[Cite as *State v. Huebner*, 2023-Ohio-2803.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio	Court of Appeals No. L-22-1109
Appellee	Trial Court No. CR0202002392
v.	
Jeremy Huebner	**DECISION AND JUDGMENT**
Appellant	Decided: August 11, 2023

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Samuel Z. Kaplan and Peter G. Rost, for appellant.

* * * * *

ZMUDA, J.

{¶ 1} Appellant, Jeremy Huebner, appeals his conviction in the Lucas County Common Pleas Court, General Trial Division. The jury found appellant guilty of two counts of rape in violation of R.C. 2907.02(A)(1)(b) and (B), and the trial court sentenced him to two mandatory life sentences, run consecutively, with parole eligibility after 50 years. For the reasons that follow, we reverse and remand for a new trial.

I. Introduction

{¶ 2} In 2018, appellant's wife, A.H., accused appellant of raping the couple's two young daughters, S.H. and V.H., on or between January 1 and September 11, 2018. A.H. made the allegations during divorce proceedings with appellant. On October 20, 2020, the state indicted appellant on two counts of rape in violation of R.C. 2907.02(A)(1)(b) and (B). The divorce was finalized by consent decree in July 2021, with language contemplating possible modification of the decree based on dismissal of the criminal charges or acquittal.

{¶ 3} During the pendency of the criminal proceeding, the parties filed numerous pretrial motions. Relevant to this appeal, the parties filed notices of experts, with supplemental filings, and motions challenging expert testimony and addressing credibility and competency issues.

{¶ 4} On March 3, 2021, appellant filed a motion requesting a *Daubert*[1] hearing to challenge the state's witness, Dr. Randy Schlievert, as provided by Evid.R. 702, and a motion in limine to prohibit hearsay testimony by Dr. Schlievert under Evid.R. 803(4). The state opposed the motion seeking a *Daubert* hearing, arguing:

[1] This refers to the hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), recognized as the appropriate procedure in Ohio by *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 687 N.E.2d 735 (1998).

> This type of testimony has been held admissible by the Ohio Supreme Court and appellate courts, and is widely recognized as permitted by Rule 702.
>
> * * *
>
> In general, "courts should admit expert testimony whenever it is relevant and satisfies Evid.R. 702."[2]

The trial court denied the motion for *Daubert* hearing after reviewing the parties' briefs, on June 17, 2021, but deferred ruling on the motion to prohibit hearsay.

{¶ 5} On July 30, 2021, appellant filed his notice of expert witness, Dr. David W. Thompson of Clinical Psychology Associates, providing Dr. Thompson's report and curriculum vitae. Appellant filed an expert report addendum on October 5, 2021. The state did not seek a *Daubert* hearing to challenge the testimony of Dr. Thompson.

{¶ 6} On December 2, 2021, appellant filed a motion seeking a reliability hearing, challenging the admission of testimony or statements of S.H. and V.H., arguing the testimony or statements "must be excluded because improper questioning has irremediably compromised the reliability of that testimonial evidence." The state opposed the motion, noting appellant "hired an expert to testify to what he thinks are improper interview techniques" and would be free to cross examine the state's witnesses

[2] As authority, the state cited to *State v. Nemeth*, 82 Ohio St.3d 202, 207, 694 N.E.2d 1332 (1998).

regarding proper interview techniques. On January 5, 2022, the trial court denied the motion, without hearing.

{¶ 7} Appellant also filed a motion to determine V.H.'s competency to testify, as she was under the age of 10 at the time of trial. On December 21, 2021, after conducting a hearing, the trial court found V.H. competent to testify.

{¶ 8} On January 4, 2022, appellant filed a witness/exhibit list, identifying witnesses that included Dr. David Thompson, Dr. Mark Babula, Court Counselor Marcia Hull-Wilson, Dr. Charlotte Dabbs-Simms, and Dr. Randall Schlievert. Appellant also identified Dr. Thompson's curriculum vitae and expert report, and an interview video with Dr. Babula as exhibits.

{¶ 9} On January 6, 2022, the state filed a witness list, identifying witnesses that included Christina DeSilvis, Bonita Roberts, Dr. Susan Long, and Dr. Schlievert. On the eve of trial, appellant renewed his motion to prohibit hearsay testimony from Dr. Schlievert, which the trial court denied on March 23, 2022, without hearing. At trial, however, the state opted not to call Dr. Schlievert to testify, and the trial court granted the state's request to prevent appellant from calling Dr. Schlievert as a witness in his case-in-chief.[3]

{¶ 10} On January 11, 2022, the state filed a motion in limine to preclude questions of A.H. regarding a prior allegation of sexual abuse. In response, appellant

[3] The transcript contains references to the exclusion of Dr. Schlievert, with no indication in the record and no reference in any order showing when this occurred.

filed a motion seeking admission of evidence of A.H.'s prior allegations of sexual abuse, based on a deposition of A.H. in the divorce proceedings in which A.H. "detailed a story in which she was told by her own mother to fabricate sexual assault allegations against her father while a custody battle was pending." Appellant argued that A.H. admitted in deposition testimony "that she now does not believe that she was sexually abused as a child" and the allegations gave her own mother an advantage in the custody dispute with her father. The trial court granted the state's motion in limine on March 14, 2022, overruling appellant's motion for admission of the testimony, without hearing.

{¶ 11} The case was tried to a jury from March 29, 2022 to April 1, 2022.

{¶ 12} During trial, the trial court addressed numerous evidentiary matters. Pertinent to this appeal, the trial court denied a renewed request to question A.H. regarding her own false allegations of sexual assault when she was a child, which appellant argued was her mother's strategy during her parents' divorce proceedings. Additionally, on the afternoon before the final day of trial, the prosecutor filed a motion to preclude testimony from Dr. Thompson, which the trial court granted after considering oral argument from counsel.

{¶ 13} The jury found appellant guilty on both counts in the indictment. After a presentence investigation, the trial court imposed two mandatory life sentences and ordered the sentences to be served consecutively. This appeal followed.

II. Assignments of Error

Appellant argues four assignments of error:

1. The trial court's exclusion of defense expert witness was contrary to law.

2. The trial court erred by excluding Dr. Thompson after applying an incorrect standard for admissibility of expert witness testimony.

3. The trial court erred in not permitting defense counsel to examine A.H. concerning a prior false allegation of sexual assault.

4. The cumulative effect of errors deprived Appellant of his constitutional right to a fair trial.

III. The Trial

{¶ 14} Appellant focuses his appeal on two specific evidentiary rulings: the trial court's exclusion of his defense expert and the trial court's limitation of A.H.'s cross examination, barring questioning regarding her prior false accusations regarding sexual assault as a strategy in a custody dispute. We consider the state's prosecution case and appellant's defense case, noting the evidence and argument related to the issues raised on appeal.

A. Opening Statements

{¶ 15} The state opened its case by outlining the evidence it would present, and argued that, while the defense may suggest that [A.H.] invented the allegations and

forced her children to lie for "some sort of custody thing," that theory was "preposterous." Essentially, the state argued that the evidence would support a guilty verdict, and the defense will blame A.H. "because they can't say anything else."

{¶ 16} Appellant's trial counsel outlined his defense in the opening statement, with emphasis placed on his expert witness, Dr. David Thompson, without any objection by the state. Trial counsel stated:

> You'll hear the testimony of Dr. David Thompson, who is an expert in psychology and interviewing and forensics. He will tell you that there's certain procedures and methods by which children should be interviewed. Certain procedures. You shouldn't do things like leading questions, things like that. And he analyzed the interview that was done by the caseworker, and you'll hear she did not follow proper interviewing techniques. But even if she had, she came way after [A.H.] had all of this time to browbeat these kids into saying what they are saying. Dr. Thompson will testify that to a reasonable degree of scientific certainty that these different factors that occurred have, certainly, affected these children's memories.

Appellant's trial counsel also attempted to reference the custody case. The prosecutor objected to this subject as part of opening statement, and the trial court sustained the objection.

B. The Prosecution Case

{¶ 17} The state called six witnesses at trial; three family members: the children, S.H. and V.H., and appellant's ex-wife, A.H.; and three professionals: the investigative caseworker for Lucas County Children Services, Christina DeSilvis; a Toledo Hospital SANE nurse, Amanda McDole; and an outpatient counselor, Bonita (Bonnie) Roberts.

{¶ 18} The children testified in general terms regarding the offenses and provided nearly identical accounts of the alleged rapes. Neither child testified regarding conduct on a specific date or within a specific time-period, and neither child testified with any detail regarding where or how the conduct occurred, with testimony limited to insertion of objects inside their "private parts."

{¶ 19} S.H. was the first to testify. She was 12 years old at the time of trial and testified that appellant "inappropriately touched me" in "my private parts" and the touching occurred "a lot" and "normally, in my room." S.H. further testified that the touching occurred "[f]rom, like, [ages] two to nine." As to the specific conduct, S.H. testified as follows:

> Q: And when you said he would touch your private parts, did he ever put anything inside of you?
>
> A: Yes.
>
> Q: Okay, what did he put inside of you?
>
> A: Well, there was, like, these Hatchimal toys things.

Q: Tell me what a Hatchimal is.

A: They are, like, kids toys but we – they – get them at Target.

Q: And these were toys that you had?

A: Yeah. And, then, there was this mulch thing and it vibrated.

Q: Okay, what is mulch? Can you tell us what that is?

A: I don't think it was, like – I don't know. It looked like mulch but it vibrated.

* * *

Q: How did it make you feel when he would put these Hatchimals or this buzzing mulch thing on your V?

A: It just made me feel uncomfortable. I just, kind of, don't remember it anymore.

S.H. also testified that appellant told her "if I told anyone that I wouldn't see my mom again," and this made her feel scared.

{¶ 20} S.H. testified that she decided to tell her mom because she was feeling "pain on my private part." She testified that after telling her mom, her mom and stepdad[4] took her to the hospital and she told someone at the hospital. S.H. then testified about counseling she received, after reporting abuse, indicating, "First we talked to someone who was, like, recording us for the case, and then we talked to Susan, and she was just,

[4] At the time of trial, A.H. was not married to her current partner, although they lived together as a family and had a child together.

like, our counselor to help us." S.H. further indicated she and her sister never discussed bad touches with each other, prior to reporting the conduct to their mom.

{¶ 21} On cross examination, appellant's trial counsel elicited testimony from S.H. indicating she never noticed any physical injury, with no blood on her clothing or bedding at any time. She also did not remember seeing a counselor after her parents separated, when she was 8 years old, but was sure that her father inappropriately touched her "thousands of times" beginning at age one or two. S.H. admitted to lying about ingesting a bottle of her mother's Adderall because she thought her mother wanted S.H. to say she took the pills after A.H. discovered the empty bottle.

{¶ 22} The state then called V.H., who was 9 at the time of trial, and she testified as follows:

Q: * * * Did your dad ever do anything to you that made you feel uncomfortable?

A: Yes.

Q: Did he ever touch you in a way that you didn't like?

A: Yes.

Q: Do you know what your private parts are:

A: Yes.

Q: Did your dad ever touch any of your private parts?

A: Yes.

Q: Do you know which one, or which ones?

A: Umm –

Q: Well, let me ask you this –

A: Yes.

Q: I'll withdraw that question.

A: Huh?

Q: Let me ask you this question, if I may? Is it okay if I keep asking you some questions?

A: Yeah.

Q: Did your dad ever put anything inside of your private parts?

A: Yes.

Q: Did you want him to be doing that?

A: No.

Q: Okay, what did he put inside your private parts?

A: Hatchimals and this thing that looked like mulch.

Q: Tell me about Hatchimals. What is a Hatchimal?

A: It's a toy.

{¶ 23} V.H. then testified that the abuse occurred "at my old house," and she did not remember if it happened when her parents were still together and, as to the frequency,

V.H. indicated she did not know how many times the conduct occurred, responding to the prosecutor's questions as follows:

Q: * * * Do you know how many times that your dad would touch you this way?

A: No.

Q: Was it more than once?

A: Yes.

Q: Was it more than five?

A: I don't know.

V.H. testified that appellant told her "don't tell anyone" and that she did not know how that made her feel. She stated she told her mother about what her father was doing "[b]ecause he wasn't supposed to be doing that."

{¶ 24} On cross-examination, V.H., like S.H., reported no physical problems or blood on her clothing or bedding, and she did not remember telling a nurse that the abuse started happening from the time she was born. She, too, had no memory of seeing a counselor prior to the allegations, and could not remember details of her life – such as where she lived or going on a vacation, during her early years.

{¶ 25} The state called A.H. next. Prior to A.H.'s testimony, appellant's trial counsel renewed the request to question A.H. about an incident "that occurred when she

was a child" in order to cross-examine A.H. regarding her bias or scheme or plan, "as far as her motivation and having gone through it herself." Trial counsel argued:

> We would ask the Court to allow us to present that testimony through Cross Examination of the mother, [A.H.], about the fact that her mother had convinced her to say that her father had abused her, and, as a result of that, her mother got custody. Which prevented the father from having any contact with her, at least, during those early years. We believe it's relevant and important for our defense.

{¶ 26} The trial court denied the request, and determined no questions could be asked of A.H. regarding the prior, false allegations she made against her own father during her parent's custody dispute. Appellant's trial counsel made the following proffer:

> Okay. We would proffer, just for the record, that on Cross Examination the mother would testify that when she was a child her mother convinced her to make false allegations against her father in order for [A.H.'s] mother to get custody, and in that scenario the father had no parenting time. Which is the same thing that we allege is happening here in this case. Okay.[5]

[5] The prosecutor objected to the proffer, offering a "correction," saying "I don't think that [A.H.] would testify to what [trial counsel] thinks she would say, based on that statement. Certainly, she would have testified that there was an allegation when she was a child, but being convinced by her mom to say or to report something, I don't think that would have been the testimony." There is nothing in the record indicating either party sought to file the deposition transcript in the record of the criminal case.

{¶ 27} The trial court then addressed the couple's divorce decree. The state moved, in limine, to preclude defense counsel's introduction of the divorce decree and "language from that decree that his client gave up custody and access and any parenting right to the kids" with modification of these conditions possible should he be found not guilty. In support, the prosecutor argued that the decree was irrelevant and placed an "unnecessary burden on the jury" and custody of the children was unrelated to the issue before the jury: whether appellant "committed these crimes or not," characterizing the divorce decree as part of "a separate proceeding all together."

{¶ 28} In response, appellant's trial counsel argued the divorce was relevant, "because it demonstrates the mother's goal to get custody" and "it also shows that the father has an opportunity to see the kids once he's found not guilty." Appellant's trial counsel further argued it placed no additional burden on the jury beyond the burden of finding appellant either guilty or not guilty of two rape charges.

{¶ 29} The trial court granted the state's motion in limine. The trial court determined that the divorce decree was from another court, and "what the parties agreed to has nothing to do with this case, and I think it's irrelevant and would put an undue burden on the jury."[6]

{¶ 30} Following the trial court's ruling, A.H. testified regarding her relationship with appellant and the eventual separation and divorce. She testified that she started

[6] While "undue burden on the jury" is not referenced as a factor for admissibility under the Rules of Evidence, appellant does not pursue this as error on appeal.

dating appellant when she was 18, and she lived with appellant's mother, Jeanne, for a short time while she was still in college for her nursing degree. She indicated that Jeanne played an important part in her life and was a positive influence, but after the allegations, the relationship with her mother-in-law ended. She also testified that she and appellant separated a couple of times during their relationship, and they separated for the last time in October of 2017.

{¶ 31} The state then questioned A.H. about the divorce, despite the trial court's ruling to preclude all evidence of the divorce. The state elicited testimony from A.H. indicating she left appellant, moved out and got her own home, and in May 2018, she started a relationship with her current partner. A.H. also testified regarding the divorce decree. In response to the state's questions, A.H. testified that the divorce was final in July 2021, and that the "divorce was by agreement" and without a trial.

{¶ 32} A.H. also characterized her dealings with appellant, during the pendency of the divorce (prior to the allegations), as "working together" to manage shared parenting. She testified that she never tried to keep the girls from spending time with appellant, stating:

> I think every parent wants both parents to be involved with their kids. It was important for me for my girls to have their – have a healthy relationship with their father so … And we did, like a shared parenting agreement. When we separated in – when we separated in 2017 we just,

> whatever, didn't file the paperwork until, like, May of 2018, I think. So we were pretty slow to file the paperwork, so we just kind of – we didn't have, like, a custody arrangement or anything like that, we just shared the girls back and forth.

A.H.'s testimony indicated a mutual decision to file for divorce, with "paperwork" filed later "so that we could get something more formal and go to counseling for it and figure out a good arrangement."

{¶ 33} As to the allegations, A.H. provided testimony regarding the approximate date of the conduct. She testified that in the summer of 2018, S.H. began complaining of pain, and because she was a nurse, A.H. "just assumed maybe she had a UTI (urinary tract infection)." A.H. took S.H. to the doctor for a urine culture which came back negative for a UTI, and A.H. "just, kind of, let it go." After repeated complaints and tests indicating S.H. did not have a UTI, A.H. testified that, in September 2018, she asked S.H. whether she was being touched inappropriately. At first, S.H. blamed V.H., but after questioning, she blamed her father.

{¶ 34} A.H. then testified that, after speaking with S.H., she sought out V.H. and asked her, out of the hearing of S.H., whether her father ever touched her "down there." A.H. indicated that, at first, V.H. stated "she didn't know," but then V.H. told her, "Yes."[7] A.H. did not testify regarding any pain experienced by V.H.

[7] Appellant's trial counsel objected to the statements of S.H. and V.H., offered by their mother. The trial court overruled the objection.

{¶ 35} In response to the girls' disclosures, A.H. testified that she called her mother because she did not know what to do. After speaking with her mother, she called child protective services (CPS) to make a report. She indicated that CPS directed her to seek medical evaluations, so she took the girls to the hospital that same night, around 9:00 p.m. After the examinations at the hospital, A.H. took her daughters to counseling. Both girls saw Susan Long at the Child Advocacy Center for 3-4 months, and later, just S.H. saw Bonnie Roberts at the Cullen Center for about 6 months. A.H. testified that V.H. did not need further therapy, but S.H. was diagnosed with dissociative PTSD. Finally, A.H. testified that she did not tell her children to make up stories of abuse.

{¶ 36} At the close of the state's direct examination of A.H., appellant's trial counsel once more asked to question A.H. regarding her prior allegations against her own father as indicative of A.H.'s custody strategy, arguing A.H.'s testimony that she did not urge the children to make up stories "is right in line of her being told by her mom to make up a story against her father." The trial court noted that A.H. stated she did not "put them up to it," and denied the request.

{¶ 37} On cross examination, appellant's trial counsel questioned A.H. about her knowledge of the process of medical evaluation, considering her experience as a nurse, and questioned why she never observed any potential issues or problems with the children prior to the period in which the couple was engaged in a custody situation. As to

the custody situation, appellant's trial counsel questioned A.H. about specific statements made, during this period. A.H. denied she told the children that appellant was "too selfish to care about them, they were better off spending as little time as possible with him." A.H. also denied telling appellant's mother, Jeanne, that appellant was a terrible person and that A.H. would do all she could to ruin his life. A.H. admitted to blocking appellant on her phone and admitted that appellant filed for divorce on his own, contrary to her prior testimony indicating "we filed" for divorce.

{¶ 38} A.H. then testified regarding the other counseling sessions the children attended, prior to the allegations, that involved the court counselor from divorce court. A.H. admitted she told the court counselor that appellant was "a totally uninvolved parent" and "would send the girls home without baths." She also admitted she accused appellant, during the divorce and custody proceedings, of physically harming S.H. by grabbing her by the arm and slamming her into a wall, but when she took S.H. for the medical evaluation and was asked about domestic violence, she reported none. Finally, when asked about preventing S.H. from going alone for her initial meeting with Bonnie Roberts at the Cullen Center, based on concerns that S.H. "would not be able to report accurately," A.H. engaged in the following exchange with appellant's counsel:

> A: You're taking that out of context. I'm more than happy to explain.

Q: It's right here in the report, word for word.[8]

A: Would you like me to explain?

Q: No, ma'am. That's what you said, isn't that true?

A: You're taking that out of context. [S.H.] was seen by Bonnie multiple occasions by herself.

Q: The first time you went there you refused to let [S.H.] talk to her alone because you were concerned that [S.H.] wouldn't remember everything?

A: No, the first time I went there I wanted to be with [S.H.] so that she would feel comfortable and forthcoming to talk to Bonnie on her first visit.

{¶ 39} Appellant's trial counsel then questioned A.H. about text messages she sent to appellant, indicating she would do everything she could to get full custody. A.H. admitted to her statements, but testified that appellant's trial counsel was "talking that out of context and leaving out words from that text message." The trial court sustained the prosecution's objections regarding further inquiry into the custody dispute, preventing questioning regarding A.H.'s possible motivation to pursue false allegations. However, A.H. admitted that S.H. had lied about taking A.H.'s ADHD medication.

[8] The referenced report was not admitted as an exhibit at trial.

{¶ 40} After the family testified, the state presented testimony from three of the professionals who interacted with the children. First, Christina DeSilvis testified regarding her investigation for Children Services while a caseworker for the agency. DeSilvis outlined her training, consisting of reviewing curriculum and demonstration videos, engaging in skill-building activities and guided discussions, and then participating in a peer review process with law enforcement, critiquing and reviewing forensic interviews. Once she began doing her own forensic interviews, her peers and law enforcement routinely evaluated her performance.

{¶ 41} DeSilvis testified that she conducted interviews with each child, at a neutral location, and videotaped the sessions. DeSilvis also testified that she used option-posing questions, "where we give A or B, or we typically, say or something else, to give them, you know, that other option." DeSilvis testified regarding details each girl disclosed, similar to details included in their own trial testimony, with the addition of V.H.'s claim that appellant was abusing her from "the time she came out of her mom's tummy."

{¶ 42} On cross-examination, DeSilvis acknowledged she only videotaped the girls' faces and did not record DeSilvis' own reactions to their responses to her questions. Appellant's trial counsel challenged the interview technique, and DeSilvis disagreed that her option-posing questions were leading or forced-choice questions (this or that), which she acknowledged as improper. Instead, DeSilvis testified that option-posing questions, like ones she used, were encouraged. She testified that children can lie, especially if

influenced to make false statements, and children do not report "the exact same thing in the exact same way." In addressing the substance of her interview, DeSilvis also acknowledged that the girls did not provide details, beyond claims regarding Hatchimals and vibrating "mulch," but she also did not ask for detail.

{¶ 43} Next, the state presented testimony of Amanda McDole, the sexual assault nurse examiner (SANE nurse) who evaluated the girls in the early morning hours of September 14, 2018. She explained that her examination was a medical examination, and not an investigation into criminal matters. She looks for injury and collects any evidence. She offered testimony regarding her examinations of S.H. and V.H.

{¶ 44} McDole testified that, based on the reported date of the assaults on September 11, she collected swabs for DNA testing, determining the examination was "right on the cusp" of the 72-hour window in which DNA might be found. She also interviewed the children, separately, without A.H. present in the room. McDole read S.H.'s statements from her report, over the objection of appellant,[9] reciting the following:

[9] The trial court admitted the records for the SANE examination for both girls as the state's exhibits 1 and 2, which included A.H.'s statements to the nurse regarding the conduct and the statements of S.H. and V.H., as recorded by the nurse. These statements provided additional details, not provided by the girls in their trial testimony. Appellant's trial counsel objected to admission, based on "a lot of hearsay in those records." There was no attempt, by the state, to have the girls declared unavailable for purposes of admitting testimonial statements, and A.H.'s statements were never specifically addressed. We recently addressed similar circumstances in *State v. Kamer*, 6th Dist. Wood No. WD-20-084, 2022-Ohio-2070. However, appellant does not raise this as an issue in his appeal.

Others present at the time of history, none. Patient – so PT is patient. Patient to SANE office with RN, registered nurse. Playing with stuffed animals and eating candy while RN and patient talk about school. NTP is nurse to patient. Do you know why mommy brought you here today. PTN is patient to nurse. And I used quotes, quote, yes, patient looks at ground. Quote, when [V.H.] gets scared she smiles and laughs, but sometimes I cry. I cried when I told mommy what happened, end quote. Nurse to patient, quote, would you like to tell me what happened? It is a safe place, and whatever you tell me you will not get in trouble for, end quote. Patient to nurse, quote, my dad touched me down there, end quote. Patient points to vaginal area. Quote, every time I get out of the bath he rubs me. He told me not to tell anyone or I would never see my mom again. He's been doing it for a long time. Sometimes he puts toys down there, and this brown thing that [V.H.] said looks like mulch, I don't know what it is. He does it more since mommy isn't there. I knew it was wrong because he only does it to me when no one else is around, end quote. Patient pauses. Nurse to patient, quote, I'm sorry that happened to you, nobody should touch your privates, that's not okay, end quote. Patient to nurse, quote, will I get to see my dad again? What if he's mad and he yells at me, end quote. Nurse to patient, quote, I'm not sure about that, honey,

but I do know that you are a very brave little girl and you did the right thing by telling mommy what happened. Mommy wants to make sure you are safe and no one is hurting you, end quote. Patient returned to room with mom.

After interviewing S.H., McDole conducted her physical exam and found no acute injuries. McDole indicated, based on her experience, a lack of injury was not uncommon for individuals reporting a sexual assault.

{¶ 45} McDole then repeated the process, around 6:00 a.m., with V.H. She again read from her notes regarding her interview with V.H.

> Others present at time of history, none. Patient brought to SANE room alone, provided with candy and stuffed animal. Patient playing with toys, talking with RN about school. Nurse to patient, quote, do you know why mommy brought you here, end quote. Patient to nurse, shakes head yes, period. Continues to look at floor. Covering eyes intermittently. Nurse to patient, would you like to tell me why? Patient to nurse, fidgeting with toys, quote, did [S.H.] tell you why, end quote. Nurse to patient, she did. Patient to nurse, was she scared to tell you, end quote. Nurse to patient, I think she was a little afraid, but, you know what, you can tell me anything you want. You're safe here and won't get in trouble for the things that you tell me. Patient to nurse, quote, my dad did, end quote. Patient

> continues to repeat, quote, my dad did, end quote. Patient provided with emotional support. Quote, my dad does, does this, end quote. Patient makes up and down motion over genitals. Quote, and he even reaches up there, end quote. Patient stands and points to butt. Nurse to patient, I'm so sorry that happened to you, [V.H.], that is not okay to touch someone's privates. Did it hurt? Patient to nurse, nods head, yes. Quote, my dad made me touch his, end quote. Patient points to genital area. Patient quiet, looking at floor. Nurse to patient, I'm so sorry. You are a brave little girl for telling mommy and I that this happened. Nobody should ever touch your privates like that. Does anything hurt right now? Patient to nurse, nods and points to genitals.

After the interview, McDole conducted a physical exam, and again found no acute injury.

{¶ 46} On cross examination, McDole indicated she asked no questions regarding whether each child had any discussions with their mother or anyone else, prior to speaking with her. She also noted that she inquired into any history of domestic violence, and A.H. checked the box reporting no domestic violence. When asked about the damage a small, plastic object such as a Hatchimal might cause, McDole testified that such an object could have injured the vagina, resulting in bleeding.

{¶ 47} The state's final witness, Bonita (Bonnie) Roberts testified regarding her counseling sessions with S.H. Roberts indicated she had 21 contacts with S.H. and her

family, with some sessions one-on-one with S.H. and some with A.H. included. She diagnosed S.H. as having post-traumatic stress disorder, without reference to any specific information that led to this diagnosis, and noted from S.H.'s patient history that she had "reportedly" exhibited signs typical for children "who have been sexually abused," without noting any signs she had independently observed. During S.H.'s initial assessment, Roberts' notes indicated, "Therapist had requested privacy for [S.H.] but [A.H.] was concerned that [S.H.] would not be able to report accurately."

{¶ 48} On cross examination, Roberts acknowledged that A.H. "sometimes clarified dates or added" to S.H.'s statements. Roberts indicated, however, that she conducted a therapeutic interview, and not a forensic interview, indicating a therapeutic interview begins with the premise that something happened, while a forensic interview seeks to determine what happened. Roberts further acknowledged that a number of things could cause PTSD, with sexual abuse and absence from a parent both potential causes. Because she conducted a therapeutic interview, she did not attempt to discover the source of the PTSD. Over the objection of appellant's trial counsel, Roberts opined that she did not believe [S.H.] had been "coached or told to say these things[.]"

{¶ 49} At the conclusion of testimony, the trial court admitted the girls' medical records for the SANE examination as state's exhibits 1 and 2, over appellant's objection, and the state rested.[10] Appellant moved for directed verdict on both counts and the state

[10] The record indicates the state proffered no other exhibits for admission.

opposed, arguing, "I believe the Court's aware of the testimony that was given over the last couple days and the State rests on that." The trial court denied the motion.

C. The Defense Case

{¶ 50} Appellant identified numerous witnesses he intended to call. In addition to his former girlfriend, Nisia and his mother, Jeanne, appellant identified Detective Michael Talton, the police detective assigned to the case, and three expert witnesses: Dr. Mark Babula, a clinical psychologist, and Marsha Hull-Wilson, the court counselor, who each interacted with the family and made recommendations in the Domestic Relations proceedings, and Dr. David Thompson, a forensic psychologist who reviewed the record and would testify regarding the interview technique used by DeSilvis.

{¶ 51} As his first witness, appellant called Detective Michael Talton. Detective Talton replaced the investigating detective, who had retired, and was assigned to present the case to the grand jury. Although he did not participate in the investigation and never interviewed appellant, Talton testified that the police did an investigation and he reviewed the reports. He also testified that appellant's residence was not searched and there was no testing for DNA or bodily fluids on the Hatchimal toys as part of the investigation. He indicated the investigation concluded in 2018.

{¶ 52} The state questioned Detective Talton on cross-examination, and elicited testimony regarding the grand jury process and Talton's knowledge of child sexual assault investigations, generally, and the limited value of DNA evidence, considering

appellant lived in the home where the offenses were alleged to have been committed, and the resulting likelihood of appellant's DNA on objects in the home. On redirect, Talton admitted that testing for semen or vaginal fluid on the Hatchimal toys would have been valuable to the investigation, but that testing had not been performed. The trial court sustained the state's objection to testimony regarding the time gap between conclusion of the investigation in 2018 and indictment in 2020.

{¶ 53} Appellant then called his former girlfriend, Nisia, who testified that she dated appellant from 2018 until 2021. Nisia spent time with appellant and his daughters, and she testified that she observed appellant to be an attentive, caring father, with no indication he was inappropriate or abused them. Nisia testified that she was with appellant during bath time on numerous occasions, and appellant did not need to bathe the girls as they were old enough to bathe themselves. She also observed the contentious relationship between appellant and A.H., and had witnessed arguments between the two from appellant's vantage point. On one such occasion, appellant and Nisia were at a Labor Day cook-out, and when appellant asked about a later pick-up, A.H. refused to let appellant pick up the girls an hour late or have his mother get them.

{¶ 54} On cross-examination, Nisia acknowledged she cared for appellant, even after they stopped dating, and did not want him to be in trouble. She also admitted that appellant helped V.H. get dressed if she asked for help, and she was not present for every bath or shower taken by the girls. As to her interactions with A.H., Nisia testified that

she thought A.H. acted jealous, but also testified that A.H. appreciated Nisia's skill in braiding the girls' hair.

{¶ 55} Appellant's mother, Jeanne, also testified. She stated that appellant was never inappropriate with the girls, and had she believed otherwise she would not testify on his behalf. During the marriage, Jeanne indicated the couple got along, but after separating, she testified that she witnessed arguments and A.H. threatened appellant. Jeanne attempted to describe appellant's role as father, during the marriage, and A.H.'s refusal of all contact after the accusations, but the state objected, arguing the testimony was irrelevant. The trial court sustained the objection. Jeanne testified that she enjoyed a close relationship with S.H. and V.H., and they shared personal things with her but never disclosed any abuse. After the allegations, Jeanne testified that she sought court-ordered visitation, but her petition for visitation was denied and she had no more contact with her granddaughters.

{¶ 56} On cross-examination, Jeanne acknowledged her prior, close relationship with A.H., and the prosecutor suggested A.H. was another of appellant's victims, asking, "Would it surprise you that [A.H.] misses her relationship with you, as was her testimony?" The state also asked Jeanne about her conversation with Dr. Babula, after the allegations, in which she described A.H. as a good mother. Jeanne testified that her view of A.H. was based on "early days," or "how I knew her in the earlier years of their marriage." Jeanne admitted to having animosity toward A.H., stating:

> I had ill will long before [the accusations] because of [A.H.'s] behavior after she left my – you know, because she left my son, basically, and left my grandchildren and then, you know, two months later, you know, her boyfriend moved in with her.

Jeanne acknowledged that appellant filed for divorce first, after A.H. left. Jeanne also admitted that she would do anything to protect appellant.

{¶ 57} After Nisia's and Jeanne's testimony, appellant intended to call non-family witnesses: Dr. Mark Babula, and Marsha Hull-Wilson, counselors that participated in the Domestic Relations proceedings. Appellant also had Dr. David Thompson scheduled to testify. Appellant's trial counsel also intended to display a video from one of Dr. Babula's sessions with appellant and the girls.

{¶ 58} The state orally moved to preclude appellant's next witnesses, and the trial court addressed the matter outside the presence of the jury. The state orally moved to preclude use of the video and Dr Babula's testimony, in its entirety, arguing Dr. Babula interviewed people to make a recommendation on custody and his report contained hearsay, rendering any opinion based on that hearsay inadmissible. The state orally moved to preclude Hull-Wilson's testimony, too, as containing hearsay. As to Hull-Wilson, the state also argued she was merely a "boiler plate, run-of-the-mill court counselor mandated in every divorce proceeding" and had nothing relevant to offer in the criminal case. Appellant's trial counsel countered this argument, stating:

> We have no intention of presenting the entire report or opinions or anything else. There's been testimony that these children are, allegedly, afraid of our client, and there's a three-minute video at the beginning of his interview with the children and my client which we believe is highly relevant to counteract that statement. Also, there's a statement in Dr. Babula's report, as we've been attacking [A.H.] for making up things and lying, and the report specifically says that she provided untruthful information. So those are the two parts of the report that I would have Dr. Babula testify about.[11]

{¶ 59} Appellant's trial counsel also indicated he intended to call the court counselor, Hull-Wilson, to demonstrate the girls were not afraid of their father, and to demonstrate A.H.'s motive to "brow-beat these kids into making these statements because she wanted custody." Trial counsel indicated Hull-Wilson would testify regarding the stories A.H. made up in order to get an advantage in the custody dispute, which yielded no results, and were then followed by the allegations of rape, which yielded the desired results. The state questioned the relevance, as Hull-Wilson's testimony would have addressed events that preceded the disclosures of sexual abuse, and also argued that questions regarding A.H.'s prior conduct in the divorce proceeding must be addressed by A.H., and not Hull-Wilson. Specifically, the prosecutor argued:

[11] Despite reference by both parties, neither the report nor the video was proffered and made part of the record on appeal.

> [Hull-Wilson] doesn't know that and you can't ask [Hull-Wilson] what [A.H.] said, you can ask [A.H.] that. You had the opportunity to confront her pursuant to the Sixth Amendment. You could have asked [A.H.] about that, and she gives you an answer. If [Hull-Wilson] is going to testify to something different than what [A.H.] told you, specifically, I think that's fair game. If you said, [A.H.], did you say XYZ and she says no and [Hull-Wilson] says, no, she said that, that's fair game. But just to have her repeat hearsay statements of a witness that you already had an opportunity to confront is improper.

{¶ 60} After considering the state's oral request and the parties' respective arguments, the trial court precluded calling Dr. Babula and Hull-Wilson as witnesses, agreeing with the state's position that permitting the testimony would result in a re-litigation of the domestic case within the criminal matter. The trial court ruled the witness testimony would be irrelevant, misleading, and prejudicial. Appellant's trial counsel proffered the substance of the testimony, verbally, without proffering the actual report or video.

{¶ 61} Appellant then took the stand. He testified he was never inappropriate with his girls and had not seen his children in a year and a half, with his last contact during a session with Dr. Babula, after the allegations. He testified that S.H. met him at the door and hugged him, followed by V.H., who also hugged him. Appellant also testified about

buying the girls Hatchimals for Christmas. The original toys, released in 2016, are about 12 inches high and the smaller version, released around 2017, are about 4-6 inches high.

{¶ 62} Appellant also testified that he filed for divorce after A.H. began withholding the children and preventing visitation. Once he filed, he indicated the divorce proceedings were "the worst divorce you can imagine" and "literal hell." He testified that A.H. accused him of drinking, but he was drug-tested for his job as an air traffic controller. The claim went nowhere and custody did not change.[12] Next, he stated, A.H. accused him of slamming S.H. against a wall, and still custody did not change. After allegations throughout the course of the divorce, custody never changed until A.H. alleged sexual abuse. Appellant indicated his divorce was final in July 2022. He reiterated that he never sexually abused or raped his daughters.

{¶ 63} The prosecutor cross-examined appellant about his admissions that he was a bad parent and made mistakes, as told to Dr. Babula during the custody case.[13] The state attempted to demonstrate appellant's guilt by using Dr. Babula's report, without objection, as follows:

[12] Based on this testimony, the trial court permitted the state to inquire into appellant's past OVI convictions and related treatment for alcoholism, over his trial counsel's objections. Appellant does not pursue this as error on appeal.

[13] Appellant's trial counsel did not renew efforts to call Dr. Babula as a witness, based on the state's questioning after the trial court barred all testimony about Dr. Babula's report or recommendations.

Q: So, if Dr. Babula wrote that you've expressed some thoughts that the girls may be better off without you, that's incorrect?

A: So the context of that is that in Dr. Babula's office I explained to him that in the process of trying to get the girls back after they had already been taken from me, that I questioned whether I was doing more harm than good by putting them through the system that I was putting them through and making them answer the questions they were having to answer, and so I questioned whether I was doing the right thing trying to get them.

The state then noted appellant's submission of DNA, questioning the voluntariness of the sample considering the state could have obtained a search warrant. Appellant also acknowledged, on cross examination, that he had used a vibrator on A.H. while they were together, but denied he had any such items in his own home after the separation from A.H.

{¶ 64} The state then questioned appellant in depth regarding his prior alcohol-related convictions and treatment for alcoholism, over the objection of appellant's trial counsel. Appellant also repeated his denial regarding the charges, and testified that A.H. caused the girls to lie about the abuse. He testified there was a fight for custody, and he believed that this custody fight was "one of the reasons" that A.H. fabricated the allegations.

D. Exclusion of Dr. Thompson's Testimony

{¶ 65} After appellant testified, appellant's trial counsel attempted to call Dr. Thompson as his next witness. The following exchange then occurred in a bench conference:

> [Trial counsel]: At this point, our last witness, our expert, is coming in tonight to testify.
>
> THE COURT: I know, I hate that. You want to file a motion in limine to exclude him?
>
> [Prosecutor]: Sure. I can file that today.
>
> [Trial counsel]: Shocker.
>
> [Prosecutor]: Well, there are grounds, but I think –
>
> THE COURT: Do we need to talk about that before we let the jury go or –
>
> [Prosecutor]: Let me talk to Counsel, Judge, and I'll let the Court know very quickly.
>
> THE COURT: Okay.
>
> THE COURT: So we are done for today?
>
> [Trial counsel]: Uh-huh.
>
> THE COURT: Oh, I hate telling them about that.

[Trial counsel]: Well, we have a bunch of other witnesses that we couldn't call that would have kept us going a long time. Nelson, Schlievert, so it was not us.

[Prosecutor]: I agree with that.

(Whereupon, the bench discussion was concluded.)

THE COURT: Ladies and gentlemen, it's 25 minutes after 11 and the next witness, unfortunately, is not available until tomorrow morning. That witness is coming from out of town. I apologize for any inconvenience. I know that the parties – and in a trial people anticipate calling several witnesses. Sometimes they decide as trial goes on that they don't need all of the witnesses that they anticipated. Other times the trial moves along more quickly than anticipated, so this is the case here. Unfortunately, we are going to recess for the rest of the day. * * *

Please be back here tomorrow morning between 9:15 and 9:30 and we will – it's my understanding that this is the final witness. * * *

[W]e will see you tomorrow morning.

{¶ 66} Later that same day, the trial court heard argument on the state's motion to exclude Dr. Thompson's testimony. Appellant's trial counsel indicated he just received the written motion and asked for time to review it and prepare a response, arguing the

filing on the eve of Dr. Thompson's testimony was unfairly prejudicial to appellant. The following exchange then occurred:

> THE COURT: Mr. [Prosecutor], obviously, this case has been pending for a long time and so I have to ask, why is it that you filed this motion now?
>
> [Prosecutor]: Judge, we have been aware of Dr. Thompson for a while, and the State filed this motion – in fact, to be correct on the record, it was hand delivered to Counsel and the Court this afternoon because it hasn't been filed yet, but will be filed as soon as this hearing is concluded. The State has the right to proceed with its case as it sees fit, and based on the evidence presented, the testimony, the Cross Examination, the State believes that, based on the witness testimony in court, including the testimony of both victims in this case, [V.H.] and [S.H.], as well as the CSB investigator, that this motion is now ripe and filed it accordingly. As the Court's aware, there was testimony involving her counseling this morning. At the conclusion of that testimony and Defense's Cross Examination the State now feels that this is appropriate.
>
> THE COURT: [to appellant's trial counsel], what do you have to say?
>
> [Trial counsel]: Judge, we still ask to be able to respond in writing.

{¶ 67} Appellant's trial counsel emphasized that an opportunity to respond was "Constitutionally necessary." The written motion sought exclusion based on Evid.R. 403, and cited exclusively to Wisconsin cases in which Dr. Thompson's trial testimony had been excluded in that jurisdiction as irrelevant, based on the facts of those cases. Appellant's trial counsel argued:

> My client has a Constitutional right to due process and effective assistance of counsel. And I will indicate to the Court, just receiving these cases and just receiving this motion without having the opportunity to review this information with Dr. Thompson makes me ineffective assistance of counsel. My client's Constitutional rights are being denied unless we have the opportunity to go through this and respond in writing.

{¶ 68} In denying the defense request for time to prepare a response, the trial court reasoned that appellant's trial counsel was aware of "some of the cases that were cited" and could proceed, limiting argument to a single case among the authority cited by the state in its motion. The trial court also implied that trial counsel's superior knowledge of his own expert's credentials and testimony was sufficient preparation to argue against the state's motion. The trial court, however, informed the parties that it had not reviewed Dr. Thompson's report, indicating the substance of that report was not necessary for its decision.

{¶ 69} Legal argument in the written motion focused on the relevancy of Dr. Thompson's prior testimony and the facts of the Wisconsin appellate court decisions cited, with the trial court indicating it would only consider the facts and law in *State v. Schmidt*, 370 Wis.2d 139, 884 N.W.2d 510 (WI App.2016). In *Schmidt*, the defendant, Daniel Schmidt, was charged with two counts of intentional homicide, alleging Schmidt, who was married, killed a woman with whom he had an affair and then killed the woman's brother to eliminate him as a witness. *Schmidt* at 145. The case was largely circumstantial, and the defense sought to admit Dr. Thompson's expert testimony "regarding potential suggestive interview techniques used during police interviews" with the woman's young son, D.R., whose testimony provided motive to implicate Schmidt in the murders. *Id.* On appeal, Schmidt only challenged the conviction for killing the brother. *Id.*

{¶ 70} In the Wisconsin case, Schmidt argued the trial court violated his due process right to present a defense by excluding Dr. Thompson's testimony. *Schmidt* at ¶ 54. Unlike the present case, in *Schmidt*, the trial court held a preliminary hearing, with D.R. and Dr. Thompson providing testimony. *Id.* at ¶ 54-55. At hearing, Dr. Thompson outlined the factors he believed a jury should consider in evaluating the accuracy of D.R.'s statements, with each factor related to "suggestive interviewing techniques." *Id.* at ¶ 56. In the Wisconsin case, however, there were no transcripts or recordings of any interview of D.R., and the prosecution argued, therefore, that "Thompson could not

reliably apply the general principles he discussed to the facts of the present case." *Id.* at ¶ 61. Furthermore, Dr. Thompson's research and expertise focused primarily on much younger children than D.R., "who was eleven-and-one-half years old at the time of the homicides." *Id.* at ¶ 13; 61.

{¶ 71} The Wisconsin trial court excluded the testimony, in a preliminary ruling, while acknowledging that Dr. Thompson's expertise might become relevant during trial "if the trial evidence revealed that any suggestive interview techniques had been applied" to the child. *Id.* at ¶ 69. The Wisconsin Court of Appeals affirmed. *Id.*

{¶ 72} In appellant's case, the state argued the facts in *Schmidt* were "on point" to appellant's case. In finding appellant's case identical to *Schmidt,* the state focused on Dr. Thompson's factors and argued because they were the same factors in his analysis in *Schmidt,* and because the Wisconsin court excluded the testimony, the trial court in appellant's case should follow suit. Additionally, the state added a new component to its argument, not addressed in the written motion, arguing Dr. Thompson's opinion was inadmissible because he could not offer that opinion *definitively.* The state referenced no Ohio law to support its reliance on *Schmidt,* or to support its argument regarding the requirement for definitive expert opinion.

{¶ 73} In contrast, appellant's trial counsel argued the facts in *Schmidt* were opposite to the present case. Significantly, he argued that Dr. Thompson was able to review the recorded interview for which he would offer expert testimony in appellant's

case, and he had elicited testimony regarding the Children Services investigator's interview techniques. Appellant's trial counsel also pointed out that "[a]n expert can never give anything definitive as to what happened or whether it affected it or not[,]" but could testify whether an interview met the proper standard.

{¶ 74} The trial court granted the state's motion without reviewing or even addressing the relevancy of the expert report, and without weighing that relevancy against the danger of confusion or misleading the jury. Instead, the trial court voiced its concern that Dr. Thompson might confuse the jury, not based on relevancy, but instead finding "he can't testify definitively." The trial court stated:

> Again, I'm concerned about what has been placed on the record with regard to each of these factors that Dr. Thompson looked at. And he repeatedly says, reasonably likely. And I understand your defense and that you're doing the best you can, however, given the facts before the Court, again, I'm afraid that it is going to confuse the jury and so I'm going to grant the State's motion.

{¶ 75} Trial resumed, and the defense rested, stating, "[W]e have no further witnesses, so at this time we will rest." The defense proffered Dr. Thompson's curriculum vitae and expert report for the record as defense exhibits A and B, not admitted by the trial court. The state called no rebuttal witnesses.

E. Closing Arguments

{¶ 76} The state proceeded with its closing argument, highlighting the testimony of S.H. and V.H. that appellant penetrated them with a toy and something that looked like "mulch."[14] The state also emphasized the quality of the forensic interview conducted by Christina DeSilvis of Children Services, characterizing the interview as 'forensically sound," stating, "We vet this stuff, folks." The state stressed the quality of DeSilvis' interview and commented on the lack of defense, stating:

> He's asking you to disregard all of the credible, reliable, corroborated evidence in this case and simply believe him and his mom and his ex-girlfriend. * * * The State called independent witnesses, medical professionals, CSB workers, counselors, with no bias, no reason to fabricate anything to you. He called his mom. Of course she's going to support her son. And he called himself. Who has a reason to lie?

{¶ 77} Appellant's trial counsel argued appellant's credibility in contrast to A.H.'s desire for custody and her motive for planting memories in the girls' minds. As an example, he noted A.H.'s statements to others and the steps A.H. took, prior to the rape allegations, to change the custody arrangement. Appellant's trial counsel also noted A.H.'s insistence, after the allegations, that S.H. not meet with Bonnie Cullen by herself.

[14] In his closing argument, the prosecutor told the jury that "mulch" is a vibrator, without pointing to any evidence establishing this as fact. Based on the record, neither party and none of the investigators attempted to clarify the girls' references to a "vibrating mulch thing."

Finally, appellant's trial counsel questioned the truth of the allegations, considering the lack of any physical injury to the children.

F. The Verdict

{¶ 78} The case was submitted to the jury. During deliberations, the jury sent two questions to the court, and the trial court responded, as follows:

Question 1:

When Christina [DeSilvis] was on the stand there was mention of their (Christina and [S.H./V.H.]) session being recorded. Can we see that video? If not, could you explain why?

Court's Answer:

You cannot see the video because it is not admissible into evidence. You must rely upon your collective recollections as to the testimony that was presented.

Question 2:

Can you provide Christina [DeSilvis] disposition?

- Unsubstantiated?

- Indicated?

- Substantiated?

Court's Answer:

CSB dispositions are not admissible in criminal proceedings. You have everything necessary for your decision.

Following deliberations, the jury found appellant guilty of two counts of rape in violation of R.C. 2907.02(A)(1)(b) and (B), each a felony of the first degree. On April 20, 2022, the trial court imposed a prison term of 25 years to life as to each count, and ordered the sentences to be served consecutively.

IV. Analysis

{¶ 79} In challenging the conviction, appellant argues error in three categories: (1) exclusion of Dr. Thompson's expert testimony as challenged in the first and second assignments of error; (2) limitations to inquiry into A.H.'s prior false allegations of sexual assault as challenged in the third assignment of error; and (3) the cumulative effect of these errors, depriving him of a fair trial, as asserted in the fourth assignment of error. We address each category of error in turn.

A. Exclusion of Dr. Thompson's expert testimony

{¶ 80} In his first and second assignments of error, appellant argues that the trial court ignored controlling authority when it excluded the defense expert, Dr. Thompson, and applied an incorrect standard for admissibility of expert testimony. In response, the state argues that the trial court was within its discretion to exclude the testimony, and the trial court applied the correct legal standard. The state further argues that, even if the trial court erred in excluding the testimony, exclusion resulted in only harmless error.

1. The trial court misapplied the law in excluding Dr. Thompson's testimony.

{¶ 81} Whether to admit evidence is a matter within the trial court's broad discretion, "and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice." *State v. Kamer,* 6th Dist. Wood No. WD-20-084, 2022-Ohio-2070, ¶ 98, quoting *State v. Conway,* 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 62 (additional citation omitted.). "Abuse of discretion means that the trial court's decision was unreasonable, arbitrary, or unconscionable." *Id.*, citing *State ex rel. Askew v. Goldhart,* 75 Ohio St.3d 608, 610, 665 N.E.2d 200 (1996).

{¶ 82} "A trial court abuses its discretion where its decision is clearly erroneous and based on either a disregard for the law or a misapplication of the law to undisputed facts." *State v. Lenhart,* 8th Dist. Cuyahoga No. 110226, 2022-Ohio-125, ¶ 13, citing *Ohio Civ.Rights Comm. v. Case W. Res. Univ.,* 76 Ohio St.3d 168, 177, 666 N.E.2d 1376 (1996), citing *Alexander v. Mt. Carmel Med. Ctr.*, 56 Ohio St.2d 155, 383 N.E.2d 564 (1978).

{¶ 83} In this case, the trial court purported to exclude the expert testimony of Dr. Thompson as inadmissible under Evid.R. 403(A), but actually found the testimony inadmissible, in its entirety, based on a lack of definitiveness. In addressing appellant's first and second assignments of error, we consider whether the trial court misapplied the

law under Evid.R. 403(A) and whether the trial court applied an incorrect standard for expert testimony.

2. The trial court did not address the probative value of Dr. Thompson's testimony.

{¶ 84} The state's motion in limine challenged the admissibility of Dr. Thompson's testimony based on relevance and Evid.R. 403(A). The state argued that the testimony was not relevant, and any relevance was outweighed by the danger of misleading the jury. In support, the state relied on cases in Wisconsin, where courts had excluded Dr. Thompson's testimony based on his own acknowledgement that he could not review a recording of the challenged interview, and the testimony in the Wisconsin case did not include evidence of proper interview techniques, an issue within Dr. Thompson's area of expertise.

{¶ 85} At the hearing on the motion in limine, the state argued application of the Wisconsin case, but also added a challenge to the reliability of the expert opinion, arguing Dr. Thompson could not state his opinion definitively. In response, appellant's trial counsel argued the Wisconsin case was easily distinguished. He also argued that expert testimony need not be definitive to be admissible. Without reviewing Dr. Thompson's report, prepared for appellant's case, and based solely on the parties' argument, the trial court determined that, because that opinion would not be definitively stated, the opinion would confuse the jury and must be excluded.

{¶ 86} The record does not reveal the nature of the trial court's consideration of Evid.R. 403(A), as the trial court made no reference to the Rule in excluding Dr. Thompson's testimony. Additionally, while the trial court did not address argument that distinguished the Wisconsin authority cited by the state, our review indicates Dr. Thompson's testimony was excluded as irrelevant in the Wisconsin cases for reasons that did not exist in appellant's case. Additionally, well-settled Ohio law deems testimony regarding interview techniques relevant and would have weighed in appellant's favor for admission on certain issues.

{¶ 87} After the trial court granted the state's motion in limine, appellant proffered the substance of Dr. Thompson's expert testimony as outlined in his report. According to the proffer, Dr. Thompson had reviewed DeSilvis's videotaped forensic interview, and in contrast to testimony regarding DeSilvis's interview technique, Dr. Thompson would have opined regarding the proper protocol for interviewing child victims.

{¶ 88} The Ohio Supreme Court has expressly deemed such testimony relevant. In *State v. Gersin*, 76 Ohio St.3d 491, 668 N.E.2d 486 (1996), the Supreme Court held that, where the prosecution witnesses relied upon interviews in giving testimony, "[h]ow that information was obtained and the accepted protocols on how to obtain such information certainly are relevant." *Gersin*, 76 Ohio St.3d at 494, 668 N.E.2d 486. Moreover, the Court found such testimony admissible, stating:

> An expert testifying as to interviewing protocols does not usurp the role of the jury, but rather gives information to a jury which helps it make an educated determination. An expert like Klein would testify as to what interview techniques are endorsed by certain professional organizations. Child sexual abuse cases are a special lot. A major distinguishing aspect of a child sexual abuse case is how the victim came to relate the facts which led to the bringing of criminal charges. A defendant not only should be able to cross-examine prosecution witnesses regarding how they obtained their information, but also should have the chance to present expert testimony as to how such information is ideally obtained. Prosecutors are free to cross-examine, or to question the idea that there is only one blanket method of interviewing that should be applied to every child.
>
> Meanwhile, the ultimate issue of the particular child's veracity is left to the jury. It was not the intent of [*State v. Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220(1989)] to stack the deck against defendants in sexual abuse cases, or to hide information from jurors. Even those who prey on the defenseless are entitled to a fair defense. *Boston* was about protecting the role of the jury. Relevant, expert information can only help a jury do its job.

Gersin, 76 Ohio St.3d at 494–95, 668 N.E.2d 486.

{¶ 89} Dr. Thompson's testimony regarding the proper interviewing technique, comparing proper technique to the protocol employed by DeSilvis, is the type of testimony referenced by *Gersin.* Simply put, the manner of questioning and proper protocol is a permissible line of inquiry. *See State v. Muttart,* 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, ¶ 49 ("[T]he court should be aware of the manner in which a physician or other medical provider elicited or pursued a disclosure of abuse by a child victim, as shown by evidence of the proper protocol for interviewing children alleging sexual abuse."). Based on *Gersin,* Dr. Thompson's proffered testimony was relevant on the issue of DeSilvis's interview technique.

3. The trial court improperly considered reliability under Evid.R. 403(A) and failed to address "confusion" as stated in the Rule.

{¶ 90} The trial court did not expressly address relevancy, and although the ruling was based on the reliability of Dr. Thompson's opinion, the trial court considered the motion under Evid.R. 403(A), and not Evid.R. 702. Evid.R. 403(A) mandates exclusion of relevant evidence when "its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." The Rule, moreover, requires evidence to be "viewed in a light most favorable to the proponent of the evidence, maximizing its probative value and minimizing any prejudicial effect to one opposing admission." *State v. Frazier,* 73 Ohio St.3d 323, 333, 652 N.E.2d 1000 (1995), quoting *State v. Maurer,* 15 Ohio St.3d 239, 265, 473 N.E.2d 768 (1984), citing *United States v. Brady,* 595 F.2d 359 (6th Cir.1979).

{¶ 91} In order to exclude Dr. Thompson's testimony under Evid.R. 403(A), the state needed to demonstrate that the expert testimony would be "confusing" or "misleading" evidence, far outweighing any probative value of that testimony. The state did not raise this argument in the trial court, however, but instead argued the testimony was inadmissible under Evid.R. 403(A) because it was not definitive. The concepts of "confusing" and "misleading," however, are not comparable to the reliability standard argued by the state.

{¶ 92} In *State v. Chinn,* 85 Ohio St.3d 548, 709 N.E.2d 1166 (1999), the Ohio Supreme Court considered whether identification testimony was misleading or confusing to the jury, where the witness did not see the killing but had identified the suspected killer by name from a composite sketch. The appellant argued the testimony "should have been excluded because Cox [the witness] did not witness the crimes and her testimony may have misled or confused the jury." *Id.* at 560. The Ohio Supreme Court disagreed, stating:

> The jury was well aware that Cox did not witness the killing. Her testimony was relevant to the fact that she had seen a man who identified himself as Tony Chinn and that she subsequently saw a composite sketch of the suspected killer and recognized the resemblance between the composite and Chinn. While this testimony was largely irrelevant to the question of appellant's guilt, the testimony was relevant to inform the jury of the events

> that led to appellant's apprehension and arrest. Cox's testimony also corroborated Washington's testimony that appellant (whose real name is Davel Von Tress Chinn) went by the name of Tony Chinn. The evidence was not confusing or misleading in any way.

Id. The court in *Chinn* did not address the reliability of the testimony. In the present case, the state focused on definitiveness, with no argument that the jury might erroneously believe that Dr. Thompson had interviewed the girls, as the proffered testimony very clearly focused on the interview technique of DeSilvis, as viewed by Dr. Thompson in the recorded interview.

{¶ 93} In *State v. King*, 12th Dist. Butler No. 07-18-2005, 2005-Ohio-3623, an internet licensing agreement that prohibited users from impersonating others was excluded under Evid.R. 403(A). In affirming, the Twelfth District Court of Appeals held:

> [The language in the agreement] would cause the jury undue confusion because it implies that a law enforcement officer may not use a Yahoo chat room to impersonate a 14-year-old girl when R.C. 2907.07(D)(2) clearly states that a law enforcement officer may. While there is some probative value in admitting the agreement to support appellant's argument that he believed Bailey was at least 18 years old, that probative value is minimal, considering the overwhelming evidence that appellant actually believed Bailey was 14 years old.

Id. at ¶ 26. In excluding the evidence, there was no discussion of the definitiveness of the evidence. Here, the state focused on a reliability argument, with no argument that Dr. Thompson's testimony would cause the jury to infer erroneous information.

{¶ 94} In *State v. Vermillion*, 5th Dist. Knox No. 03CA0000015, 2004-Ohio-3175, the trial court precluded admission of portions of three studies in an OVI trial concerning standardized field sobriety testing, published by the U.S. Highway Safety Administration. The defendant sought to admit the reports as exhibits "without an expert from the NHTSA to interpret or explain such studies." *Id.* at ¶ 16. In affirming, the Fifth District Court of Appeals held:

> Upon review, based on the voluminous nature of the studies and the lack of any accompanying interpretation or explanation, we cannot say that the trial court therefore acted arbitrarily, unreasonably, or unconscionably in refusing to admit the studies into evidence on the ground that any probative value was substantially outweighed by the danger that such might confuse the jury.

Id. at ¶ 25. The court excluded the studies in *Vermillion*, based on the lack of interpretation or explanation, and not based on the reliability of the information. In this case, the state's focus was on reliability, with no argument that Dr. Thompson's testimony would provide voluminous, unexplained information that a jury could not comprehend.

{¶ 95} The trial court also excluded Dr. Thompson's testimony based on fear the testimony was confusing for lack of definitiveness, a comment on the reliability of the expert opinion. Based on Ohio precedent, confusion under Evid.R. 403(A) applies more to the jury's misapprehension than to the reliability of the witness, and requires a finding that the danger of confusion *substantially outweighs* the probative value of the testimony, viewing the testimony most favorably for the appellant, as proponent. (Citations omitted) *Frazier* at 333. Accordingly, considering the record, the trial court did not address admissibility under Evid.R. 403(A), but instead considered only the state's argument of the reliability necessary for admissible expert opinion.

4. The expert standard does not require definitive opinion for admissibility.

{¶ 96} The Ohio Rules of Evidence expressly permit expert testimony, with reliability addressed under Evid.R. 702. The Rules "establish adequate preconditions for admissibility of expert testimony," favoring admission "whenever it is relevant and the criteria of Evid.R. 702 are met." *State v. Nemeth,* 82 Ohio St.3d 202, 207, 694 N.E.2d 1332 (1998), citing *State v. Williams,* 4 Ohio St.3d 53, 466 N.E.2d 444 (1983), syllabus; 57-58.

{¶ 97} Based on the state's argument at trial, the trial court addressed the reliability or definitiveness of Dr. Thompson's proposed testimony, a challenge more appropriately asserted under Evid.R. 702. The degree of certainty required, under

Evid.R. 702, has been addressed by the Ohio Supreme Court. In *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 128, the Court stated:

> We have "held that expert witnesses in criminal cases can testify in terms of possibility rather than in terms of a reasonable scientific certainty or probability." *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 77, citing *State v. D'Ambrosio*, 67 Ohio St.3d 185, 191, 616 N.E.2d 909 (1993). In the criminal context, questions about certainty go not to admissibility but to sufficiency of the evidence; they are matters of weight for the jury. *Id.* Thus, no error occurred when [the expert] testified in terms of possibilities.

{¶ 98} The state argued admissibility required certainty, or a definitively stated expert opinion, relying on the authority of *Schmidt* and other Wisconsin case law without any reference to Ohio precedent, addressing argument exclusively to the specific facts of the Wisconsin cases and application of only Wisconsin law to those facts. Additionally, based on the state's motion seeking exclusion under Evid.R. 403(A), the trial court did not address the issue of admissibility under Evid.R. 702, and the state did not directly challenge Dr. Thompson's expertise. However, the trial court's stated reasoning in excluding the testimony addressed reliability, a matter of weight for the jury. *See Lang* at ¶ 77, quoting *State v. Allen*, 5th Dist. Delaware No. 2009-CA-13, 2010-Ohio-4644, ¶ 157,

quoting *United States v. Brady,* 595 F.2d 359, 363 (6th Cir.1979) ("[C]ertainty of the scientific results are matters of weight for the jury.").

{¶ 99} Accordingly, considering the record, we find the trial court abused its discretion in applying an incorrect standard and disregarding applicable law in excluding Dr. Thompson's entire testimony under Evid.R. 403(A). Appellant's first and second assignments of error, therefore, are well-taken.

5. The trial court's error was not harmless error.

{¶ 100} The state next argues that excluding all "Dr. Thompson's testimony was harmless error, if error at all, because defense counsel's cross-examination of Ms. DeSilvis challenged the propriety of her forensic interview of the child victims." In support, the state cites *State v. Slaven,* 5th Dist. Delaware No. 12 CAA 08 0062, 2013-Ohio-3352.

{¶ 101} In *Slaven,* the trial court excluded expert testimony, in part, because the expert would not have addressed whether the interview of the victim affected the victim's statements regarding the abuse, but instead, would have consisted of a "general discussion" about "whether things would be important" in an interview. *Slaven* at ¶ 39-40. Furthermore, the trial court had granted funds for the defense to retain an expert to provide consulting assistance in reviewing the "substantial psychiatric records in discovery relative to the case[.]" *Id.* at ¶ 33.

{¶ 102} In affirming the trial court, the Fifth District Court of Appeals noted that "this is not a case where a defendant was denied all access to expert assistance." *Id.* at ¶ 41. The Court also noted that the expert's purported testimony would have been cumulative, as every witness who testified regarding "indicators of abuse" stated that "the indicators could be caused by many things other than sexual abuse[.]" *Id.* at ¶ 42. Therefore, any error in excluding the defense expert "was harmless beyond a reasonable doubt." *Id.* at ¶ 47.

{¶ 103} The state contends that the facts in appellant's case are like those in *Slaven*, because appellant was able to cross-examine DeSilvis regarding her forensic interview and "provided the jury with sufficient information about the alleged shortfalls of the forensic interview." The state views Dr. Thompson's proffered expert opinion as cumulative to DeSilvis' and other testimony.

{¶ 104} We have reviewed the record and find no support for the state's interpretation of the testimony, because DeSilvis testified her technique was proper and the recommended method and the state emphasized this technique as forensically sound, with no countering evidence to cast doubt on DeSilvis' interview. Furthermore, the state presented another witness, Bonnie Roberts, who testified about the therapeutic interview she conducted with S.H. While Roberts explained the difference between a therapeutic and forensic interview, with her interview beginning with the premise that something happened, the state adduced testimony from Roberts, over objection, that Roberts did not

believe [S.H.] had been coached or influenced to accuse appellant, supporting DeSilvis' unchallenged assertion of a proper interview that did not influence the girls' accounts of abuse.

{¶ 105} Based on the expert report and appellant's proffer, Dr. Thompson would have challenged DeSilvis' interview technique. Specifically, based on the proffer, Dr. Thompson would have addressed the type of questions used by DeSilvis as potentially suggestive questions, posing a danger of influencing the girls' statements or memories of events. Appellant's trial counsel cross-examined DeSilvis on this issue, but testimony was not elicited from any witness at trial to address the issues within Dr. Thompson's proposed testimony. Based on the record, DeSilvis denied that she used an improper technique or that her "option-posing" questions were leading, forced-choice questions. Dr. Thompson would have refuted this testimony, based on appellant's proffer.

{¶ 106} In arguing harmless error, the state has the burden of proving that the error did not affect the substantial rights of the defendant." *State v. Morris,* 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 23, citing *State v. Perry,* 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 15. An error involving the deviation from a legal rule is harmless if such error was not prejudicial. *Id.,* citing *State v. Fisher,* 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶ 6 (additional citation omitted.). "[T]he harmless-error rule was created in essence to forgive technical mistakes." *Id.* at ¶ 24, citing Crim.R. 52(A).

{¶ 107} The mistakes, in this case, were not technical, but instead involved misapplication of the law that unduly prejudiced appellant's defense. The case against appellant rested heavily on the statements of S.H. and V.H., with no physical evidence, and the defense sought to raise credibility issues regarding the girls' recall of events, based in large part on the method used in questioning the children regarding the rape allegations. The state did not timely challenge the admissibility of Dr. Thompson's testimony, and in fact opposed a reliability hearing for the girls' testimony prior to trial, arguing, in part, that appellant was going to call Dr. Thompson, whose expected testimony would challenge DeSilvis' interview technique. The state did not move to exclude Dr. Thompson's testimony until hours before he was scheduled to testify, and after the trial court excluded Dr. Thompson, appellant rested without presenting any expert testimony.

{¶ 108} Most significantly, Dr. Thompson's expert testimony was integral to the defense and the state capitalized on the exclusion of that testimony. Appellant's trial counsel had addressed that testimony in opening statements, and elicited evidence regarding the methods used to interview S.H. and V.H., addressing proper interview techniques and DeSilvis "option-posing" questions. The state took advantage of the exclusion of Dr. Thompson by stressing the lack of expert testimony on appellant's behalf, while also commenting on DeSilvis' "forensically sound" interview, a well-vetted interview without suggestive or leading questions. The state argued that it called

independent witnesses, "medical professionals, CSB workers, counselors, with no bias," while appellant "called his mom" and had "his paid lawyer."

{¶ 109} In considering whether the error is merely harmless, we must consider whether the error affected substantial rights, or had a "substantial and injurious effect or influence in determining the [jury's] verdict." *State v. Lewers,* 5th Dist. Stark No. 2009-CA-00289, 2010-Ohio-5336, ¶ 64, quoting *Kotteakos v. United States,* 328 U.S. 750, 776, , 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) (additional citations omitted.). As part of this consideration, we note "the actions of a prosecutor may combine with an evidentiary error to cause greater impact." *State v. Morris,* 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 31.

{¶ 110} Here, the prosecutor expressed an opinion as to the credibility of DeSilvis' testimony during closing argument, informing the jury that the information was forensically sound and "vetted," without any evidence adduced during trial regarding this "vetting" process. "It is improper for a prosecutor to vouch for the credibility of a witness at trial. Vouching occurs when the prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue." (Citations omitted) *State v. Myers,* 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 145. By informing the jury he "vetted" the interview conducted by DeSilvis, the prosecutor expressed a belief or opinion regarding the credibility of DeSilvis' testimony while implying the state would not have called DeSilvis to testify unless her testimony was first scrutinized and deemed

true. *State v. Russell,* 2d Dist. Montgomery No. 21458, 2008-Ohio-774, ¶ 118, citing *State v. Smith,* 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984) ("The fact that this vouching was predicated on Hargrove's testimony having been vetted by a polygraph examination does not ameliorate, but compounds the error, because it combines the improper vouching of the witness with an improper implication that the vouching is based upon the witness having passed a polygraph examination.").

{¶ 111} The prosecutor also referenced other professionals who testified, stating these witnesses had no bias," compared to appellant's witnesses and counsel, "his mom" and "his paid lawyer." These professionals, however, did not conduct a forensic examination or interview, however, with McDole testifying regarding her medical examination and Roberts testifying regarding her therapeutic interview. McDole and Roberts each began their work with the premise that something happened, and only DeSilvis considered *whether* a sexual assault occurred. The prosecutor also imputed insincerity to appellant's witnesses and counsel, attributing bias based on maternal feelings or a desire for compensation. *See, e.g., State v. Keenan,* 66 Ohio St.3d 402, 405-406, 613 N.E.2d 203 (1993) (implying an insincere "belief" in a defendant or motivation for representation "is both irrelevant and prejudicial" and a "jury is likely to believe a prosecutor's suggestion that defense counsel are mere 'hired guns'").

{¶ 112} Considering the record, we find the error caused exclusion of a key witness for the defense, and the prosecutor exploited this error in closing argument. We

also note that, based on the proffer, appellant's expert would have addressed DeSilvis' interview, and the jury focused on this interview, which was the subject of a jury question during deliberations. Accordingly, based on our review and applicable law, we find the error in excluding Dr. Thompson's testimony under Evid.R. 403(A) was not harmless error.

{¶ 113} Although the error in excluding Dr. Thompson's testimony in its entirety resulted in prejudice, meriting a new trial, we still must address appellant's third assignment of error, challenging the trial court's prohibition on questions regarding A.H.'s prior false allegations of sexual abuse. Whether or not inquiry into these prior allegations was admissible will remain an issue in a new trial, and therefore appellant's third assignment of error is not moot.

{¶ 114} Pursuant to App.R. 12(A)(1)(c), "[u]nless an assignment of error is made moot by a ruling on another assignment of error," a court of appeals shall "decide each assignment of error and give reasons in writing for its decision." "An assignment of error is moot when it cannot have 'any practical legal effect upon a then-existing controversy.'" *State v. Gideon,* 165 Ohio St.3d 156, 2020-Ohio-6961, 175 N.E.3d 720, ¶ 26, quoting *Culver v. Warren,* 84 Ohio App.373, 393, 83 N.E.2d 82 (7th Dist.1948), quoting *Ex parte Steele,* 162 F.694, 701 (N.D.Ala.1908).

B. Cross-Examination of A.H.

{¶ 115} In his third assignment of error, appellant argues that the trial court erred in not permitting cross-examination of A.H. regarding her prior false allegations of sexual assault within the context of a custody proceeding. The state opposed the questioning, arguing the statements related to events "at least 30 years ago when A.H. was a child," and appellant's "attempt to bring up the details of his acrimonious divorce in this case is nothing more than a red herring – designed to distract the Court from the real issue – whether or not A.H. could be cross-examined about allegations made over 30 years ago when she was a child." The state noted that the jury "obviously did not find Appellant's attempt to paint A.H. as the wrong-doer to be credible," believing the evidence of S.H.'s diagnosis of PTSD lent credibility to the abuse claims.

1. A.H.'s prior statements, in the context of a contemporaneous custody dispute, were relevant to show bias, prejudice, interest, or motive to misrepresent.

{¶ 116} Appellant sought to cross-examine A.H. regarding her prior statements that referenced the use of false allegations to win a custody battle. Specifically, appellant argued that A.H. had given deposition testimony in her divorce proceeding that indicated she, herself, was coerced into making false allegations of rape so that her mother would prevail in the custody fight with her father. Evid.R. 616 permits impeachment on cross-examination or through extrinsic evidence to show "bias, prejudice, interest, or any motive to misrepresent" Evid.R. 616(A).

{¶ 117} While the trial court deemed details of the divorce irrelevant and inadmissible, both A.H. and appellant testified regarding the divorce. The state elicited testimony from A.H. indicating the divorce ended with a consent decree, without trial, and A.H. characterized her interactions with appellant during the proceedings as smooth and cooperative, up until the time the allegations were made. A.H. admitted she said negative things about appellant to the girls and she threatened to do everything in her power to obtain full custody. The trial court prevented appellant from inquiring more in-depth regarding specific instances of A.H.'s conduct during the custody proceedings or A.H.'s prior statements, at deposition, regarding her own mother's use of allegations to obtain full custody.

{¶ 118} Appellant's defense was based on the theory that A.H. coerced the girls to repeat rape allegations in order to prevail in the couples' custody dispute, with suggestive questioning of the girls fixing the allegations in the girls' memories. Prior to trial, appellant filed a motion to permit cross-examination of A.H. on the issue of her prior, false allegations. In excluding cross-examination, the trial court determined that "the probative value of the proposed evidence and testimony of the mother of the alleged victims regarding allegations of a fabricated sexual assault against her own father or that the mother no longer believes that she was sexually abused as a child is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, and misleading the jury." During trial, the trial court denied appellant's renewed motion, relying on its

earlier ruling and indicating a fear of relitigating the domestic case within the criminal trial.

{¶ 119} On appeal, appellant argues that the trial court erred in precluding questions "on a pivotal and central point of contention throughout the trial." Appellant argues the cross-examination of A.H. would have demonstrated "A.H.'s superior knowledge about the effect an allegation of sexual assault against a parent can have on custody." In support, appellant cites to *State v. Storch,* 66 Ohio St.3d 280, 284-85, 612 N.E.2d 305 (1993), in which the Ohio Supreme Court recognized children could become pawns in a custody dispute, and "[s]ometimes the adults are willing to believe the worst about their adult adversaries and encourage, consciously or subconsciously, stories of abuse when abuse has not occurred." Appellant contends he was denied the opportunity to question A.H. regarding her motive to misrepresent, with her statements in the custody proceeding illustrative of this motive.

{¶ 120} Reference to collateral issues to demonstrate bias is not categorically barred in a criminal case under Evid.R. 403(A). For example, a witness may be questioned regarding their own charges where the testimony is given in exchange for promises in a plea deal in the witness's own case. *See State v. Brooks,* 75 Ohio St.3d 148, 152, 661 N.E.2d 1030(1996) (a witness' pending charges or plea deal are admissible to demonstrate bias of the witness). A defense witness may be impeached through cross-examination regarding text messages exchanged with the accused that contradicted the

witness's subsequent testimony. *See State v. McDuffie,* 3d Dist. Marion No. 2020-Ohio-5466, ¶ 15-16 (cross examination regarding text messages permitted to impeach witness's testimony that the accused had no knowledge of the drugs, kept in their bedroom for the witness' personal use, belied by content of texts). Finally, the Ohio Supreme Court has determined that "[i]t is beyond question that a witness' bias and prejudice by virtue of pecuniary interest in the outcome of the proceeding is a matter affecting credibility under Evid.R. 611(B)." *See State v. Ferguson,* 5 Ohio St.3d 160, 165, 450 N.E.2d 265 (1983).

{¶ 121} Pursuant to Evid.R. 611(B), "Cross-examination shall be permitted on all relevant matters and matters affecting credibility." Evid.R. 616(A) permits impeachment by demonstrating "bias, prejudice, interest, or any motive to misrepresent[.]" While impeachment evidence is relevant, Evid.R. 403(A) requires exclusion only where "its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Considering the record, the trial court did permit some testimony regarding the divorce case, and the proposed cross-examination held probative value because it supported the defense theory of bias, interest, plan, scheme, or motive to misrepresent on the part of A.H. Therefore, we must consider whether the trial court properly determined that the probative value was substantially outweighed as provided by Evid.R. 403(A).

{¶ 122} A trial court has broad discretion in determining whether to exclude otherwise relevant evidence under Evid.R. 403(A). *State v. Bethel,* 110 Ohio St.3d 416,

2006-Ohio-4853, 854 N.E.2d 150, ¶ 170. Accordingly, we will not disturb the trial court's ruling absent a clear abuse of that discretion." *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 40.

2. The trial court abused its discretion in foreclosing inquiry into A.H.'s bias or motivation.

{¶ 123} Appellant sought to impeach A.H. by cross-examining her regarding her prior false allegations against her own father, in order to demonstrate A.H.'s bias, interest, or motive to misrepresent under Evid.R. 616(A). Appellant further argued that, because the allegations were false, the testimony did not fall within the rape shield statute. *See State v. Boggs,* 63 Ohio St.3d 418, 421, 588 N.E.2d 813(1992) ("False accusations, where no sexual activity is involved, do not fall within the rape shield statute."). The trial court deemed the testimony inadmissible under Evid.R. 403(A), without clearly articulating a basis on the record.

{¶ 124} The state argues the trial court correctly excluded the line of questioning regarding A.H.'s prior, false allegations. In support, the state argues the case of *State v. Aguirre,* 9th Dist. Lorain No. 13CA010418, 2015-Ohio-922 is instructive. In *Aguirre,* the defense was not permitted to question the state's witness, the mother who walked in on Aguirre as he sexually assaulted her child, regarding false accusations of sexual misconduct against her ex-husband and ex-mother-in-law during custody proceedings in the three years proceeding the offense. *Aguirre* at ¶ 8. Aguirre argued that evidence of the mother's false accusations "bore upon her character for truthfulness." *Id.* The trial

court, in *Aguirre,* permitted testimony from the ex-husband and ex-mother-in-law regarding the witness' credibility and reputation for truthfulness, but precluded evidence of "specific instances of conduct" under Evid.R. 608. *Id.* at ¶ 9.

{¶ 125} We find little similarity between the present case and the facts in *Aguirre.* In *Aguirre,* the accused did not argue, in the trial court, that the cross examination should be permitted under Evid.R. 616(A), and the Ninth District Court of Appeals declined to address the argument for the first time on appeal. *Aguirre* at ¶ 17. Furthermore, Aguirre was not involved in a custody dispute with the state's witness and sought to elicit testimony of prior conduct demonstrating a character for untruthfulness under Evid.R. 608. The witness testified as to conduct she witnessed, and her testimony was corroborated by the eight year old victim. *Aguirre* at ¶ 15-17.

{¶ 126} Here, appellant specifically sought to introduce evidence of A.H.'s motivation for pursuing rape allegations, pursuant to Evid.R. 616(A). The allegations against appellant arose during a contentious custody battle. A.H. provided deposition testimony in the custody case, and appellant proffered that A.H. admitted her own mother may have coerced her into falsely accusing her own father of sexual abuse to help her mother obtain full custody.[15] At trial, A.H. testified that she asked her mother for guidance after eliciting statements from S.H. and V.H. regarding the abuse. A.H. also

[15] The deposition transcript from the domestic relations proceeding was not placed in the record of the present case, and the state objected to appellant's proffer regarding A.H.'s deposition testimony.

acknowledged that S.H. made a prior false claim – that she ingested her mother's ADHD medication – and while A.H. denied S.H.'s motivation, S.H. confirmed in her testimony that she made the claim because she believed her mother, A.H., wanted her to do so.

{¶ 127} Where accusations arise in the context of a pending custody battle, courts have found error where the accused is not permitted to cross-examine on the issue of possible bias or prejudice, related to the custody dispute. In *State v. Warren,* 106 Ohio App.3d 753, 757, 667 N.E.2d 68 (1st Dist.1995), the First District Court of Appeals found error where the trial court prevented this type of cross-examination. In *Warren,* the accused, Ray Warren, had filed a custody action against his wife after the couple separated. *Id.* at 756. Warren had been caring for the couple's child while his wife recovered from a surgery, and Warren lived with the child in a mobile home behind the house of his wife's mother. *Warren* at 755. After an incident in Warren's home, his wife accused him of domestic violence. *Id.*

{¶ 128} In reviewing the failure to permit cross examination on the issue of possible bias, the First District recognized that a defendant's right to confront witnesses against him includes a right to cross-examine those witnesses "to explore the witness's credibility, especially his or her motivation in testifying." *Warren* at 757, citing *Davis v. Alaska,* 415 U.S. 308, 316-317, 94 S.Ct. 1105, 39 L.E.2d 347 (1974). "A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they

may relate directly to issues or personalities in the case at hand." *Id.*, quoting *Davis* at 316.[16]

{¶ 129} The right to confrontation, protected by the Sixth Amendment to the United States Constitution, includes the right to cross-examination as part of the right to confront opposing witnesses. *State v. Brunson,* Slip Opinion No. 2022-Ohio-4299, citing *Davis*, 415 U.S. at 315, 94 S.Ct. 1105, 39 L.Ed.2d 347; *see also Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). "The exposure of a witness's motivation in testifying is a proper and important function of the defendant's Sixth Amendment right." *Brunson* at ¶ 52, citing *Davis* at 316-317.

{¶ 130} The trial court, in this case, did not address Evid.R. 611 or 616, but instead prevented cross-examination based on Evid.R. 403(A). We previously addressed the exclusion of impeachment evidence under Evid.R. 403(A), in *State v. Sepeda*, 2020-Ohio-4167, 157 N.E.3d 889 (6th Dist.) and determined that a jury should be permitted to filter a witness' accusation through the lens of the impeachment evidence. While the evidence might prejudice the state's case, "it does so by attacking the credibility of the accuser * * *, and is thus not unfairly prejudicial to the state." *Sepeda* at ¶ 32. As to the balancing under Evid.R. 403(A), we noted:

[16] In *Warren,* The First District found error, but determined that error was merely harmless error based on the record evidence, including physical evidence corroborating the wife's testimony of an assault. *Warren,* 106 Ohio App.3d at 760, 667 N.E.2d 68.

> "In reaching a decision involving admissibility under Evid.R. 403(A), a trial court must engage in a balancing test to ascertain whether the probative value of the offered evidence outweighs its prejudicial effect." *State v. Wright*, 8th Dist. Cuyahoga No. 108026, 2019-Ohio-4460, 2019 WL 5618471, ¶ 50, citing *State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984), paragraph seven of the syllabus. In order for the evidence to be deemed inadmissible under Evid.R. 403, its "probative value must be minimal and the prejudice great." *State v. Morales*, 32 Ohio St.3d 252, 258, 513 N.E.2d 267 (1987). "When determining whether the relevance of evidence is outweighed by its prejudicial effects, the evidence is viewed in a light most favorable to the proponent, maximizing its probative value and minimizing any prejudicial effect to the party opposing admission." *State v. Lakes*, 2d Dist. Montgomery No. 21490, 2007-Ohio-325, 2007 WL 196552, ¶ 22.

Sepeda at ¶ 27.

{¶ 131} Here, the probative value of appellant's cross-examination of A.H. was potentially great, as it could demonstrate both A.H.'s knowledge of rape accusations as a successful strategy in a custody dispute and A.H.'s own bias, interest, or motive to misrepresent. Challenging the credibility of the state's witness, moreover, is not unfairly prejudicial to the state. *See Sepeda* at ¶ 32. Finally, arguing that the jury would be

confused or misled by the custody dispute or statements made within that dispute presumes the highly improbable: that the jury might mistakenly believe they were deciding the custody issue, and not determining guilt regarding rape charges, alleged during pendency of the custody dispute.

{¶ 132} We recognize that trial courts have wide latitude in limiting the scope of cross-examination. *State v. Rock,* 6th Dist. Erie No. E-08-070, 2009-Ohio-3195, ¶ 19, citing *Van Arsdall* at 679. However, limitations that deny an accused the opportunity to demonstrate a motive to lie violate core confrontation rights. *State v. McKelton,* 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 172. The focus, in considering whether the confrontation clause has been violated, "must be on the particular witness, not on the outcome of the entire trial." *State v. Au,* 5th Dist. Delaware No. 09-CA-108, 2010-Ohio-4418, ¶ 46, quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 678-679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors * * * could appropriately draw inferences relating to the reliability of the witness.'" (Citation omitted) *Van Arsdall* at 680.

{¶ 133} Here, the trial court foreclosed the line of inquiry based on Evid.R. 403(A), without reaching the issue of whether the rape shield applied to bar cross-

examination, but permitted some questioning regarding custody matters that did not probe in-depth regarding A.H.'s motivation or bias. Significantly, the state was able to elicit testimony from A.H. regarding resolution of the divorce/custody case by agreement, without trial. In determining cross-examination inadmissible under Evid.R. 403(A), the trial court expressed an unwillingness to relitigate the custody matter, with the record revealing little to support a finding that cross-examination regarding A.H.'s prior statements would confuse or mislead the jury. As a result, the trial court's decision, precluding cross-examination on the topic, exhibited an unreasonable, arbitrary, or unconscionable attitude, and constituted an abuse of discretion.

3. The error in precluding cross-examination of A.H. was not harmless error.

{¶ 134} Having found error, we must next consider whether such error was merely harmless error. Our review is guided by well-settled law, requiring consideration of whether the error was harmless beyond a reasonable doubt, "assuming that the damaging potential of the cross-examination were fully realized." *Van Arsdall* at 684.

> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material

> points, the extent of cross-examination otherwise permitted, and of course, the overall strength of the prosecution's case.

Id. at 684.

{¶ 135} The record demonstrates that A.H. was an important witness in the state's case. A.H. testified that she first brought up the possibility of abuse with her daughter, S.H., after she noted S.H. seemed to have recurring UTIs. A.H. indicated that, at first, S.H. was hesitant to identify appellant as her abuser, but A.H. encouraged S.H. to disclose, and then obtained the same information from V.H. A.H. also indicated she consulted with her mother regarding how to proceed, once she elicited disclosures from each child, and A.H. was actively involved with the reporting process.

{¶ 136} The state presented the testimony of each child, which included little detail as to time, place, or manner of the abuse beyond identical statements of Hatchimals in private parts and vibrating mulch. No testimony or evidence was adduced to explain "vibrating mulch." The state had no physical evidence of abuse, and while evidence of the custody dispute was admitted, such evidence was limited and defense witnesses provided most of the evidence of a contentious custody battle. This testimony was primarily limited to appellant's testimony regarding A.H.'s repeated, failed attempts to obtain a change in custody arrangements, including accusations that appellant was a bad father or slammed S.H. into a wall, with appellant testifying that A.H. had no success until the girls accused him of sexual assault.

{¶ 137} Considering the record, evidence of A.H.'s prior, false allegations was an important part of appellant's defense, as it would have introduced A.H.'s motivation as a factor for the jury's consideration. In precluding questioning of A.H. regarding her potential bias or motivation, the trial court prevented the jury from considering whether A.H.'s bias or motivation affected the credibility of her testimony, an error implicating appellant's right to confrontation. To conclude this error was merely harmless error, we must determine the evidence of guilt was overwhelming or that the error did not contribute to the conviction. *Ferguson,* 5 Ohio St.3d at 167, 450 N.E.2d 265, fn 5. Based on our review of the evidence, as previously stated, we find neither overwhelming evidence of guilt nor clear indication that the error did not contribute to the conviction. We therefore find appellant's third assignment of error well-taken, with that error not harmless beyond a reasonable doubt.

C. Cumulative Error

{¶ 138} In his fourth and final assignment of error, appellant argues that the cumulative effect of the trial court's errors deprived him of his constitutional right to a fair trial.

{¶ 139} Having found reversible error as to the exclusion of Dr. Thompson's testimony and reversible error as to the preclusion of cross-examination of A.H. for bias or motive, we need not address the argument of cumulative error. Appellant's fourth assignment of error, accordingly, is deemed moot.

V. Conclusion

{¶ 140} Having found substantial justice has not been done, we reverse the judgment of the Lucas County Common Pleas Court, vacate the conviction, and remand the matter for a new trial. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed
and remanded.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J. _____
JUDGE

Gene A. Zmuda, J. _____
JUDGE

Myron C. Duhart, P.J. _____
CONCUR.
JUDGE