[Cite as *State v. Wilson*, 2010-Ohio-6015.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93772

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERIC WILSON

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTIONS AFFIRMED; SENTENCES VACATED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-518393

BEFORE: Rocco, P.J., McMonagle, J., and Sweeney, J.

RELEASED AND JOURNALIZED: December 9, 2010

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ON RECONSIDERATION[1]

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant, Eric Wilson, challenges his convictions and sentences for three counts of rape and two counts of kidnaping following a jury trial. He raises twelve assignments of error for our review. He

[1]The original opinion in this case, *State v. Wilson*, Cuyahoga App. No. 93772, 2010-Ohio-5121, released and journalized October 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).

contends that:

(1) he was denied due process when he was convicted of one count of rape but acquitted of two other counts of rape that allegedly occurred on the same date;

(2) the court conducted an inadequate inquiry regarding his request to represent himself;

(3) the court erred by allowing the state to introduce evidence of other "bad acts" committed by the defendant;

(4) the court erred by failing to give the jury a limiting instruction about this other acts evidence;

(5) the court erred by allowing testimony of other sexual activity by the defendant;

(6) the court erred by failing to instruct the jury that it was required to agree about the kind of sexual conduct involved in each offense;

(7) the court erred by denying appellant's motion for a judgment of acquittal;

(8) the court should have merged the two kidnaping counts into a single offense;

(9) the court erred by imposing a sentence of life

imprisonment;

(10) the court erred by imposing consecutive sentences;

(11) the sexually violent predator specification was inadequate; and

(12) the evidence was insufficient to support his conviction on the sexually violent predator specification.

Procedural History

{¶ 2} Appellant was charged in a seven-count indictment filed December 2, 2008 with five counts of rape and two counts of kidnaping. All of the charges carried firearm specifications and sexually violent predator specifications; in addition, the kidnaping counts included a sexual motivation specification. The court appointed the public defender to represent him. The public defender was given leave to withdraw, and John Carson was appointed to represent appellant. Appellant expressed some interest in representing himself, and the court indicated it was willing to revisit the issue.

{¶ 3} Appellant subsequently expressed concern that Mr. Carson was lying to him. Carson made an oral motion to withdraw as counsel. Appellant denied that he wanted to represent himself, and the court then appointed Rufus Sims as appellant's counsel. On the day of trial, appellant

objected to Sims's representing him, although he again denied that he wanted to represent himself. The court ruled that "to the extent that you've asserted a motion to represent yourself, that motion is declined, based upon the evidence." The court stated that it was "not persuaded * * * that you have the legal understanding to represent yourself competently."

{¶ 4} At trial, the state presented the testimony of the victim, L.C.; K.H., who was with the victim and the appellant throughout the relevant time; Cleveland police officer Alencia Small-Smith; and Cleveland police detective Charlie McNeeley. The defense presented the testimony of appellant's friends, Jose Rivera, James Woodruff, and Mary Keith.

{¶ 5} L.C. testified that she was 18 years old at the time of the events at issue. On the evening of June 23, 2007, she was walking down East 55th Street toward Kinsman to get on a bus. Appellant, who she knew only as "Big," pulled up beside her in a silver, four-door car and ordered her to get in. She saw that he had a gun in his lap. K.H. was in the front seat and moved to the back. L.C. got into the front seat.

{¶ 6} Appellant drove the two women to a house on Holmden on the west side of Cleveland. It was approximately 6:00 or 7:00 p.m. A tall skinny man opened the door and they went inside. The tall, skinny man then went down to the basement. Appellant instructed both women to

undress. He held a pair of pliers and asked L.C. which nipple she wanted him to cut and told her that "he was going to cut [her] clit[oris] off." He raped her vaginally and anally. They were at that house for approximately 20 to 30 minutes. They were then allowed to dress and appellant drove them to a house on Grand.

{¶ 7} There were three other people at the house on Grand when they arrived: a girl named Kisha, "a guy," and a woman appellant called his mom. Appellant took L.C. and K.H. upstairs to a room that contained two mattresses, locked the door, and made them undress. He made L.C. and K.H. "give him oral sex there and made [them] have sex with him." Appellant fell asleep.

{¶ 8} The following morning, appellant told L.C. to take a shower. She pretended to get in the shower, but she climbed out the window and went to a shopping center nearby where she called the police. The police took a statement from her and took her to a hospital, but a rape kit was not done.

{¶ 9} L.C. saw appellant on a television news program in September 2007. She called Cleveland police detective McNeeley to inform him. She chose appellant's photograph from a photo array.

{¶ 10} Officer Alencia Small-Smith testified that she and her partner responded to L.C.'s call. L.C. showed them the house on Grand where the

events took place. The police knocked on the door, but got no answer. They also looked for appellant's car, but did not find it. They then took L.C. home, then to Lutheran Hospital.

{¶ 11} K.H. testified that she had been friends with appellant for a few weeks beginning in the April before these crimes occurred. She saw him a few times each week. However, she said she "got scared" and avoided his calls after that. K.H. testified that she had just gotten home on June 23, 2007 when she heard a car horn outside. She went out and saw that it was appellant. Kisha was in the car with him. Appellant got out of the car and told K.H. that she owed him money. Appellant struck her and hit her head against a pole. He then made her get in his car. He drove around with her all day. She did not feel free to leave because he had a gun in the car.

{¶ 12} Late that afternoon, appellant made a U-turn. He grabbed a woman and made her get in the front seat of the car while K.H. moved to the back. Appellant took the two women to a house on Holmden, off West 25th Street. Appellant made the two women undress. He made K.H. lie on the floor and perform oral sex on L.C. while L.C. performed oral sex on appellant. Appellant said L.C. owed him money. Appellant also penetrated L.C. anally. Appellant then instructed them to get dressed, and drove them to his house on Grand Avenue.

{¶ 13} At the Grand Avenue house, appellant gave both L.C. and K.H. a T-shirt and panties to sleep in and left them alone in a room upstairs. They talked about how to get away. Appellant came into the room with Kisha. Kisha went to sleep while appellant made both women perform oral sex on him. K.H. then fell asleep. Appellant woke her up the following morning. He was very angry and pushed her outside and into his car.

{¶ 14} Detective McNeeley testified that he determined that Mary Keith lived in the house on Grand Avenue. Keith was also the owner of a house on Holmden.

{¶ 15} At the conclusion of the trial, the jury returned verdicts finding appellant guilty of three counts of rape with sexually violent predator specifications, but not guilty of the attached three-year firearm specifications. The jury also found appellant guilty of kidnaping with a sexual motivation specification and a sexually violent predator specification, but not guilty of the attached three-year firearm specifications. The jury was unable to reach a verdict as to two of the rape counts and the one year firearm specifications. The state dismissed those charges and specifications, with prejudice.

{¶ 16} The court sentenced appellant to a term of 20 years' imprisonment on each of the kidnaping charges, to be served concurrently with one another and consecutive to a term of life imprisonment on each of

the rape counts. All terms of imprisonment were to be served consecutively to the sentences appellant was already serving in three other cases.

Law and Analysis

{¶ 17} In his first assignment of error, appellant contends that his acquittal on the first two counts of rape precluded his conviction on count three, which was identical to counts one and two. He claims this outcome placed him in jeopardy twice for the same offense. We disagree. Appellant had a single trial at which he was found guilty of only one of the three charges of rape he was alleged to have committed on June 23, 2007. The remaining two charges were dismissed with prejudice, so they cannot be tried again. There was no double jeopardy. The only way a double jeopardy issue will arise is if appellant's conviction on count three is reversed and the state wishes to retry him. Cf. *State v. Ogle*, Cuyahoga App. No. 87695, 2007-Ohio-5066; *Madsen v. McFaul* (N.D. Ohio 2009), 643 F.Supp. 962.

{¶ 18} In connection with his first assignment of error, appellant refers to case law concerning the sufficiency of the indictment. Appellant did not raise this issue in the trial court, so we will review it for plain error. Although neither the indictment nor the bill of particulars distinguished the three rape charges from one another, the state presented testimony at trial that would have supported multiple convictions of rape. See, e.g., *State v.*

Salahuddin, Cuyahoga App. No. 90874, 2009-Ohio-466; *State v. Cunningham*, Cuyahoga App. No. 89043, 2008-Ohio-803. Therefore, we overrule the first assignment of error.

{¶ 19} Second, appellant asserts that the court failed to conduct an adequate inquiry concerning appellant's request to represent himself. Appellant repeatedly told the court that he did *not* want to represent himself. He objected to every attorney who was appointed to represent him, and said he wanted to select his attorney himself. "In general, an indigent defendant does not have a constitutional right to choose the attorney who will represent him or her at state expense." *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶64. A substitution of counsel may be warranted if the defendant shows good cause. *State v. Murphy*, 91 Ohio St.3d 516, 523, 2001-Ohio-112, 747 N.E.2d 765. In this case, the court conducted extensive inquiries about the bases for appellant's complaints about his attorneys and substituted counsel for appellant twice. Appellant has not demonstrated that the court failed to conduct an adequate inquiry. Therefore, the second assignment of error is overruled.

{¶ 20} The third assignment of error claims the court erred by allowing K.H. to testify about appellant's other "bad acts." K.H. testified that appellant struck her and forced her into his car, and she did not feel free to

leave because he had a gun in the car. The state urges that this evidence was relevant to demonstrate appellant's "plan, scheme, or system."

{¶ 21} The decision to admit or exclude relevant evidence is within the sound discretion of the trial court. *State v. Bey* (1999), 85 Ohio St.3d 487, 490, 1999-Ohio-283, 709 N.E.2d 484. Under Evid.R. 404(B), "[e]vidence 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." R.C. 2945.59 also provides: "In any criminal case in which * * * the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show * * * 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."

{¶ 22} K.H. and L.C. gave similar testimony about how they came to be in appellant's car and how appellant treated them thereafter. They both testified that they met appellant when he drove up next to them in his car, that they been with appellant casually before this incident, and appellant

gave them clothing. We find the court did not abuse its discretion by allowing this testimony to demonstrate that appellant had used the same methods to acquire both victims.

{¶ 23} Appellant next complains that the court failed to give the jury a limiting instruction about the use of this testimony. Appellant's counsel did not request a limiting instruction from the court, so we must consider whether the failure to give a limiting instruction was plain error. *State v. Shaw*, Montgomery App. No. 21880, 2008-Ohio-1317, ¶13. While a limiting instruction should have been given, we cannot say that the court's failure to give such an instruction affected appellant's "substantial rights" or that a limiting instruction would have altered the outcome of this case. Crim.R. 52(B); *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894. Therefore, we overrule the fourth assignment of error.

{¶ 24} Appellant also complains that the court allowed evidence of his other sexual activity. K.H. testified that she heard appellant and Kisha "having sex" when she was at his house. The court struck this testimony and instructed the jury to disregard it. K.H. also testified that appellant made her perform oral sex on L.C. while L.C. was performing oral sex on appellant. This testimony concerned the events that were the basis of the crime charged. It cannot be characterized as evidence of "other sexual activity."

Therefore, the fifth assignment of error is overruled.

{¶ 25} Sixth, appellant asserts that he was deprived of his right to a unanimous verdict because the court's instructions did not require the jury to agree about the act of sexual conduct that constituted the offense in order to find appellant guilty of rape. Again, appellant did not raise this issue below, so we review it for plain error. Appellant provides no legal authority for this proposition and we find none. A jury need not agree on the specific act that constituted the offense. *Schad v. Arizona* (1991), 501 U.S. 624, 631-32, 111 S.Ct. 2491, 115 L.Ed.2d 555. Therefore, we overrule the sixth assignment of error.

{¶ 26} Seventh, appellant contends that the court erred by denying his motion for acquittal. He questions L.C.'s credibility because she omitted facts from her police statements. He also claims there was no physical evidence of a gun or knife or the pliers that appellant used, or of the injuries L.C. suffered. These arguments challenge not the sufficiency of the evidence but the weight of it. They do not demonstrate that the court erred by denying his motion for acquittal.

{¶ 27} Appellant next claims the court erred by failing to merge the kidnaping and rape charges because the kidnaping was incidental to the rape. The restraint here was clearly not incidental to the rape. L.C. was forced

into a vehicle and driven to two different houses where she was raped. She was kept in a locked room overnight afterward. A separate animus exists for the rapes and kidnapings. See, e.g., *State v. Greathouse*, Montgomery App. No. 21536, 2007-Ohio-2136. Therefore, we overrule the eighth assignment of error.

{¶ 28} In his ninth assignment of error, appellant argues that the court erred by sentencing him to a term of life imprisonment rather than an indefinite prison term. We must agree with appellant that the court incorrectly sentenced him to a term of life imprisonment on each of the rape charges. Having been found guilty of rape in violation of R.C. 2907.02(A)(2) with sexually violent predator specifications, appellant was subject to an indefinite prison term "consisting of a minimum term fixed by the court that is not less than ten years, and a maximum term of life imprisonment," pursuant to R.C. 2971.03(A)(3)(d)(ii). The trial court here did not impose an indefinite term of imprisonment. Rather, it imposed a prison term of "life" on each of the rape charges. This sentence was erroneous as a matter of law.

{¶ 29} We also note that the court plainly erred by sentencing appellant to twenty years imprisonment on the two kidnaping charges. On these charges, the court was also required to impose an indefinite term of imprisonment, consisting of a minimum fixed term of not less than ten years

and a maximum term of life. R.C. 2971.03(A)(3)(b). Therefore, we vacate the sentences imposed on all of the offenses and remand for resentencing in accordance with R.C. 2971.03.

{¶ 30} Appellant's tenth assigned error challenges the court's imposition of consecutive sentences. This assignment of error has been rendered moot by our disposition of the ninth assignment of error.

{¶ 31} The final two assignments of error contend that appellant was deprived of due process by his conviction and sentences for sexually violent predator specifications. First, he claims the indictment was insufficient because it did not allege any of the elements the state had to prove to convict him of that specification. R.C. 2941.148(A)(2) provides that the specification must be in substantially the form in which it appeared in each count of the indictment in this case. A specification is not an offense in itself, and therefore the indictment need not charge every "element" needed to prove the specification. Moreover, the "elements" appellant cites are merely factors the jury can consider in determining if the defendant is likely to commit a sexually violent offense in the future. *State v. Ferrell*, Cuyahoga App. No. 92573, 2010-Ohio-1201, ¶48-52.

{¶ 32} Appellant finally claims the evidence was insufficient to support the sexually violent predator specification. He argues that there was no

evidence relating to some of the factors the jury was told they could consider in determining whether appellant was likely to engage in the future in one or more sexually oriented offenses. The prosecution did not have to provide evidence supporting every one of these factors. Therefore, we overrule the twelfth and final assignment of error.

{¶ 33} Appellant's convictions are affirmed. The sentences are vacated and this case is remanded for resentencing on all charges, consistent with this opinion.

It is ordered that appellant recover from appellee 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.

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

KENNETH A. ROCCO, PRESIDING JUDGE

JAMES J. SWEENEY, J., CONCURS;
CHRISTINE T. McMONAGLE, J.,
CONCURS IN JUDGMENT ONLY IN PART, and
DISSENTS IN PART

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

{¶ 34} *Respectfully, I dissent from the majority opinion on the first assignment of error. In that assignment, Wilson attacks the sufficiency of the indictment on the grounds that the carbon-copy counts of the indictment violated his due process rights under the Fourteenth Amendment. I agree as to Counts 5 and 6. I concur in judgment only upon the third and twelfth assignments of error.*

{¶ 35} *Valentine v. Konteh* (C.A.6, 2005), 395 F.3d 626, originated in the Eighth District as *State v. Valentine* (July 17, 1997), Cuyahoga App. No. 71301. Michael Valentine was charged in an indictment containing identical and undifferentiated counts, and, like Wilson, was convicted of all counts and sentenced to multiple consecutive life sentences. He first raised the issue of the undifferentiated counts before the Eighth District;[2] the Eighth District held that the law did not require any more in an indictment than a recitation of the statute itself. Specifically, this appellate court said:

{¶ 36} "Regarding the state's failure to specify the type of sexual conduct, the Ohio Supreme Court has determined that * * * Crim.R. 7(B) authorizes indictments to utilize the words of the applicable section of the statute. *State v. Murphy* (1992), 65 Ohio St.3d 544, 583. The indictment in this case utilizes the

[2]It does not appear from the opinion that the issue was raised before the trial court, hence it appears our review was correctly based upon "plain error."

wording of Revised Code Sections 2907.02 and 2907.17, which provided Valentine with statutory notice of the charges against him. Consequently, the state did not deprive him of his rights to due process." *Valentine*, Cuyahoga App. No. 71301.

{¶ 37} Valentine attempted to get this issue before the Ohio Supreme Court; they declined jurisdiction, declaring there was "no substantial constitutional question." *State v. Valentine* (1997), 80 Ohio St.3d 1466, 687 N.E.2d 295. However, pursuant to a writ of habeas corpus filed in the United States District Court, Valentine obtained review of the issue. The district court found that the Eighth District's "application of clearly established federal law was not only incorrect, but unreasonable." *Valentine v. Huffman* (N.D.Ohio 2003), 285 F.Supp.2d 1011, 1027. In reaching this conclusion, the district court cited the controlling law contained in *Russell v. United States* (1962), 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240. *Russell* requires that an indictment (1) contain the elements of the offense charged (not an issue in this case — the indictment did in fact charge each and every essential element of the crime), (2) provide the defendant adequate notice of the charges against which he must defend (the seminal issue in the case before us), and (3) provide protection against double jeopardy by enabling the defendant to plead an acquittal or conviction to bar future prosecutions for the same offense. Id. See, also, *Isaac v. Grider* (C.A.6, 2000), 211 F.3d 1269.

{¶ 38} The United States Supreme Court further stated that "[t]he object of the indictment is to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. 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 circumstances. *U. S. v. Cruikshank* (1875), 92 U.S. 542, 558, 23 L.Ed. 588." *Valentine v. Huffman*, at 1024.

{¶ 39} The United States Supreme Court further noted that under the second mandate of *Russell*, "[u]ndoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the description, with which he is charged." *United States v. Hess* (1888), 124 U.S. 483, 487, 8 S.Ct. 571, 31 L.Ed. 5126; see, also, *Valentine v. Huffman*, at 1024-1025. Apropos of this mandate, the district court in *Valentine v. Huffman* discussed how the carbon-copy indictments gave no notice to the defendant sufficient to present an alibi (if one was to be established) or an alternative theory to one of guilt (if such was to be the case), or any other specific defense or defenses. Significantly, however, the district court did not

decide *Valentine* on this second mandate.

{¶ 40} *Valentine* was decided on the third mandate of *Russell*, that of double jeopardy. (With some counts dismissed, it is impossible to determine with such carbon-copy indictments which counts were convictions and which acquittals. See *State v. Ogle*, Cuyahoga App. No. 87695, 2007-Ohio-5066, which under similar facts, reached the same conclusion.) "The Ohio Court of Appeals did not specify which 5 counts were dismissed, nor could it given that the counts were identical and there was no way to distinguish among them." *Valentine v. Huffman*, at 1027.

{¶ 41} In short, while commenting on the lack of notice, *Valentine* at the district court level was decided on the double jeopardy portion of the due process clause of the Fourteenth Amendment. Valentine was granted his writ of habeas corpus and ordered released. Id. at 1027.

{¶ 42} The government appealed to the Sixth Circuit Court of Appeals, which upheld the decision of the district court, but modified the writ to exclude all but one of the carbon-copy counts. (A single count cannot be carbon copy.)

{¶ 43} In Wilson's case, there were two sets of rape charges. Counts 1, 2, and 3 were identical to each other, all occurring on June 23, 2007. Counts 5 and 6 were identical to each other, but occurred on June 24, 2007.[3] The majority

[3]The bill of particulars reveals that Counts 1, 2, and 3 are identically charged "sexual conduct" at 10 p.m. on Holmden Street on June 23; this same bill of particulars

contends that the state delineated the factual bases for the multiple counts of rape during trial. But delineating the differences during trial or at the conclusion of the case certainly does not "apprise the defendant of what he must be prepared to meet." Notice during or at the conclusion of trial is no kind of notice at all.

{¶ 44} It is true that some differentiation of the counts was made at trial; however, this impacts only the third factor discussed in *Russell*, that is, "[i]n case any 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." Id. at 764. See, also, *Ogle*, supra.

{¶ 45} However, in-trial or post-trial differentiation is not sufficient to satisfy the due process requirement of **notice**. This is not a case where a child is unable to testify to exact dates or times; courts have great tolerance and understanding of that difficulty. This is a case where the available differentiating information, e.g., cunnilingus, fellatio, vaginal penetration, anal penetration, etc., was in fact available, but specifically and purposefully omitted from the indictment and bill of particulars prior to trial.[4]

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reveals that Counts 5 and 6 are identically charged "sexual conduct" "between 12 a.m. and 9:50 a.m." on Grand Avenue on June 24.

[4] All of the above are different means or manners of engaging in "sexual conduct"; these different means are apparently responsible for the multiple counts on June 23 and 24.

{¶ 46} The state has offered no explanation why such information was not included in the indictment, or at the very least, in a pre-trial bill of particulars. If the evidence submitted at trial of differentiation between the counts had been included in the indictment (it was clearly available), this indictment would, no doubt, have been constitutionally adequate.

{¶ 47} The majority in this case concludes that "although neither the indictment nor the bill of particulars distinguished the three rape charges from one another, the state presented testimony at trial which would have supported multiple convictions of rape." Contrary to the assertion of the majority, I believe that the Sixth Circuit ruling is that carbon-copy indictments violate both the double jeopardy and the notice provisions of the due process clause of the Fourteenth Amendment: "For the reasons stated above, we affirm the District Court's ruling that the indictment charging Valentine with multiple, identical and undifferentiated counts violated the constitutional requirements imposed by due process. We agree with the District Court's determination that 'the Ohio Court of Appeals' application of clearly established federal law was not only incorrect, but unreasonable.' **When prosecutors opt to use such carbon-copy indictments, the defendant has neither adequate notice to defend himself, nor sufficient protection from double jeopardy.**" (Emphasis added.) *Valentine v. Konteh*, at 636.

{¶ 48} In sum, this case is identical to the *Valentine* matter, save some

evidence here of differentiation at trial that *might* impact an analysis on double jeopardy grounds only. In neither matter was there a pre-trial bill of particulars differentiating one from the other, the three rapes on June 23, and the two rapes on June 24.

{¶ 49} In *Cruikshank*, *Russell*, and *Valentine*, the United States Supreme Court and the Sixth Circuit Court of Appeals have ruled that facts must be included in an indictment in order to differentiate the allegations of one count from another, and that this is a matter of constitutional due process. While *Valentine* may hint in dicta that the error in failing to differentiate counts in an indictment might be harmless if differentiation was afforded in a bill of particulars, or in the case of the double jeopardy issue only, with evidence during or at the conclusion of trial, the seminal holding in all these cases is that the indictment itself must contain the differentiating language.

{¶ 50} In the five years since the Eighth District was told that our application of clearly established federal law was both "incorrect and unreasonable," we continue to affirm convictions based upon carbon-copy indictments. I would follow the clearly established federal law made applicable to us in *Valentine*, and would vacate one of the rapes in either Counts 5 or 6.[5]

[5] While Counts 1, 2, and 3 were likewise identical, the state has already dismissed with prejudice Counts 1 and 2. Under the authority of *Valentine*, the single

count of rape on June 23, 2007 should accordingly be upheld.