[Cite as *State v. Stacy*, 2024-Ohio-4539.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY

STATE OF OHIO, Plaintiff-Appellee, - vs - STEWART G. STACY, Defendant-Appellant.	**CASE NO. 2023-A-0022** Criminal Appeal from the Court of Common Pleas Trial Court No. 2019 CR 00510

O P I N I O N

Decided: September 16, 2024
Judgment: Reversed and remanded

Dave Yost, Ohio Attorney General, State Office Tower, 30 East Broad Street, 16th Floor, Columbus, OH 43215, and *Andrea K. Boyd*, Assistant Attorney General, 30 East Broad Street, 23rd Floor, Columbus, OH 43215 (For Plaintiff-Appellee).

Robert N. Farinacci, 65 North Lake Street, Madison, OH 44057 (For Defendant-Appellant).

MATT LYNCH, J.

{¶1} Defendant-appellant, Stewart G. Stacy, appeals his convictions and sentence for multiple counts of Rape and Gross Sexual Imposition. For the following reasons, we reverse Stacy's convictions and remand this matter for further proceedings consistent with this Opinion.

{¶2} On August 21, 2019, the Ashtabula County Grand Jury indicted Stacy along with two co-defendants on six counts of Rape and two counts of Gross Sexual Imposition.

{¶3} On October 30, 2019, a Superseding Indictment was returned. With respect to victim L.O., Stacy was charged with Rape (Counts One, Two, Three, Four, Five, Six),

felonies of the first degree in violation of R.C. 2907.02(A)(1)(b) and 2971.03(A)(2), with the specification that he purposely compelled the victim to submit by force or threat of force and that he is a sexually violent predator pursuant to R.C. 2941.148(A)(1)(b); and Gross Sexual Imposition (Counts Seven and Eight), felonies of the third degree in violation of R.C. 2907.05(A)(4) and (C)(2). With respect to N.G., Stacy was charged with Rape (Counts Nine, Ten, Eleven, Twelve, Thirteen, Fourteen), felonies of the first degree in violation of R.C. 2907.02(A)(1)(b) and 2971.03(A)(2), with the specification that he purposely compelled the victim to submit by force or threat of force and that he is a sexually violent predator pursuant to R.C. 2941.148(A)(1)(b); and Gross Sexual Imposition (Counts Fifteen and Sixteen), felonies of the third degree in violation of R.C. 2907.05(A)(4) and (C)(2). Additionally, Stacy was charged with Endangering Children (Count Seventeen), a felony of the third degree in violation of R.C. 2919.22(A) and (E)(2)(c), and Endangering Children (Count Eighteen), a felony of the second degree in violation of R.C. 2919.22(B) and (E)(4).

{¶4} On November 25, 2019, the State filed an Amended Bill of Particulars in response to the Superseding Indictment.

{¶5} On December 19, 2019, the parties filed a Journal Entry of Stipulation of Use of Polygraph Test.

{¶6} On November 25, 2020, the State filed a Motion to Preclude Defendant from Cross-Examining the Victims on Prior Sexual Abuse in Violation of the Rape-Shield Law.

{¶7} On January 25, 2022, Stacy filed a Motion for Appropriation of Funds to Consult a Polygraphist and Interrogation Expert for Peer Review.

{¶8} On February 14, 2022, the trial court denied the Motion for Appropriation.

{¶9} On September 13, 2022, the Ashtabula County Children Services Board filed a Motion to Quash and for Protective Order.

{¶10} On October 27, 2022, the trial court granted the Children Services Board's Motion to Quash and for Protective Order.

{¶11} On March 8, 2023, Stacy filed a Motion in Limine regarding Polygraph Examination of the Defendant, seeking to prohibit or limit the introduction of the video recording of the polygraph examination.

{¶12} On March 20, 2023, the trial court denied the Motion in Limine regarding Polygraph Examination.

{¶13} Trial on the charges was held between March 20 and April 3, 2023. Prior to trial, the State dismissed Counts Seventeen and Eighteen (Endangering Children). At trial the following testimony was presented:

{¶14} Jenelle Schafer (Anne) Morales testified that N.G. currently lives with her and her family. N.G. is diagnosed borderline developmentally disabled and with neurofibromatosis, which causes learning disabilities. She functions at the age of a seven- or eight-year-old.

{¶15} N.G. (born August 17, 2008 and age 14 at trial) testified that she and her siblings (L.O., D.R., and R.O.) went to live with their grandmother (Roberta or Robin) and "grandpa" (Roberta's boyfriend Stacy). An uncle (Danny) and Danny's girlfriend also lived with them. Grandmother and R.O. slept on the first floor. She, L.O., D.R., and Stacy slept on the second floor. Danny and his girlfriend slept in the basement. One night, when other people were staying on the first floor, N.G. was sleeping in Stacy's bed and "he reached his hand down [her] pants." She awoke as Stacy was taking her clothes off.

He was naked and touching her "front part" with his "front part." He told her "not to tell." She pretended to go to the bathroom but walked into his closet by mistake. The next morning she told grandmother.

{¶16} On another occasion, she and L.O. were sleeping in their room when Stacy carried them one at a time into his room. He began to touch them as he had on the previous night. He told them not to tell or he would hurt them.

{¶17} This usually happened at night, but sometimes in the morning. Sometimes grandmother would be at home and sometimes she would not be. Stacy locked the bedroom door when the abuse occurred. Stacy also touched her "back" or "bottom" with either his hands or his front part. "Sometimes he would take his front and then pull up and down on it, and then he would put his finger on it and then put his finger inside me." When he touched her bottom, "it stayed outside." At different times, Stacy would do similar things to L.O.'s bottom. N.G. saw Stacy do this and L.O. told her that he did it.

{¶18} "Clearish white stuff" sometimes came out of Stacy's "front private." He would put the stuff inside or outside her using either his finger or his private. When he did things, it would feel "weird," or "uncomfortable," and sometimes "hurt." One time, her "front" was bleeding. N.G. saw Stacy do similar things to L.O.

{¶19} N.G. described occasions when Stacy used children's toys to penetrate her and L.O.

{¶20} N.G. testified that Stacy would pull her legs apart if she tried to keep them shut. And if she tried to scream, he covered her mouth. When she asked him to stop, he said no.

{¶21} On another occasion, Stacy licked N.G.'s front part while they were in the

basement. Stacy did the same thing to L.O. and told them not to tell. N.G. told grandmother "a lot, but she wouldn't listen."

{¶22} Before living with grandmother and Stacy, N.G. and her siblings lived with their parents in a house on Woodman where bad things also happened. N.G. believed she was at grandmother and Stacy's house for one or two years.

{¶23} L.O. (born September 13, 2010, and age 12 at trial) testified that she used to live with N.G., her grandmother (Roberta) and her boyfriend (Stacy). She shared a room with N.G. Stacy would do things that L.O. did not like by touching her front area and her back area. These things happened in Stacy's room and N.G. was there when he did them. He would carry her and N.G. to his bedroom. He would touch her front area with his front area. He touched her back area with his hands "both" inside and outside and it felt "very bad." It also hurt when he touched her front part. "Mostly" what she remembered was Stacy putting toys inside her. He threatened her not to tell anyone. He did the same things to N.G. as well.

{¶24} Detective Jesse Lardi was a patrolman with the Conneaut Police Department on February 7, 2017. On that date, Stacy came to the police department to report false accusations being made against him by his girlfriend (Roberta) that he was sexually assaulting his grandchildren. Lardi took an informative report (as no allegations had yet been reported) which he forwarded to the Detective Bureau and Children Services.

{¶25} Deputy John Helfer was a patrolman with the Conneaut Police Department in 2017. On June 26, 2017, Helfer was dispatched to 557 State Street where he spoke with Roberta Obhof and N.G. Helfer advised Obhof to have the child examined medically

and forwarded his report of the incident to the detectives.

{¶26} Kathleen Hacket is the Forensic Nurse Program Coordinator and Pediatric Sexual Assault Nurse at UH Rainbow Babies and Children's Hospital. On June 26, 2017, Hacket took a medical assault history from N.G. (age eight) for an incident occurring two nights earlier. Stacy brought N.G. and L.O. to his bedroom. N.G. reported Stacy digitally penetrating her both vaginally and anally. N.G. also indicated being penetrated with his penis and ejaculation. Hacket conducted a physical examination of N.G. noting redness throughout the vaginal area (labia majora and minora, perineum, and hymen) and a tear in the posterior fourchette. Hacket then conducted a similar examination of L.O. (age six) who indicated digital vaginal and anal penetration, penile vaginal, anal, and oral penetration, and ejaculation. The physical examination revealed an anal abrasion and tearing, and redness on the labia minora. She testified that redness could be a "non-specific" indicator with respect to abuse but that tears and abrasions are caused by blunt force and are indicative of abuse.

{¶27} Monique Malmer testified that she is a nurse practitioner for Akron Children's Hospital at the Child Advocacy Center. On February 5, 2018, following an interview conducted by Courtney Wilson, Malmer medically examined N.G. regarding sexual abuse involving their stepfather, Douglas Obhof. Malmer's conclusion was that the results of the assessment were "highly concerning for sexual abuse." Stacy was not mentioned in the interview on February 5. N.G. was seen again at the Child Advocacy Center twice in 2019. According to Malmer's information, there were four forensic examinations of the children, two for N.G. and two for L.O.

{¶28} Michelle Flick testified that, in June 2017, she was an assessment

caseworker for the Ashtabula County Children Services Board when she was assigned to N.G., L.O., and their siblings. At this time, N.G. and L.O. were placed with an aunt and uncle where their other siblings were already staying. She conducted forensic interviews with N.G. and L.O. on June 29, 2017, following their examinations at Rainbow Babies and Children's Hospital.

{¶29} After this initial involvement, Flick again became involved with N.G. and L.O. in December 2017 because of disclosures that the girls had been abused by other people in addition to Stacy. This resulted in the examinations at the Child Advocacy Center in March 2018.

{¶30} Trooper Jack Reno of the Ohio State Highway Patrol testified that he works in the polygraph department. On January 24, 2020, he conducted a polygraph examination of Stacy. The recorded examination was played before the jury. Reno questioned Stacy as to whether he inserted any part of his penis into N.G.'s or L.O.'s vaginas, whether any part of his penis touched N.G.'s or L.O.'s vaginas, and whether any part of his penis penetrated N.G.'s or L.O.'s vaginas. Stacy denied the foregoing and the results of the polygraph for all responses were "deception indicated." When interrogated by Reno following the exam, Stacy admitted that he "had sex with the children," but claimed it happened in the living room and that there was no penetration.

{¶31} At this point in the trial, the following joint stipulations were presented to the jury:

> Number one, in addition to this Defendant, Stewart Stacy, several other individuals have been accused of sexually abusing L.O. and/or N.G. This information was learned in part by disclosures by L.O. and N.G. and in part from other law enforcement efforts. Cherise Griffith [the biological mother], Douglas Obhof [the biological father], Dannail Obhof and other unnamed individuals have been identified as

> suspects. You may not use this information to determine the guilt or innocence of the Defendant Stewart Stacy. It is provided solely to give context to some of the evidence before you.
>
> Number two, while medical personnel may have observed injury to L.O. and/or N.G., the medical personnel cannot determine who caused this injury or when the injury was suffered.

{¶32} Hallie Dreyer testified that she was a forensic scientist within the DNA unit at the Ohio Bureau of Criminal Investigation until 2020. She testified regarding the results of rape test kits belonging to N.G. and L.O. From a sample taken from L.O.'s underwear, male DNA was detected but was insufficient for comparison. From anal swabs taken from N.G and from her underwear, male DNA was detected. N.G.'s anal swab produced a single male DNA profile sufficient for comparison. The profile was consistent with that of Douglas Obhof but Stacy was excluded as a possible source of that DNA.

{¶33} After the State's presentation of evidence, Stacy moved for acquittal pursuant to Criminal Rule 29. The trial court granted the motion with respect to Count Six (Rape of L.O.), but denied it with respect to all other Counts.

{¶34} The following testimony was given on behalf of the defense:

{¶35} Carli Wojtowicz Gerics works as a dispatcher for the Conneaut Police Department. She testified regarding the call on February 7, 2017, when Stacy reported to then Patrolman Lardi that Roberta was accusing him of molesting the children. She also testified to two calls on June 26, 2017. The first call, at 2:00 a.m., was from Stacy who reported that Roberta was coaching her granddaughter to say that he had touched her inappropriately. The second call came at 2:03 a.m. from Roberta who reported that Stacy had touched her eight-year-old granddaughter "the other day." A third call on June 26 came at 11:56 a.m. Stacy reported that Roberta was "flipping out" and had threatened

him with a knife.

{¶36} Lesley Bussey testified that Stacy is her brother. She observed Stacy interact with Roberta's four grandchildren while they lived in his house. The children required a lot of patience and understanding. N.G. had to be shown how to eat with a fork and spoon. The children also presented physical and emotional challenges. Stacy was very involved with the children and there were no complaints. Roberta was often absent and abused illegal substances.

{¶37} D.R. (age 13 at trial) testified that, when he and his siblings lived with their parents on Woodland Avenue, his father was physically abusive. When they were sent to live with Roberta and Stacy life was "pretty good." He had a bedroom upstairs where his sisters and Stacy also slept. He did not witness anything inappropriate between Stacy and his sisters.

{¶38} Olivia Clokey worked in direct services for New Beginnings Residential Treatment Center. Between December 2017 and April 2018, Clokey was N.G.'s individual counselor and her group therapist while N.G. was a resident there. Clokey testified that N.G. was admitted to New Beginnings "as a perpetrator of abuse on three of her younger siblings and one of her younger cousins." Clokey also testified that N.G.'s background included extreme neglect by her mother and grandmother and an abusive stepfather. N.G. had a sleeping disorder. She had a "severe fear of nighttime" which is when she reported her abuse would occur. As a mandatory reporter, Clokey twice reported disclosures of sexual abuse by N.G., involving her stepfather and Stacy. Clokey testified that N.G. "was very clear about who did what [to her]."

{¶39} Sandra B. McPherson, a clinical and forensic psychologist, reviewed the

interviews of the children and found that the appropriate protocols for such interviews were only partially followed. She noted instances where an interviewer corrected a child, did not completely review the rules and ensure the child understood what was expected, and asked leading questions. With respect to N.G.'s first interview, McPherson concluded "that the content of this interview would be consistent with having had experiences of a sexual nature that would be inappropriate and constitute abuse" and that "the handling of the questions and the responses as to detail really asked for much further elaboration in order to know more about what exactly had occurred with this child." With respect to L.O.'s first interview, McPherson concluded "this was not an interview that would allow one to come to final conclusions about details of events in this child's life."

{¶40} McPherson testified regarding N.G.'s second interview, "[s]he named other people, but then denied that the defendant had been part of that, or at least denied anyone else had done it I should say, and then indicated that she was threatened by one of the other people to keep quiet." In L.O.'s second interview, "[s]he identifies multiple sources of abuse and the last of them is the defendant * * * [a]nd she indicates that she was spanked for saying that defendant had offended against her." McPherson's impression of N.G. was that "she is the victim of extensive abuse, and that it has caused her to be severely, emotionally disturbed." It was not McPherson's opinion that the girls had been coached in making their statements.

{¶41} On April 3, 2023, the jury found Stacy guilty of Rape (Count One) and Gross Sexual Imposition (Counts Seven and Eight) with respect to L.O.; and guilty of Rape (Count Nine) and Gross Sexual Imposition (Counts Fifteen and Sixteen) with respect to N.G. Stacy was acquitted of the remaining charges.

{¶42} On April 6, 2023, the trial court entered a Judgment Entry "determin[ing] beyond a reasonable doubt, pursuant to R.C. 2971.01(H)(1) and (2)(f), that Stewart G. Stacy is a **Sexually Violent Predator**."

{¶43} On April 10, 2023, the trial court issued its Judgment of Conviction memorializing Stacy's sentence. The court sentenced Stacy to life imprisonment for the Rape Counts One and Nine and sixty months in prison for the Gross Sexual Imposition Counts Seven, Eight, Fifteen and Sixteen. The two sentences for Rape were ordered to be served consecutively with each other and concurrently with the sentences for Gross Sexual Imposition.

{¶44} On April 14, 2023, Stacy filed a Notice of Appeal. On appeal, he raises the following assignments of error:

> [1.] The trial court erred to the prejudice of the appellant when it denied appellant the funding necessary to engage a polygraph expert to evaluate the polygraph examination conducted by the State's expert and to assist the defense in understanding the process employed, the results produced, and any infirmities or irregularities that should be explained to the jury.
>
> [2.] The trial court erred to the prejudice of the appellant when it upheld the stipulated agreement (T.D. 37) in its entirety and the video of the polygraph examination including the subsequent interrogation and confession and permitted the trooper to testify regarding [the] same despite the inadequacies of that agreement and the State's intentional breach thereof.
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> [3.] The trial court erred to the prejudice of the defendant when it sustained the objection of the Ashtabula County Children[']s Services Board quashing defendant's subpoena for certain records and determined that all 2,499 pages of those records were off limits to the defense.
>
> [4.] The court abused its discretion by finding that the appellant is a sexually violent predator when it relied solely upon R.C. 2971.01(2)(F), the catch all provision of the statute, citing facts often inherent in the offenses that are not indicia or predicative of future

violent sexual acts as required by R.C. 2971.01(H)(1).

[5.] The trial court erred to the prejudice of the defendant when it focused on the wide breadth of dates permitted instead of the incidents or events that went wholly undefined in the bill of particulars.

[6.] [N.G.'s] claims and testimony [were] too saturated with inconsistencies, contradictions and implausibilit[ies] to provide the jury with a reasonable basis upon which to sustain a conviction of the charges.

[7.] The State failed to produce competent credible evidence as to L.O. such that the jury could have found that the appellant committed sexual conduct as defined by R.C. 2907.02.

{¶45} In the first assignment of error, Stacy argues that, by denying his Motion for Appropriation of Funds to Consult a Polygraphist, the trial court deprived him of the tools necessary to construct an effective response to the State's own expert and execute a viable challenge to the technical and specialized evidence introduced by the State and presented to the jury, thus depriving him of a fair trial and level playing field.

{¶46} "Due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution, requires that an indigent criminal defendant be provided funds to obtain expert assistance at state expense only where the trial court finds, in the exercise of a sound discretion, that the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial." *State v. Mason*, 82 Ohio St.3d 144, 694 N.E.2d 932 (1998), syllabus; *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971) ("the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for

a price to other prisoners").

{¶47} Stacy's Motion for Appropriation of Funds to Consult a Polygraphist and Interrogation Expert for Peer Review sought funds in the amount of $2,500.00 to retain a polygraph expert "to review the video of the polygraph examination and the prior and subsequent interrogation" conducted by Trooper Reno. Stacy argued: "Given the complexity of this case as already revealed by the indictment, discovery and media accounts, such an expert is necessary to review and confirm or challenge the findings of the State's investigators and Polygraphist and to aid counsel in understanding the conduct and reported results of the State's experts."

{¶48} As an initial matter, Stacy's Motion fails to demonstrate any particularized need for the retention of a polygraph expert but merely states that the case is complex and an expert is necessary to review the examination. Stacy identifies nothing about the manner in which the examination was conducted or the results obtained to suggest that the test was improperly administered. If such were sufficient to require the provision of an expert, then a polygraph expert would be required in every case involving a polygraph examination. That is not the constitutional standard. *Mason* at 150 ("a defendant must show more than a mere possibility of assistance from an expert," rather, "a defendant must show a reasonable probability that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial") (citations omitted); *State v. Dennis*, 2017-Ohio-4437, 93 N.E.3d 277, ¶ 20 (8th Dist.) ("[i]f we follow Dennis's logic [that there could possibly be errors], all defendants would be entitled to their own forensic experts in every case involving DNA evidence").

{¶49} During the cross-examination of Trooper Reno at trial, Stacy raised

concerns about the length of the examination, the uneven armrests of the chair in which he was sitting, the location of a space heater, and the questioning techniques employed. These concerns were not raised in Stacy's Motion for Appropriation of Funds. Even if they had been, it is not clear that these concerns merited the retention of an expert.

{¶50} A further consideration is the fact that it is a polygraph examination at issue. In Ohio, "[t]he law favors neither 'the admissibility of test results [nor] statements regarding an individual's willingness or lack of willingness to submit to a test.'" *State v Austin*, 2017-Ohio-7845, 97 N.E.3d 1266, ¶ 18 (9th Dist.). Nevertheless, "[t]he results of a polygraphic examination are admissible in evidence in a criminal trial for purposes of corroboration or impeachment" under certain conditions, one of which is that "[t]he prosecuting attorney, defendant and his counsel must sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state." *State v. Souel*, 53 Ohio St.2d 123, 372 N.E.2d 1318 (1978), syllabus.

{¶51} In the present case, the parties entered into a Stipulation of Use of Polygraph Test pursuant to "*State v. Souel (1978), 53 Ohio St. 2d 123*." The Stipulation provided in part:

> 3. The Prosecuting Attorney shall designate the person who will administer and conduct the testing of the Defendant, such person to be selected from those persons employed by the Ohio State Highway Patrol as properly trained, experienced, and qualified to conduct such testing.
>
> 4. The parties agree that such person designated by the Prosecuting Attorney shall be permitted, if called as a witness by the State of Ohio or Defendant, to testify at trial of this cause as an expert regarding all aspects of the test administered and such testimony shall be offered and received as evidence in the trial of this cause without objection of any kind by any party to this Agreement.

{¶52} Also in accordance with *Souel*, the jury was instructed as follows:

> Evidence has been admitted of a polygraphic examination of Mr. Stacy. You are instructed that the examiner's testimony does not tend to prove or disprove any element of the crimes with which the defendant is charged, but, at most, tends only to indicate that at the time of the examination Mr. Stacy was not telling the truth. You are further instructed that it is for you, as jurors, to determine what weight and effect such evidence should be given.

Id. at syllabus ("[i]f such evidence is admitted the trial judge should instruct the jury to the effect that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged, and that it is for the jurors to determine what weight and effect such testimony should be given").

{¶53} It is understood that Stacy sought a polygraph expert to challenge the weight rather than the admissibility of the evidence. Nonetheless, the facts that the admission of polygraph evidence must be stipulated and that such evidence is only admitted for the purpose of corroboration or impeachment distinguishes the present case from other cases where an expert was found necessary to assist the defense and ensure a fair trial. For example, in *State v. Ruiter*, 7th Dist. Mahoning No. 22 MA 0002, 2023-Ohio-3594, the court of appeals found that it was an abuse of discretion not to provide the defendant facing rape and sexual battery charges a DNA expert. *Id.* at ¶ 111. In contrast to the present case, in *Ruiter* "most of the charges were based mainly on the DNA evidence and Ms. Troyer's [the State's expert] testimony." *Id.* at ¶ 109. In *Ruiter*, the defendant did not stipulate to the admission of the State's evidence. Here, the direct evidence of Stacy's guilt was the children's testimony. In this regard, it is worth noting that the trial court did grant Stacy funds to consult and then retain a clinical psychologist and expert for child interviews (Dr. McPherson). Stacy argued that such an expert was

necessary where "the State put this case before the Grand Jury based in large part upon the video interviews of the alleged child victims" and "the credibility and reliability of the girls' interviews and ultimately their testimony will substantially inform the injury."

{¶54} Likewise, in *State v. Sargent*, 169 Ohio App.3d 679, 2006-Ohio-6823, 864 N.E.2d 155 (1st Dist.), the court of appeals found an abuse of discretion in the denial of the defendant's motion for the appointment of an eyewitness-identification expert. Again, in contrast to the present case, the expert would have aided the defense on "a pivotal issue at trial": "The state's case was based primarily on one person's identification of Sargent as the robber, and that person was under the stress of having been accosted at gunpoint." *Id.* at ¶ 13. Here, the polygraph examination was not the pivotal issue at trial. According to *Souel*, the purposes of such evidence are limited to corroboration and impeachment.

{¶55} The first assignment of error is without merit.

{¶56} In the second assignment of error, Stacy challenges both the admission of the polygraph examination at trial and his statement at the conclusion of the examination wherein he admitted his guilt. Prior to trial, Stacy filed a Motion in Limine Regarding Polygraphic Examination of the Defendant, seeking "an Order prohibiting the introduction of the video recording of the Defendant's Polygraph Examination conducted on the 24th day of January 2020 and any reports or testimony by Trooper Jack M. Reno of the Ohio State Highway Patrol." The grounds for the Motion were the State's purported breach of the parties' Stipulation of Use of Polygraph Test and the violation of Stacy's right to counsel and right against self-incrimination.

{¶57} Following an evidentiary hearing, the trial court denied the Motion and found

as follows:

> The Court * * * finds that the defendant knowingly, intelligently, and voluntarily entered into the stipulation regarding use of the polygraph at trial, and during the pre-test interview, knowingly, intelligently, and voluntarily waived his various statutory and constitutional rights, including the right to counsel and the right to remain silent.
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> The Court further finds that the defendant did not invoke his right to counsel at any time during the polygraph examination itself or during the post-test interview/interrogation.
>
> The Court further finds that the stipulation for use of this polygraph testing covers the entirety of the polygraph protocol, including the post-test interview/interrogation.

{¶58} Although denominated a Motion in Limine, Stacy's Motion was in effect a motion to suppress and treated as such by the trial court inasmuch as an evidentiary hearing was held. *See Pirock v. Crain*, 2020-Ohio-869, 152 N.E.3d 842, ¶ 72 (11th Dist.) ("a motion in limine * * * may be used as the equivalent of a motion to suppress evidence which is either not competent or improper because of some unusual circumstance[1]"). Accordingly, we will apply the standard of review appropriate to motions to suppress. "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. "[A]n appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence," but, "must then independently [i.e., de novo] determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Id.* For the purposes of this assignment of error, there are no material facts in dispute inasmuch as the analysis relies on the video of the polygraph

1. Here, in addition to the fact of an evidentiary hearing being held, Stacy could not object to the admission of the polygraph at trial per the terms of the Stipulation.

examination and the written stipulation. The focus will be on whether the facts satisfy the legal standard for a valid waiver.

{¶59} The question of "whether a valid waiver of the right to counsel and the right to silence [has] occurred" depends on "whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances." *State v. Tench*, 156 Ohio St.3d 85, 2018-Ohio-5205, 123 N.E.3d 955, ¶ 107. "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *State v. Lather*, 110 Ohio St.3d 270, 2006-Ohio-4477, 853 N.E.2d 279, ¶ 7, quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). "Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (Citations omitted.) *Id.* "The state bears the burden of proving by a preponderance of the evidence that the accused's waiver of his *Miranda* rights was knowing, intelligent, and voluntary." *In re J.G.*, 2023-Ohio-4042, 228 N.E.3d 645, ¶ 31 (1st Dist.); *State v. Martin*, 151 Ohio St.3d 470, 2017-Ohio-7556, 90 N.E.3d 857, ¶ 100.

{¶60} The law regarding the admissibility of evidence from a polygraph examination beyond the results of the examination has been aptly stated by the Twelfth District Court of Appeals:

> A polygraph examination "consists of three separate phases: the pre-test, the testing phase and the post-test." *State v. Ferris*, 12th Dist. Warren No. CA88-05-042, 1989 Ohio App. LEXIS 195, *3 (Jan. 17, 1989). The pre-test phase consists of the examiner reading

> the examinee his constitutional rights and asking background information. *Id.* "During the testing phase, the examinee is hooked up to the machine while being questioned in order to determine whether or not he is telling the truth." *Id.* The post-test phase immediately follows the testing phase and provides the examinee "an opportunity to offer any additional information concerning his particular test, and to state anything else that the examiner should be aware of, or any problems he had during the testing." *Id.*
>
> The parameters set out in *Souel* are inapplicable when the polygraph examiner testifies at trial without discussing polygraph results. *State v. Azbell*, 5th Dist. Fairfield No. 04CA11, 2005-Ohio-1704, ¶ 198-200 (holding trial court did not abuse its discretion by permitting examiner to testify as to defendant's statements made during the course of a polygraph examination without any mention of the examination or the results therefrom), citing *State v. Spirko*, 59 Ohio St.3d 1, 6 (1991); *see also State v. Smith*, 715 P.2d 1301, 1310 (Mont.1986) (differentiating between test results and statements, as test results involve the examiner's evaluation of responses, while statements involve direct responses to questioning and not any credibility evaluations or impressions), citing *Bashor v. Risley*, 730 F.2d 1228, 1238 (9th Cir.1984).
>
> Consistent with the Fifth District's holding during the testing phase, the United States Supreme Court has held that statements during a "post-test interrogation" were admissible because the defendant had been properly *Mirandized* and voluntarily, knowingly, and intelligently waived his rights prior to the polygraph examination. *Wyrick v. Fields*, 459 U.S. 42, 48, 103 S.Ct. 394[, 74 L.Ed.2d 214] (1982) (stating "[a]lthough the results of the polygraph examination might not have been admissible evidence, the statements [the defendant] made in response to questioning during the course of the polygraph examination surely would have been"). Likewise, the Ohio Supreme Court and this court have found that confessions made during "pre-test" and "post-test" interviews were admissible where the defendant was properly *Mirandized* and voluntarily, knowingly, and intelligently waived his rights prior to the polygraph examination. *See*, *e.g.*, *State v. Hughbanks*, 99 Ohio St.3d 365, 2003-Ohio-4121, ¶ 55-66; *State v. Liso*, 12th Dist. Brown No. CA2012-08-017, 2013-Ohio-4759, ¶ 10-18; *State v. Menke*, 12th Dist. Butler No. CA2002-01-021, 2003-Ohio-77, ¶ 13-15.

State v. Gibson, 12th Dist. Butler No. CA2016-06-107, 2017-Ohio-877, ¶ 24-26. Compare the hearing testimony of Trooper Reno: "Basically, a polygraph examination consists of,

there's a pre-test, there's test data collection, test data analysis, and a post-test."

{¶61} The Stipulation of Use of Polygraph Test executed by Stacy in the present case provided:

> 7. Prior to signing this Entry and agreeing thereby to submit to polygraph testing, the Defendant has been fully advised of his constitutional and statutory rights, and by signing this Entry, he knowingly, intelligently, and voluntarily waives his right to remain silent and his right to seek advice of counsel during any stage of the administration of the polygraph test procedure. Admissions or other culpable statements made by the Defendant during testing shall be admissible and may be testified to during the trial of this case.

{¶62} During the early stages of the testing procedure, Trooper Reno advised Stacy of his constitutional rights, including the right not to answer questions and have his attorney present. Stacy responded: "I don't need my lawyer here to advise me 'answer this question, don't answer that question'. I am willing to answer all questions that are pertaining to my innocence * * * even if they are horrific nasty ugly questions I am willing to answer them."

{¶63} Stacy's first argument under this assignment is that the trial court erred when it failed to find that he was denied contact with counsel during the polygraph examination. At the evidentiary hearing, counsel for Stacy, Malcomb S. Douglas, testified that he wished to speak with Stacy prior to the examination. The examination was scheduled for 1:00 p.m. at the BCI office in Youngstown, but Douglas did not arrive at the testing location until about 1:20 p.m. He called the Attorney General's office while en route and said that he wanted to speak with Stacy prior to the beginning of the test. When he arrived at the testing location, Stacy had already been taken back to the examination room. Douglas asked to speak with Stacy several times, but was advised by the prosecutor that she did not have the ability to interrupt the test. Stacy was not told that

Douglas was at the testing site and wished to speak with him.

{¶64} Stacy claimed that he did not understand that the Stipulation involved a waiver of his right to counsel and he believed that his attorney would be present for the examination. Stacy also claimed that he asked to speak to his attorney during the examination: once while being led to the examination room and again during a bathroom break. Stacy acknowledged that neither of these requests were recorded on video. Moreover, Stacy did not believe that by signing the Stipulation he was agreeing to be interrogated after the results of the examination were determined.

{¶65} Trooper Reno testified that Stacy never asked for counsel during the polygraph examination. Lieutenant Gamel Brimah, the polygraph commander for the Highway Patrol, testified that, when he brought Stacy out of the examination room, he said something about asking for his attorney. When Brimah challenged him and reminded him that the examination had been recorded, Stacy conceded that he had not asked for his attorney.

{¶66} We agree with the trial court that Stacy waived the right to have counsel present during the polygraph examination (leaving aside the question of whether the post-test interview/interrogation was part of the examination proper). This waiver was expressly contained in the written Stipulation signed by both Stacy and his counsel. Nor do we find that Stacy invoked his right to counsel at any time during the examination. On the video recording, Trooper Reno expressly reviewed Stacy's right to counsel and Stacy affirmed that he did not need counsel to be present. Stacy's claims to have requested counsel while being led to the examination room and during a bathroom break are not credible inasmuch as they are flatly contradicted or inconsistent with his statements and

behavior during the recorded portion of the examination as well as the testimony of Trooper Reno and Lieutenant Brimah. However, this issue is not determinative of whether that waiver was valid during post-examination questioning.

{¶67} Contrary to the conclusion of the trial court, we find that the facts of the present case do not satisfy the standard for a valid waiver of Stacy's constitutional rights with respect to the post-test interrogation and, therefore, the post-test interrogation including Stacy's admissions to having had sex with the girls should have been suppressed.

{¶68} In the first instance, the post-test interview and/or interrogation cannot reasonably be construed as part of the polygraph test procedure and, therefore, was not covered by the stipulated waiver of rights. It is readily acknowledged that some amount of questioning after the results of the test have been determined is part of the polygraph protocol. Stacy's trial counsel admitted that there is typically a pre-test and post-test interview in addition to the "actual test itself," and the Stipulation itself provided that "[t]he examination process may involve a series of interviews and tests employing such device [known as a "lie detector" or polygraph]." The post-test interrogation in the present case, however, in no way resembled an "opportunity [for Stacy] to offer any additional information concerning his particular test, and to state anything else that the examiner should be aware of, or any problems he had during the testing" described by the *Gibson* court. Nor was this the sort of interview that would have been contemplated by either Stacy or his counsel when executing the Stipulation. After the results of the polygraph were delivered to Stacy, Trooper Reno harangued him for an hour for the sole purpose of obtaining a confession. Reno urged Stacy to be a man and admit what he did to the

girls. He argued that if Stacy really loved the girls he would confess to spare them from having to testify and begin to make their lives better. He reminded Stacy of eternity and guaranteed him the Lord's protection if he would admit to and be sorry for what he had done. Throughout the interrogation, the accuracy of the test results and Stacy's guilt were never questioned. When Stacy protested his innocence, Reno responded that he was "not innocent" and that the girls were telling the truth. As interrogation this may be fine, but to maintain that such questioning is a normal part of the polygraph procedure is untenable. Nor is it tenable to believe that either Stacy or his counsel contemplated that such questioning would be encompassed by the Stipulation. In fact, both testified at hearing that they did not anticipate the interrogation that followed the examination.

{¶69} Despite the finding that the post-test interrogation conducted by Trooper Reno was not encompassed by the terms of the Stipulation, it has been held that a waiver of Miranda rights prior to a polygraph examination remains effective during a period of post-test interrogation. In *Wyrick v. Fields*, 459 U.S. at 48, 103 S.Ct. 394, 74 L.Ed.2d 214, the United States Supreme Court held that the validity of the waiver in such circumstances depends upon the "totality of circumstances":

> If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be "interrogation." In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.

Id. at 46, quoting *Edwards v. Arizona*, 451 U.S. 477, 486, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), fn. 9; *also id.* at 48 (rejecting the per se rule "that, notwithstanding a voluntary,

knowing, and intelligent waiver of the right to have counsel present at a polygraph examination, and notwithstanding clear evidence that the suspect understood that right and was aware of his power to stop questioning at any time or to speak to an attorney at any time, the police again must advise the suspect of his rights before questioning him at the same interrogation about the results of the polygraph"); *United States v. Martinez*, D.N.M. 21-CR-01934 MV, 2023 WL 8436166, *12 ("[c]ircuit courts have applied the *Wyrick* totality of the circumstances test to determine that a *Miranda* waiver secured prior to a polygraph test did not constitute a valid waiver of the right to counsel for purposes of a post-test custodial interrogation").

{¶70} Considering the totality of the circumstances, we conclude that the waiver of Miranda rights that preceded the testing procedure was not valid as to the subsequent interrogation. There is no indication in the record before this Court that either Stacy or his trial counsel understood the waiver to be any broader in its scope than necessary to perform the polygraph examination. Stated otherwise, the waiver was only executed for the purposes of administering the examination. Inasmuch as the interrogation following the test cannot be construed as part of the test or the interpretation of the results, it was beyond Stacy's contemplation when he waived his Miranda rights. *United States v. Leon-Delfis*, 203 F.3d 103, 112 (1st Cir.2000) ("[i]t does not follow that León-Delfis waived his right to counsel for post-test questioning because he waived his right to pre-test and test questioning"); *United States v. Vazquez*, S.D.Florida No. 07-20141-CR, 2007 WL1655429, *4 ("defendant agreed to be questioned by [a federal agent] only in conjunction with a polygraph test and with no clear understanding or expectation, by either defendant or her attorney, that a post-examination interview would follow if

defendant's veracity was at issue").

{¶71} The State maintains that, "[b]y signing the stipulated agreement, Appellant and his counsel acknowledged their understanding that there would be a post-test interview conducted without counsel present." Brief of Appellee at 22. We disagree. As quoted above, the Stipulation provided that Stacy "knowingly, intelligently, and voluntarily waives his right to remain silent and his right to seek advice of counsel during any stage of the administration of the polygraph test procedure" and that "[t]he examination process may involve a series of interviews and tests employing [the polygraph] device." This language in no way expressly or unambiguously advised Stacy that he would be subject to the hour-long interrogation following the test. The State may argue that the post-test interrogation was a stage of the administration of the polygraph test procedure, but the evidence does not support the claim. Trooper Reno testified that the Stipulation did not specifically reference a post-test interrogation and that he did not advise Stacy that, if he failed the test, he would be subject to interrogation. Reno did state that, when a person fails the test, an interview or interrogation is conducted "to resolve issues regarding the outcome of the test." The interrogation to which Stacy was subject did not attempt to resolve issues regarding the test but was solely focused on securing Stacy's confession to the charges. Reno's attitude throughout was as follows: "The only thing I * * * could be wrong about is you [Stacy] not being the man I know you are that can stand up and say, 'you know what, I made a mistake' and admit those mistakes." We further note that the interrogation took place after Stacy had been under examination for a period of about five and a half hours, the test itself employing the device had concluded, and the results delivered to Stacy.

{¶72} There is nothing necessarily wrong with attempting to secure a confession from a suspect. The issue in the present case is that Stacy did not knowingly, intelligently, and voluntarily agree to be subject to the interrogation. Rather, the evidence is that Stacy only waived his rights for the purpose of the polygraph and that this particular post-test interrogation was not part of the polygraph procedure. *Compare Leon-Delfis* at 112 (finding the waiver of rights invalid where, inter alia,"[t]he waivers León-Delfis signed did not specifically mention the possibility of post-polygraph questioning, and Agent López failed to explain that post-polygraph questioning would occur").

{¶73} Again, it is acknowledged that some sort of post-test interview or interrogation is properly considered part of the polygraph examination process, whether "to resolve issues regarding the outcome of the test" or to provide an opportunity for the suspect "to offer any additional information concerning his particular test, and to state anything else that the examiner should be aware of, or any problems he had during the testing" as stated in *Gibson*. Reno's interrogation of Stacy, however, was not of that character.

{¶74} It is the nature of the post-test interrogation that distinguishes the present case from *Wyrick*, where the Supreme Court concluded that no additional warnings were required. In *Wyrick*, the post-test interrogation was described as follows: "At the conclusion of the polygraph examination, which took less than two hours, the CID agent told Fields that there had been some deceit, and asked him if he could explain why his answers were bothering him. Fields then admitted having intercourse with the victim on September 21, but said that she had instigated and consented to it." *Wyrick*, 459 U.S. at 44, 103 S.Ct. 394, 74 L.Ed.2d 214. The court found that "it would have been

unreasonable for Fields and his attorneys to assume that Fields would not be informed of the polygraph readings and asked to explain any unfavorable result." *Id.* at 47. Here, Stacy was not asked to explain the unfavorable results or what was bothering him. Rather, Trooper Reno impressed upon Stacy that, in light of the results, the only decent thing he could do as a man, for the sake of the girls as well as his own soul, was to admit to what he had done.

{¶75} In this regard, the present case aligns more closely with *Martinez*, where the district court found that, "by signing the Advice of Rights form *prior* to the polygraph test, Mr. Martinez did not knowingly and intelligently relinquish his rights in connection with the post-test interview." *Martinez*, 2023 WL 8436166, at *12. While not wholly identical to the present case, the post-test interview or interrogation in *Martinez* was of a similar character:

> [W]hile Mr. Martinez had been advised that he was free to leave and could stop answering questions *in the context of SA Coyle obtaining his consent to be interviewed with a polygraph test*, no such advisements were offered when, three hours later, the polygraph test ended, and SA Coyle's tone became accusatory. To the contrary, SA Coyle told him in no uncertain terms that he was not being honest with her and conveyed that because he did not "pass the test," he had no choice but to continue answering her questions, stating: "[W]e need to talk about [] what happened to DeAnna. Okay? We need to talk about it."

Id. at *8.

{¶76} The Supreme Court in *Wyrick* held that, by agreeing to undergo a polygraph examination, a defendant waives "his right to be free of interrogation about the crime of which he was suspected." *Wyrick* at 47. Such waiver generally remains valid during the period of post-test questioning "unless the circumstances changed so seriously that his answers no longer were voluntary, or unless he no longer was making a 'knowing and

intelligent relinquishment or abandonment' of his rights." (Citation omitted.) *Id.* In the present case, as in *Martinez*, the circumstances of the post-test interrogation had altered so dramatically as to render the waiver invalid as to this interrogation.

{¶77} The dissenting judge claims that, "instead of properly applying *Wyrick*, the majority fashions and applies its own per se rule." *Infra* at ¶ 129. On the contrary, *Wyrick* instructs that, in the context of a polygraph examination, the validity of a waiver of the right to counsel as well as the right to remain silent depends on "the totality of the circumstances." Having considered the totality of the circumstances in the present case, we conclude that Stacy's waiver was invalid inasmuch as the post-test interrogation was so wholly unrelated to either the administration of the test itself or the interpretation of the results that it was beyond his contemplation at the time the waivers were executed. If the dissent believes otherwise, an argument should be made similarly based on the totality of the circumstances explaining how such post-test interrogation could reasonably be encompassed within, in the words of the stipulated waiver, "any stage of the administration of the polygraph test procedure." If such an argument could be convincingly made, the waivers would be found valid.

{¶78} The dissenting judge also claims that the "majority opinion, continuing a disturbing trend, * * * fashions its own factual findings" which "appear nowhere in the trial court record." *Infra* at ¶ 133. On the contrary, the entire post-test interrogation was recorded and admitted into evidence both at the pretrial hearing and at trial itself. If the dissenting judge believes that the majority has misstated or mischaracterized the substance of the post-test interrogation, a counterargument should be made.

{¶79} Finally, we disagree that the admission of Stacy's confession (the remainder

of the polygraph examination being admissible) was harmless error. Apart from the confession, the evidence against Stacy consists of the victims' testimony. The physical evidence of abuse indicated a perpetrator other than Stacy. It cannot be presumed that his confession in these circumstances was without weight or effect.

{¶80} The second assignment of error is with merit.

{¶81} In the third assignment of error, Stacy argues that the trial court erred by granting the Ashtabula County Children Services Board's Motion to Quash and for a Protective Order with respect to records in its possession where the State had unfettered access to these records and where Stacy had discovered exculpatory evidence in a portion of those records inadvertently provided to the defense in discovery.

{¶82} On September 12, 2022, Stacy issued a Subpoena Duces Tecum to the Children Services Board for "[a]ny and all records, from January 1, 2016 to present, regarding, concerning, and[/]or mentioning" the four siblings, Stacy, and other relatives.

{¶83} On September 13, 2022, the Children Services Board filed a Motion to Quash and for a Protective Order based on the confidentiality of the requested records as established by R.C. 5153.17 (confidentiality of investigations of children, families, and foster homes); R.C. 2151.421(H) (immunity for reporters of suspected child abuse); R.C. 2317.02 (testimonial privileges); R.C. 149.431(A)(1) (medical records not considered public records); and R.C. 2151.141 (requests for copies of records subject to review).

{¶84} On October 21, 2022, a hearing was held on the Motion to Quash. On October 27, the trial court granted the Motion. The court ruled: "Prior to making this finding [that the Motion to Quash is well taken], the Court reviewed 2,499 pages of ACCSB

records[2] provided in response to defendant's subpoena. * * * These records were reviewed in-camera, by the Court only, following defendant's showing of a basis to believe that the records contain evidence material to the defendant's defense. The Court finds that these records are subject to statutory confidentiality and that their release is not necessary to assure the defendant a fair trial. Any need for disclosure is outweighed by the need to preserve confidentiality of such records."

{¶85} The confidentiality accorded to the records of a children services board or agency "is not absolute." Rather, "[w]here the records are necessary and relevant to a proceeding and good cause is shown for disclosure, 'access to the records may be warranted.'" (Citation omitted.) *In re C.A.*, 8th Dist. Cuyahoga No. 102675, 2015-Ohio-4768, ¶ 78. "Ohio law requires an in camera examination of the agency records to determine whether: (1) the records are relevant and necessary to the pending action[;] (2) whether the individual seeking disclosure has demonstrated good cause; and (3) whether admission of the records outweighs the statutory confidentiality considerations." *State v. McCutchen*, 8th Dist. Cuyahoga No. 111406, 2023-Ohio-368, ¶ 36. *Compare Pennsylvania v. Ritchie*, 480 U.S. 39, 60, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987): "We find that [the defendant's] interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the [children services] files be submitted only to the trial court for *in camera* review. Although this rule denies [the defendant] the benefits of an 'advocate's eye,' we note that the trial court's discretion is not unbounded. If a defendant is aware of specific information contained in the file (*e.g.*, the medical

2. These records consisted of: Activity Reports (511 pages); Intake (39 pages); N.G.'s Education and Health Records (684 pages); L.O.'s Education and Health Records (473 pages); R.O.'s Education and Health Records (109 pages); and D.R.'s Education and Health Records (683 pages).

report), he is free to request it directly from the court, and argue in favor of its materiality. Moreover, the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial."

{¶86} "In general, discovery orders are reviewed under an abuse-of-discretion standard." *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 13. "But whether the information sought is confidential and privileged from disclosure is a question of law that is reviewed de novo." *Id.*; *A.A. v. Ohio Univ.*, 2024-Ohio-313, 234 N.E.3d 645, ¶ 15 (10th Dist.). Here, Stacy does not dispute the confidential nature of the records involved, rather, he argues that by denying him access to information that was both relevant and exculpatory the trial court abused its discretion and deprived him of the ability to formulate a complete defense.

{¶87} At the outset, we note that Stacy fails to identify specific information possessed by the Children Services Board necessary for his defense. As will be shown below, Stacy's claims are largely speculative. Moreover, Stacy fails to identify specific documents in the State's possession that were not produced in discovery. He claims that the State "appears to have unfettered access to whatever it wants" but the claim is unsubstantiated. Likewise, Stacy claims prejudice from the quashing of the subpoena without actually demonstrating the prejudice.

{¶88} Stacy acknowledges that he received several pages of Activity Logs containing important exculpatory information. Without this information, he claims he would not have known the identity of witnesses to call at trial (such as Clokey) or what to ask on cross-examination for the State's witnesses (such as Flick). Without these reports,

he would not have known that N.G. was confined to a lock-down facility for sexually predatory behavior. Stacy, however, cannot claim prejudice based on documents in his possession. Nevertheless, because of the existence of this relevant and exculpatory evidence, Stacy "believed that there may be important information regarding other placements and temporary guardians, specifically other relatives, that could be instructive for the Defense * * * [a]lthough the Defense had not seen any documents specifically identifying these individuals." Stated otherwise, Stacy can only speculate as to the existence of other such documents. In a similar way, Stacy speculates that there may have been more than two forensic examinations each of N.G. and L.O. that were not disclosed. The witnesses at trial testified that the children were only examined twice forensically and the State was unaware of other such interviews, although they did undergo examinations for reasons unrelated to sexual abuse. But Stacy maintains that, based on the mere possibility of additional interviews, he "could have undertaken [his] own inquiries or investigation had [he] had the secreted records." On the contrary, "[a] defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth's [or Children Services'] files." *Ritchie*, 480 U.S. at 59, 107 S.Ct. 989, 94 L.Ed.2d 40.

{¶89} Finally, this Court is in possession of the files (under seal) reviewed by the trial court and finds no abuse of discretion in the decision to quash the subpoena on the grounds that their discovery was not necessary to ensure a fair trial.

{¶90} The third assignment of error is without merit.

{¶91} Stacy's remaining assignments of error challenge the sufficiency and/or the weight of the evidence underlying his convictions.

{¶92} A challenge to the sufficiency of the evidence raises the issue of "whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Clinton*, 153 Ohio St.3d 422, 2017-Ohio-9423, 108 N.E.3d 1, ¶ 165; Crim.R. 29(A) ("[t]he court * * * shall order the entry of a judgment of acquittal * * * if the evidence is insufficient to sustain a conviction"). In reviewing the sufficiency of the evidence, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. As sufficiency raises a question of law, the question of whether there was sufficient evidence to sustain a conviction is reviewed de novo. *State v. Smith*, 167 Ohio St.3d 220, 2022-Ohio-269, 191 N.E.3d 418, ¶ 5.

{¶93} Whereas "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, * * * weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997). "[A] reviewing court asks whose evidence is more persuasive—the state's or the defendant's?" *Id.* An appellate court must consider all the evidence in the record, the reasonable inferences, the credibility of the witnesses, and whether, "in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." (Citation omitted.) *Thompkins* at 387. "Since there must be sufficient evidence to take a case to the jury, it follows that 'a finding that a conviction is supported by the weight of the evidence necessarily must include a finding of

sufficiency.'" (Citation omitted.) *State v. Mack*, 11th Dist. Trumbull No. 2023-T-0029, 2023-Ohio-4374, ¶ 50.

{¶94} In the fourth assignment of error, Stacy argues that the evidence in the record was insufficient to support the trial court's finding that he is a sexually violent predator for the purposes of the specification included with Counts One (Rape of L.O.) and Nine (Rape of N.G.).

{¶95} "'Sexually violent predator' means a person who, on or after January 1, 1997, commits a sexually violent offense [including Rape pursuant to R.C. 2971.01(G)(2) and (L)(1)] and is likely to engage in the future in one or more sexually violent offenses." R.C. 2971.01(H)(1).

> For purposes of division (H)(1) of this section, any of the following factors may be considered as evidence tending to indicate that there is a likelihood that the person will engage in the future in one or more sexually violent offenses:
>
> (a) The person has been convicted two or more times, in separate criminal actions, of a sexually oriented offense or a child-victim oriented offense. For purposes of this division, convictions that result from or are connected with the same act or result from offenses committed at the same time are one conviction, and a conviction set aside pursuant to law is not a conviction.
>
> (b) The person has a documented history from childhood, into the juvenile developmental years, that exhibits sexually deviant behavior.
>
> (c) Available information or evidence suggests that the person chronically commits offenses with a sexual motivation.
>
> (d) The person has committed one or more offenses in which the person has tortured or engaged in ritualistic acts with one or more victims.
>
> (e) The person has committed one or more offenses in which one or more victims were physically harmed to the degree that the particular victim's life was in jeopardy.

(f) Any other relevant evidence.

R.C. 2971.01(H)(2).

{¶96} "[T]here is no requirement that all of the factors * * * be proved in order to find a person to be a sexually violent predator," rather, "any of the factors may be considered as evidence that an individual is likely to engage in one or more sexually violent offenses." (Citations omitted.) *State v. Woods*, 8th Dist. Cuyahoga No. 112987, 2024-Ohio-1053, ¶ 53. Moreover, "R.C. 2971.01(H) allows an offender to be classified and sentenced as a sexually violent predator based on the convictions of the underlying offense contained in the indictment." (Citations omitted.) *State v. Kelley*, 2024-Ohio-157, 233 N.E.3d 1219, ¶ 81 (8th Dist.).

{¶97} In the present case, the trial court determined Stacy is a sexually violent predator based on the "following relevant information":

> 1. The defendant was found guilty by a jury in the underlying case of two counts of forcible [R]ape of two different victims who were less than ten years of age.
>
> 2. The defendant was found guilty by a jury in the underlying case of four counts of Gross Sexual Imposition, two each of the same two victims who were less than ten years of age.
>
> 3. The defendant knew that each of the victims was sexually abused by others before being placed in the home where the defendant also resided.
>
> 4. The defendant was an authority figure to each of the victims with whom he was often alone as a "step grandfather."
>
> 5. Though found guilty of only two counts of [R]ape the defendant engaged in multiple different acts of "Sexual Conduct" and "Sexual Contact" with each victim.

{¶98} Stacy argues that the evidence is insufficient to support the specification. He emphasizes that none of the statutory factors apply to his case except the "catch-all" provision in division (H)(2)(f). He characterizes reliance on "[a]ny other relevant evidence" as the sole factor in finding someone a sexually violent predator as "extremely rare." Moreover, the reasons cited by the trial court in support of the finding "on their face do not indicate the likelihood of future violent sexual acts." We disagree.

{¶99} It has been recognized that "[e]vidence sufficient to support even one of the factors listed in R.C. 2971.02(H)(2) is enough to affirm the trial court's finding that a defendant is a sexually violent predator pursuant to R.C. 2971.01(H)(1)." *State v. T.E.H.*, 10th Dist. Franklin Nos. 16AP-384, 16AP-385, and 16AP-386, 2017-Ohio-4140, ¶ 72. Moreover, there are cases in which the designation of sexually violent predator has been affirmed under comparable circumstances. For example, in *State v. Rodriquez*, 8th Dist. Cuyahoga No. 109320, 2021-Ohio-2580, the defendant was charged with over 24 counts of Rape, Gross Sexual Imposition, and Kidnapping with respect to four children but only convicted of four counts with respect to one child. The nature of the abuse was similar to that perpetrated by Stacy except that the abuse occurred over a longer period of time and the victim was older. *Id.* at ¶ 5. On appeal Rodriguez argued unsuccessfully that it was improper for the jury to consider the evidence presented in support of the counts for which he was acquitted to support the finding that he was a sexually violent predator. Rather, the court ruled that "the jury could permissibly consider evidence pertaining to counts for which Rodriguez was ultimately found not guilty in determining whether he was a sexually violent predator." *Id.* at ¶ 19.

{¶100} In *Kelley*, 2024-Ohio-157, 233 N.E.3d 1219, the sexually violent predator finding was upheld based on the following: "Kelley abused two young children over an approximate eight-month period. Kelley, who was in a position of trust with the victims, groomed them by rewarding them with use of his cell phone in exchange for their compliance with his sexual requests. Further, Kelley escalated his abuse – from gross sexual imposition to rape – after J.J. and J.G. disclosed the abuse to their mother and grandmother." *Id.* at ¶ 83. In a similar way, Stacy used his position of authority to groom N.G. and L.O. and continued to abuse them even after Roberta threatened to report him to the police. In other respects, Stacy's conduct was more predatory than Kelley's inasmuch as he used physical force against his victims who were being or had been abused by others.

{¶101} The fourth assignment of error is without merit.

{¶102} In the fifth assignment of error, Stacy challenges the charging documents for failing to provide sufficient specificity and notice of the charges thereby denying him the ability to distinguish the acts alleged and the opportunity to competently defend himself. Although Stacy refers to the indictments as well as the evidence at trial in this assignment of error, the focus of his argument is on the Bill of Particulars.

{¶103} "A bill of particulars has a limited purpose–to elucidate or particularize the conduct of the accused alleged to constitute the charged offense." *State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E.2d 781 (1985). "A bill of particulars is not designed to provide the accused with specifications of evidence or to serve as a substitute for discovery." *Id.* "Even if the bill of particulars is insufficient in itself, the defendant must show that lack of knowledge of certain facts required to be placed in the bill of particulars

prejudiced his ability to fairly defend himself." *State v. Donkers*, 170 Ohio App.3d 509, 2007-Ohio-1557, 867 N.E.2d 903, ¶ 140 (11th Dist.); *State v. Bouyer*, 2023-Ohio-4793, 233 N.E.3d 41, ¶ 36 (8th Dist.); on the relation between the bill of particulars and the indictment, *see State v. Haynes*, 171 Ohio St.3d 508, 2022-Ohio-4473, 218 N.E.3d 878, ¶ 18-20; *State v. Troisi*, 169 Ohio St.3d 514, 2022-Ohio-3582, 206 N.E.3d 695, ¶ 21-26.

{¶104} "In a criminal prosecution the state must, in response to a request for a bill of particulars or demand for discovery, supply specific dates and times with regard to an alleged offense where it possesses such information." *Sellards* at syllabus. However, "precise times and dates are not essential elements of offenses." *Id.* at 171; *Bouyer* at ¶ 35. "[P]articularly in cases involving sexual misconduct with a child, the precise times and dates of the alleged offense or offenses oftentimes [sic] cannot be determined with specificity" inasmuch as "children of tender years * * * are simply unable to remember exact dates and times, particularly where the crimes involve a repeated course of conduct over an extended period of time." (Citations omitted.) *State v. Cochern*, 8th Dist. Cuyahoga No. 104960, 2018-Ohio-265, ¶ 40; *State v. Furmage*, 11th Dist. Ashtabula No. 2020-A-0057, 2022-Ohio-1465, ¶ 90 ("[t]he problem is compounded where the accused and the victim are related or reside in the same household, situations which often facilitate an extended period of abuse") (citation omitted).

{¶105} In the present case, the Amended Bill of Particulars provides a consolidated description of Counts One through Six (Rape of L.O.):

> On or about or between February 1, 2017, and June 26, 2017, in Ashtabula County, Ohio, the Defendant did engage in sexual conduct with L.O., * * * specifically the child was 6 years of age and the Defendant was in loco parentis to the child and was in a position of authority over the child and he used actual force in the commission of the offenses and the offenses occurred in his family home and he

> sexually abused the child and he inserted his penis into her vagina, inserted his penis into her anus, inserted his fingers in her vagina, inserted his fingers in her anus, he put toys inside of her vagina, he put toys inside of her anus, and he performed oral sex on her and he committed the aforementioned acts on at least six occasions.

The language of the Bill of Particulars tracks that of the Indictment except that the conduct constituting "sexual conduct" is identified with particularity. The Bill of Particulars provides a similarly consolidated description of Counts Seven and Eight (Gross Sexual Imposition of L.O.), as well as Counts Nine through Fourteen (Rape of N.G.) and Counts Fifteen and Sixteen (Gross Sexual Imposition of N.G.). With respect to the Counts of Gross Sexual Imposition, the Bill of Particulars describes particular acts constituting "sexual contact."

{¶106} Stacy did not object to the sufficiency of the Bill of Particulars or take any action to remedy its alleged deficiencies prior to trial. Accordingly, he has waived the right to claim error based on the Bill of Particulars itself. *State v. Glass*, 3d Dist. Paulding No. 11-18-07, 2018-Ohio-5060, ¶ 4 ("[a] defendant waives any claim of error regarding the inadequacy of the bill of particulars by proceeding to trial without bringing the matter to the attention of the trial court"); *State v. Hickle*, 6th Dist. Ottawa No. OT-03-034, 2004-Ohio-5250, ¶ 15 ("[a] defendant who has requested a bill of particulars waives error by proceeding to trial without receiving the bill or requesting a continuance"); *State v. Robinson*, 11th Dist. Lake No. 2004-L-146, 2005-Ohio-6286, ¶ 21 ("appellant failed to object to the form of the indictment or the state's bill of particulars * * *[,] [a]ccordingly, appellant has waived all but plain error on appeal with respect to the adequacy of the bill of particulars").

{¶107} Stacy further argues that the defects in the charging instruments carried over into trial, i.e., inasmuch as the individual Counts were not differentiated in the

charging instruments, the evidence at trial failed to delineate a factual basis for the individual Counts. "[T]he State threw all of the alleged acts and offenses up in the air and left them to the Jury and Defense to separate, differentiate, organize and match everything as they hit the ground."

{¶108} Stacy's argument is illustrated in two cases: *Valentine v. Konteh*, 395 F.3d 626 (6th Cir.2005), and *State v. Hemphill*, 8th Dist. Cuyahoga No. 85431, 2005-Ohio-3726. The holdings of these cases have been summarized thus:

> In *Valentine*, the defendant was charged with 20 counts of child rape and 20 counts of felonious penetration of a minor. The state alleged that each count occurred over a 10-month period. *Id.* at 629. The indictment mirrored the Revised Code and contained identical language for each count of child rape and felonious penetration. *Id.* The bill of particulars alleged that each offense occurred in the defendant's home. *Id.* at 634. The Sixth Circuit granted habeas relief because the indictment and evidence presented at trial "did not attempt to lay out the factual bases of forty separate incidents that took place." *Id.* at 632. In fact, the only evidence presented with regard to the number of sexual encounters between Valentine and the victim came from the victim who described a typical abusive encounter and then estimated the number of times that the behavior occurred. *Id.* at 632-633. The court found that "[g]iven the way that Valentine was indicted and tried, it would have been incredibly difficult for the jury to consider each count on its own." *Id.* at 633.
>
> In *Hemphill*, the defendant was convicted of 22 counts each of rape and gross sexual imposition with sexually violent predator specifications, 7 counts each of rape without specifications, and 22 counts of kidnapping with sexual motivation specifications. *Id.* at ¶ 49. Relying on *Valentine*, the Eight[h] District held that the state had failed to adequately differentiate these counts and, with three exceptions, failed to subject each count to individual proof. *Id.* at ¶ 88, ¶ 112. The court found that the majority of the charges were based on a "numerical estimate unconnected to individual, distinguishable events." *Id.* at ¶ 88.

State v. Stanforth, 12th Dist. Clermont No. CA2016-07-052, 2017-Ohio-4040, ¶ 40-41; *State v. Webster*, 1st Dist. Hamilton No. C-120452, 2013-Ohio-4142, ¶ 23-24 (summarizing *Valentine* and *Hemphill*).

{¶109} In contrast to *Valentine* and *Hemphill*, Stacy was acquitted of the majority of the charges against him. The issue of whether the State sufficiently distinguished the conduct underlying the six Counts on which Stacy was found guilty and whether the evidence supported those convictions is discussed in the next two assignments of error. Here, we note that Stacy's convictions were not based on the type of testimony rejected in *Valentine* and *Hemphill*. *See*, *e.g.*, *Hemphill* at ¶ 82-87 ("the girl stated that he touched her inappropriately on any opportunity that he could do so," the State asked if it happened "at least 33 times," and the girl replied "yes").

{¶110} The fifth assignment of error is without merit.

{¶111} In the sixth assignment of error, Stacy challenges his convictions with respect to N.G.

{¶112} In order to convict Stacy of Rape (Count Nine), the State was required to prove beyond a reasonable doubt that he "engage[d] in sexual conduct with another * * * when * * * [t]he other person [was] less than thirteen years of age." R.C. 2907.02(A)(1)(b). In order to convict Stacy of Gross Sexual Imposition (Counts Fifteen and Sixteen), the State was required to prove beyond a reasonable doubt that he did "have sexual contact with another * * * when * * * [t]he other person * * * [was] less than thirteen years of age." R.C. 2907.05(A)(4).

{¶113} N.G. described several distinct incidents of abuse in her testimony in which Stacy engaged in sexual conduct and/or sexual contact with her. She described incidents

in his bedroom when he touched her front with his front; when he touched her with his finger, sometimes inside her front part and sometimes outside; when he touched her bottom. She described incidents in the basement when he licked her private and used a toy to penetrate. These incidents are sufficient to sustain a count of Rape and two counts of Gross Sexual Imposition.

{¶114} Stacy argues that N.G.'s testimony was "so infected with infirmities as to render it incapable of proving his guilt beyond a reasonable doubt." He notes inconsistencies in her testimony about the sleeping arrangements at Stacy's house and whether she saw Stacy abuse L.O. or whether L.O. told her about the abuse. He notes that there was no testimony about how these incidents would end or about how they told their grandmother about them. Stacy also notes that D.R.'s testimony failed to corroborate N.G.'s testimony, the DNA evidence implicated the girls' father rather than Stacy, and N.G. failed to mention Stacy during her second forensic interview.

{¶115} We do not find that the inconsistencies identified by Stacy so undermine N.G.'s testimony as to render his convictions a miscarriage of justice. In general, the inconsistencies pertain to ancillary matters rather than the essential elements of the crimes for which Stacy was convicted. While N.G.'s testimony was not corroborated by D.R. or the DNA evidence, it was corroborated by L.O.'s testimony, the forensic interviews, and the results of the polygraph (excluding consideration of the post-test confession). It is also worth noting that N.G. never recanted or wavered in her accusations against Stacy. Where, as here, the inconsistencies and discrepancies in the evidence do not compel a particular outcome, the court of appeals may properly defer to

the fact finder's determination of what the evidence has proven. *State v. Barnes*, 11th Dist. Trumbull No. 2022-T-0061, 2023-Ohio-353, ¶ 62.

{¶116} The sixth assignment of error is without merit.

{¶117} In the seventh assignment of error, Stacy challenges his convictions for Rape and Gross Sexual Imposition with respect to L.O.

{¶118} L.O. testified to incidents that occurred in Stacy's room when N.G. was present, such as Stacy touching her front area and back area with his front part. When he touched her private areas with his hands it was both on the inside and the outside. These touches were painful. She particularly recalled Stacy putting a toy inside her.

{¶119} Stacy claims L.O.'s testimony is not probative because the majority of her answers to the prosecutor's leading questions were either "I don't know" or "I'm not sure." While bearing on L.O.'s credibility, we cannot conclude that L.O.'s uncertainty regarding much of what she was asked wholly undermines her credibility. L.O.'s testimony was corroborated by N.G.'s testimony, the forensic interviews, and the results of the polygraph (excluding consideration of the post-test confession). Given that L.O. was twelve-years old at the time of trial and testifying about things that happened when she was six-years-old, it would be expected that there were many things she could not remember.

{¶120} The seventh assignment of error is without merit.

{¶121} For the foregoing reasons, Stacy's convictions are reversed, and this matter is remanded for further proceedings consistent with this Opinion. Costs to be taxed against the parties evenly.

JOHN J. EKLUND, J., concurs,

MARY JANE TRAPP, J., concurs in part and dissents in part with a Dissenting Opinion.

MARY JANE TRAPP, J., concurs in part and dissents in part with a Dissenting Opinion.

{¶122} I concur in the majority's opinion except for its disposition of Mr. Stacy's second assignment of error. I respectfully dissent from the majority's determination that the trial court erred by failing to suppress Mr. Stacy's confession from the post-test interview. In my view, the majority misapplies the governing precedent and the required standard of review.

The Governing Precedent

{¶123} The governing precedent is the Supreme Court of the United States' decision in *Wyrick v. Field*, 459 U.S. 42 (1982), which Mr. Stacy does not cite. In *Wyrick*, the defendant was a solider stationed in Missouri and was accused of raping an 81 year-old woman. *Id*. at 43. After meeting with private counsel and a military attorney that the Army provided, the defendant requested a polygraph examination. *Id*. at 44. Prior to undergoing the polygraph examination, he was given a written consent document informing him of his *Miranda* and other legal rights, which he signed. *Id*. The examiner, who was an agent of the Army's Criminal Investigation Division, also read the defendant a detailed statement that included the following notice: "If you are now going to discuss the offense under investigation, which is rape, with or without a lawyer present, you have a right to stop answering questions at any time or speak to a lawyer before answering

further, even if you sign a waiver certificate." (Emphasis deleted.) *Id*. The defendant was asked if he wanted a lawyer at that time, and he answered, "No." *Id*.

{¶124} At the conclusion of the polygraph examination, the examiner told the defendant there had been some deceit and asked if he could explain why his answers were bothering him. *Id*. The defendant then admitted to having intercourse with the victim but claimed she had instigated and consented to it. *Id*. at 44-45.

{¶125} The defendant was tried before a jury, where he sought to suppress the examiner's testimony regarding his confession to voluntary intercourse. *Id*. at 45. The trial court denied the motion, ruling that the defendant had waived his rights, which a state appellate court affirmed on appeal. *Id*. Later, a federal circuit court of appeals granted the defendant a writ of habeas corpus, finding that "the State had failed to satisfy its burden of proving that '[the defendant] knowingly and intelligently waived his right to have counsel present at the post-test interrogation.'" *Id*. at 46. The circuit court suggested that if the examiner had merely paused to remind the defendant of his rights, there would have been no violation. *Id*. at 46-47.

{¶126} The Supreme Court of the United States reversed the circuit court's judgment. *Wyrick*, 459 U.S. at 49. The Court rejected the circuit court's apparent adoption of a per se rule "that, notwithstanding a voluntary, knowing, and intelligent waiver of the right to have counsel present at a polygraph examination, and notwithstanding clear evidence that the suspect understood that right and was aware of his power to stop questioning at any time or speak to an attorney at any time, the police again must advise the suspect of his rights before questioning him at the same interrogation about the results of the polygraph." *Id*. at 48. Instead, the Court held that "the totality of the circumstances

. . . is controlling." *Id*. In particular, the "[the defendant] validly waived his right to have counsel present at 'post-test' questioning, unless the circumstances changed so seriously that [the defendant's] answers no longer were voluntary, or unless he no longer was making a 'knowing and intelligent relinquishment or abandonment' of his rights." *Id*. at 47, quoting *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

{¶127} The Court explained that the circuit court had relied on two facts in finding that a new set of *Miranda* warnings were required: (1) the polygraph examination had been discontinued, and (2) the defendant was asked if he could explain the test's unfavorable results. *Id*. at 47. The Court held that "[t]o require new warnings because of these two facts is unreasonable. Disconnecting the polygraph equipment effectuated no significant change in the character of the interrogation. The [examiner] could have informed [the defendant] during the examination that his answers indicated deceit; asking [the defendant], after the equipment was disconnected, why the answers were bothering him was not any more coercive." *Id*.

{¶128} The Court also rejected the circuit court's finding that "there was no indication that [the defendant] or his lawyer anticipated that [the defendant] would be asked questions after the examination," stating "it would have been unreasonable for [the defendant] and his attorneys to assume that [the defendant] would not be informed of the polygraph readings and asked to explain any unfavorable result." *Id*. In addition, the defendant "had been informed that he could stop the questioning at any time, and could request at any time that his lawyer join him. Merely disconnecting the polygraph equipment could not remove this knowledge from [the defendant's] mind." *Id*. at 47-48.

{¶129} Here, instead of properly applying *Wyrick*, the majority fashions and applies its own per se rule. Specifically, the majority adopts the Twelfth Appellate District's description of "the three separate phases of a polygraph exam," i.e., "the pre-test, the testing phase and the post-test." According to the Twelfth District, "[t]he post-test phase immediately follows the testing phase and provides the examinee 'an opportunity to offer any additional information concerning his particular test, and to state anything else that the examiner should be aware of, or any problems he had during the testing.'" *State v. Gibson*, 2017-Ohio-877, ¶ 24 (12th Dist.), quoting *State v. Ferris*, 1989 WL 2292, *1 (12th Dist. Jan. 17, 1989). The majority then finds that the "post-test interrogation" of Mr. Stacy was broader than this description; therefore, the stipulation did not encompass it.

{¶130} The Twelfth District's descriptions originate from a polygraph examiner's testimony at a suppression hearing. *See Ferris* at *1 ("the polygraph examiner stated . . . "). The court subsequently cited them as general principles in *Gibson*. No other court has adopted these descriptions. Therefore, contrary to the majority opinion's assertion, they are not "*the law* regarding the admissibility of evidence from a polygraph examination beyond the results of the examination." (Emphasis added.)[3]

{¶131} Here, Trooper Reno testified that the polygraph examination he administers typically includes a "post-test interview," which he described as follows: "[I]f a person passes an exam, it could be a debrief. If a person fails an exam, then there's an interview to resolve issues regarding the outcome of the test." Thus, Trooper Reno's description

[3]. Notably, the Supreme Court in *Wyrick* described a polygraph examination as an "interrogation about the crime of which [a person] [i]s suspected." *Id.,* 459 U.S. at 47. The fact that Mr. Stacy was given his *Miranda* rights is also relevant—such a requirement is implicated only when there is a "custodial interrogation." *Miranda v. Arizona,* 384 U.S. 436, 444 (1966).

was not limited in scope like in *Ferris/Gibson*. The waiver/stipulation that Mr. Stacy signed was similarly broad. Specifically, it provided that Mr. Stacy "knowingly, intelligently, and voluntarily waives his right to remain silent and his right to seek advice of counsel during *any stage* of the administration of the polygraph test procedure" and that "[a]dmissions or other culpable statements made by [Mr. Stacy] *during testing* shall be admissible and may be testified to during the trial of this case." (Emphasis added.)

The Standard of Review

{¶132} This court's standard of review is well-established. The Supreme Court of Ohio has held that "[a]ppellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 2003-Ohio-5372, ¶ 8. "[A]n appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence," but "must then independently determine, without deference to the conclusion of the trial court [i.e., de novo], whether the facts satisfy the applicable legal standard." *Id*. The court has further held that "[a]t a suppression hearing, . . . the credibility of witnesses are issues for the trier of fact." *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Thus, "a reviewing court should not disturb the trial court's findings on the issue of credibility." *State v. Ashford*, 2001 WL 137595, *2 (11th Dist. Feb. 16, 2001).

{¶133} The trial court, after holding an evidentiary hearing, expressly found that "the stipulation for use of this polygraph testing covers the entirety of the polygraph protocol, including the post-test interview/interrogation." The stipulation itself and witness testimony support this finding. The majority opinion, continuing a disturbing trend, *see, e.g., In re O.E.*, 2023-Ohio-1946 (11th Dist.), fashions its own factual findings. For instance, the majority adopts Mr. Stacy's terminology by repeatedly referring to the post-

test questioning as an "interrogation." The majority also declares that "Trooper Reno harangued [Mr. Stacy] for an hour for the sole purpose of obtaining a confession"; "the accuracy of the test results and [Mr.] Stacy's guilt were never questioned"; "such questioning . . . may be fine . . . [a]s interrogation . . . [but] is [not] a normal part of the polygraph procedure"; and Mr. Stacy and his counsel would not have "contemplated" that the stipulation "encompassed . . . such questioning." These findings appear nowhere in the trial court record.

{¶134} The majority's misapplication of the required standard of review is further demonstrated by its reliance on federal district court decisions. *See, e.g., United States v. Martinez*, 2023 WL 8436166 (D.N.M. Nov. 30, 2023); *United States v. Vazquez*, 2007 WL 1655429 (S.D.Fla. May 3, 2007). Federal district courts are trial courts that make factual findings, not courts of appeals that review them.

{¶135} Finally, the majority presumes that the trial court's alleged error warrants reversal of Mr. Stacy's convictions. However, even if the majority's analysis were correct, an erroneous ruling on a motion to suppress is subject to a harmless error analysis, i.e., whether the remaining evidence is sufficient to support Mr. Stacy's convictions. *See, e.g., State v. LaRosa*, 2021-Ohio-4060, ¶ 36-40; *State v. Gordon*, 1989 WL 260228, *8 (11th Dist. Mar. 31, 1989); *United States v. Leon-Delfis*, 203 F.3d 103, 112 (1st Cir. 2000). As the majority's discussion of Mr. Stacy's other assignments of error demonstrates, plenty of other trial evidence established his guilt.

{¶136} For the foregoing reasons, I would find that the trial court properly denied Mr. Stacy's motion in limine, overrule his second assignment of error, and affirm his convictions.