[Cite as *State v. Jones*, 2015-Ohio-2151.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101514

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GREGORY C. JONES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-570553-A

BEFORE: McCormack, P.J., Stewart, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: June 4, 2015

ATTORNEYS FOR APPELLANT

Robert L. Tobik
Cuyahoga County Public Defender

By: Jeffrey Gamso
Assistant Public Defender
310 Lakeside Ave, Suite 200
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

By: Jesse W. Canonico
Melissa Riley
Assistant County Prosecutors
8th Floor, Justice Center
1200 Ontario Street
Cleveland, OH 44113

TIM McCORMACK, P.J.:

{¶1} Defendant-appellant, Gregory C. Jones, appeals from his conviction of one count of rape and one count of kidnapping. Following a thorough review of the record, we affirm.

Procedural History and Substantive Facts

{¶2} On January 17, 2013, Jones was charged in a multiple count indictment.[1] He was charged in Count 5 with kidnapping, in violation of R.C. 2905.01(A)(4), in Count 6 with rape, in violation of R.C. 2907.02(A)(2), and in Counts 7, 8, and 9, with three counts of gross sexual imposition, in violation of R.C. 2907.05(A)(1). The charges stem from an incident in July 2012 involving the victim, L.L.

{¶3} Prior to the commencement of trial, the state filed a motion in limine to preclude Jones from questioning L.L. regarding her filing of a prior false police report involving another matter. Following a hearing on the matter, the court granted the state's motion, finding the prior police report was not clearly probative of untruthful character.

---

[1] Jones was initially indicted in Cuyahoga C.P. No. CR-12-565888 and subsequently re-indicted in Cuyahoga C.P. No. CR-13-570553. The original case concerned an incident in July 2013 involving the victim L.L. The subsequent case included the charges from the original case as well as additional charges that stemmed from an incident in June 2008 involving a second victim. The state dismissed the charges contained in Case No. CR-12-565888 and proceeded to trial on Case No. CR-13-570553, with no objection from defense counsel. The jury found Jones not guilty on all counts as they related to the second victim (Counts 1 through 4). On appeal, we address the substantive facts only as they pertain to L.L., the victim in Counts 5 through 9, as they are the subject of this appeal.

{¶4} During trial, and at the conclusion of the state's evidence, Jones moved to dismiss Counts 2 through 9, arguing that the grand jury did not find the events alleged in those counts to have occurred in Cuyahoga County and, therefore, venue was not proper. The trial court overruled Jones's motion and determined that venue in Cuyahoga County was proper. Jones also moved for Crim.R. 29 judgment of acquittal, which the court denied. Finally, the defense preliminarily moved to preclude the state from questioning Jones about having a sexually transmitted disease, should Jones testify. The trial court denied Jones's motion, allowing the state to pursue that line of questioning on cross-examination.

{¶5} At the close of all the evidence, Jones renewed his Crim.R. 29 motion, which the court denied. On April 2, 2014, the jury returned a guilty verdict as to the kidnapping and rape contained in Counts 5 and 6, respectively, and not guilty as to all the remaining counts. At sentencing, the court found Counts 5 and 6 to be allied offenses, and the state elected to proceed on Count 6 for sentencing purposes. The court sentenced Jones to nine years' imprisonment plus five years' postrelease control. Jones was designated a Tier III sex offender. He appealed his conviction in Counts 5 and 6, assigning three assignments of error for our review.

{¶6} Testimony at trial revealed that the victim, L.L., who was visiting the Cleveland area from Chicago, testified that she met Jones, who is a Cleveland police officer, while staying with a friend, Ebonyshia Terrance ("Ebony"), at approximately 9:30 p.m. on July 13, 2012. Ebony invited Jones to her home to play cards. Jones and L.L.

"made small talk" for approximately 20 to 30 minutes while sitting on the living room couch. After learning that Jones did not wish to play cards, L.L. testified that she offered to walk Jones to his car, because there was "no need for him to be there."

{¶7} L.L. testified that when they arrived at Jones's car, which was parked in Ebony's driveway, he asked her to sit in the car and she did. She stated that Jones offered to give her a tour of the city and she declined. He asked again, telling her that it would only take five minutes. L.L. agreed to go, but she told Jones that she needed to go back to the house to get her insulin pump and her cell phone. She has diabetes and is insulin dependent, requiring continual monitoring and adjusting of her blood sugar levels. He once again told her that they would only be gone for five minutes, so she agreed, leaving the house without her insulin pump, purse, or cell phone. L.L. testified that had she planned to be gone for a longer period of time, she would have attached her insulin pump, stating that she could not go very long without her pump.

{¶8} L.L. testified that after driving around the neighborhood for approximately five or ten minutes, they pulled into Jones's driveway. L.L. testified that Jones told her he needed to get something inside his house and he invited her inside. She initially declined, but "he kept insisting it will only take a minute." L.L. stated that she "eventually agreed to go in because he wouldn't let up." She stated that she was not concerned or scared, because Jones was a friend of Ebony's and he was a police officer, and she "didn't think anything of it." In her previous employment as a 911 dispatcher in her hometown, she would often interact with police officers.

{¶9} Once inside the house, Jones asked L.L. to have a seat; she sat on the couch, and he left the room for approximately five minutes. She stated that when he returned, Jones did not have any pants on and "his penis was out" and he was erect. He told her to "suck it." L.L. testified that she said "no." He then told her to "touch it," and he proceeded to grab her hand and place her hand on the tip of his penis. She stated that she immediately jumped back and removed her hand. She now began to worry, explaining that she did not know where she was, he had his pants down, and she was afraid that he was going "to do something that I didn't want to happen." L.L. stated that Jones indicated he wanted to "titty fuck" her and he then approached her, pulled her shirt and bra down, and placed his penis between her exposed breasts, moving his penis up and down. L.L. asked him to stop and pushed him back. After she pushed him, Jones stopped.

{¶10} L.L. testified that she then jumped up, put her shirt and bra back in place, and asked that he take her back to Ebony's house. She informed Jones that she was menstruating, in hopes to dissuade him from wanting to have sex with her. She stated that she could not leave the room because he was standing between her and the door, blocking the exit. She was scared. He told her to calm down, and she backed away from him, toward the bed. According to L.L., "all of a sudden," he apologized, pushed her so that she fell back on the bed, sat on her, pulled her shirt back down, and began to "titty fuck" her again. She stated that she was having difficulty breathing and she tried to get out from under him by wiggling her shoulders; however, her arms were trapped

under his legs and she was beginning to lose feeling in her arm. L.L. testified that Jones then flipped her over onto her stomach, which caused her right arm to be wedged under her chest, removed her shorts, and proceeded to have anal sex with her, despite her attempts to move and her "begging him to stop." She stated that she was in pain and was crying, and the more she asked him to stop, the more force he applied.

{¶11} L.L. testified that she has a medical condition in her right arm called "frozen shoulder," which resulted in limited mobility and use of her arm and very little strength. Dr. Joseph Thometz, an orthopedic surgeon who has treated L.L. for her shoulder condition, testified that L.L. had adhesive capsulitis. This condition causes progressive loss of motion, stiff and painful joints, and weakness. Dr. Thometz testified that, due to this condition and L.L.'s "very limited range of motion," L.L. would not have been able to push herself up while lying on her back, or to a limited degree but with pain, push herself up while lying on her stomach.

{¶12} L.L. stated that at the point where Jones began to apply more force, her right arm had gone completely numb "to where it [felt] like pins and needles were stabbing" her and she had difficulty moving it. She stated that after he had finished, she could not move her right side at all. And at one point, Jones also bit both sides of her neck as she attempted to remove herself from that position.

{¶13} After Jones had removed himself from being on top of L.L., she managed to roll herself onto her left side, sit up, dress, and exit Jones's house. She was in a lot of pain. She walked to the street, refusing Jones's offer to drive her. She testified that

Jones followed her in his car, telling her to get in the car. She stated that he repeatedly apologized, stating that he did not mean to hurt her but "it's just been a while, and he couldn't help himself." She eventually found her way back to Ebony's house.

{¶14} Upon arriving at Ebony's house, L.L. "broke down and cried." She then went into the house, retrieved her cell phone, and proceeded back outside. She called her daughter's father, Joseph Tolliver, and told him she had been raped. Tolliver testified that he was working when he received a call from L.L. at approximately 11:30 p.m. He stated that she was crying and distraught and she was having difficulty answering some of his questions, because "she was still trying to get herself together." L.L. refused to call the police because she knew that Jones was a police officer in the district where the rape had occurred. Tolliver told L.L. that he would call his pastor, who is a detective with the Cleveland Police Department, for advice. He told L.L. to tell Ebony what happened and to go to the hospital. He then arranged for friends to pick her up and take her to the hospital.

{¶15} L.L. then called Ebony from her cell phone and asked her to come outside, where she proceeded to tell Ebony what happened. Ebony advised L.L. to go to the hospital, and she forwarded a picture of Jones to L.L.'s phone for the hospital's use of a description of Jones. L.L. testified that at this point, she was beginning to feel very sick, her heart was beating very fast, she was having some chest pain, and her mouth was hurting badly. L.L. had previously had some teeth extracted and was in need of future dental work.

{¶16} Tolliver's friends, Lovasia Clemente and Dawon Campbell, arrived at Ebony's house to pick up L.L. and take her to the hospital. Clemente testified that L.L. looked upset, was crying and shaking, and she did not "look like herself." She stated that L.L. was "not together at all" and she appeared to be in a lot of pain. Campbell testified that L.L. "looked like crap," explaining that she looked like she had been in a fight. He stated that L.L. "was all roughed up looking. She didn't look the same. She was crying."

{¶17} L.L. retrieved her insulin pump and checked her blood sugar level, which was at a dangerous level. L.L. entered the blood sugar reading, and the pump immediately began to give her insulin. She also began to get feeling back in her shoulder. Clemente and Campbell drove L.L. to the hospital. After explaining to hospital personnel that she had been raped by a police officer, they directed her to a different hospital so that she may be examined by a qualified nurse. Before leaving, however, the nurses gave L.L. pain medication. L.L. testified that her mouth was hurting because, when Jones was lying on top of her, he was pressing her face down on the bed. She stated that the medication alleviated some of the mouth and shoulder pain; however, she was still experiencing pain in her rectal area.

{¶18} Tolliver arrived and drove L.L. to Hillcrest Hospital, where L.L. was examined by Mary Andrykovitch, a sexual assault nurse examiner ("SANE"), at approximately 4:00 a.m. Andrykovitch testified that she specifically remembered L.L.'s mouth was swollen and she was in a lot of pain, having recently had mouth surgery. She

also noted that she was concerned about L.L.'s blood sugar level, which was "through the roof," at a potentially fatal level. She stated that L.L.'s clothes were disheveled, she was crying and shaking, and she appeared visibly upset. Andrykovitch testified that L.L. had red marks on her neck that were consistent with bite marks, bruising on her right shoulder that was consistent with "being held down," and trauma to her rectal area.

{¶19} A couple of days later, when L.L. learned that Tolliver's pastor would not be available to assist her in filing a police report, she reported the rape to the second district police department.

{¶20} Gregory Jones testified on his own behalf. According to Jones, he knew that L.L. was attracted to him immediately upon entering Ebony's living room. L.L. followed him to his car as he was leaving Ebony's house. He testified that, after some "small talk" on the porch, they both got into his car, where L.L. put her hand on his inner thigh, and he reciprocated. They "were doing a little more rubbing than talking" and he suggested they go to his house. She agreed. Jones stated that they were "just going at it * * * we were just all over one another." He then invited her into the house where they "continued to go at it." At one point, he expressed his desire to have anal sex. According to Jones, L.L. turned over, helped get her shorts off, and positioned herself on her stomach while tilting her bottom up. He stated that L.L. then "put my penis on her anus" and they proceeded to have consensual anal sex. He stated that when he had finished, L.L. was crying.

{¶21} Upon cross-examination, Jones was unable to estimate how much time had passed between acts, stating only "a while" or "quite a while." He also testified on cross-examination that he did not pay any attention to L.L.'s face or the position of her arms. He could not testify as to which hand L.L. used to reach through her legs in order to reach his penis, nor could he explain how L.L. was able to support herself on her weak shoulder while doing this. Jones testified, however, that L.L. initiated anal sex, by placing his penis on her anus, without asking for lubrication. He stated that L.L. did not tell him to stop.

Assignments of Error

I. The trial court committed prejudicial error and denied appellant his rights to confront his accuser, to present a defense, and to a fair trial when it prevented him from cross examining his accuser regarding a false police report she filed in Matteson, Illinois in 2009.

II. The trial court committed error when it permitted the state to question Mr. Jones about his having herpes as the question was unduly prejudicial and immaterial.

III. The court should have dismissed counts two through nine of the indictment because the indictment did not properly charge venue on those counts.

Venue

{¶22} We address Jones's third assignment of error first. Jones contends that the trial court should have dismissed Counts 2 through 9 because the indictment did not assert that the events alleged in those counts occurred in Cuyahoga County. More specifically, as Jones asserts, the indictment was insufficient to establish venue because it did not

specifically state that the kidnapping and rape charged in Counts 5 and 6 occurred in Cuyahoga County. This argument is without merit.

{¶23} This court has previously determined that where the jurisdiction of the court is stated once in a multiple count indictment, "the subsequent counts were not required to reiterate" jurisdiction. *State v. White*, 8th Dist. Cuyahoga No. 95066, 2011-Ohio-4089, ¶ 16; *see also State v. Williams*, 53 Ohio App.3d 1, 557 N.E.2d 818 (10th Dist.1988). In *White*, we found that where Count 1 of the indictment specifically stated that the grand jury found the offense occurred in Cuyahoga County, the indictment was not rendered insufficient because Counts 2 and 3 did not repeat the location of the alleged offenses. *Id.* at ¶ 15, 16.

{¶24} Similarly, here, Count 1 of the indictment states:

> The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, do find and present, that the above named Defendant, on or about the date of the offense set forth above, *in the County of Cuyahoga*, unlawfully * * *. (Italics added.)

{¶25} Counts 2 through 9 state that "[t]he grand jurors, on their oaths, further find that the Defendant(s) unlawfully * * *."

{¶26} In light of the above, we find that Count 1 of Jones's indictment stated that the alleged offense occurred in Cuyahoga County. And because the jurisdiction was clearly stated once in the indictment, repetition in the remaining counts was not required. Venue in Cuyahoga County is therefore properly alleged.

{¶27} Although Jones acknowledges this court's decision in *White*, 8th Dist. Cuyahoga No. 95066, 2011-Ohio-4089, he maintains that our decision was "wrong" and should be overruled in light of the Ohio Supreme Court's decision in *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324. We disagree and find *Hampton* distinguishable.

{¶28} In *Hampton*, the Supreme Court affirmed the trial court's judgment of acquittal because the state failed to prove venue. *Id.* In that case, the indictment alleged that the offenses occurred in Franklin County. However, after the trial had begun, the investigating detective testified that he had just learned that the offenses had occurred in Fairfield County, not in Franklin County, as alleged in the indictment. *Id.* at ¶ 5. In affirming the decision of the trial court, the Supreme Court determined that where it was undisputed that "all of the events in question occurred in Fairfield County, not Franklin County, as alleged in the indictment," a motion for judgment of acquittal regarding venue must be granted. *Id.* at ¶ 24. In this case, however, there is no allegation that the offenses occurred anywhere other than Cuyahoga County. Therefore, *Hampton* does not apply.

{¶29} Jones's third assignment of error is overruled.

False Police Report

{¶30} In his first assignment of error, Jones contends that the trial court erred when it prevented him from cross-examining L.L. regarding a false police report L.L. had filed in Illinois in 2009. The trial court determined that this evidence was not "clearly

probative" of untruthfulness and granted the state's motion to prohibit Jones's cross-examination on this issue.

{¶31} In response to the state's motion in limine, Jones attached a copy of an incident report from the Mattheson, Illinois Police Department that is dated July 4, 2009, and identifies L.L. as the victim of an aggravated robbery. The report also includes a supplemental report dated July 6, July 9, and July 10.

{¶32} According to L.L., as indicated in the police report, she was robbed by two purportedly armed men of $850 on July 4. On July 6, L.L. provided additional detail regarding the alleged robbery through a supplemental report. On July 9, police officers summarized their investigation in another supplemental report. Finally, on July 10, the supplemental report indicated that "[a]fter debating the facts of the case," L.L. informed the investigating officer that the "real truth" was that she was, in fact, robbed; however, "they did not get anything because she already lost the money" gambling. L.L. explained that she fabricated the story because she did not want to get into trouble with her mother for losing the rent money. L.L. was then charged with one count of misdemeanor disorderly conduct for filing a false police report, which was later dismissed.

{¶33} In his brief in opposition to the state's motion and again on appeal, Jones stated that he did not intend to inquire on cross-examination of the nature of the dismissed charge; rather, he claimed that he was entitled to cross-examine L.L., under Evid.R. 608(B), on the false police report, for the limited purpose of attacking her character for

truthfulness. The state argued that the 2009 false police report does not exhibit a high degree of probative value as to L.L.'s truthfulness and the trial court was within its discretion to preclude the defense from cross-examining the witness on the report.

{¶34} Under Evid.R. 402, only relevant evidence is admissible. Evid.R. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Although relevant, evidence is not admissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403. Unfair prejudice is "that quality of evidence which might result in an improper basis for a jury decision." *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 24.

{¶35} Evidence of a person's character is not admissible for the purpose of proving that the individual "acted in conformity therewith on a particular occasion," with certain exceptions:

> (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.
>
> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

> (3) Character of witness. Evidence of the character of a witness on the issue of credibility is admissible as provided in Rules 607, 608, and 609.

Evid.R. 404(A).

{¶36} The exception relevant to our discussion of Jones's first assignment of error is the evidence of the character of a witness as outlined in Evid.R. 608(B). That rule provides as follows:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid.R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Evid.R. 608(B).

{¶37} Evid.R. 608(B) is a rule of law that "'protects a legitimate state interest in preventing criminal trials from bogging down in matters collateral to the crime with which the defendant was charged.'" *State v. Myricks*, 2d Dist. Montgomery No. 22846, 2009-Ohio-5304, ¶ 26, quoting *State v. Boggs*, 63 Ohio St.3d 418, 422-23, 588 N.E.2d 813 (1995). In balancing this state interest, a defendant may question a witness on

cross-examination regarding prior instances of misconduct when the questioning is "clearly probative" of the witness's character for truthfulness. *State v. Moshos*, 12th Dist. Clinton No. CA2009-06-008, 2010-Ohio-735, ¶ 18; *see also State v. Widmer*, 12th Dist. Warren No. CA2011-03-027, 2012-Ohio-4342, ¶ 134.

{¶38} Therefore, Evid.R. 608(B) permits cross-examination of a witness regarding specific instances of conduct that may have "a clear bearing" upon the witness's truthful character and requires a "high degree of probative value" of the prior conduct "as to the truthfulness of the witness" before the court will allow cross-examination as to the prior conduct for purposes of attacking the credibility of the witness. Staff Notes to Evid.R. 608(B). The conduct must therefore be "clearly probative of truthfulness or untruthfulness" in order to avoid unfair prejudice, confusion of the issues, and misleading of the jury.[2] *Widmer*, citing *State v. Williams*, 1 Ohio App.3d 156, 157, 440 N.E.2d 65 (10th Dist.1981).

{¶39} "Probative" evidence is evidence that is relevant and "tends to prove the issue in question." *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571, 589 N.E.2d 1303 (1992) (defining "probative" in the context of an administrative agency's standard of review); *see also Ross v. Cleveland Unit*, 8th Dist. Cuyahoga No. 48322, 1985 Ohio App. LEXIS 6030, *4, 5 (Mar. 7, 1985) (applying the ordinary dictionary meaning as having the effect of proof or tending to prove).

---

[2] According to the rule's Staff Notes, the July 1, 1992, amendment to Evid.R. 608(B) substituted the phrase "character for truthfulness" for the term "credibility," stating that "the latter term is too broad and, therefore, may cause confusion."

{¶40} The general admission or exclusion of evidence rests in the sound discretion of the trial court, and a trial court's ruling on the admissibility of evidence will be upheld absent an abuse of discretion and a showing of material prejudice. *State v. Peterson*, 8th Dist. Cuyahoga Nos. 100897 and 100899, 2015-Ohio-1013, ¶ 139. Within this broad discretion is the trial court's duty "to determine whether testimony is relevant and to balance its potential probative value against the danger of unfair prejudice." *State v. Clark*, 8th Dist. Cuyahoga No. 95928, 2011-Ohio-4109, ¶ 32. The trial court's discretion is therefore subject to the provisions of Evid.R. 403. *Ruff v. Bowden*, 10th Dist. Franklin No. 94APE08-1116, 1995 Ohio App. LEXIS 1311, *7 (Mar. 28, 1995).

{¶41} A trial court abuses its discretion where its ruling lacks a "'sound reasoning process.'" *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶42} In support of its argument that the trial court properly excluded evidence of L.L.'s false police report, the state cites to *Williams*, 1 Ohio App.3d 156, 440 N.E.2d 65. In *Williams*, the court held that the trial court did not abuse its discretion in excluding defense counsel's line of questioning concerning a previous employment application falsified by the state's key witness in a matter involving an alleged aggravated burglary. The court determined that information about the witness's falsified job application concerned an event that occurred four years earlier and the defense was otherwise permitted wide latitude in questioning the witness. *Id.*

{¶43} The state also cites to *State v. Lenoir*, 2d Dist. Montgomery No. 19241, 2003-Ohio-2820. In *Lenoir*, the court affirmed the trial court's decision to prohibit the defendant from questioning the witness concerning her failure to file income taxes, her previous use of drugs, and whether she carried a gun. The court determined that these matters were extrinsic to the defendant's charges of abduction and assault and therefore not clearly probative of truthfulness. *Id.* at ¶ 31.

{¶44} Where prior misconduct is not relevant to the underlying action and would lead to a "distracting inquiry into entirely unrelated matters," as seemingly indicated above, it is appropriate to exclude such evidence. *See State v. Harrison*, 8th Dist. Cuyahoga No. 69821, 1996 Ohio App. LEXIS 3557, * 17 (Aug. 22, 1996). However, where the victim's credibility is the crucial issue and his or her testimony is vital to the state's case, a trial court abuses its discretion when it "unduly limits cross examination of the victim." *State v. Carlson*, 31 Ohio App.3d 72, 73, 508 N.E.2d 999 (8th Dist.1986) (allowing evidence of prior misconduct under Evid.R. 608(B) where the victim and the defendant were the only witnesses to the crime and their stories differed), citing *State v. Ferguson*, 5 Ohio St.3d 160, 166, 450 N.E.2d 265 (1983). In cases where evidence of specific instances of conduct is permitted, the central focus is the witness's behavior, not the mere existence of the prior misconduct. *See Myricks*, 2d Dist. Montgomery No. 22846, 2009-Ohio-5304, at ¶ 28 (finding the evidence of prior misconduct inadmissible where the defendant only sought to rely on the fact of the prior misconduct rather than the witness's behavior as it relates to the witness's character for truthfulness).

{¶45} Here, we find that the false police report filed by L.L. exhibits a high degree of probative value of L.L.'s truthfulness. In this case, the crucial issue is L.L.'s credibility. L.L. and Jones were the only witnesses to the incident that gave rise to Jones's conviction for rape and kidnapping, and they had dramatically different versions of the event. The state's case rests on whether L.L. told the truth when she reported to police that the sexual encounter with Jones was not consensual and that she was raped. L.L.'s testimony is the material evidence establishing Jones's guilt. Evidence that she previously provided false information to the police regarding allegations of criminal conduct committed against her could cast doubt on her credibility. This evidence is therefore relevant and highly probative.

{¶46} Moreover, the trial court's reasoning for prohibiting the evidence is unsustainable. In granting the state's motion in limine, the court stated that "[s]ix days [after the alleged event of 2009, L.L.] came in on her own volition and voluntarily indicated to the police that she was not truthful in her initial report * * *. So I don't think that that is clearly probative of untruthful character * * *." According to the trial court, because L.L. recanted her initial false report, she cured any concerns about her credibility. We disagree. L.L.'s recantation does not diminish the probative nature of the fact that she filed false allegations in the first place.

{¶47} We therefore find the trial court erred in finding the evidence of L.L.'s false police report was not clearly probative of L.L.'s character for truthfulness or untruthfulness.

Disclosure of disease

{¶48} In his second assignment of error, Jones contends that the trial court erred when it allowed the state to question him about having genital herpes, a sexually transmitted disease ("STD"). Jones argues that the evidence regarding herpes was irrelevant and unduly prejudicial and therefore inadmissible.[3]

{¶49} In response, the state claims that, depending on Jones's answer, the evidence would go toward the lack of consent or Jones's credibility:

> First, if [Jones] answered, "Yes," when asked if he told L.L. he had herpes before having sex with her, in order to find [Jones's] testimony truthful, the jury would have been required to believe that after meeting [Jones] and having known him for a very brief period of time, and despite her myriad medical issues and the fact she was on her period, L.L. agreed to have unprotected anal sex with a herpes-infected [Jones] at the risk of death due to her diabetes;
>
> Second, if [Jones] answered, "No," * * * the jury would have been in a better position to evaluate both [Jones's] credibility and the reasonability of his testimony, in light of the fact he admittedly withheld the fact he had an

[3] Jones also argues that the state's questions regarding his STD are prohibited by R.C. 2907.02(D). Ohio's so-called rape shield law, which applies equally to victims and defendants, prohibits the introduction of any extrinsic evidence of sexual activity unless the evidence concerns "the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value." R.C. 2907.02(D); *State v. Williams*, 21 Ohio St.3d 33, 34, 487 N.E.2d 560 (1986). "Sexual activity" means sexual conduct or sexual contact, or both. R.C. 2907.02(C). Because the resolution of this assigned error does not concern "sexual activity" or "the origin of disease," but rather, it pertains to the non-disclosure of a disease, we decline to analyze Jones's assignment of error under this statute.

STD from L.L. who he claimed then had consensual, unprotected anal sex with him at risk of death due to her diabetes.

{¶50} At the close of the state's evidence, defense counsel moved to have the state precluded from questioning Jones, should he testify, about whether he disclosed to L.L. the fact that he has herpes. The trial court denied Jones's motion, stating that the evidence would go toward consent and is probative of truthfulness.

{¶51} After the court's ruling, Jones took the stand in his own defense. Upon cross-examination, and over defense counsel's objections, the following exchange took place:

> State: So your testimony is that she first grabbed your penis, put it right there on her anus, you took that as a sign to go ahead and push your penis in. So without asking for any lubrication, she initiated that anal sex, correct?
>
> Jones: Correct.
>
> State: Okay. At what point during that part of the activity did you tell [L.L.] that you have herpes?
>
> Jones: At no point.
>
> State: Okay. Why didn't you tell her that fact? Isn't that something she should have known before she agreed to have unprotected, anal sex with you, who[m] she had known for 35 or 40 minutes?
>
> Jones: When I have a lesion, I make sure, I'm protected with — when I have a lesion. I had no lesion at that time.
>
> State: So, you decided you didn't need to tell [L.L.] that you had herpes before you had unprotected, anal sex with her. Is that correct?
>
> Jones: Correct.
>
> * * *

State: At what point in this evening in the 40 minutes you had known [L.L.] did you decide to be a gentleman?

Jones: Well, everything we did that night was consensual.

State: It would have been a gentlemanly thing to do to tell her you had herpes, wouldn't it have been?

Jones: Correct.

{¶52} And then in closing arguments, the prosecutor stated:

> I would ask you to think about, when you consider this defendant's interest, in your verdicts, if he's willing to lie to you about the little things, then why wouldn't he be willing to lie to you about the big things?
>
> Is he an honest person who you can trust? Because aside from that little lie [about when and where he went to high school], * * * he also told you as part of his testimony, that when this supposed consensual encounter happened with [L.L.], he never bothered to tell her that he had an STD. So, is that an honest person? Is that somebody you can trust?

{¶53} We find the state's claim that evidence of Jones's disclosure, or lack thereof, goes toward the lack of consent or Jones's credibility is without merit. As evident from the record indicated above, the state's line of questioning was clearly used to demonstrate Jones's bad character, i.e., having sexual relations without disclosing his STD.

{¶54} "Character" generally refers to a person's disposition or a general trait, such as honesty, and is described as one's "propensity." *State v. Smith*, 84 Ohio App.3d 647, 660, 617 N.E.2d 1160 (2d Dist.1992). As previously discussed, evidence of a person's character or trait is generally not admissible for the purpose of proving that the individual "acted in conformity therewith on a particular occasion," unless the state is presenting character evidence to rebut evidence initially offered by the defendant. Evid.R. 404(A);

State v. Kerr, 8th Dist. Cuyahoga No. 80272, 2002-Ohio-4190, ¶ 22, 24. Evid.R. 404 therefore prohibits an "inferential pattern," in which a character or trait is used to show one's propensity, which is used to show the conforming conduct. *Smith*.

{¶55} Here, the prosecutor's suggestion to Jones, guised in the form of a question, that disclosing he had herpes would have been a "gentlemanly thing to do," undoubtedly demonstrated the state's true intention with respect to this evidence: that, at best, Jones was not a gentleman because he did not disclose his STD; and at worst, because he was not a gentleman, the jury can infer that he committed the crimes. The prosecutor's closing remarks, questioning Jones's honesty and trustworthiness, reinforces the state's position. When the state's purpose in offering such evidence is the inference prohibited by Evid.R. 404, the evidence is inadmissible. *See Smith* at 663. Therefore, evidence that Jones did not disclose that he has herpes was improperly admitted at trial.

{¶56} An exception to the impropriety of the admission of character evidence is found in Evid.R. 608(B), which, as previously discussed, permits cross-examination of a witness regarding specific instances of conduct that are "clearly probative of truthfulness or untruthfulness." Here, however, the fact that Jones did not disclose that he has herpes has no bearing upon his truthful character where he had no obligation to disclose that fact. Moreover, there is no evidence in the record that L.L. has the disease, that L.L. claims that Jones infected her with the disease, or that L.L. knew Jones had an STD. The evidence of Jones's failure to disclose having herpes, therefore, is not probative of his credibility. Rather, Jones's admission that he did not disclose to L.L. that he has herpes

leaves the factfinder with the inescapable conclusion that he is a bad man for NOT disclosing his STD. Its admission was therefore improper.

Harmless Error

{¶57} Having found errors in the admission (and exclusion) of evidence, we must now determine whether the errors are reversible or harmless. For the reasons set forth below, we find that reversal is not required, as we find the errors to be harmless.

{¶58} An error is harmless if it does not affect a substantial right of an accused Crim.R. 52(A); *State v. Mims*, 8th Dist. Cuyahoga No. 100520, 2014-Ohio-5338, ¶ 60. The accused, therefore, has a constitutional guarantee to a trial free from prejudicial error, not necessarily one free of all error. *State v. Fears*, 8th Dist. Cuyahoga No. 89989, 2008-Ohio-2661, ¶ 14. And where there is no reasonable possibility that the unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal. *Id.*, citing *State v. Lytle*, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976), paragraph three of the syllabus, vacated on other grounds in *Lytle v. Ohio*, 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154 (1978).

{¶59} In finding harmless error, the appellate court must review the entire record, excise the objectionable evidence, and find that there is overwhelming evidence of the defendant's guilt, aside from the objectionable material. *State v. Davis*, 44 Ohio App.2d 335, 338 N.E.2d 793 (8th Dist.1974), paragraph three of the syllabus. "An otherwise valid conviction should not be set aside if the reviewing court may confidently say, in the whole record, that the error was harmless beyond a reasonable doubt." *State v.*

Matthews, 8th Dist. Cuyahoga No. 59467, 1991 Ohio App. LEXIS 5931, * 11 (Dec. 12, 1991). Therefore, the conviction should not be reversed where the remaining evidence, standing alone, constitutes overwhelming evidence of defendant's guilt. *State v. Williams*, 6 Ohio St.3d 281, 452 N.E.2d 1323 (1983), paragraph six of the syllabus.

{¶60} Notwithstanding the errors in this case, we find there is overwhelming evidence of Jones's guilt. L.L. testified that she did not consent to anal sex with Jones, stating that she begged him to stop. She reported the incident to her daughter's father and to her friend with whom she was staying almost immediately upon getting away from Jones. Several witnesses testified that she appeared visibly shaken, was crying and in pain, and she was physically disheveled. Having presented herself to two hospitals for examination, she was ultimately referred to a qualified SANE nurse. The SANE nurse testified that L.L. was in a lot of pain, her mouth was swollen, and her blood sugar level was at a potentially fatal level. The nurse also testified that L.L. had red marks on her neck that were consistent with bite marks, bruising on her right shoulder that was consistent with "being held down," and trauma to her rectal area. Dr. Thometz testified that due to L.L.'s adhesive capsulitis, she experienced pain, weakness, and very limited range of motion of her right shoulder and she would not have been able to position herself in the manner to which Jones testified. Within days, L.L. reported to the police that she had been raped.

{¶61} In light of the overwhelming evidence above, we cannot say the trial court's errors improperly contributed to Jones's conviction. We therefore find the errors were harmless beyond a reasonable doubt and they did not deprive Jones of a fair trial.

{¶62} Jones's first and second assignments of error are without merit.

{¶63} Judgment affirmed.

It is ordered that appellee recover of appellant 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 execution of sentence.

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

_____

TIM McCORMACK, PRESIDING JUDGE

SEAN C. GALLAGHER, J., CONCURS;
MELODY J. STEWART, J., DISSENTS (WITH SEPARATE OPINION ATTACHED)

MELODY J. STEWART, J., DISSENTING:

{¶64} I dissent from the decision reached by the majority, but I do so based on the set of the circumstances unique to this case.

{¶65} I agree with the majority regarding the two evidentiary errors, and I also believe that the bulk of the state's evidence was enough to sustain the convictions.

However, because this case was based largely on credibility and the two evidentiary errors went right to the heart of the credibility of Jones and the victim, I am not as confident that the errors were harmless.

{¶66} As the majority notes, the fact that the victim later came clean about the untruthfulness of her police report did not vitiate the filing of a false report. Furthermore, the court did not give any limiting instructions on the use of the STD testimony; indeed, the court's statement that Jones's failure to tell the victim that he had herpes went to his ability to be truthful appeared to show the court's failure to comprehend the import of the evidence.

{¶67} Given that the two evidentiary errors dealt directly with issues of veracity and credibility, and in particular, because the jury acquitted Jones on the three counts of gross sexual imposition, it cannot be said that these errors were harmless beyond a reasonable doubt. I would therefore reverse the conviction and remand for a new trial.