no authority, and defendant points to none, that suggests a defendant's invoking his or her right to remain silent prevents a party from offering into evidence, under the circumstances of this case, defendant's own statements to the victim. Because the testimony was admissible as non-hearsay under Evid.R. 801(D)(2)(a) and further was admissible for purposes of identity under Evid.R. 404(B), we overrule defendant's first assignment of error." *Williams* at ¶20.

{¶ 19} Here, A.L. testified that she learned of Wilson's past when she engaged him in conversation because she feared for her life. Similar to *Rupp* and *Williams*, the testimony was permissible under Evid.R. 404(B) to show Wilson's intent, opportunity, scheme, or plan. It was also admissible under Evid.R. 801(D)(2) as an admission by a party-opponent.

{¶ 20} Accordingly, the first assignment of error is overruled.

Hearsay and Opinion Testimony

{¶ 21} In his second assignment of error, Wilson contends that he was denied a fair trial because the investigating detective and responding officer testified to hearsay and the detective offered inadmissible expert opinion testimony.

{¶ 22} In regard to the alleged hearsay testimony, Wilson cites the following: (1) the detective's testimony that during his investigation he learned of a phone number that may or may not have been important to the case. He subpoenaed the subscriber information for the number and learned to whom the number belonged in 2004; (2) the detective's testimony that he contacted the owners of the apartment building where A.L. said Wilson had taken her and learned that Wilson had been a tenant in the building in 2004; and (3) the officer's testimony that the police report narrative contained

information that the above-mentioned phone number had been checked through Telekey, with no results being found.

{¶ 23} Evid.R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

{¶ 24} The detective's testimony about his investigation into the phone number was not hearsay because there was neither a declarant nor a statement made. Rather, the detective merely testified about the steps he took in his investigation. Moreover, the testimony was not offered for its truth, but rather to detail the detective's investigation of the case. Similarly, the detective's testimony about contacting the owners of the apartment building was not offered for its truth, but rather, again, to detail his investigation of the case.

{¶ 25} In regard to the alleged improper expert opinion testimony, Wilson cites the testimony of the investigating detective, who testified from his experience in law enforcement about what an officer responding to an alleged victim of a sex offense would do. The testimony was not improper expert opinion testimony; it was merely a description of the procedures and practices a police officer would use in investigating a sexual assault.

{¶ 26} Accordingly, the second assignment of error is overruled.

Identical Rape Counts

{¶ 27} In the third assignment of error, Wilson argues that he was denied his right to know the nature of the offense when he was convicted under identical indictments. He relies on *State v. Ogle*, Cuyahoga App. No. 87695, 2007-Ohio-5066, and *Valentine v. Konteh* (C.A.6, 2005), 395 F.3d 626, claiming that the indictment was insufficient because he was charged with four identical counts of rape that did not distinguish what form of sexual conduct he allegedly committed.

{¶ 28} However, in *State v. Cunningham*, Cuyahoga App. No. 89043, 2008-Ohio-803, this court distinguished *Valentine* because the State had presented evidence at trial to differentiate each of the five counts for which defendant was convicted. We relied on *State v. Hardy*, Cuyahoga App. No. 86722, 2007-Ohio-1159, ¶27-31, which quoted *Valentine*'s finding that, "due process problems in the indictment might have been cured had the trial court insisted that the prosecution delineate the factual bases for the forty separate incidents either *before or during the trial*." (Emphasis added.)

{¶ 29} In the instant case, A.L. testified to four distinct acts where Wilson forced her to have vaginal sex twice and oral sex twice. The factual bases were delineated during trial. Furthermore, the bill of particulars informed Wilson that each offense occurred between 11:00 p.m on November

23, 2004 and 3:00 a.m. on November 24, 2004. Thus, although the State provided some further detail in the bill of particulars, Wilson never raised the inadequacy of this information before trial commenced. On the day of trial, Wilson's counsel informed the court that he was ready for trial and had only three issues to address before trial began. None of these issues involved Wilson's earlier motion to dismiss that had alleged carbon copy indictments. Therefore, we find no merit to his argument that the indictments were insufficient to apprise him of the nature of his offenses.

{¶ 30} Accordingly, the third assignment of error is overruled.

Lack of Jury Unanimity on Kidnapping Counts

{¶ 31} For his fourth assigned error, Wilson contends that because the indictment and jury instructions alleged three different forms of kidnapping, connected with "and/or," there was no way of determining on which version of the offense he was convicted. Specifically, the language of which he complains provided that Wilson kidnapped the victim "for the purpose of facilitating the commission of a felony, or the flight thereafter, and/or terrorizing or inflicting serious physical harm * * * and/or engaging in sexual activity[.]"

{¶ 32} Wilson did not raise this issue at the trial court level. We therefore review for plain error under Crim.R. 52(B). "Plain errors or defects

affecting substantial rights may be noticed although they were not brought to the attention of the court." Id. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, however, under exceptional circumstances and only to prevent a miscarriage of justice." *State v. Ford*, Cuyahoga App. No. 84138, 2004-Ohio-5610, ¶23, citing *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.

{¶ 33} The Ohio Supreme Court addressed the issue of indicting several means of kidnapping in the disjunctive and held that "[u]se of the word 'or' in the indictment was not vague, since the alleged purposes were not mutually exclusive." *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶29.

{¶ 34} This court also addressed this issue in *State v. Warren*, Cuyahoga App. No. 84536, 2005-Ohio-3431, stating:

{¶ 35} "Appellant has failed to show that the jury would not have found him guilty of kidnapping had the jury been instructed that they were required to unanimously agree that either appellant kidnapped the victim by removing the victim from a place or by restraining her of her liberty. Pursuant to R.C. 2905.01, the trial court properly instructed the jurors that they could find appellant guilty of kidnapping, with respect to a person under the age of 13, if they found that appellant removed the victim from a place or

restrained her of her liberty for the purpose of engaging in sexual activity. The jurors unanimously returned their verdict that appellant kidnapped the victim (who they unanimously agreed was under the age of 13) with the purpose of engaging in sexual activity. Since there was evidence that appellant 'removed the victim from a place' when he lured her into the storage room under the guise of 'playing a game' and there was evidence that appellant 'restrained the victim of her liberty' when he grabbed her arm and threatened her as she tried to run away, any perceived error would not have changed the outcome." Id. at ¶13.

{¶ 36} Wilson has also failed to demonstrate that the jury would not have convicted him of kidnapping if it had been instructed to unanimously agree on the form of kidnapping. The jury found Wilson guilty of rape and gross sexual imposition, which supported a finding that he kidnapped A.L. "for the purpose of facilitating the commission of a felony." The rape and gross sexual imposition convictions also supported a finding that he kidnapped the victim for the purpose of "engaging in sexual activity." And finally, the victim's testimony that Wilson tried to "sic" dogs on her, banged her head against the car window, and told her that he had been to prison, supported a finding that he kidnapped her for the purpose of "terrorizing or inflicting serious physical harm."

{¶ 37} In light of the above, the fourth assignment of error is overruled.

Culpable Mental States in Indictment

{¶ 38} For his fifth assigned error, Wilson contends that the indictment failed to allege a culpable mental state for all the crimes. Upon review, all the counts allege that Wilson acted with "purpose" or "purposely." Because a culpable mental state was alleged for all the crimes, the fifth assignment of error is overruled.

Amendment of the Indictment

{¶ 39} In his sixth assignment of error, Wilson contends that the trial court's answers to the following jury questions amended the indictment so as to deny him due process:

{¶ 40} Question no. 1: "Are the charges in chronological order? We need clarification of when each charge occurred in relation to the other charges."

{¶ 41} Answer: "No."

{¶ 42} Question no. 2: "Is Count Four referring to the transportation between the Highland tavern and the apartment on E. 40th Street, or between the apartment and Grayton Road Area?"

{¶ 43} Question no. 3: "Is Count Six referring to the transportation between Grayton Road and [the] unidentified east side location, or is it between the apartment and Grayton Road area?"

{¶ 44} Answers: "The prosecutors' claims are as follows:

{¶ 45} "COUNT FOUR, Kidnapping, R.C. §2905.01(A)(2) and/or (A)(3) and/or (A)(4); Transportation between East 40th apartment and Grayton Road area.

{¶ 46} "COUNT SIX, Kidnapping, R.C. §2905.01(A)(2) and/or (A)(3) and/or (A)(4): Transportation between Grayton Road and unidentified east side location."

{¶ 47} Crim.R. 7(D) permits the trial court to amend the indictment, information, complaint, or bill of particulars at any time before, during, or after a trial with respect to any variance in the evidence, provided that no change is made in the name or identity of the crime charged. See *State v. Bailey*, Cuyahoga App. No. 81498, 2003-Ohio-1834. The court's answers here did not change the name or identity of the charges against Wilson. Accordingly, the sixth assignment of error is overruled.

Fair Trial

{¶ 48} Wilson contends in his seventh assigned error that he was denied a fair trial because "the court had a negative opinion of him." In particular,

the judge referred to Wilson as "a pimp and a habitual criminal." Wilson also complains about the judge's "facial expressions" and "other non-verbal behavior * * * which would be observed by the jury."

{¶ 49} In regard to the court's reference to Wilson as "a pimp and a habitual criminal," that occurred outside the presence and hearing of the jury. After a careful review of the record, we do not find that any action or comment by the trial judge, in or out of the jury's presence, served to deny Wilson a fair trial. As to the alleged "facial expressions" and "other non-verbal behavior," as Wilson acknowledges, those actions are not reflected in the record. This court is prohibited from considering matters that are not in the record. *State v. Gray* (1993), 85 Ohio App.3d 165, 619 N.E.2d 460; App.R. 9.

{¶ 50} Accordingly, the seventh assignment of error is overruled.

Sufficiency of the Evidence

{¶ 51} Wilson challenges the sufficiency of the evidence in his eighth assignment of error. An appellate court's function in 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 52} Wilson contends in this assignment of error that the victim was "totally unreliable," and her "story" was "unbelievable." In a sufficiency exercise, however, this court does not make determinations of credibility. Rather, we decide, based on the evidence presented, if believed, whether any rational trier of fact could have found the defendant guilty of the crimes charged. We find that A.L.'s testimony, if believed, established rape, kidnapping, and gross sexual imposition.

{¶ 53} Moreover, to the extent that Wilson also challenges the manifest weight of the evidence, the weight of the evidence supported the convictions. Although the test for sufficiency requires a determination of whether the prosecution has met its burden of production at trial, a manifest weight challenge questions whether the prosecution has met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541. When considering a manifest weight claim, a reviewing court must examine the entire record, weigh the evidence and consider the credibility of witnesses. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80, 434

N.E.2d 1356. The court may reverse the judgment of conviction if it appears that the factfinder "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins* at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. A judgment should be reversed as against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387.

{¶ 54} Upon review, the result in this case was not "exceptional," and it does not appear that the jury "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." The jury was aware of the victim's history; the victim offered explanations as to her inconsistent statements, and the jury chose to believe her. There was nothing incredible about that.

{¶ 55} In light of the above, the eighth assignment of error is overruled.

Sentencing

{¶ 56} In his final two assignments of error, Wilson challenges his sentence. In his ninth assignment of error, he asserts that he was denied "due process of law and his sixth amendment rights when the court arbitrarily sentenced [him] to a twenty (20) year consecutive sentence." His argument is incomprehensible; on one hand, Wilson alleges that the "court did not even marginally allude to the principles and purposes of sentencing," and on the other hand, he complains that "the sentence was based on judicial factfinding." Accordingly, unable to comprehend counsel's argument, we overrule the ninth assignment of error.

{¶ 57} In his tenth assignment of error, Wilson alleges that his sentence is void because the court improperly sentenced him to four years of postrelease control. Under *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, and its progeny, *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, and *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, Wilson's sentence fails to notify him that five years of postrelease control is mandated by his conviction and, pursuant to *State v. Singleton*, requires that we remand for the trial court to employ the "sentence-correction mechanism" of R.C. 2929.191. *Singleton*, paragraph two of syllabus, ¶27.

{¶ 58} Accordingly, the tenth assignment of error is sustained.

Affirmed in part; reversed in part and remanded for further proceedings under R.C. 2929.191.[3] It is ordered that appellee and appellant equally share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for correction of entry of conviction and advisement regarding postrelease control.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

COLLEEN CONWAY COONEY, PRESIDING JUDGE

MARY J. BOYLE, J., CONCURS;
CHRISTINE T. McMONAGLE, J., CONCURS IN PART AND DISSENTS IN PART (WITH SEPARATE OPINION).

[3]The court should also correct the journal entry of conviction to reflect that the sexually violent predator specifications were dismissed prior to trial.

CHRISTINE T. McMONAGLE, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶ 59} Respectfully, I dissent from the majority's resolution of the third assignment of error. I concur with its resolution of the remaining assignments of error.

{¶ 60} In his third assignment of error, Wilson contends that the use of carbon copy indictments for rape deprived him of his Fifth Amendment right to notice of the charges against him and the prohibition against double jeopardy.[4] Wilson cites *Valentine v. Konteh* (C.A. 6, 2005) 395 F.3d 626, and *State v. Ogle*, Cuyahoga App. No. 87695, 2007-Ohio-5066, in support of his contention.[5] Appellant requested the State provide him with facts differentiating between the counts, but the State refused. The matter went to the trial with the above-described counts still undifferentiated. The jury returned a question asking if the identical counts were arranged in some sort of "chronological order," stating "we need clarification of when each charge occurred in relation to the other charges." The trial court's answer to the question was simply "no."

[4]Although Wilson argued in his pretrial motion for dismissal of both the rape and kidnapping counts, he only raised the rape counts on appeal and I therefore limit my discussion to those counts.

[5]While *Ogle* is instructive as to potential double jeopardy outcomes when there is a split verdict on identically charged rapes (an inability to determine upon which acts appellant was found guilty, which acts not guilty, and which acts "hung"), *Ogle* does not directly address due process (right to notice) aspects of the Fifth Amendment.

{¶ 61} In *Valentine*, the United States Court of Appeals for the Sixth Circuit affirmed the district court's granting habeas corpus relief to the defendant on all but one of his convictions, holding that the multiple, undifferentiated charges (of rape) in the indictment violated the defendant's constitutional rights. Id. at 634. In *Valentine*, the court referred to these identical, undifferentiated counts as "carbon copy." *Valentine* discussed two different sections of the Fifth Amendment in reaching this conclusion: (1) the due process portion, which pursuant to *Russell v. United States* (1962), 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240, requires that a criminal defendant be given adequate notice of the charges in order to enable him to mount a defense, and (2) the double jeopardy portion, which requires enough specificity of facts in an indictment to prevent a re-indictment or retrial on charges that have already been decided by a trier of fact. The Sixth Circuit held that an indictment was constitutionally sufficient only "if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy." *Valentine* at 631.

{¶ 62} The *Valentine* court in its decision cited *Russell*, which held that the criteria by which the sufficiency of an indictment is measured is whether the indictment "contains the elements of the offense intended to be charged and 'sufficiently apprises the defendant of what he must be prepared to meet' and secondly 'in case any other proceedings are taken against him for a similar

offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'" *Russell* at 763-64.[6]

{¶ 63} As stated in *U.S. v. Cruickshank* (1875), 92 U.S. 542, 23 L.Ed. 588, "[t]he object of the indictment is first * * * to furnish the accused with such description of the charges against him as will enable him to make his defence. * * * **For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstance**." (Emphasis added.) Id. at 558. As held by the Sixth Circuit in *Valentine,* "as the forty criminal counts were not anchored to forty **distinguishable criminal offenses**, Valentine had little ability to defend himself." (Emphasis added.) Id. at 633.

{¶ 64} In *Cole v. Arkansas* (1948), 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644, the United States Supreme Court stated that, "[n]o principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by the charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." Id. at 201.

{¶ 65} Here, although each rape count contained the elements of the charged offense, the identical counts did not give any notice of their distinctions,

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[6]This law is applicable to the states. See *DeVonish v. Keane* (C.A.2, 1994), 19 F.3d 107, 108; *Fawcett v. Bablitch* (C.A.7, 1992), 962 F.2d 617, 618.

nor did they protect against double jeopardy. Especially troublesome to me in this matter is that the issue of the identical counts of the indictment was properly raised before trial by motion, as required by Crim.R. 12(C). At that initial juncture, the trial court did nothing to require the State to differentiate between the charges. Although the State alleges that each rape charged was specifically delineated by the evidence as the trial unfolded, nothing was done to amend the indictment, or to instruct the jury on the differences in the charges. As proof-positive that the jury had no idea which charge referred to which act, the jury sent a question to the court asking "are the counts in chronological order?" The court answered "no" and gave no guidance whatsoever as to which count referred to which act. The State urges that since the resulting verdict was guilty as to all the undifferentiated counts, there was no error, or in the alternative, if there was error, it was harmless. Given, however, the specific question asked by the jury requesting differentiation between the counts, I cannot so conclude. Or at least I cannot reach that conclusion beyond a reasonable doubt.

{¶ 66} The majority cites *State v. Cunningham*, Cuyahoga App. No. 89043, 2008-Ohio-803, in support of its contention that so long as there is differentiation between counts contained in the evidence presented at trial, there is no error. *Cunningham*, however, never addressed the constitutional issue of the defective indictment. The issue raised in *Cunningham* was whether the "trial court erred in not granting appellant's request for a more specific bill of particulars." Id. at ¶36.

The instant case is not about a bill of particulars; it is about a constitutionally defective indictment.

{¶ 67} In *Valentine*, the district court granted the writ of habeas corpus as to all counts; however that decision was partially reversed when the Sixth Circuit Court of Appeals held that one count in each duplicative group of charges should remain. Likewise, in *State v. Holder*, Cuyahoga App. No. 89709, 2008-Ohio-1271, this court upheld a trial court's dismissal of all but one count of each charge in a carbon copy indictment case.

{¶ 68} Specifically, this court held in *Holder* that "[i]n the instant case, the State indicted Holder with five carbon copy rape counts, five carbon copy gross sexual imposition counts, and two carbon copy sexual battery counts. Holder timely raised his objection pursuant to Crim.R. 12(C). However, the prosecutor failed to respond with an amendment to the indictment or a supplemental bill of particulars to differentiate these counts from one another such that a court in a second trial would be able to discern whether there had been a previous finding of not guilty as to the alleged act. [Citation omitted.] Therefore, we find that the indictment was insufficient and the trial court did not err in granting, in part, Holder's motion to dismiss." Id. at ¶11. (Holder had requested that all counts be dismissed, but pursuant to the adjustment the Sixth Circuit made in the writ issued by the trial court in *Valentine*, this court dismissed only those counts that were duplicative.)

{¶ 69} The Sixth Circuit Court of Appeals directed this court as early as 2005 in *Valentine* that carbon copy indictments are constitutionally defective; both insofar as they do not provide notice prior to trial of each specific charge against the defendant, and further because of the potential for double jeopardy. In 2007 in *Ogle*, this court followed the dictates of *Valentine* when the State's refusal to cease the practice of issuing carbon copy indictments resulted in a hung jury on some (but not all) of the carbon copy counts.[7] This court again followed the dictates of *Valentine* in 2008 in *Holder* by upholding the trial court's pretrial dismissal of all but one of the carbon copy indictments upon a timely filed Crim.R. 12(C) motion. I perceive absolutely no reason that we should not continue to adhere to *Valentine* in this case.

{¶ 70} Accordingly, and in line with the relief afforded in *Valentine*, on this issue I would remand to the trial court with instructions to vacate three of the rape convictions and resentence Wilson.

[7]Accordingly, there was no way for the court to retry the hung counts because there was no way to determine which counts had been resolved by the jury in the first case.