[Cite as *State v. Portman*, 2026-Ohio-4401.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	C.A. No. 2025-CA-93
Appellee	:	
	:	Trial Court Case No. 25-CR-292
v.	:	
	:	(Criminal Appeal from Common Pleas
DARIEN LEE PORTMAN	:	Court)
	:	
Appellant	:	**FINAL JUDGMENT ENTRY & OPINION**

. . . . . .

Pursuant to the opinion of this court rendered on November 6, 2026, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), the clerk of the court of appeals shall immediately send a copy of the court's ruling to each party and note that action on the docket. Additionally, pursuant to App.R. 27, the clerk of the court of appeals shall send a certified copy of this judgment, which constitutes a mandate, to the clerk of the trial court and note the service on the appellate docket.

For the court,



MARY K. HUFFMAN, JUDGE

TUCKER, J., and HANSEMAN, J., concur.

OPINION
CLARK C.A. No. 2025-CA-93

LUCAS W. WILDER, Attorney for Appellant
JOHN M. LINTZ, Attorney for Appellee

HUFFMAN, J.

{¶ 1} Darien Lee Portman appeals from his convictions on 21 counts of pandering obscenity involving a minor ("pandering"). For the following reasons, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶ 2} On April 14, 2025, Portman was indicted on 21 counts of pandering. On October 28, 2025, following a jury trial, he was convicted on all the offenses. The court ordered that the sentences on Counts 1, 2, 14, 15, 16, and 19 be served consecutively; the sentences on Counts 3-13, 17-20, and 21 were imposed concurrently with the consecutive sentences. In sum, the court imposed an indefinite sentence of a minimum of 24 years and a maximum of 26 years; Portman was also classified as a Tier II sex offender. Portman appeals.

Assignments of Error and Analysis

I. Sufficiency and Manifest Weight of the Evidence

{¶ 3} Portman raises six assignments of error. First, he argues that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. He claims that, pursuant to R.C. 2901.22(B), the State was required to prove that he "knowingly created, reproduced, or published obscene material that has a minor in it" for each of the 21 convictions, and that it failed to do so. Portman claims that the "normal, common meaning" of the verbs create, reproduce, and publish "is 'create' = make,

'reproduce' = copy/duplicate and 'publish' = distribute or make available." He asserts that there "was insufficient evidence that [he] engaged in these actions," and that the State "did not provide the identity" of the person who did so.

{¶ 4} Specifically, according to Portman, a phone containing obscene material was found at his home and attributed to him by means of an email address. He claims there was no evidence that he created, reproduced or distributed the images on the phone, and that Special Agent Jason Kearns with Homeland Security Investigations, who testified for the State, acknowledged that it was "possible" that someone else committed the offenses. Further, Portman argues that there was no proof that he "even viewed the images." He contends that there was "no medical testimony, or evidence that the person in each image was a juvenile"; the person in each image merely "appear[ed] to be a minor."

{¶ 5} A sufficiency of the evidence argument challenges whether the State "presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson*, 2009-Ohio-525, ¶ 10 (2d Dist.), citing *State v. Thompkins,* 78 Ohio St.3d 380 (1997). "The relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Sheeders*, 2019-Ohio-3120, ¶ 27, citing *State v. Dennis*, 79 Ohio St.3d 421, 430 (1997). "A guilty verdict will not be disturbed on appeal unless 'reasonable minds could not reach the conclusion reached by the trier-of-fact.'" *Id.* In other words, on review for sufficiency, courts are to assess not whether the State's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Thompkins* at 390.

{¶ 6} A weight of the evidence argument, on the other hand, challenges the believability of the evidence and asks which of the competing inferences suggested by the

evidence is more believable or persuasive. *Wilson* at ¶ 12. "[W]hen reviewing an argument challenging the weight of the evidence, an appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Sheeders* at ¶ 28, citing *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983).

{¶ 7} As recently noted by the Ohio Supreme Court:

> In such cases, the court sits as a "'"thirteenth juror"' who may disagree with the fact-finder's resolution of the *conflicting evidence*." (Emphasis added.) *State v. Martin*, 2022-Ohio-4175, ¶ 26, quoting *Thompkins* at ¶ 25, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982).

State v. Reillo, 2026-Ohio-2701, ¶ 27. "An appellate court sits as the thirteenth juror only when evidence contradicts a fact-finder's findings, . . . or when a witness's testimony is so inconsistent as to material facts, so impeached, or so fantastical as to make it patently unbelievable." *Id.* at ¶ 3, citing *Martin* at ¶ 26.

{¶ 8} "Although sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency." *State v. Flores-Lopez*, 2017-Ohio-690, ¶ 49 (2d Dist.), citing *State v. McCrary*, 2011-Ohio-3161, ¶ 11 (10th Dist.); *accord State v. Robinson*, 2015-Ohio-1167, ¶ 17 (2d Dist.). As a result, "a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Id*., citing *State v. Braxton*, 2005-Ohio-2198, ¶ 15 (10th Dist.).

{¶ 9} As noted in *Reillo*:

> But "[i]n weighing the evidence, the court of appeals must always be mindful of the presumption in favor of the finder of fact." *Eastley*, 2012-Ohio-2179, at ¶ 21. " ' "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment." ' " *Z.C.*, 2023-Ohio-4703, at ¶ 14, quoting *Seasons Coal Co.*, 10 Ohio St.3d at 80, fn. 3, quoting 5 Ohio Jur.3d, Appellate Review, § 603, at 191-192 (1978). " 'The underlying rationale of giving deference to the findings of the [fact-finder] rests with the knowledge that the [fact-finder] is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *Id.*, quoting *Seasons Coal* at 80.

Reillo at ¶ 28.

{¶ 10} Regarding the offenses at issue here, R.C. 2907.321(A)(1) states: "No person, with knowledge of the character of the material or performance involved, shall do any of the following: (1) Create, reproduce, or publish any obscene material that has a minor . . . as one of its participants . . ." A minor is "a person under the age of eighteen." R.C. 2907.01(M). Obscenity is defined in relevant part as follows:

> When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is 'obscene' if any of the following apply:
>
> (1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, . . . or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

. . .

(5) it contains a series of displays . . . of sexual activity . . . [or] nudity . . ., the cumulative effect of which is a dominant tendency to appeal to prurient . . . interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

R.C. 2907.01(F).

A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact."

R.C. 2901.22(B).

{¶ 11} At trial, Detective Sheila Crews of the Clark County Sheriff's Office testified that she became familiar with Portman in 2022, learning that he owned and operated Red Moon Foot Modeling. She stated that Portman photographed "adults and juveniles in bathing suits" and took "foot pictures." According to Crews, Portman had a website where

"[p]eople could buy photos . . . of the females that he took pictures of." She testified that the images available on the website were not obscene.

{¶ 12} Crews stated that, on October 4, 2022, she executed a search warrant for electronics at Portman's home in Springfield. Crews identified a Clark County Sheriff's Office property receipt reflecting that a rose-colored Samsung cell phone was taken from a drawer in Portman's bedroom, and she also identified a photo of the phone in the drawer as it was found. Crews stated that the phone was given to the Department of Homeland Security, and she subsequently learned phone numbers and email addresses used by Portman on the phone. She acknowledged that she did not know what was on the phone or who had used it.

{¶ 13} Special Agent Jason Kearns testified that he had specialized in cyber investigations since 2007 and had performed computer forensics since 2013; the majority of his work involved child sexual abuse materials. He testified:

> So devices are brought to us, and we do what's called a forensic extraction if it's a mobile device or forensic copy if it's a computer or hard drive; and from there, we take the extraction and we put it into forensic software and we analyze it. On child sex abuse material cases, we have a set of hash values. A hash value is basically a mathematical equation that's given to a picture kind of like a fingerprint where it's unique, and those hash values are either created by our office or we also get a set from the National Center for Missing and Exploited Children, and those hash values are typically either pictures or videos of child sex abuse material that have been seen and/or victims that have been identified . . . .

{¶ 14} Kearns stated that such materials are often located on "the dark web, because users can "hide their identity" and "what they're downloading and trading" there. According to Kearns, the easiest way to get on the dark web "that most people utilize is the TOR [application]," which stands for "The Onion Router," and which "will modify a browser for you to be able to access the dark web," and "to be able to go on there to download, search, things like that." Kearns testified that search engines such as Bing, Google Chrome, or Yahoo! cannot access the dark web.

{¶ 15} Kearns stated that, in October 2022, he was asked by the Clark County Sheriff's Office to conduct a forensic analysis of possible child sexual abuse materials involving Portman. He received 14 devices, and "[g]oing through all the devices, there was a lot of pictures of feet," and "there was an HP desktop that had filenames that were indicative of child exploitative material." According to Kearns, some of the filenames "included the acronym PTHC," which he knew from his experience to stand for "preteen hard core," and others had the name "Pedo," which refers to child sexual abuse material.

{¶ 16} Kearns testified that he found 474 images of child sexual abuse material on the cell phone retrieved from Portman's bedroom, specifically prepubescent children "in some sort of sexual act or gratuitous showing of the genitalia." Kearns stated that the images had been downloaded using the TOR app, and "the download link had the word 'onion' in it." According to Kearns, to "download the app, you need an account basically utilizing the Google Play Store because it's a Samsung Android device," and the "e-mail account was redmoonphotography123@gmail. It was downloaded on September 13, 2020."

{¶ 17} Kearns identified a report he prepared regarding the cell phone. He stated that the report identified various e-mail accounts that had been utilized on the device, all the

websites and cloud storage accessed by the phone, and any programs, applications, or images that were downloaded. Kearns testified that there were several email addresses "involving Red Moon Photography or Red Moon Feet," as well as a darienportman112@gmail.com account; there was also a photo of Portman on the device.

{¶ 18} Kearns testified that he had documented 21 images of child sexual abuse material on Portman's phone, including the download links and dates and other identifying information about the images. Regarding the images, he stated that the "creation time is basically the download time, so the creation time is not the date that the image was actually created itself. It's the date that it is saved . . . on the device." According to Kearns, "if you were to take that picture and copy it to a thumb drive, the creation date on that thumb drive would be the date that you copied it over and saved it onto the thumb drive." He testified that the "download source URL" reflects the location from where the individual images were downloaded.

{¶ 19} Kearns reviewed Exhibits 7 through 28, each of which depicted distinct child sexual abuse material, and he stated that the majority of them came to the phone via the TOR application. He testified that those 21 images served as the basis for Portman's indictment; the other images on the phone were similar in nature. When asked what evidence showed that Portman himself was using the phone when the images were downloaded, Kearns stated that the "phone was wiped on September 2, 2020, to a factory reset and then, after that, the e-mail accounts that were on the device" were associated with Portman. The 21 images were all downloaded after the reset, according to Kearns.

{¶ 20} On cross-examination, Kearns described the process of obtaining the images, noting that "we hook the phone up to a forensic computer that contains software that pulls what's referred to as an imager extraction from the device. And then it processes that

image and pulls all the information off of that device that it can read." Kearns stated that a reset deletes everything on a phone, and he did not know who had initiated the reset. He testified that he believed the phone belonged to Portman based upon the e-mail addresses utilized on it and having been advised that it was his phone. Kearns stated that he was not aware of any security features on the phone, such as a PIN or fingerprint recognition.

{¶ 21} The following exchange occurred:

Q. So the ability for someone else to use that phone, it's possible.

A. It's possible.

Q. . . . So as far as knowing for sure who downloaded all of these images, you really don't know.

A. I can say they were downloaded on the device.

Q. Okay. They were downloaded on the device, but as far as who it was that actually went to these websites, who was it that opened up the onion router or the onion app, you don't know.

A. Correct. All I can say is that e-mail account was utilized to download the apps.

Q. It was the e-mail account? Or someone used an e-mail account to download the app.

A. Correct.

Q. But downloading the app does not automatically download a bunch of pictures.

A. Correct.

Q. . . . So downloading the app give[s] you the ability or gives the user of that phone the ability to go to the onion and there possibly find images or download images from the onion.

A. Correct.

Q. . . . So an e-mail associated with Darien was used to download the app; but beyond that, we can't know who was using the phone at the time that these images were downloaded.

A. Yeah, I can't say for sure.

{¶ 22} Kearns testified that "URL stands for uniform resource locator . . .. If you type in www.Google.com, that is the URL. So the .onion is . . . similar to the .com, such that anything that ends in .onion comes from the onion router website." Kearns stated that "the location of the link is where the download source URL was located. So that's where that information was pulled from."

{¶ 23} When asked how he linked the source URL, the location of the link, and any specific image, Kearns responded that "when actions are performed, it's all stored into databases to track that information. Devices typically do that to make it more user friendly. In case you ever want to go back to different websites or things like that, it helps to load it faster," meaning the phone stores information to facilitate returning to certain websites. According to Kearns, the user is unable to modify information as far as when something is downloaded.

{¶ 24} Kearns testified that the dark web is "like a separate part of the Internet" used for "everything from stolen credit cards, human trafficking, firearms trafficking, and child abuse material," and that the TOR application is the easiest way to access it to view things

that would not be visible on a normal Google search. He denied that once the application is installed and opened on a phone, images are downloaded automatically.

{¶ 25} Regarding the individual images, Kearns testified that Exhibits 7, 8, and 12-22 were downloaded from the TOR application; Exhibits 8 and 12-22 were located in a "download folder" on the phone, and Exhibits 9-11 and 23-27 were located in a "myfiles\cache folder."

> Q. . . . Now, as far as them being downloaded, . . . do you have any indication that those images were ever actually opened and looked at?
>
> A. They were downloaded onto the device. . . . I believe they were viewed when they were downloaded or viewed before they were downloaded.
>
> Q. You believe that, but you don't know for sure as far as what somebody clicked on that they were able to view it before actually downloading it. You don't know that.
>
> A. Not without going to that specific site.
>
> Q. . . . And have you gone to any of these sites?
>
> A. I have not.
>
> Q. So you don't know what it looked like or what the user was seeing when they clicked on the download.
>
> A. Correct.
>
> Q. . . . So it may have just been the filename that they clicked on.
>
> A. It's possible.
>
> Q. . . . So if someone clicked on a filename and they never - - it's possible they could have clicked on that filename, it could have been downloaded to

the device, the person that clicked on it and downloaded it would have never actually seen it.

A. There were a few of the images that were in the cache folder. Those that were in myfiles\cache folder are ones that had to have been viewed. That's why it was in the cache folder.

{¶ 26} When asked if it was possible the images that were not located in the cache folder could have been clicked on without the user seeing them, Kearns replied that the "access date would track that the file was accessed." In discussing Exhibit 8 as an example, Kearns stated that it was simultaneously created and last accessed on the device at the same time. His testimony continued:

Q. So does that indicate that there was any human interaction with this file at all?

A. It was basically downloaded and looked at at the same time.

Q. I mean do you really even know that it was looked at?

A. The file was according to the access date and time.

Q. But that was the exact same time that it was downloaded.

A. Correct. So if it pops up right when you download it, that would be accessed.

Q. But do you know that it popped up when it downloaded?

A. The date and time would be indicative of that.

Q. That it popped up?

A. Possibly.

Q. Possibly. But it could have possibly gone into some file on the phone and never actually got looked at.

A. I guess that's possible.

Q. So unless there was some sort of thumbnail or preview or something to where someone could see it before they downloaded it, if it was just a filename that said download and they clicked on it, they would have never seen it, they would have opened it, they would never have viewed it. And that's possible.

A. It's possible.

{¶ 27} Kearns testified that, based on his experience and training, "the cache app is a temporary file location folder, so it's one of those locations where it helps you bring the websites and things like that, pictures back faster to enhance your viewing experience." He stated that the user does not place websites or images in the cache folder but that the device automatically does so.

{¶ 28} When Kearns was asked about the age of the victim in Exhibit 27, the following exchange occurred:

Q. . . . How do you know that that's a juvenile in that picture?

A. Just based on all my training and experience. I don't know off the top of my head either. It could have been flagged as an identified victim.

Q, . . .So you're not sure if that actually is a child?

A. It appears to be a minor to me.

Q. What about it?

A. Just based on the size of the male and the size of the female.

Q. Because it's a small female? But as far as knowing that she's under 18 or 15 or 13 or 8 or 10, is there anything about that picture other than just being relatively small?

A. Like I said, it might have been flagged as a known victim. I don't know.

Q. Might have been. All right.

{¶ 29} On redirect examination, Kearns testified that, in his experience, people don't "just get child porn downloaded on their devices without knowledge of it." "[Y]ou have to be actually looking for it. Typically when you do, like a Google search and you search for either child pornography or what not, . . . it will not pop up. . . . Google and other companies are required to look for it and report it to the National Center for Missing and Exploited Children." He stated that the majority of the images seem to have been downloaded from the dark web.

{¶ 30} After Kearns testified, the State recalled Crews over objection. She acknowledged having heard Kearns's testimony. Crews testified that she had provided an e-mail address to Kearns: "redmoon123@gmail.com." She stated that she had become aware of the address through her investigation of "a Cash App subpoena" that "showed that Darien and Cash App were having conversation using that email address."

{¶ 31} Having reviewed the entire record and weighed the evidence and all reasonable inferences, we cannot conclude that Portman's convictions were against the manifest weight of the evidence and or unsupported by sufficient evidence. The jury reasonably concluded that Portman had created obscene material with minors as participants by downloading 21 images to his cell phone, with knowledge of the character of the images involved.

{¶ 32} Notably, Portman does not assert that the phone found in his bedroom did not belong to him or that the images on it were not obscene. Kearns made clear that "creation time" was the date that the images were downloaded, and that a user must deliberately search for such material as it is not available on conventional search engines. Thirteen of the images on Portman's phone had been transferred to a "download folder" on the phone, and 13 were located in a cache folder. Fourteen of them specifically came from the TOR application, which Kearns testified was the most straightforward route to the dark web.

The images had been accessed by an email account associated with Portman, and Kearns testified that once the TOR application is installed, images cannot be downloaded without deliberate action by the user. Although defense counsel repeatedly sought to establish that the images could have been downloaded without being viewed, each download, or creation, completed the offense.

{¶ 33} Based upon Kearns's testimony, the jury could have reasonably concluded that Portman had deliberately accessed the dark web for downloading purposes. Such a conclusion was also supported by the fact that Portman's desktop reflected filenames indicative of child sexual abuse material, including "PTHC" and "Pedo." The vast number of images on Portman's devices belies any suggestion that the downloads were not intentional. Portman's email account was downloaded shortly after the phone received a factory reset.

{¶ 34} Regarding any suggestion that the victims in the images were not minors, R.C. 2907.322(B)(3) states: "In a prosecution under this section, the trier of fact may infer that a person in the material or performance involved is a minor . . . if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the person as a minor . . ." In other words, expert testimony was not required to establish the age of the victims. *See State v. Tooley*, 2007-Ohio-3698 (holding that the state sufficiently established that persons depicted were real minors by submitting actual images to jury.)

{¶ 35} We have viewed the images. The photos speak for themselves, and the victims depicted were clearly under the age of 18 by a significant margin. *See State v. Gann*, 2003-Ohio-4000, ¶ 41, quoting *State v. Young*, 37 Ohio St.3d 249, 258 (1988).

Accordingly, the jury reasonably concluded that they were minors beyond a reasonable doubt.

{¶ 36} Portman's convictions for pandering were supported by sufficient evidence and were not against the manifest weight of the evidence. His first assignment of error is overruled.

II. Limiting Instruction

{¶ 37} In his second assignment of error, Portman argues that the trial court erred in failing to provide a limiting instruction on "prejudicial evidence."

{¶ 38} He points to the following statements by the prosecutor in opening statement: "And you will hear bits and pieces as to why he came onto the radar of the sheriff's department. Some of it's not relevant, but you will hear that the defendant ran a photography business where he took pictures mainly of girls and young women, mostly scantily dressed and sometimes featuring their feet." Portman also argues that "pictures and information were provided about Portman's foot picture business." According to Portman, this evidence of prior acts and conduct was impermissible under Evid.R. 404(B) and "undoubtedly influenced the jury." He claims that any suggestion that he did not possess, view, or download the child material "was affected by this irrelevant evidence about his foot pictures and 'scantily' dressed minors."

{¶ 39} Portman acknowledges that he did not object during the State's opening statement. He notes that he did object during Crews's and Kearns's testimony, but that no limiting instruction was given until Kearns's testimony and the final instructions. According to Portman, by that point, the damage had been done. He argues that the alleged Evid.R. 404(B) "prior bad acts evidence undoubtedly influenced the jury," and any defense "was affected by this irrelevant evidence about foot pictures or 'scantily' dressed minors."

{¶ 40} "'A hallmark of the American criminal justice system is the principle that proof that the accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime.'" *State v. Hartman*, 2020-Ohio-4440, ¶ 20, quoting *State v. Curry*, 43 Ohio St.2d 66, 68 (1975). This principle "is premised on our understanding of human nature: the typical juror is prone to 'much more readily believe that a person is guilty of the crime charged if it is proved to his satisfaction that the defendant has committed a similar crime.'" *Id.*, quoting *State v. Hector*, 19 Ohio St.2d 167, 174-175 (1969).

{¶ 41} "The general principle that guides admission of evidence is that '[a]ll relevant evidence is admissible . . . .'" *State v. Morris*, 2012-Ohio-2407, ¶ 11, citing Evid.R. 402. To be relevant, evidence must have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401.

{¶ 42} Evid.R. 404(B), however, provides exceptions to the general principle that all relevant evidence is admissible. It states:

> (B) Other Crimes, Wrongs or Acts.
>
> (1) Prohibited Uses. Evidence of any other crime, wrong or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) Permitted Uses . . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. . . .

{¶ 43} To be admissible under Evid.R. 404(B)(2), the "key is that the evidence must prove something other than the defendant's disposition to commit certain acts." *Hartman*

at ¶ 22. In other words, "while evidence showing the defendant's character or propensity to commit crimes or acts is forbidden, evidence of other acts is admissible when the evidence is probative of a separate, nonpropensity-based issue." *Id.*

{¶ 44} "The Supreme Court of Ohio has put forth a three-step analysis for a trial court to use in determining the admissibility of other acts evidence." *State v. Walter*, 2013-Ohio-2700, ¶ 62 (2d Dist.), citing *State v. Williams*, 2012-Ohio-5695, ¶ 20. "The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *Id.,* citing Evid.R. 401. The second step requires the trial court to "consider whether evidence of the crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B)." *Id.* The third step requires the trial court "to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice." *Id.,* citing Evid.R. 403. "The defendant's other act 'must have such a temporal, modal and situational relationship with the acts constituting the crime charged that evidence of the other acts discloses purposeful action in the commission of the offense in question.'" *Id.* at ¶ 63, quoting *State v. Snowden*, 49 Ohio App.2d 7, 10 (1st Dist.1976), citing *State v. Burson*, 38 Ohio St.2d 157, 159 (1974).

{¶ 45} "The admissibility of other-acts evidence pursuant to Evid.R. 404(B) is a question of law. The [trial] court is precluded from admitting improper character evidence under Evid.R. 404(B), but it has discretion to allow other-acts evidence that is admissible for a permissible purpose." *State v. Graham*, 2020-Ohio-6700, citing *Hartman* at ¶ 22, citing *Williams* at ¶ 17. Appeals of such decisions are considered by an appellate court under an

abuse-of-discretion standard of review." *State v. Morris*, 2012-Ohio-2407, ¶ 14. "A trial court's improper admission of other-acts evidence 'may be deemed harmless error . . . when, after the tainted evidence is removed, the remaining evidence is overwhelming.'" *State v. Beall*, 2021-Ohio-5052, fn. 3, quoting *State v. Morris*, 2014-Ohio-5052, ¶ 32.

Opening Statement

{¶ 46} As to the prosecutor's statements regarding Red Moon Foot Modeling in opening statement, Portman's failure to request a limiting instruction waives all but plain error. *State v. Carter*, 2018-Ohio-3671, ¶ 53 (8th Dist.), citing *State v. Perez*, 2009-Ohio-6179, ¶ 136. "Where the defense fails to request a limiting instruction on other acts evidence, the trial court's failure to give such an instruction is not plain error where nothing suggests the jury used other acts evidence to convict the defendant because he was a bad person." *Id.* Further, Crews testified that the images on the website were not pornographic; in other words, they were not indicative of any prior bad acts. Portman points to nothing that suggests the jury relied on the prosecutor's remarks in opening statement to convict him.

Crews's Testimony

{¶ 47} During Crews's initial direct testimony, after the prosecutor indicated that the photos on Portman's website were not pornographic, and as she prepared to introduce images from the website, defense counsel objected. After a discussion at sidebar in which the prosecutor indicated that the pictures were screenshots of Portman's photography business of girls, some under 18, in bathing suits, the court ordered the State not to "show any additional pictures." When the prosecutor subsequently indicated that she intended to show photos of the search warrant and its execution, defense counsel again objected, and the court excused the jury to resolve the objection.

{¶ 48} After a lengthy discussion, the court indicated, "if the State plans on getting into other images, . . . if they go towards such things as absence of mistake or knowledge, then they would be admissible; however, I'm not going to allow the images to be shown, just the testimony to them; and I will give a limiting instruction to the jury." After further discussion, the court reiterated that if the State sought to introduce the evidence pursuant to Evid.R. 404(B) to prove "that this wasn't a mistake, that he had knowledge of what the type of character was that he was putting on his device, then yes. I don't want to cloud the jury with a thousand other images," but "someone can testify that . . . there were other images." The court further indicated that in the event of an objection by defense counsel, it would instruct the jurors that "they cannot consider that for any other purpose only to go towards the absence of mistake and the knowledge, not that he acted in conformity therewith," and that "not only will I instruct [the jury] during the testimony but also again instruct them during the jury charge."

{¶ 49} Crews then testified regarding the execution of the search warrant. Defense counsel objected to photos of "everything that was found in the house." After a discussion at sidebar, Crews introduced the property receipt listing Portman's phone as Item 22 and photos of the outside of Portman's home, the phone in the drawer where it was found, and Portman's room.

{¶ 50} None of the website photos were introduced, and the other exhibits were not Evid.R. 404(B) material. Accordingly, Portman's assertion that the trial court erred in not giving a limiting instruction (that was not requested) lacks merit.

Kearns's Testimony

{¶ 51} Kearns testified that there had been an HP desktop computer at Portman's house "that had filenames indicative of child exploitative material," and defense counsel

objected. The court advised the jury that the case was based upon the 21 images, but "the State is asking that additional information come in to show that there wasn't a mistake", and such evidence "doesn't come in to show that he acted in conformity" as to the 21 images. The court advised the jury, "I am giving you this limiting instruction that you cannot and shall not consider it for any other purpose other than to go to the absence of mistake or the knowledge of these 21 images that were on this device."

{¶ 52} In the course of the final jury charge, the court instructed the jury:

> Evidence was received about the commission of other acts other than with which the defendant is charged in trial. That evidence was received for a limited purpose. It was not received and you may not consider it to prove the character of the defendant in order to show that he acted in conformity or in accordance with that character. If you find evidence of other acts is true and the defendant committed them, you may consider this evidence only for the purpose of deciding whether it proves the absence of mistake or accident to commit the offenses charged at trial.

Portman did not object to these instructions.

{¶ 53} Jurors "are presumed to have followed the trial court's instructions." *State v. Robb*, 88 Ohio St.3d 59, 86 (2000), citing *State v. Fears*, 86 Ohio St.3d 329, 334 (1999). The court properly admonished the jury twice that Kearns's testimony regarding additional child sexual abuse material beyond the 21 images charged in the indictment was admissible only to prove Portman's knowledge or lack of mistake and not as proof of his character.

{¶ 54} No abuse of discretion is demonstrated with respect to limiting instructions. Portman's second assignment of error is overruled.

III. Recall of Detective Crews

{¶ 55} In his third assignment of error, Portman argues that the trial court abused its discretion in allowing the State to recall Detective Crews, over objection, in violation of Evid.R. 611. According to Portman, the recall of Crews "allowed the State to fill a gap, or hole, in its presentation and evidence, i.e., that Portman was not associated with the email provided."

{¶ 56} Portman objected to the recall of Crews, stating that the State "need[ed] to establish why they need to recall a witness that's already testified." The court responded, "It's still in her case in chief" and allowed the State to recall Crews.

{¶ 57} In her initial direct testimony, Crews testified that a "TLO" is a device used by law enforcement to discover emails associated with a particular person by entering their date of birth or Social Security number, and that she used the device to discover emails linked to Portman. Crews stated that there were several such email accounts, but she was unable to identify them in the absence of her notes, which she had not brought to court.

{¶ 58} When she was recalled to the stand after Kearns's testimony, Crews acknowledged that she had heard his testimony regarding the email addresses associated with Portman's phone, and that he received one of those addresses from her, namely redmoon123@gmail.com. She stated that she became aware of the address through a "Cash App" investigation and subpoena. She acknowledged that she had never sent an email to Portman or received one from him.

{¶ 59} "Evid.R. 611(A) provides that the trial court exercises control over the mode and order of interrogating witnesses and the presentation of evidence to ensure that the interrogation and presentation of evidence are effective in ascertaining the truth." *State v. Taylor*, 2003-Ohio-7115, ¶ 18 (3d Dist.). The rule states: "The court shall exercise

reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

{¶ 60} "Evid.R. 611(A) . . . provides a trial judge considerable latitude in controlling a trial." *State v. Richardson*, 2021-Ohio-3482, ¶ 5 (11th Dist.). A "heavy burden is borne by the person who claims error in the manner in which the procedure takes place." *State v. Kinley*, 1993 WL 224498 (2d Dist. June 24, 1993). "Whether to permit a witness to be recalled to the stand to give additional testimony is a matter committed to the sound discretion of the trial court." *State v. Taylor*, 2003-Ohio-7115, ¶ 18 (3d Dist.), citing *State v. Sims*, 3 Ohio App.3d 321, 329 (8th Dist.1981). "A trial court may exercise its discretion to permit the recall of a witness in order to correct testimony previously given through a mistake or oversight on the part of the witness." *State v. Brown*, 2021-Ohio-2540, ¶ 16 (9th Dist.), citing *State v. McBride*, 2008-Ohio-5888, ¶ 28-36 (5th Dist.).

{¶ 61} When Crews was recalled, her testimony merely clarified her prior statements regarding the emails associated with Portman. She initially testified that there were several such addresses, and then she explained the exact address she had provided to Kearns. That email address was already part of the record when Crews was recalled. The court complied with Evid.R. 611, and an abuse of discretion is not demonstrated. Portman's third assignment of error is overruled.

IV. Ineffective Assistance of Counsel

{¶ 62} In his fourth assignment of error, Portman argues that he received ineffective assistance of counsel at trial for four reasons. We will consider each in turn.

{¶ 63} To prevail on an ineffective assistance of counsel claim, a defendant must prove that his attorney was ineffective under the two-part analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must show that counsel's performance was deficient. *Id.* at 687. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Id.*

{¶ 64} As to the first part, much deference is given to trial counsel. "[A] court must indulge in a strong presumption that the challenged action might be considered sound trial strategy. Thus, judicial scrutiny of counsel's performance must be highly deferential." *State v. Bird*, 81 Ohio St.3d 582, 585 (1998). "A debatable decision involving trial tactics generally does not constitute a deprivation of effective counsel." *State v. Russell*, 2007-Ohio-137, ¶ 50 (2d Dist.). "Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time." *State v. Cook*, 65 Ohio St.3d 516, 524-525 (1992).

{¶ 65} If the first part is met, then "prejudice" may be considered. To demonstrate prejudice, "the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph one of the syllabus. Speculation does not prove either part of the *Strickland* analysis. *State v. Morgan*, 2017-Ohio-7565, ¶ 53 ("speculation cannot prove prejudice"); *State v. Powell*, 2012-Ohio-2577, ¶ 86 (speculative argument cannot be a basis for finding deficient performance under an ineffective assistance of counsel claim). A "court need not [first] determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies."

Strickland at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Id.*

1. Failure to Retain an Expert

{¶ 66} First, Portman argues that, because his case "centered on whether the images at issue were created, reproduced and published," defense counsel was ineffective for failing to obtain an expert witness to testify regarding "cache" files, the "possibility and likelihood that files can be stored on a device without a user intentionally downloading them," the manner in which "images are automatically stored by the web browser in the computer's temporary cache files," and the lack of evidence that Portman viewed the pornographic images on his computer.

{¶ 67} The Fifth District has stated:

> "Debatable trial tactics do not establish ineffective assistance of counsel." *State v. Hoffner* (2004), 102 Ohio St.3d 358, 365, 2004-Ohio-3430, ¶ 45. Trial counsel's failure to request an expert is a "debatable trial tactic," and does not amount to ineffective assistance of counsel. See *State v. Thompson* (1987), 33 Ohio St.3d 1, 9 (trial counsel's failure to obtain a forensic pathologist to "rebut" issue of rape was not ineffective assistance of counsel); *State v. Foust*, 105 Ohio St.3d 137, 153-154, 2004-Ohio-7006, ¶ 97-99 (trial counsel's failure to request funds for a DNA expert, an alcohol and substance-abuse expert, a fingerprint expert, and an arson expert did not amount to ineffective assistance of counsel because appellant's need for experts was "highly speculative" and counsel's choice "to rely on cross-examination" of prosecution's expert was a "legitimate tactical decision"); *State v. Yarger* (May 1, 1998), 6th Dist. No. H-97-014 (trial counsel's failure to hire an expert medical doctor to rebut state's

expert witness was not ineffective assistance of trial counsel); *State v. Rutter*, 4th Dist. No. 02CA17, 2003-Ohio-373, ¶ 19, 28 (trial counsel's failure to hire an accident reconstructionist did not amount to ineffective assistance of counsel).

State v. Snyder, 2009-Ohio-2473, ¶ 32 (5th Dist.).

{¶ 68} Portman has not demonstrated Ineffective assistance of counsel. Kearns had significant experience with these types of files and how they are acquired. He explained that cache files are temporary files saved by applications and websites to a device, causing them to load faster such that they do not require re-downloading. He testified that, in his experience, one must search for child sexual abuse material to find it, that files cannot be stored on a device without deliberate action by the user, and that an image is created when it is downloaded. Defense counsel's decision not to call an expert witness to rebut these assertions was tactical, and Portman has not demonstrated prejudice.

2. Jury Instructions

{¶ 69} Second, Portman argues that defense counsel was ineffective for failing to request a jury instruction defining the terms "create," "reproduce," and "publish," and that without such instructions, the "jury likely convicted on a legally incorrect understanding of these *seemingly* common words". Portman claims that these "verbs have a different meaning in the context of electronic storage and child pornography accusations," and it was "critical to request instructions on these definitions."

{¶ 70} "'An attorney's decision not to request a particular jury instruction is a matter of trial strategy and does not establish ineffective assistance of counsel.'" *State v. Harrison*, 2015-Ohio-1419, ¶ 89 (3d Dist.), quoting *State v. Morris*, 2005-Ohio-1136, ¶ 100 (9th Dist.), citing *State v. Fisk,* 2003-Ohio-3149, ¶ 9 (9th Dist.), citing *State v. Hill*, 73 Ohio St.3d 433,

443 (1995). Further, Portman's convictions were premised on his creation of the images on his phone, and Kearns adequately explained how the images were created by means of downloading. Finally, Portman merely speculates that the jury "likely" convicted him based upon an alleged misunderstanding of the words in the statute. Defense counsel's decision not to request a jury instruction was a matter of trial strategy, and neither prejudice nor ineffective assistance of counsel is demonstrated.

3. Comments to the Jury

{¶ 71} Third, Portman argues that defense counsel made prejudicial comments to the jury that could not be deemed trial strategy. He directs our attention to the following statement during voir dire: "You're going to be disgusted with Darien. Darien is involved in some things that are a little bit unsavory, things that people will probably think are morally and ethically wrong." He also cites the following comment in opening statement: "the . . . State is gonna say and it wasn't just like - - these were the 21 wor[st] ones, there was hundreds, there were thousands, the dude has a massive porn stash, he's a creep. The dude takes pictures of underage girls and they're scantily dressed."

{¶ 72} First, we note that "'[o]pening statements are not evidence; they serve merely as previews of a party's claims and are designed to help the jury follow the evidence as it is presented later in the trial.'" *State v. Sewell*, 2018-Ohio-2027, ¶ 41 (2d Dist.), quoting *Parrish v. Jones*, 2013-Ohio-5224, ¶ 29. The trial court so instructed the jury. Further, "[a]n often-used trial strategy is to preempt the prosecution by introducing harmful character evidence first, thereby lessening its impact." *State v. Taylor*, 2011-Ohio-5080, ¶ 33 (3d Dist.), citing *State v. Baskerville*, 2008-Ohio-3114, ¶ 17 (5th Dist.). Accordingly, we cannot conclude that defense counsel's remarks in voir dire and opening statement were anything other than trial strategy. There was overwhelming evidence of Portman's guilt,

and defense counsel's concessions allowed him to maintain credibility at trial and focus the jury's attention on suggested inaccuracies in Kearns's testimony regarding the technology on Portman's cell phone. Portman has failed to establish that, in the absence of the comments, the outcome of the trial would have been different. Ineffective assistance of counsel is not demonstrated.

4. Failure to Object

{¶ 73} Finally, Portman directs our attention to Crews's testimony regarding an email address associated with him through a Cash App application. According to Portman, the "evidence she testified to was not properly authenticated during trial and amounted to hearsay." He claims the evidence should have been excluded, and defense counsel was ineffective in failing to object.

{¶ 74} Portman further points to Kearns's testimony that the Samsung cell phone contained "474 images of child sexual abuse material." He claims that "these additional, uncharged 453 images had no relevance to the indicted counts," and that defense counsel was ineffective for failing to object to the testimony regarding the additional images.

{¶ 75} "[T]he decision to object or not object is within the strategic consideration of trial counsel." *State v. Villani*, 2019-Ohio-1831, ¶ 19 (12th Dist.). Put differently, the "[f]ailure to make objections does not automatically constitute ineffective assistance of counsel . . . ." *State v. Homer*, 2006-Ohio-1432, ¶ 15 (12th Dist.). "This is because '[o]bjections tend to disrupt the flow of a trial and are considered technical and bothersome by a jury.'" *State v. Kaufhold*, 2020-Ohio-3835, ¶ 58 (12th Dist.), quoting *State v. Steele*, 2005-Ohio-943, ¶ 100 (12th Dist.). *See State v. Wilson*, 2019-Ohio-338, ¶ 28 (12th Dist.) (noting that excessive objections, or objections to otherwise trivial matters, can negatively impact the jury's opinion of the defendant).

{¶ 76} The following exchange occurred on cross-examination after Crews was recalled:

Q. So you said you issued a subpoena to someone at Cash App?

A. Yes, Cash App.

Q. . . . And I should have objected; but actually, I think it did help my case that . . . someone else outside this court said, yep, Darien Portman or someone with the name of Darien Portman opened up an account with Cash App using this email that has the words "Darien Portman" in it?

A. Yes.

{¶ 77} Crews stated that she was aware of money being received into the Cash App account "by the transaction they sent me." When asked if she knew who was using the Cash App account, Crews stated that "it comes back to the address as Darien Portman and it comes back to that email address." She acknowledged that the e-mail address was the same as the account associated with the cell phone, but that she did not know who used the phone.

{¶ 78} In this instance, defense counsel acknowledged that his failure to object benefitted his case. Moreover, even if we assume that Crews's statement regarding the Cash App investigation was hearsay warranting an objection, we cannot conclude that any such objection, if sustained, would have altered the outcome of the trial, given the overwhelming evidence of Portman's guilt. Ineffective assistance of counsel is not demonstrated.

Kearns

{¶ 79} As discussed above, the court instructed the jury that the indictment was based on the 21 images that were shown to the jury. It allowed testimony about other images only for the permissible limited purpose to show knowledge and lack of mistake, and it so instructed the jury. Ineffective assistance is accordingly not demonstrated in counsel's strategic decision not to object to Kearns's testimony regarding other images.

{¶ 80} Portman's fourth assignment of error is overruled.

V. Cumulative Error

{¶ 81} In his fifth assignment of error, Portman argues that based upon the foregoing alleged errors, the doctrine of cumulative error applies. Under the cumulative error doctrine, "a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial-court error does not individually constitute cause for reversal." *State v. Powell*, 2012-Ohio-2577, ¶ 223, citing *State v. DeMarco*, 31 Ohio St.3d 191 (1987), paragraph two of the syllabus. Further, "[a] claim of cumulative error based on the ineffective assistance of counsel would require a determination that while no single act by trial counsel met the standard set forth in *Strickland*, [466 U.S. 668], the cumulative effect of counsel's conduct satisfied the *Strickland* standard." *State v. Howard*, 2020-Ohio-3819, ¶ 85 (2d Dist.), citing *State v. Jordan*, 2017-Ohio-7342, ¶ 55 (2d Dist.). However, "[e]ach assertion of ineffective assistance of counsel going to cumulative error depends on the merits of each individual claim; cumulative error cannot be established simply by joining those meritless claims together." *State v. Graham*, 2020-Ohio-6700, ¶ 170. In other words, "'the accumulation of non-errors cannot collectively amount to a violation of due process.'" *Id.* at ¶ 171, quoting *Campbell v. United States*, 364 F.3d 727 (6th Cir. 2004).

{¶ 82} Having concluded that Portland has not established any errors, his claim of cumulative error fails. His fifth assignment of error is overruled.

VI. Cruel and Unusual Punishment

{¶ 83} Finally, in his sixth assignment of error, Portman argues that his sentence amounted to cruel and unusual punishment. He claims that, even assuming that he was guilty of the offenses for which he was convicted, his criminal history was "minimal" and "he did not share or actually create the images." Thus, he claims his sentence of 24 years was cruel and unusual, since he will be 59 years old at his expected release date.

{¶ 84} First, as discussed above, Portman's actual creation of the images served as the basis of his convictions, which he accomplished by downloading them. Further, the Eighth Amendment's prohibition on "cruel and unusual punishments" requires that the punishment for a crime be proportionate to the offense. *Weems v. United States*, 217 U.S. 349, 367 (1910). "'[C]ases in which cruel and unusual punishments have been found are limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person.'" *State v. Weitbrecht,* 86 Ohio St.3d 368, 371 (1999), quoting *McDougle v. Maxwell,* 1 Ohio St.2d 68, 69 (1964). "'As a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment.'" *State v. Hairston,* 2008-Ohio-2338, ¶ 21, quoting *McDougle* at 69. In *Hairston,* the Supreme Court concluded that the imposition of an aggregate 134-year prison term on a defendant did not constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution or Article I, Section 9 of the Ohio Constitution. The Court held, "Where none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term

resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment." *Id*. at syllabus.

{¶ 85} The individual sentences imposed on Portman were within the statutory range, R.C. 2929.14(A)(2)(a), and they were not grossly disproportionate to the respective offenses. Accordingly, the aggregate prison term resulting from the consecutive imposition of those sentences was not unconstitutional. Portman's sixth assignment of error is overruled.

Conclusion

{¶ 86} Portman's pandering convictions were not against the manifest weight of the evidence and were supported by sufficient evidence. The court did not err in failing to provide limiting instructions regarding knowledge and lack of mistake or abuse its discretion in allowing the recall of a State's witness in the State's case-in-chief. Portman has not established Ineffective assistance of counsel. In the absence of any error, Portman's claim of cumulative error fails. Finally, cruel and unusual punishment is not demonstrated.

{¶ 87} Judgment affirmed.

. . . . . .

TUCKER, J., and HANSEMAN, J., concur.