[Cite as *State v. Brown*, 2011-Ohio-1041.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. JAMES D. BROWN Appellant	C.A. No. 25287 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 09 05 1600

DECISION AND JOURNAL ENTRY

Dated: March 9, 2011

WHITMORE, Judge.

{¶1} Defendant-Appellant, James Brown, appeals from his convictions and sentence in the Summit County Court of Common Pleas. This Court affirms in part and reverses in part.

I

{¶2} When she was five years old, A.W. told members of her family that Brown, her mother's boyfriend, had asked her to "lick certain areas of his private place." A.W.'s mother, Kimberly Truman, ultimately dismissed A.W.'s accusation, believing it to be the result of A.W.'s having seen Truman and Brown being intimate the week earlier. Truman had two children with Brown over the years, and he became a father figure to A.W. Truman and Brown never married, but they lived together and raised the children as a family.

{¶3} After A.W. turned fourteen years old, she began acting out. She smoked marijuana, drank alcohol, and saw her boyfriend over Truman's protests. In early April 2009, A.W. ran away from home, prompting Truman to call the police. Truman decided to have a

"heart to heart" with A.W. shortly thereafter to try to discover the source of her unruly behavior. A.W. confided that Brown had been sexually abusing her over the course of several months. Specifically, Brown had digitally penetrated A.W., performed oral sex on her, and made A.W. perform oral sex on him. Brown also provided A.W. with marijuana and alcohol on more than one occasion, after which he would take advantage of her intoxication. These incidents took place at the family's home, at the family's cabin, and in the family's Dodge Durango. Truman called the police after she talked with A.W., and the police took statements from both of them. A.W. also underwent an interview and examination at the Akron Children's Hospital CARE Center ("CARE Center").

{¶4} On May 21, 2009, a grand jury indicted Brown on the following counts: (1) two counts of rape, in violation of R.C. 2907.02(A)(2); (2) two counts of sexual battery, in violation of R.C. 2907.03(A)(5); and (3) two counts of corrupting another with drugs, in violation of R.C. 2925.02(A)(4)(a). A supplemental indictment was later filed, adding the following counts: (1) two counts of corrupting another with drugs, in violation of R.C. 2925.02(A)(4)(a); (2) rape, in violation of R.C. 2907.02(A)(2); (3) rape, in violation of R.C. 2907.02(A)(1)(b); and (4) two counts of sexual battery, in violation of R.C. 2907.03(A)(5). Thus, the grand jury indicted Brown on twelve separate counts.

{¶5} The trial court dismissed one count of sexual battery before trial, and the matter proceeded to a bench trial on the remaining counts. The trial court found Brown guilty of all the remaining counts and sentenced him to a total of twenty-four years in prison. The court also classified him as a Tier III sex offender/child victim offender.

{¶6} Brown now appeals from his convictions and raises nine assignments of error for our review. For ease of analysis, we rearrange several of the assignments of error.

II

Assignment of Error Number One

> "THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUPPORT DAN BROWN'S CONVICTIONS ON COUNTS I, II, III, IV, V, VI, IX, X, AND XI."

{¶7} In his first, captioned assignment of error, Brown argues that his convictions for the crimes contained in counts one, two, three, four, five, six, nine, ten, and eleven are based on insufficient evidence. We disagree.

{¶8} In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. at paragraph two of the syllabus; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

"In essence, sufficiency is a test of adequacy." *Thompkins*, 78 Ohio St.3d at 386.

{¶9} "No person shall engage in sexual conduct with another who is not the spouse of the offender *** when *** [t]he other person is less than thirteen years of age[.]" R.C. 2907.02(A)(1)(b). Further, "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." R.C. 2907.02(A)(2). The phrase "sexual conduct" includes fellatio, cunnilingus, and digital penetration, however slight. R.C. 2907.01(A). The commission of either of the foregoing offenses constitutes rape. R.C. 2907.02(B).

{¶10} "No person shall engage in sexual conduct with another, not the spouse of the offender, when *** [t]he offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person." R.C. 2907.03(A)(5). One who commits the foregoing offense commits sexual battery. R.C. 2907.03(B).

{¶11} Finally, "[n]o person shall knowingly *** [b]y any means, *** [f]urnish or administer a controlled substance to a juvenile who is at least two years the offender's junior, when the offender knows the age of the juvenile or is reckless in that regard[.]" R.C. 2925.02(A)(4)(a). "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). The foregoing offense constitutes the crime of corrupting another with drugs. R.C. 2925.02(C).

{¶12} Brown does not set forth or specifically challenge any of the particular elements of any of the crimes for which he was convicted. He primarily argues that the State did not present sufficient evidence because A.W. testified that none of the accusations she made against Brown were true. A.W. recanted at some point before trial. The trial court called A.W. as a witness at the request of the State, and both the prosecutor and defense counsel cross-examined her. A.W. testified that she fabricated all of the allegations against Brown because she was angry at him and Truman for not allowing her to see her boyfriend and for threatening to send her to boarding school. Brown argues that, absent A.W.'s testimony that Brown sexually abused her, his convictions all rested on insufficient, circumstantial evidence.

{¶13} While cross-examining A.W., the State asked her about all of the accusations she made against Brown in her written statement to the police and her interview at the CARE Center. A.W. admitted that her trial testimony differed from the statements she initially gave to the police and to the social worker at the CARE Center. In those statements, A.W. said that Brown: (1) performed oral sex on her; (2) forced her to perform oral sex on him; and (3) digitally penetrated her. She described the incidents as having happened several times in her bedroom, at the family's cabin in Coolville, Ohio, and in the front seat of the family's Dodge Durango. A.W. also said that Brown provided her with marijuana and alcohol on several occasions and used the drugs to coax her into performing sexual acts.

{¶14} Despite A.W.'s recantation, the State was permitted to rely upon the statements she made to the police and the social worker at the CARE Center. See, e.g., *State v. Major*, 9th Dist. No. 21662, 2004-Ohio-1423 (affirming defendant's rape and gross sexual imposition convictions based on minor victim's prior statements where victim later recanted). A conviction is not based on insufficient evidence simply because the witness recants before the trial. See, e.g., *State v. Lungaro* (Feb. 16, 2000), 9th Dist. No. 2951-M, at *2-3. Rather, the victim's recantation is an issue of credibility. Id. at *3 ("This case was decided upon the credibility of the witnesses and the finder of fact was free to believe [the witnesses'] original statements to the police."). Because Brown's assignment of error challenges sufficiency and not manifest weight, this Court need not assess A.W.'s credibility as a victim. *State v. Porter*, 9th Dist. No. 24996, 2010-Ohio-3980, at ¶9 ("[A] sufficiency challenge tests the State's production of evidence, not the persuasiveness of the evidence produced.").

{¶15} Brown did not object to the introduction of any of A.W.'s previous statements when the State introduced them during her testimony. Nor did he object when the State moved

to admit A.W.'s written statement to the police. Thus, A.W.'s accusations against Brown were evidence in support of Brown's convictions. Additionally, the State presented other evidence at trial.

{¶16} J.S., one of A.W.'s friends, testified that Brown would pull up the shirts of A.W. and her friends between their breasts when they were at A.W.'s house and that Brown made "inappropriate comments" about A.W.'s body. S.M., another friend of A.W., testified that she saw Brown pinch A.W.'s breasts and "mess with her shirt" several times. Rachel Truman, A.W.'s aunt, testified that A.W. told her that several incidents involving oral sex occurred between her and Brown at the family's cabin, at A.W.'s home, and in the family's car. A.W. made similar disclosures to her grandmother, who also testified. Christopher Smith, a forensic scientist for the Bureau of Criminal Identification and Investigation ("BCI"), testified that he tested several samples taken from A.W.'s family's Dodge Durango during the course of the police investigation and that one of the samples from the driver's side center console tested positive for semen. Stacy Violi, another BCI forensic scientist, testified that the semen was consistent with Brown's DNA sample such that Brown could not be eliminated as its source.

{¶17} Viewing the evidence in a light most favorable to the State, we cannot conclude that the trial court erred by convicting Brown of rape, sexual battery, and corrupting a minor with drugs. A.W.'s pre-recantation statements support Brown's convictions for rape, sexual battery, and corrupting another with drugs. And, while largely circumstantial in nature, other evidence in the record, such as the presence of Brown's semen in the family's Dodge Durango, corroborated A.W.'s accusations. See *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus ("Circumstantial evidence and direct evidence inherently possess the same probative value[.]"). To the extent Brown argues that A.W.'s prior statements were inadmissible hearsay, he did not object to them

on that basis at trial or argue plain error on appeal. Thus, this Court will not construct a claim of plain error on his behalf. *State v. Porter*, 9th Dist. No. 24996, 2010-Ohio-3980, at ¶20. Brown's argument that his convictions for the crimes contained in counts one, two, three, four, five, six, nine, ten, and eleven are based on insufficient evidence lacks merit.

{¶18} Brown's assignment of error also includes a brief argument that his conviction for corrupting one of A.W.'s friends with drugs, as contained in count eight of his indictment, is based on insufficient evidence. Apart from not addressing any of the specific elements of that crime, App.R. 16(A)(7), Brown did not include count eight in his captioned assignment of error. Brown specifically challenged nine of his convictions in his captioned assignment of error, but the conviction relating to count eight was not one of them. An appellant's captioned assignment of error "provides this Court with a roadmap on appeal and directs this Court's analysis." *State v. Marzolf*, 9th Dist. No. 24459, 2009-Ohio-3001, at ¶16. This Court will not address underdeveloped arguments that an appellant fails to separately assign as error. *Ulrich v. Mercedes-Benz USA, L.L.C.*, 9th Dist. No. 24740, 2010-Ohio-348, at ¶24. Thus, we need not address Brown's additional claim that his conviction under count eight of the indictment is based on insufficient evidence. Brown's first assignment of error lacks merit.

Assignment of Error Number Two

> "THE TRIAL COURT ERRED BY ADMITTING THE COMPUTER EVIDENCE AND THEN RELYING ON THAT EVIDENCE TO SUPPORT ITS GUILTY VERDICT."

{¶19} In his second assignment of error, Brown argues that the trial court abused its discretion when it admitted evidence concerning searches and images found on the computer in A.W.'s home. Specifically, Brown argues that the evidence was irrelevant, highly prejudicial, and constituted improper "other acts" evidence.

{¶20} An appellate court applies an abuse of discretion standard when reviewing a trial court's decision to admit evidence over an objection that it is irrelevant, substantially more prejudicial than probative, or improper other acts evidence. *State v. Turner*, 9th Dist. No. 24709, 2009-Ohio-6613, at ¶12-19; *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, at ¶96, quoting *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, at ¶66. An abuse of discretion means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶21} The trial court here admitted evidence that the computer in A.W.'s home contained searches for a variety of pornographic websites, mainly involving teenagers, in its search history and similar pornographic images in its temporary internet files. All of the websites and images were legal, but the State introduced them to imply that Brown was sexually attracted to teenage girls and used A.W. to act upon his attraction. Brown argues that the court abused its discretion by admitting the evidence taken from the computer because: (1) the State's expert could not say that Brown was the one who actually searched for or viewed the websites or images; (2) the State's expert could not say how long websites were viewed or if any of the images were pop-ups, which the user had not deliberately sought out; and (3) even if Brown had viewed the pornography, his doing so would have no bearing on any crimes committed against A.W.

{¶22} Even assuming that the trial court erred by permitting the State to introduce the foregoing evidence, Brown cannot demonstrate prejudice as a result of its admission. Truman testified on Brown's behalf, but admitted that she told the police she had once caught Brown masturbating to pornography on the family's computer. Thus, even apart from the State's expert, there was evidence in the record with regard to Brown viewing pornography on the family's

computer. More importantly, however, Brown's convictions stemmed from A.W.'s accusations against him, not from the website history or images contained on the family's computer. As set forth in Brown's first assignment of error, other evidence corroborated A.W.'s accusations, including the presence of Brown's semen in an area where A.W. said Brown raped her. Accordingly, any error in the trial court's admission of the evidence taken from the family's computer was, at most, harmless error. See *State v. Smead*, 9th Dist. No. 24903, 2010-Ohio-4462, at ¶30, citing Crim.R. 52(A). Brown's second assignment of error is overruled.

Assignment of Error Number Three

> "THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION FOR TIME TO HAVE THEIR OWN EXPERT EXAMINE THE COMPUTER HARD DRIVE AND REPORTS CREATED BY THE STATE'S EXPERT."

{¶23} In his third assignment of error, Brown argues that the trial court erred by refusing to grant him a continuance for the purpose of obtaining an expert and having the expert examine the computer at issue in this matter. We disagree.

{¶24} The decision to grant or deny a litigant a continuance for the purpose of obtaining an expert is a discretionary one. *State v. Jackson*, 9th Dist. No. 24650, 2009-Ohio-4863, at ¶9. As such, this Court reviews a trial court's decision to grant or deny a continuance for an abuse of discretion. *Harrold v. Collier*, 9th Dist. No. 02CA0005, 2002-Ohio-3864, at ¶18-19; *Christian v. Johnson*, 9th Dist. No. 24327, 2009-Ohio-3863, at ¶11-13. An abuse of discretion means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore*, 5 Ohio St.3d at 219.

> "In evaluating a motion for a continuance, a court should note, inter alia: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant

> factors, depending on the unique facts of each case." *State v. Unger* (1981), 67 Ohio St.2d 65, 67-68.

The foregoing factors essentially constitute "a balancing test in which any potential prejudice to the moving party is to be weighed against the trial court's right to control its docket and the public interest in the timely and efficient dispatch of justice." *Vaughan v. Vaughan*, 9th Dist. No. 10CA0014-M, 2010-Ohio-5928, at ¶9, citing *Unger*, 67 Ohio St.3d at 67.

{¶25} The latest possible date that Brown became aware that the State intended to introduce evidence it obtained from the computer in A.W.'s home was September 30, 2009. On that day, the State filed a motion to admit other acts evidence and listed the "teen pornographic websites" searched for on the computer as one of the items it sought to have admitted. On January 14, 2010, the court issued a judgment entry, granting the State's motion to admit the content it discovered on the computer. On January 19, 2010, the trial commenced. The second day of trial, the State indicated that Richard Warner, a special agent for BCI, would be testifying about the items he found on the computer and would have his report ready by "this afternoon, if not [the next] afternoon." Defense counsel only asked for an opportunity to review Warner's report before he testified. The trial court indicated that defense counsel would have that opportunity.

{¶26} Later the same day, defense counsel received Warner's report. Defense counsel then informed the court that they would like the opportunity to obtain an expert "to interpret some of this stuff." When the trial court pressed defense counsel to articulate the reason why the defense might need their own expert, defense counsel said, "[w]ell, that's why we need an expert so maybe he can tell us what he can help us with." The court held the oral motion for a continuance in abeyance until it heard Warner's testimony, but ultimately denied the motion.

{¶27} Brown does not dispute that the computer at issue was available to him for inspection throughout the discovery process or that he was aware, well before trial, that the State intended to introduce evidence taken from the computer. He also does not dispute that he waited until the middle of the second day of trial to ask for a continuance. Moreover, the record reflects that the primary reason Brown wanted an expert was to determine whether the images found on the computer were pop-ups rather than images for which someone actively searched. Brown insists that Warner said it was possible that the pornographic content the State discovered on the computer was the result of pop-ups. What Warner actually said, however, was that it was possible that the pornographic *images* on the computer were the result of pop-ups. Warner testified that someone actively searched for all of the websites found in the computer's search history. Thus, Brown misinterprets Warner's testimony.

{¶28} In light of all the foregoing, we cannot conclude that the trial court abused its discretion by denying Brown's motion for additional time to seek an expert. Brown waited until the middle of trial to request a continuance, despite being aware of at least some of the computer evidence the State sought to introduce. The computer at issue was available to him throughout the discovery process, and he could have obtained an expert at any point during that time. It was reasonable for the court to refuse to delay the trial given that Brown had the opportunity to obtain an expert before the trial even began. See *Unger*, 67 Ohio St.2d at 67-68. Furthermore, the evidence of the pornographic content itself was in no way a critical portion of the State's case. See *Vaughan* at ¶9 (instructing a court to consider the prejudice to the defendant in granting or denying a continuance). The State's case depended upon A.W.'s accusations, which were corroborated by other evidence. Brown's argument that the court abused its discretion by denying him a continuance lacks merit. As such, his third assignment of error is overruled.

Assignment of Error Number Four

"MR. BROWN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL."

{¶29} In his fourth assignment of error, Brown argues that both of his trial counsel were ineffective and prejudiced his trial because they failed to object to the admission of the DVD and medical records from the CARE Center and the written statement that A.W. completed for the police. We disagree.

{¶30} To prove an ineffective assistance claim, Brown must show two things: (1) that counsel's performance was deficient to the extent that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) that "the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687. To demonstrate prejudice, Brown must prove that "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Furthermore, this Court need not address both *Strickland* prongs if an appellant fails to prove either one. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10.

CARE Center DVD & Medical Records

{¶31} Brown argues that his counsel performed deficiently because they failed to object to the admission of the DVD recording of the statements A.W. made during her interview at the CARE Center and the medical records documenting her visit at the CARE Center. He argues that the foregoing exhibits were inadmissible hearsay because the statements contained therein were not statements made for purposes of medical diagnosis or treatment under Evid.R. 803(4).

Brown points to A.W.'s recantation and her testimony that she accused him in order "to get rid of [him]," as proof that she did not intend to offer her statements for the purposes outlined in Evid.R. 803(4).

{¶32} Regardless of a declarant's availability, statements that would otherwise be hearsay are admissible if the statements were "made for purposes of medical diagnosis or treatment and describ[e] medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Evid.R. 803(4). In particular, "[s]tatements made by a child identifying the perpetrator in the course of medical treatment or diagnosis are admissible under Evid.R. 803(4) as long as the statements are made for the purposes of medical diagnosis or treatment." *Major* at ¶7. Treatment under Evid.R. 803(4) includes treatment for psychological injuries in addition to physical ones. Id.

{¶33} The only reason Brown argues that A.W.'s statements were not made for the purpose of medical diagnosis or treatment is that A.W. later recanted. Yet, the fact that a child-victim recants before trial is not a per se bar to the admission of that child's statements under Evid.R. 803(4). See *Major* at ¶3-13 (upholding admission of child-victim's statements to social worker under Evid.R. 803(4) where child recanted before trial). Accord *State v. Moore* (Feb. 7, 2001), 9th Dist. No. 00CA007587, at *1-2 (upholding admission of child-victim's statements to medical personnel under Evid.R. 803(4) where child recanted shortly thereafter). Rather, it is something for the court to consider in deciding whether to admit the child's statements. See *State v. Dever* (1992), 64 Ohio St.3d 401, 410-11 (instructing court to consider circumstances surrounding the making of a hearsay statement, including any factor that might affect reliability).

{¶34} Based on our review of the record, we are not convinced that Brown has demonstrated any prejudice as a result of his counsel's failure to object to the admission of the foregoing exhibits. The fact that A.W. recanted, standing alone, does not prove that her statements at the CARE Center were hearsay because she made them for an improper purpose. See, e.g., *Major* at ¶3-13; *Moore*, at *1-2. Rather, her recantation created an issue of credibility going to the very heart of the matter: whether A.W. initially told the truth or whether she was telling the truth at trial. As such, any objection only would have put the issue of A.W.'s credibility squarely before the trial court; a matter that the trial court had to consider anyway. Moreover, before the exhibits were even introduced, A.W. testified that she accused Brown of sexually assaulting her on multiple occasions, in her home, in the car, and at the family's other property. Thus, by her own testimony and independent of the exhibits later introduced, A.W. admitted at trial that she had accused Brown of sexually assaulting her. Brown does not challenge the admission of A.W.'s testimony. Indeed, Brown relies upon A.W.'s testimony as proof of her recantation. Brown also does not explain how the admission of the foregoing exhibits prejudiced him in light of other evidence in the record, including testimony from A.W.'s aunt and grandmother that A.W. had disclosed Brown's abuse to them. We must conclude, therefore, that Brown has not proven that his counsel's failure to object to the CARE Center exhibits prejudiced the outcome in this matter. *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus.

{¶35} Brown also argues that his counsel should have objected to the exhibits from the CARE Center on the basis that they were not business records under Evid.R. 803(6). We have already determined that Brown's counsels' failure to object did not prejudice Brown. Accordingly, we need not go on to address his additional argument that the exhibits were

objectionable for another reason as well. Because Brown has not shown that he suffered any prejudice as a result of his counsels' failure to object to the admission of the CARE Center DVD and medical records, his argument that he received ineffective assistance of counsel on that basis lacks merit. See id.

Police Statement

{¶36} Brown also argues that his trial counsel were ineffective because they failed to object to the admission of the written statement A.W. completed for the police. A.W.'s written statement mirrored the information that she gave at the CARE Center. The statement, therefore, was surplusage in that the record already contained the same information. Once again, Brown has not proven that, but for the admission of A.W.'s written statement, the result of his trial would have been different. See id. Brown's fourth assignment of error is overruled.

Assignment of Error Number Seven

> "THE TRIAL COURT ERRED WHEN IT FAILED TO DISMISS COUNT VIII."

{¶37} In his seventh assignment of error, Brown argues that the trial court erred by refusing to grant his Crim.R. 29 motions with respect to count eight of his indictment. Specifically, Brown argues that the court should have dismissed count eight because it allegedly occurred in Athens County, not Summit County.

{¶38} Brown's argument is essentially a sufficiency challenge with regard to the State's failure to establish venue as to count eight. See *State v. Tayse*, 9th Dist. No. 23978, 2009-Ohio-1209, at ¶34. We incorporate the standard of review set forth in Brown's first assignment of error.

{¶39} Count eight of Brown's indictment charged him with providing marijuana to one of A.W.'s friends, J.S., who was a minor at the time. Specifically, Brown was charged with

providing J.S. with marijuana at A.W.'s family cabin on one occasion when J.S. accompanied A.W. and her family on a trip there. The State does not dispute that the conduct pertaining to J.S. took place outside of Summit County. The State argues, however, that Brown could be charged with the foregoing conduct in Summit County because Brown engaged in a continuous course of criminal conduct. R.C. 2901.12(H) provides, in part, as follows:

> "When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, the offender may be tried for all of those offenses in any jurisdiction in which one of those offenses or any element of one of those offenses occurred. Without limitation on the evidence that may be used to establish the course of criminal conduct, any of the following is prima-facie evidence of a course of criminal conduct:
>
> "(1) The offenses involved the same victim, or victims of the same type or from the same group.
>
> "(2) The offenses were committed by the offender in the offender's same employment, or capacity, or relationship to another.
>
> "(3) The offenses were committed as part of the same transaction or chain of events, or in furtherance of the same purpose or objective.
>
> "***
>
> "(5) The offenses involved the same or a similar modus operandi."

"R.C. 2901.12(H) provides a sensible, efficient approach to justice by permitting one court to hear a matter which has roots in several court jurisdictions." *State. v. Lydicowens* (Nov. 22, 1989), 9th Dist. No. 14054, at *6.

{¶40} Brown's sole argument is that the trial court should have dismissed count eight because it occurred in another county. The fact that conduct occurred in another county, however, is not a dispositive one because R.C. 2901.12(H) specifically allows for the prosecution of out-of-county conduct. That is the theory upon which the State proceeded at trial. The State maintains that theory on appeal. Yet, Brown has not addressed the State's argument that it could prosecute count eight in Summit County based on R.C. 2901.12(H). As this Court

has repeatedly held, "[i]f an argument exists that can support [an] assignment of error, it is not this [C]ourt's duty to root it out." *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, at *8. Because Brown has not set forth any argument that the State failed to prove a continuous course of criminal conduct pursuant to R.C. 2901.12(H), this Court will not create such an argument on his behalf. Id. Brown's seventh assignment of error is overruled.

Assignment of Error Number Eight

"THE JUDGE ERRED BY RELYING ON HEARSAY TO MAKE ITS JUDGMENT."

Assignment of Error Number Nine

"THE JUDGE ERRED BY RELYING ON FACTS NOT IN THE RECORD."

{¶41} In his eighth assignment of error, Brown argues that the trial court erred when it relied upon hearsay statements to convict him. In his ninth assignment of error, Brown argues that the trial court convicted him based, in part, upon misstated facts that were not a part of the record. As support for both of the foregoing assignments of error, Brown relies upon a "judgment entry" that the court filed on February 25, 2010, three days after it issued Brown's final judgment. In its February 25th entry, the court explained its reasons for finding Brown guilty of the offenses upon which he went to trial. Presumably, the court filed its entry in response to a "motion for findings of facts and conclusions of law" that defense counsel filed on January 27, 2010, two days after the conclusion of trial.

{¶42} The "judgment entry" that the trial court issued on February 25, 2010, is a nullity. The court issued Brown's final judgment entry on February 22, 2010. The Ohio Rules of Criminal Procedure do not contain a mechanism whereby a trial court may journalize findings of fact and conclusions of law in a bench trial after the court has issued its final judgment. Indeed, Crim.R. 23(C) specifically provides that "[i]n a case tried without a jury the court shall make a

general finding." "[S]eparate findings of fact and conclusions of law are neither countenanced nor permitted; therefore, a trial court's reasoning after a general finding of guilt is mere surplusage without legal significance sufficient to impeach the general findings of guilt[.]" *State v. Cattledge*, 10th Dist. No. 10AP-105, 2010-Ohio-4953, at ¶26, citing *State v. Crawford* (Feb. 6, 1986), 10th Dist. No. 85AP-324. Accord *Lorain v. Prudoff* (Dec. 21, 1994), 9th Dist. No. 93CA005684, at *3. Because Brown's eighth and ninth assignments of error rely upon the trial court's February 25, 2010 entry, a nullity, they are without merit. As such, they are overruled.

Assignment of Error Number Five

"THE TRIAL COURT ERRED BY FAILING TO COMPLY WITH CRIMINAL RULE 32(A)."

{¶43} In his fifth assignment of error, Brown argues that the trial court erred by failing to afford him his right of allocution and that the court's error requires a resentencing. We disagree.

{¶44} Pursuant to Crim.R. 32(A)(1), a trial court shall "[a]fford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment." The rule "requires a trial court to afford a defendant an opportunity to speak before the court imposes sentence." *State v. Maynard*, 9th Dist. No. 07CA0116-M, 2009-Ohio-282, at ¶38.

{¶45} Brown's sentencing hearing took place on February 11, 2010. The trial court permitted Brown's counsel an opportunity to speak on Brown's behalf. The court listened to Brown's counsel's statement and then set forth Brown's tier classification and the terms of his sentence. Brown's counsel then notified the trial judge that she had not given Brown the chance to make a statement on his own behalf. The trial judge acknowledged her mistake and gave

Brown the chance to speak. Although Brown began his statement by saying that "[he] ha[d] a lot to say, [but] it's too late now," Brown then went on to address the court. He both professed his innocence and pleaded for the court's sympathy. The trial judge listened to Brown's entire statement, briefly addressed him personally, and indicated that she made her decision based on all the evidence at trial. The court did not issue Brown's sentencing entry until February 22, 2010.

{¶46} The trial judge acknowledged that she should have allowed Brown to speak before she set forth the terms of his sentence. Brown argues that the court's failure to do so constitutes a violation of Crim.R. 32(A)(1) and necessitates a reversal for resentencing. We do not agree. Brown's counsel spoke on his behalf before the court took any action with regard to his sentence, and the trial court listened to everything Brown had to say once his counsel pointed out that the court had not provided Brown an opportunity to speak. Moreover, although the court set forth the terms of Brown's sentence in open court, it did not journalize Brown's sentence until much later. See *Maynard* at ¶45 ("[Defendant's] sentence was not finalized until the trial court filed its sentencing entry and, up until that time, anything it said about what that sentence would be was tentative."). The record does not support the conclusion that Brown was denied his right of allocution. Compare *Lorain v. Pendergrass*, 9th Dist. No. 04CA008437, 2004-Ohio-5688, at ¶11-12; *State v. Gamble*, 9th Dist. No. 3243-M, 2002-Ohio-3185, at ¶15-18 (both reversing for resentencing where the court journalized a defendant's sentence without first affording defendant an opportunity to speak on his own behalf). Brown's fifth assignment of error is overruled.

Assignment of Error Number Six

"THE TRIAL COURT ERRED BY FAILING TO MERGE COUNTS I AND III, II AND IV, [AND] IX AND X."

{¶47} In his sixth assignment of error, Brown argues that the trial court erred by failing to merge several of his offenses as allied offenses of similar import. Specifically, he argues that the offenses had to be merged because they were based on the same conduct.

{¶48} The record reflects that Brown did not object to his sentence in the court below. The Ohio Supreme Court has held, however, that a trial court commits plain error when it imposes multiple sentences for allied offenses of similar import. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, at ¶31. Thus, we turn to the convictions at issue.

{¶49} Recently, the Ohio Supreme Court reevaluated its allied offense jurisprudence and overruled its decision in *State v. Rance* (1999), 85 Ohio St.3d 632. *State v. Johnson*, Slip Opinion No. 2010-Ohio-6314. *Johnson* stemmed from a conflict between the First and Fifth Districts with regard to the issue of whether the crimes of felony murder and child endangering must merge when child endangering also serves as the predicate offense for the felony murder charge. Id. at ¶4-5, citing *State v. Johnson*, 1st Dist. Nos. C-080156 & C-080158, 2009-Ohio-2568 (concluding offenses were not allied because the legislature intended for the offenses to protect distinct societal interests) and *State v. Mills*, 5th Dist. No. 2007-AP-07-0039, 2009-Ohio-1849 (comparing elements in the abstract and concluding offenses were allied). In answering the certified question, the Court recognized the difficulty in applying its allied offense law, abandoned its current approach, and fashioned a new, conduct-based approach. In particular, the Court embraced R.C. 2941.25's plain language and rejected *Rance's* directive that courts examine the statutory elements of offenses in the abstract before considering the conduct of a defendant. *Johnson* at ¶44. Accord id. at ¶68 (O'Connor, J., concurring in judgment); id. at ¶78

(O'Donnell, J., separately concurring). The Court held that "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Johnson* at syllabus. Although none of the separate opinions in *Johnson* gained a majority, a majority of the Court clearly agreed that an allied offense determination must depend upon a defendant's conduct and the evidence introduced and arguments made at trial with regard to that conduct. Id. at ¶54-57; id. at ¶69-70 (O'Connor, J., concurring).

{¶50} Brown argues that his rape and sexual battery convictions are allied offenses of similar import because the crimes "cover[ed] the same conduct." Brown argues that the trial court erred by failing to merge count one (rape) with count three (sexual battery), count two (rape) with count four (sexual battery), and count nine (rape) with count ten (sexual battery). The issue under the particular facts of this case, therefore, is whether, under R.C. 2941.25(B), Brown committed the crimes of rape and sexual battery separately or with a separate animus. See *Johnson*, supra. See, also, *State v. Bigelow*, 9th Dist. No. 08CA0072-M, 2009-Ohio-4093, at ¶11. Rather than decide this issue in the first instance, we must remand the matter to the trial court for a determination as to whether Brown's rape and sexual battery offenses are, in fact, allied offenses of similar import. *Johnson* at ¶49-50; *Bigelow* at ¶11. Accord *State v. Wenker*, 9th Dist. No. 25185, 2011-Ohio-786, at ¶21-22 (remanding matter to the trial court for consideration of defendant's conduct and offenses pursuant to *Johnson*). Accordingly, we reverse on this basis and remand to the trial court for the application of *Johnson*.

III

{¶51} Brown's first, second, third, fourth, fifth, seventh, eighth, and ninth assignments of error are overruled. As to Brown's sixth assignment of error, the judgment must be reversed

and remanded for the application of *Johnson*. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with the foregoing opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

BETH WHITMORE
FOR THE COURT

CARR, J.
CONCURS

BELFANCE, P. J.
DISSENTS, SAYING:

{¶52} The State introduced evidence suggesting that Mr. Brown viewed pornographic websites that although legal, were consistent with teen pornography to demonstrate that he was the type of person who would commit the offense of which he was accused. In other words, if Mr. Brown was the type of person who would view a pornographic website with teen-like images, then he must be the type of person who would sexually assault a teenage girl. The State did not establish that this evidence was admissible for any of the reasons permitted under Evid.R. 404(B).

{¶53} I respectfully disagree with the conclusion that the admission was harmless. It is true that there was testimony that Ms. Truman saw Mr. Brown masturbating to pornography on the family's computer, however, that testimony cannot be equated with evidence that Mr. Brown viewed websites consistent with *teenage* pornography. Knowledge that a person might view legal pornography containing images of mature women is fundamentally different than the more inflammatory evidence that one is viewing images consistent with teenage pornography. While many adults would not think ill of a person who generally views pornography, most would think that one crosses a moral boundary when an adult views pornographic images of girls. In the face of conflicting evidence where the victim has recanted that the sexual assaults ever took place, it is precisely this type of evidence of the accused's bad character that is designed to tip the scales toward a guilty verdict. Furthermore, in light of the trial court's judgment entry, it is clear that this evidence was relied upon by the court. Thus, I cannot conclude that there was no reasonable possibility that the admission of the evidence may have contributed to Mr. Brown's conviction. See *State v. Rahman* (1986), 23 Ohio St.3d 146, 151, quoting *State v. Bayless* (1976), 48 Ohio St.2d 73, 106, vacated in part on other grounds by *Bayless v. Ohio* (1978), 438 U.S. 911.

APPEARANCES:

ROBERT ALAN BRENNER, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.