

IN THE SUPREME COURT OF OHIO

STATE OF OHIO :
 :
 Plaintiff-Appellee, :
 v. :
 JAMES COX :
 :
 Defendant-Appellant. :

On appeal from the
Butler County Court of Appeals,
Twelfth Appellate District
Court of Appeals Case No. CA2005-12-0513
06-2379
Supreme Court Case No. _____

MEMORANDUM OF APPELLANT IN SUPPORT OF JURISDICTION

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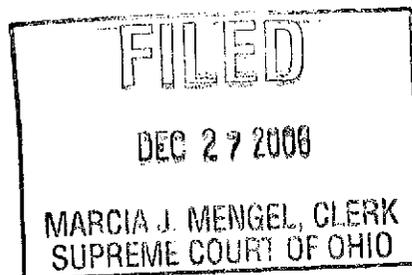


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Courts have traditionally been leery of allowing the transcript of a portion of a trial to be received by a jury during its deliberations because of the danger that a jury may place undue emphasis on the transcript, rather than using its collective memory in order to consider **all** the testimony adduced at trial. The courts have emphasized the dangers that a jury would consider a transcript to be authoritative, to the exclusion of the other testimony, and that a transcript would cause a jury to focus on only that portion of the trial, rather than on the evidence as a whole. **United States v. Hernandez**, 27 F.3d 1403 (9th Cir. 1994), cert. denied, 115 S.Ct. 1145 (1995). It is precisely because of these dangers that the court in **United States v. Rodgers**, 109 F.3d 1138 (6th Cir. 1997), stated that, for all United States District Courts within the Sixth Circuit, the “minimum amount of protection” a court should provide when granting a request to receive a transcript is that the trial court must provide a cautionary instruction to the jury on the proper use of that testimony. 109 F.3d, at 1145. Accord **United States v. Hernandez**, 27 F.3d 1403 (9th Cir. 1994).

Despite the inherent dangers in receiving such a transcript, and despite objections from the defendant to even allow the jury to review the transcript to begin with, the trial court in this case did not provide any cautionary or limiting instructions to the jury. In affirming that decision, the Court of Appeals acknowledged that there are apparently no cases in Ohio which have applied a **Rodgers** rule requiring a limiting instruction to be provided to a jury upon its receipt of a transcript. ¶23. Given the overriding concerns regarding a transcript in the jury room, see also O.R.C. §2945.35 (jury to have no documents during deliberations except those which has been admitted into evidence), there can be no doubt that the better practice would be to mandate such a requirement in order to reassure all defendants that if the court, in its

discretion, should allow the transcript to be provided to a jury, there will be no undue emphasis placed on that transcript. After all, it has been repeatedly held that a jury is presumed to follow instructions provided to it by the court. Pang v. Minch, 53 Ohio St.3d 186, 559 N.E.2d 1313 (1990). Thus, if such instructions are given, then this entire question would be laid to rest because of the assurance that there would be no undue emphasis placed on the transcript.

If there is no requirement for the court to instruct the jury to not place undue emphasis on the transcript and to not allow the transcript to serve as a substitute for the assessment of credibility of the witnesses, see United States v. Sacco, 869 F.2d 499, 502 (9th Cir. 1989), then there will always be an open question regarding the validity of a defendant's conviction. While the trial court does have discretion whether or not to allow the jury to view the transcript, if the court should exercise that discretion in favor of allowing its use, then, in order to forestall any appeals and in order to provide confidence in the verdict, the proper instruction should be provided.

It is precisely because the decision whether to allow the transcript into the jury room is discretionary, compare State v. Carter, 72 Ohio St.3d 545, 651 N.E.2d 965 (1995) (discretionary to not provide transcript) with State v. Berry, 25 Ohio St.2d 255, 267 N.E.2d 775 (1971) (discretionary to provide transcript), that the instruction is so crucial. If the court is going to exercise its discretion in favor of allowing the transcript, then the safeguards of the instruction should be in place in order to eliminate any risks that the court may have abused its discretion and in order to temper the dangers listed above. As Rodgers explained, a court might still abuse its discretion in allowing the jury to review a transcript, but if a cautionary instruction is provided, that would assure at least a minimum amount of protection for the defendant. 109 F.3d, at 1145.

Although appellant originally argued to the Court of Appeals that the trial court had abused its discretion to begin with in even providing the transcript to the jury, he does recognize that an abuse of discretion standard is difficult to overcome and is therefore not making that argument herein. Instead, the narrow focus is on what instructions need to be provided to the jury when they receive the transcript. This was a hotly contested case, and the testimony of Cox's daughter, if believed, was especially sympathetic, given her age, relationship to the Defendant, and the nature of her accusations. Hers was the only testimony reviewed by the jury, however, and at no time was the jury ever cautioned not to place undue emphasis on her testimony, to not use the transcript as a substitute for credibility, and to rely on its collective memory in order to consider the evidence as a whole.

Although this Court should issue a decision which requires the requisite instructions to be provided in every instance when a transcript is provided to the jury, the facts in this case make such a rule even more compelling. This Court can therefore use this case to explain to the bench in Ohio that, while a reviewing court will not disturb a discretionary decision to provide a transcript of a witness's testimony to the jury, the court must nevertheless proceed with caution and that this caution must extend to the provision of limiting instructions.

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant, James Cox, Jr., was charged with six counts of rape, two counts of illegal use of a minor in a nudity-oriented material of performance, and two counts of pandering sexually-oriented matter involving a minor. A jury found Cox not guilty of three counts of rape, guilty of the lesser included offense of gross sexual imposition on two of the counts, and guilty on one count of rape. The jury found Cox not guilty on all remaining counts. The trial court sentenced Cox to 20 years in prison, and, on November 20, 2006, the Twelfth District Court of

Appeals affirmed the underlying convictions, although the court did remand the case for a new sentencing hearing in light of State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856.¹

The key witness against Cox was his 11 year old daughter, Ashley, who claimed that her father would periodically have sexual conduct with her, including having her rub his penis, touching her between the legs, having her touch herself with a vibrator, and eat Hershey Kisses that had been placed on her body. She also claimed that her father had put his penis into her mouth and would then have an orgasm.

Nevertheless, Ashley also admitted that she does lie on occasion. More importantly, she also described incidents when her father would supposedly be alone in a bedroom with her 16 year old cousin, Dustin. She claimed that she could hear groans and moans coming from the room, and these were the same noises that her father would make when he would have an orgasm. She was able to lie down on the floor and see their legs under the door. It was as a result of these allegations that the additional charges were brought against Cox. Nevertheless, Dustin testified and denied that there were any improprieties whatsoever with Cox, and the jury ultimately found Cox not guilty of those charges relating to any conduct with Dustin. A physical exam on Ashley revealed nothing out of the ordinary, and she had an intact hymen.

Cox denied all of the allegations brought by Ashley, explaining that Ashley had exhibited a curiosity regarding sex and that it was she who had located various sexual toys in the home that had been purchased by his then-wife.

¹ Upon remand, on December 13, 2006, the trial court did not change the original 20 year sentence.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I:

WHEN THE EVIDENCE IN A CRIMINAL CASE IS CONFLICTING AND A JURY REQUESTS TO REVIEW THE TRANSCRIPT OF ONE WITNESS AND THE COURT DECIDES, IN ITS DISCRETION TO ALLOW SUCH A REVIEW, IT IS INCUMBENT UPON THE COURT TO INSTRUCT THE JURY TO NOT PLACE “UNDUE EMPHASIS” ON THE TRANSCRIPT.

After the jury had been deliberating for approximately ten hours, it requested to review the testimony of Cox’s daughter, Ashley. That transcript was readily available, because the court had already requested its production in anticipation of a discussion regarding instructions for a lesser-included offense. Defendant’s counsel objected to the jury receiving the transcript, arguing that it should have to rely on its collective memory, although counsel did not ask for a limiting instruction. The court² overruled the objection and allowed the transcript to be reviewed by the jury. Three hours later, the jury convicted appellant of rape.

Although O.R.C. §2945.35 precludes the jury from having any documents inside the jury room other than items that have been admitted into evidence, the courts have traditionally had the discretion whether or not to allow a transcript to be provided as well. See generally State v. Carter, 72 Ohio St.3d 545, 651 N.E.2d 965 (1995). The danger of allowing the jury to have the transcript, though, is that the jury will place an undue emphasis on the testimony therein, rather than having to rely on its collective memory regarding all the facts adduced at trial. After all, the jury will have the transcript that it can refer to time and time again, to the exclusion of all other

² The trial was heard by Judge Sage, but he had had a previously scheduled judicial conference to attend and was not available after the first day of deliberations, although he stated that he would be able to be reached by telephone if needed. The case was therefore assigned to Judge Nastoff, who presided without objection over the jury deliberations, and it was Judge Nastoff who made the decision to allow the jury to review the transcript, and it was he who did not provide the limiting instruction.

evidence presented. Thus, it is almost as if there is a witness presence in the jury room during deliberations. It is because of these concerns that the courts, when they do exercise their discretion in favor of allowing the transcript to be used, have also traditionally cautioned the jury to not place an undue emphasis on the matters contained within the transcript.

As noted by the Court of Appeals in this case at ¶23, this practice of providing a limiting instruction has apparently not been required by any courts in this state, although there is a similar requirement in at least some Federal Courts. See **United States v. Rodgers**, 109 F.3d 1138 (6th Cir. 1997). The reasons for such a requirement in Federal Courts are obvious, because they provide the “minimum amount of protection” for a defendant in case the jury is tempted to place too much emphasis on the information contained within the transcript. Thus, **Rodgers** held, “We hold that if a district court chooses to give a deliberating jury transcribed testimony, or chooses to reread testimony to a deliberating jury, the district court must give an instruction cautioning the jury on the proper use of that testimony.” *Id.*, at 1145.³ Accord, **Hernandez, supra**.

There is no good reason why a similar rule should not be enacted for the state courts in Ohio. Even though the Court of Appeals in this case conducted a plain error analysis, finding that there was no plain error, the Court of Appeals’ decision was an after-the-fact justification, given that it focused its conclusion on the fact that the jury “at no time, indicated a difficulty in reaching a unanimous verdict.” ¶25. Given the length of deliberations—ten hours prior to and three hours after receiving the transcript—such a conclusion is not so easily reached. Clearly, the jury was having difficulty in arriving at a decision because it needed to review the testimony of the main complaining witness. Had the deliberations been as easily pursued as indicated by the Court of Appeals, there would have been no such necessity. In any event, whether or not the

³ The other **Rodgers** concerns regarding accuracy of the transcript, prejudicial sidebar conferences, and undue delay for its preparation do not exist in this case.

failure to provide the transcript rose to the level of plain error is beside the point, given that if there is a requirement for such a jury instruction on every occasion when the jury receives a transcript, such an argument, along with its speculative conclusions, would be foreclosed. How can there be confidence in the outcome of a proceeding when a witness is present in the jury room in the form of a transcript and the jury is never informed to place that witness's testimony in the proper context?

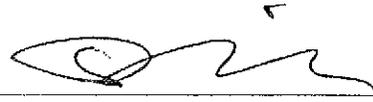
Given these considerations, as well as the facts contained in this case, it is clear that if the court was going to provide the transcript to the jury, it should have also provided a limiting instruction, whether or not it was requested by the Defendant. It is entirely speculative as to whether the jury was having difficulty in reaching its decision, so a limiting instruction would have increased everybody's confidence in the validity of the verdict in this case.

For the foregoing reasons, Defendant-Appellant respectfully requests this Court to accept jurisdiction in this case and to reverse the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons, Defendant-Appellant respectfully requests this Court to accept jurisdiction in this case and to reverse the decision of the Court of Appeals.

Respectfully submitted,

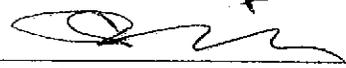


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the within was hand-delivered to Robin Piper, III, Prosecuting Attorney, 315 High Street, 11th Floor, Hamilton, Ohio 45011, on the 21 day of December, 2006.



Fred S. Miller

Miller

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

2005-12-15
COURT CLERK
BUTLER COUNTY
CLERK OF COURTS

STATE OF OHIO,

:

Plaintiff-Appellee,

:

CASE NO. CA2005-12-513

:

JUDGMENT ENTRY

-vs-

:

JAMES L. COX, JR.,

:

Defendant-Appellant.

:

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is reversed as to sentencing only and this cause is remanded to the trial court for further proceedings according to law and consistent with the Opinion filed the same date as this Judgment Entry.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed 50% to appellant and 50% to appellee.

Stephen W. Powell

Stephen W. Powell, Presiding Judge

James E. Walsh

James E. Walsh, Judge

William W. Young

William W. Young, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2005-12-513
 :
 -vs- : OPINION
 : 11/20/2006
 :
 JAMES L. COX, JR., :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2005-01-0115

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Fred Miller, 246 High Street, Hamilton, OH 45011, for defendant-appellant

POWELL, P.J.

{11} Defendant-appellant, James L. Cox, Jr. appeals from his judgment of conviction and sentence in the Butler County Court of Common Pleas for one count of rape and two counts of gross sexual imposition. For the reasons outlined below, we affirm appellant's convictions but reverse the judgment of the trial court as to sentencing only, and remand this case for resentencing.

{12} In January 2005, appellant was indicted on ten counts, six involving acts

committed against his minor daughter A.C., and four involving acts committed against his minor nephew D.H. All six counts relating to appellant's daughter were charges of rape in violation of R.C. 2907.02(A)(1)(b), first degree felonies. Two of the charges relating to appellant's nephew were for illegal use of a minor in nudity-oriented material in violation of R.C. 2907.323(A)(1) and (3), a second degree felony and a fifth degree felony, respectively. The remaining two charges relating to appellant's nephew were for pandering sexually oriented matter involving a minor in violation of R.C. 2907.32.2(A)(1) and (5), a second degree felony and a fourth degree felony, respectively.

{13} Appellant entered pleas of not guilty and proceeded to a jury trial. The trial began on September 27, 2005. At the first day of trial, the state presented six witnesses. The first of those witnesses was appellant's daughter, A.C. A.C. testified that, from the time she was in second grade, her father repeatedly engaged in sexual acts with her. A.C. testified in detail about multiple occasions during which appellant had caused her to use KY Jelly and rub his penis until he had an orgasm, placed Hershey Kisses upon his penis and caused her to perform fellatio upon him, placed Hershey kisses upon her vagina and performed cunnilingus upon her, and caused her to touch herself with various sex toys. A.C. also testified that appellant put his fingers inside her anus and, on at least one occasion, attempted to engage in vaginal sexual intercourse with her, but, because it hurt, he did not continue. A.C. testified that in July 2004 she told her friend, J.H. about the sexual abuse. A.C. testified that J.H. then told her mother, Sandra, who called A.C.'s mother, who brought A.C. to the police station to report the abuse.

{14} Following the testimony of the state's sixth witness, the trial was continued until September 29, 2005. The trial judge also informed the parties that he would be leaving town after 6:30 p.m. on the evening of September 29, 2005 and that if the jury was

still deliberating after that time, another judge would step in to handle any issues during deliberations. In anticipation of discussions regarding lesser included offenses, a transcript of A.C.'s testimony was prepared and given to both the state and appellant's trial counsel prior to the second day of trial on September 29, 2005.

{¶5} The trial resumed for its second day on September 29, 2005, with both the state and appellant's trial counsel presenting additional evidence and testimony. The case was turned over to the jury that morning and the jury began its deliberations at approximately 1:10 p.m. that day. The jury deliberated until approximately 6:20 p.m., at which point they were released for the evening. The trial judge again informed the parties and the jury that he was needed out of town and that another judge would be stepping in to handle the remaining deliberations and answer any questions. The trial judge further indicated that he would be available for questions by telephone if any should require his assistance.

{¶6} The jury returned on September 30, 2005 and continued deliberations from approximately 9:00 a.m. until 1:30 p.m. At that time, the jury submitted a request. The judge then handling deliberations responded, and informed the parties that the jury was requesting to review A.C.'s testimony. Appellant's counsel objected to the request, arguing that the proper instruction would be to have the jury rely on their collective memory of the testimony. The judge overruled appellant's objection and granted the request. The judge then asked if there were any objections to sending the transcript into the jury room. Appellant's trial counsel noted that, aside from his general objection, he did not object to the transcript being sent to the jury room.

{¶7} The jury then continued to deliberate until 4:45 p.m., at which time they returned with a verdict. The jury found appellant guilty of the lesser included offense of

gross sexual imposition as to count three, guilty of rape as charged in count four, guilty of the lesser included offense of gross sexual imposition as to count six, and not guilty on the remaining charges. Appellant proceeded to sentencing on November 9, 2005. The trial court found appellant to be a sexual predator and sentenced appellant to five years imprisonment on count three, ten years imprisonment on count four, and five years imprisonment on count six. The court went on to find that appellant posed the greatest likelihood of committing future sexually oriented offenses and that consecutive terms were necessary to protect the public. The judge ordered that the sentences run consecutively for an aggregate incarceration term of 20 years, the maximum penalty under the law. Appellant filed this appeal, raising three assignments of error for our review.

{¶18} Assignment of Error No. 1:

{¶19} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT PERMITTED THE JURY TO REVIEW A TRANSCRIPT OF THE VICTIM'S TESTIMONY."

{¶10} Appellant argues that the trial court erred in allowing the jury to review the transcript of A.C.'s testimony during its deliberations. Appellant further contends that the trial court erred in failing to give the jury a limiting instruction regarding the use and weight of the transcribed testimony.

{¶11} Initially we note that appellant has argued on appeal that the judge stepping in to handle deliberations was not qualified to make the decision to permit the jury to review A.C.'s testimony because he was unfamiliar with the facts and circumstances of the case. However, no objection was presented at trial when the parties were informed that another judge would be stepping in to handle the remaining deliberations. Therefore any such objection was waived and we need not consider such argument on appeal. We turn

then to the actions of the judge in sending the transcript of A.C.'s testimony to the jury. A trial court has broad discretion in determining whether to permit a jury to re-hear all or part of a witness's testimony during deliberations. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶123 (finding trial court's decision to have portions of testimony of two witnesses re-read to deliberating jury within court's discretion), *State v. Carter*, 72 Ohio St.3d 545, 1995-Ohio-104, (finding trial court's decision to refuse to provide transcript of expert testimony within court's discretion), *State v. Berry* (1971), 25 Ohio St.2d 255 (finding trial court's decision to read portions of transcribed testimony to deliberating jury within court's discretion). Therefore, a reviewing court will not reverse a trial court's decision absent an abuse of that discretion. *Id.* Further, an "abuse of discretion" "connotes more than just an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130, *State v. Leide*, Butler App. No. CA2005-08-363, 2006-Ohio-2716, ¶14. The term has been further defined as "a view or action that no conscientious judge, acting intelligently, could honestly have taken." *Id.*

{¶12} A review of Ohio case law reveals that a trial court's decision to provide the jury with an actual transcript of the testimony of a witness has been accepted as properly within its discretion. In *State v. Smoot* (Nov. 17, 1989), Clark App. No. 2588, 1989 WL 138412, the Second District Court of Appeals upheld the trial court's decision to deliver the transcribed testimony of three trial witnesses to the jury during deliberations. The court held that "the trial court was within its discretion in deciding to accommodate the jury by providing it with transcripts of the testimony which bore upon the factual questions that the jury had earlier propounded to the court." *Id.* at *5.

{¶13} The court came to a similar conclusion in *State v. Malone* (Jan. 2, 1992),

Clark App. No. 2806, 1992 WL 217. In *Malone*, the deliberating jury requested the transcript of the testimony of the state's key witness. *Id.* at *2. Over objections, the trial court granted the jury's request. On appeal, the Second District Court of Appeals again held that the decision was properly within the court's discretion. Compare, *State v. Boyd* (Oct. 31, 1997), Champaign App. No. 91 CA 1, *State v. Strickland* (Oct. 23, 1979), Greene App. No. 1085 (holding that preferred practice is to interpret a jury's request for a transcript as a request for a re-reading of the testimony, but finding that trial court's decision to deliver transcript to jury room was harmless).

{¶14} We further find persuasive guidance from federal analysis of this issue. In *U.S. v. Rodgers* (C.A.6, 1997), 109 F.3d 1138, the Sixth Circuit Court of Appeals reviewed a district court's decision to provide a deliberating jury with the transcript of a law enforcement officer's testimony. In *Rodgers*, the court discussed what it recognized as "two inherent dangers" in allowing a jury to read a transcript of a witness's testimony during deliberations. *Id.* at 1143. The court stated that, "[f]irst, the jury may accord 'undue emphasis' to the testimony;" and "second, the jury may apprehend the testimony 'out of context.'" *Id.*, citing *U.S. v. Padin* (C.A.6, 1986), 787 F.2d 1071. The court also recognized more general concerns, including: "(1) any transcript provided to a jury should be accurate; (2) transcription of side bar conferences, and any other matters not meant for jury consumption, must be redacted; and (3) as a purely practical matter, a district court 'should take into consideration the reasonableness of the jury's request and the difficulty of complying therewith.'" *Id.*, citing *U.S. v. Hernandez* (C.A.9, 1994), 27 F.3d 1403; *U.S. v. Almonte* (C.A.1, 1979), 596 F.2d 261.

{¶15} In reviewing the actions of the district court in the case before it, the Sixth Circuit found that the accuracy of the transcript was not disputed, the transcript was free of

side bar conferences, and the district court was able to provide the transcript the morning after it was requested. *Id.* The court went on to find that the district court had eliminated the second identified "inherent danger" by providing the complete transcript of the witness's testimony, elicited under both direct and cross-examination. *Id.* Turning to the first identified "inherent danger," the court found that there was no evidence to support the appellant's contention that the jury had afforded the transcript "undue emphasis." *Id.* at 1144. The court explained that "[i]t is true that 'after the jury has reported its inability to arrive at a verdict,' there is heightened concern that the jury will place inordinate emphasis on any testimony it then reviews." However, finding that no such situation occurred in the circumstances of the case before it, and noting that there was not an inordinate amount of deliberation before or after the delivery of the transcript, the court held that the case did not present an "obvious intent to emphasize a specific portion of the transcript." *Id.* The Sixth Circuit held that the district court did not abuse its discretion in allowing the deliberating jury to review the witness's transcribed testimony.

{¶16} We find the Ohio case law and the federal case law on the issue to be persuasive, and therefore find that the trial court in this case did not abuse its discretion when it permitted the transcript of A.C.'s testimony to be delivered to the jury. The child victim A.C. was the first of ten witnesses to testify, having done so two days before the jury began deliberating. Her testimony regarding the circumstances of the sexual abuse, particularly with regard to the specifications charged in the indictment that A.C. was under the age of ten when the abuse began, were facts important for accurate analysis by the jury.

{¶17} Additionally, as in *Rodgers*, both parties were previously provided a copy of the transcript of A.C.'s testimony and there is nothing in the record or on appeal to suggest

that the transcript provided to the jury was in any way inaccurate. Further, the only side bar conference held during A.C.'s testimony was redacted from the transcript given to the jury and, due to the fact that the court had previously transcribed A.C.'s testimony for instruction purposes, the transcript was easily provided to the jury that same afternoon. Additionally, as in *Rodgers*, the trial court avoided the inherent danger encountered when a jury apprehends the testimony "out of context" by providing the jury with A.C.'s entire testimony, as elicited during both direct and cross-examination.

{¶18} Therefore, the only remaining concern argued by the defendant is that the jury may have afforded the transcript "undue emphasis." However, we do not find that concern supported by the circumstances of this case. The jury deliberated for approximately ten hours before requesting the transcript, but at no time indicated that they were having difficulty reaching a unanimous verdict. After receiving the transcript, the jury continued to deliberate for an additional three hours before returning with a verdict. In a case involving ten counts of sexual abuse, two lesser included offenses, age specifications, and 18 pages of jury instructions, we do not find the amount of time that the jury deliberated, before or after receiving the transcript, indicative of the jury's placing undue emphasis on the transcript.

{¶19} Based on the circumstances of the case, the above analysis, and the fact that appellant's trial counsel did not object to the jury's review of the transcript in the jury room, we find that the trial court did not abuse its discretion in permitting the delivery of the transcript of A.C.'s testimony to the jury room.

{¶20} We now turn to appellant's argument that the trial court committed plain error by failing to issue a limiting instruction cautioning the jury against putting undue emphasis on the transcript. Because appellant's trial counsel did not request any limiting instruction,

our review of this issue is limited to a determination of whether the court committed plain error in failing to *sua sponte* give a limiting instruction regarding the transcript. See, *State v. Davis* (1991), 62 Ohio St.2d 326, 339.

{¶21} Crim.R. 52 governs harmless and plain error, stating that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Ohio law recognizes that plain error does not exist unless, but for the error, the outcome of the trial would have been different. *State v. Haney*, Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶50. Further, "notice of plain error is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.*

{¶22} Appellant cites the *Rodgers* case, discussed above, for the proposition that the trial court was required to *sua sponte* issue a limiting instruction cautioning the jury about the proper use and weight of the transcribed testimony. While upholding the district court's decision to deliver a witness's transcribed testimony to the jury, the *Rodgers* court went on to hold that a district court is required to give a cautionary instruction when providing a deliberating jury with such a transcript. *Rodgers*, 109 F.3d at 1145. The court explained that an instruction cautioning the jury not to emphasize re-read testimony over other evidence represented the "minimum amount of protection" a court should provide if it grants a deliberating jury's request for testimony. *Id.*

{¶23} However, we are aware of no case in Ohio law which has applied the rule announced in *Rodgers*. Of the Ohio cases reviewing the issue of a jury's request to re-read, re-hear or otherwise review evidence or testimony submitted during trial, none suggest that the trial court is required to give a limiting instruction when allowing such additional review. Compare, *State v. Riddle*, Mahoning App. No. 99 CA 147, 2001-Ohio-

3484 (citing *State v. Mason*, 82 Ohio St.3d 144, 1998-Ohio-370, for proposition that a limiting instruction is required when providing deliberating jury with transcript of recorded police interviews as listening aid), *State v. Norton* (July 29, 1993), Franklin App. No. 93AP-194 (recognizing that cautionary instruction was given to jury receiving witness's transcribed testimony during deliberations). On these facts, we therefore decline to find that the trial court erred in failing to sua sponte issue a limiting instruction when delivering the transcript of A.C.'s testimony to the jury.

{¶24} We also note that, even if we were to follow the rule declared in *Rodgers* as requested by appellant, any error in failing to issue a limiting instruction in this case would not rise to the level of plain error. In *Rodgers*, the court held that although the district court had erred in failing to issue such a limiting instruction, that error failed to rise to the level of plain error. *Id.* at 1145. The court explained that the record failed to demonstrate that the district court's failure to give the cautionary instruction prejudicially affected the outcome of the trial or resulted in a miscarriage of justice. *Id.* The court therefore held that the error did not rise to the level of plain error and overruled the appellant's argument.

{¶25} Similar to the appellant in *Rodgers*, appellant in the case before us has failed to demonstrate that the court's failure to provide the jury with a limiting instruction affected the outcome of the case. As we have already discussed above, we do not find appellant's contention that the jury afforded the transcript "undue emphasis" supported by the record. The jury, at no time, indicated a difficulty in reaching a unanimous verdict. Additionally, the length of time that the jury spent deliberating, before and after receiving A.C.'s transcribed testimony, was not inordinate for the circumstances of the case and do not plainly suggest that they placed undue emphasis on the transcript. Therefore, we do not find the court's failure to instruct the jury regarding the proper use or weight of the

transcript to have affected the outcome of the case or created a manifest miscarriage of justice. Therefore, even if we were to follow the analysis of the Sixth Circuit as requested by appellant and determine that the court erred in failing to give a limiting instruction to the jury in this case, such error did not rise to the level of plain error requiring reversal to cure a manifest miscarriage of justice. Accordingly, appellant's first assignment of error is overruled.

{¶26} Assignment of Error No. 2:

{¶27} "THE DEFENDANT-APPELLANT RECEIVED THE INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶28} Appellant's second assignment of error contends that he was denied the effective assistance of trial counsel due to his attorney's failure to request that the judge issue a cautionary instruction to the jury concerning the proper use of the transcribed testimony.

{¶29} In order to successfully establish a claim of ineffective assistance of counsel, an appellant must satisfy both prongs of the two-part showing required in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. First, an appellant must show that his trial counsel's performance was deficient, and second, that the deficient performance prejudiced the defense to the point of depriving the appellant of a fair trial. *State v. Brown*, Warren App. No. CA2002-03-026, 2002-Ohio-5455, ¶10, citing *Strickland*. In order to establish the first prong, an appellant must show that his counsel's representation "fell below an objective standard of reasonableness." *Strickland* at 688. However, attorneys are given a "heavy measure of deference" in their decision making and there exists a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Additionally, even debatable strategic and trial

tactics do not constitute ineffective assistance of counsel. *In re J.B.*, Butler App. Nos. CA2005-06-176, CA2005-07-193, CA2005-08-377, 2006-Ohio-2715. In order to establish the second prong, an appellant must show "a reasonable probability that, but for counsel's actions, the result of the proceeding would have been different." *Strickland* at 694. Failure to make an adequate showing on either the "performance" or "prejudice" prongs of the *Strickland* standard is fatal to an appellant's claim. *Id.* at 697.

{¶30} In the case at bar, appellant argues that his trial counsel's error in failing to request a cautionary jury instruction regarding the transcript of A.C.'s testimony falls outside the presumption of reasonable trial strategy and prejudiced the outcome of the trial. However, we have previously recognized that the failure to seek a limiting instruction does not in and of itself indicate ineffective assistance of counsel. *Brown* at ¶16, *State v. Homer*, Warren App. No. CA2003-12-117, 2006-Ohio-1432. In *Brown*, this court rejected a claim of ineffective assistance where the appellant's trial counsel had failed to request a limiting jury instruction regarding certain evidence received during trial. *Id.* We explained that a trial counsel may have a sound reason for not requesting such an instruction. *Id.*

{¶31} Appellant in the case at bar argues that his trial counsel's failure to request a limiting instruction cannot fall within reasonable trial strategy because his counsel had objected to the submission of the transcript and therefore clearly recognized its prejudicial value. However, as in *Brown*, appellant's counsel may have decided that a limiting instruction would bring undue attention to the objectionable testimony and may therefore have chosen not to request an instruction as a part of a reasonable trial strategy.

{¶32} Further, appellant has failed to establish that the outcome of the trial was affected by his counsel's failure to request a limiting instruction. As we have discussed above, we do not find appellant's argument that the jury afforded the transcript undue

emphasis to be supported by the record. Therefore, appellant has failed to show that his attorney's failure to request an instruction cautioning against such emphasis to have affected the outcome of the case. Accordingly, appellant's second assignment of error is overruled.

{¶33} Assignment of Error No. 3:

{¶34} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT MADE CERTAIN FACTUAL FINDINGS IN IMPOSING CONSECUTIVE, MAXIMUM SENTENCES ON APPELLANT."

{¶35} Appellant's final assignment of error challenges the sentences imposed by the trial court as contrary to law. Specifically, appellant challenges the court's imposition of maximum and consecutive prison terms as violative of *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, and *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. We note that appellant was sentenced under portions of Ohio's statutory sentencing scheme which have since been deemed unconstitutional by the Ohio Supreme Court. Among these sections was R.C. 2929.14(C), which required judicial fact-finding before the imposition of maximum prison terms. *Foster* at ¶¶97-99. The court further found that R.C. 2929.14(E)(4) and R.C. 2929.41(A), which required judicial fact-finding before the imposition of consecutive sentences, were also unconstitutional. *Id.* The court severed these sections from the remaining statutory provisions. *Id.* As a result, judicial fact-finding prior to the imposition of a sentence within the basic statutory ranges is no longer required. *Foster* at ¶100. The *Foster* court instructed that all cases pending on direct review in which the unconstitutional sentencing provisions were utilized must be remanded for resentencing. *Foster* at ¶104.

{¶36} The state agrees that appellant was sentenced under statutes now deemed

unconstitutional and must be resentenced. Consequently, we remand this case for resentencing consistent with *Foster*. The trial court will have full discretion to impose sentences within the statutory ranges and is no longer required to make findings or give reasons for imposing consecutive or maximum sentences. Appellant's third assignment of error is sustained.

{¶37} Having reviewed the assignments of error, we affirm appellant's convictions for one count of rape and two counts of gross sexual imposition. However, pursuant to *Foster*, we reverse the court's sentencing decisions and remand this matter for resentencing in accordance with this opinion.

{¶38} Judgment reversed as to sentencing only.

WALSH and YOUNG, JJ., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>