

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	OSC CASE NO. 08-1304
)	
Plaintiff-Appellee,)	<u>NOTICE OF CERTIFIED CONFLICT</u>
)	<u>PURSUANT TO SUPREME COURT</u>
v.)	<u>RULE OF PRACTICE IV.</u>
)	
JERMAINE BAKER,)	On Appeal from the Ninth District
)	Court of Appeals, Summit App. 23840
Defendant-Appellant.)	
)	Trial Court Summit CR 07-01-0186(A)

Counsel for Defendant-Appellant Jermaine Baker now notifies this Honorable Court that the Ninth District Court of Appeals has entered a journal entry declaring that the instant case has legal holdings that conflict with the First District, Second District, Fourth District, Eighth District, and Eleventh District Courts of Appeal. Specifically, on June 9, 2008, the Ninth District Court of Appeals certified three separate conflicts with the legal opinions of the five other appellate districts previously mentioned. (Exhibit A, June 9, 2008 journal entry certifying conflicts)

The three conflicts, as listed by the Ninth District, are as follows: 1) Does *Old Chief v. United States* (1997), 519 U.S. 172, apply to Ohio, state law, criminal prosecutions?, 2) Are parties required to object to avoid waiver of criminal sentencing issues on appeals?, 3) Is the issue of merger waived if a trial court imposes concurrent sentences?

These conflicts between *State v. Baker*, Summit App. 23840, are with the following other opinions, attached as exhibits to this notice: *State v. Simms*, 2004-Ohio-0652 (Exhibit B), *State v. Winn*, 173 Ohio App.3d 202, 2007-Ohio-4327 (Exhibit C), *State v. Taylor*, 2008-Ohio-484 (Exhibit D), *State v. Fischer* (1977), 52 Ohio App.2d 53

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(Exhibit E), *State v. Reid*, 2004-Ohio-2018 (Exhibit F), and *State v. Hatfield*, 2007-Ohio-7130 (Exhibit G).

This Notice is being filed pursuant to Rule IV of the Supreme Court Rules of Practice, and in accordance with Article IV, Section 3(B)(4) of the Ohio Constitution.

Respectfully submitted,



DONALD GALLICK (OH - 0073421)
ATTORNEY FOR APPELLANT
159 South Main Street #300
Akron, Ohio 44308
(330) 631-6892
dongallick@sbcglobal.net

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this Notice of Certified Conflict and Attached Exhibits were sent by regular U.S. to the office of the Summit County Prosecutor at 53 University Avenue, Akron, Ohio 44308, on this seventh day of July, 2008.



DONALD GALLICK (OH - 0073421)
ATTORNEY FOR APPELLANT

STATE OF OHIO
COUNTY OF SUMMIT

) COURT OF APPEALS
) SSNIEL M. HORTIGAN
)
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IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

JERMAINE BAKER

Appellant

SUMMIT COUNTY
CLERK OF COURTS

C.A. No. 23840

RECEIVED

JUN 11 2008



JOURNAL ENTRY

Appellant, Jermaine Baker, moves this Court to certify a conflict between the judgment in this case and those of the First District Court of Appeals in *State v. Simms*, 1st Dist. Nos. C 030138, C 030211, 2004-Ohio-652, the Second District Court of Appeals in *State v. Winn*, 173 Ohio App.3d 202, 2007-Ohio-4327, the Fourth District Court of Appeals in *State v. Taylor*, 4th Dist. No. 07CA29, 2008-Ohio-484, the Eighth District Court of Appeals in *State v. Fischer* (1977), 52 Ohio App.2d 53 and *State v. Reid*, 8th Dist. No. 83206, 2004-Ohio-2018, and the Eleventh District Court of Appeals in *State v. Hatfield*, 11th Dist. No. 2006-A-0033, 2007-Ohio-7130. The State has not responded to this motion.

Baker has proposed that three conflicts exist among the districts on the following three issues:

- (1) Does *Old Chief v. United States* (1997), 519 U.S. 172, apply to Ohio, state law, criminal prosecutions?
- (2) Are parties required to object to avoid waiver of criminal sentencing issues on appeal?
- (3) Is the issue of merger waived if a trial court imposes concurrent sentences?

When certifying a conflict, an appellate court must: 1) determine that its judgment is in conflict with a judgment of another court of appeals on the same question; 2) determine that the conflict is on a rule of law, not on the facts of the cases; and 3) clearly set forth in its opinion or its journal entry the rule of law believed to be in conflict with that of another district. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St. 3d 594, 596.

The decision in this case conflicts with the judgment of the First District Court of Appeals in *State v. Simms*, 1st Dist. Nos. C 030138, C 030211, 2004-Ohio-652, and the judgment of the Eleventh District Court of Appeals in *State v. Hatfield*, 11th Dist. No. 2006-A-0033, 2007-Ohio-7130. All three cases involved the application of *Old Chief v. United States* (1997), 519 U.S. 172, to state law criminal cases. In our case, we held that *Old Chief* was inapplicable to Ohio's criminal statutes for several reasons, namely because the Supreme Court in *Old Chief* construed a federal statute and therefore that decision was not binding on this Court's interpretation of an Ohio statute. This Court's holding conflicts with the First District's holding in *Simms* and the Eleventh District's holding in *Hatfield* wherein our sister courts applied *Old Chief*.

Likewise, this Court's judgment that Baker waived a sentencing issue because he failed to object to the sentence at the time it was imposed, conflicts with the Eighth District Court of Appeals decisions in *State v. Fischer* (1977), 52 Ohio App.2d 53 and *State v. Reid*, 8th Dist. No. 83206, 2004-Ohio-2018. In *Fischer* and *Reid* the Eighth District held that a defendant is not required to object to his sentence in order to preserve any errors with the sentence for appeal.

We also find a conflict among this Court's judgment and that of the Second District Court of Appeals in *State v. Winn*, 173 Ohio App.3d 202, 2007-Ohio-4327, the Fourth District Court of Appeals in *State v. Taylor*, 4th Dist. No. 07CA29, 2008-Ohio-484, and the Eighth District Court of Appeals in *State v. Fischer* (1977), 52 Ohio App.2d 53. In the within matter, this Court held that "plain error does not exist when concurrent sentences are imposed for crimes that constitute allied offenses of similar import." In contrast, in *Winn*, *Taylor* and *Fischer*, the courts found plain error where the trial court imposed two convictions that should have been merged.

Accordingly, Baker's motion to certify a conflict is granted.



Judge



Judge

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-030138
	:	C-030211
Plaintiff-Appellee,	:	TRIAL NO. B-0206358
vs.	:	<i>DECISION.</i>
WILLIAM SIMMS,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: February 13, 2004

Michael K. Allen, Hamilton County Prosecuting Attorney, and *Katie M. Burroughs*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

David C. Wagner, for Defendant-Appellant.

We have sua sponte removed this case from the accelerated calendar.



WINKLER, Presiding Judge.

{¶1} Defendant-appellant William Simms appeals from his conviction, after a jury trial, of one count of retaliation, in violation of R.C. 2921.05(B), a third-degree felony. On appeal, Simms raises four assignments of error.

{¶2} The testimony at trial showed that Simms had confronted his stepsister's daughter on the street and followed her, shouting threats of physical harm. The daughter immediately called the police, as well as her mother, for help. The confrontation occurred subsequent to Simms's release from prison. After having been convicted of the rape of the daughter, who was thirteen years of age at the time, Simms had been sentenced to a five-year prison term.

{¶3} R.C. 2921.05(B) provides, "No person, purposely and by force or by unlawful threat of harm to any person or property, shall retaliate against the victim of a crime because the victim filed or prosecuted criminal charges."

{¶4} In the first assignment of error, Simms contends that the trial court abused its discretion when it permitted the state to introduce evidence of the prior rape conviction, including irrelevant prejudicial details. Evid.R. 403(A) provides, "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." When considering evidence under Evid.R. 403, the trial court is vested with broad discretion,¹ and an appellate court should not interfere absent a clear abuse of discretion.² Our inquiry is whether the trial

¹ See *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus.

² See *State v. Allen*, 73 Ohio St.3d 626, 632-633, 1995-Ohio-283, 653 N.E.2d 675; *State v. Maurer* (1984), 150 Ohio St.3d 239, 265, 473 N.E.2d 768.

court acted unreasonably, arbitrarily, or unconscionably in deciding the evidentiary issues about which Simms complains.³

{¶5} Evid.R. 404(B), which concerns the admissibility of other-acts evidence, provides, “Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”⁴

{¶6} Because Simms’s actions might have appeared somewhat innocuous at first glance, the trial court could have correctly permitted the introduction of the rape conviction to demonstrate both motive and intent to retaliate, as well as to show the legitimacy of the threat of harm Simms presented to the victim by his current conduct.⁵ After his release from prison, the acts of following the victim, viewed within the context of Simms’s simultaneous verbal threats, and a realistic view of Simms’s actions against the victim before his incarceration, would undoubtedly have aided the jury in evaluating the existence of retaliation.

{¶7} Unsurprisingly, Simms relies on the holding in *Old Chief v. United States*⁶ that a stipulation concerning the rape conviction should have occurred, thereby preventing the introduction of damaging evidence surrounding the conviction.⁷ If the criminal charges alone were sufficient to prove the elements of retaliation, then a stipulation might have been appropriate to avoid any undue prejudice. But because Simms’s prior conviction and his

³ See *State v. Barnes*, 94 Ohio St.3d 21, 23, 2002-Ohio-68, 759 N.E.2d 1240.

⁴ See R.C. 2945.59; *State v. Broom* (1988), 40 Ohio St.3d 277, 282, 533 N.E.2d 682.

⁵ See *State v. McGrath* (Sept. 6, 2001), 8th Dist. No. 77896.

⁶ (1997), 519 U.S. 172, 117 S.Ct. 644.

⁷ While witnesses testified about a few details and consequences of the rape, a stipulation about the rape conviction was agreed to in front of the jury immediately preceding closing argument.

actions at the prior proceedings proved additional elements of retaliation, *Old Chief* does not call for a reversal in this case.

{¶8} *Old Chief* recognized the risks of a verdict tainted by improper considerations inherent in admitting evidence regarding prior offenses. The Supreme Court stated that it was an abuse of a trial court's discretion to admit the full judgment record over the objections of a defendant when the purpose of that evidence was solely to prove the element of a prior conviction.

{¶9} But there were additional considerations in the present case. The intimate nature of the prior crime, combined with Simms's threats at the prior proceedings, demonstrated more than the mere element of a prior conviction. We must note that R.C. 2921.05 contains no requirement for a conviction—merely the filing or prosecution of charges. But *Old Chief's* logic still applies. To prove retaliation, the prosecution had to show that the offender acted purposely and did so because the victim had filed or prosecuted criminal charges.⁸ The victim testified that Simms had made similar threats to her at the previous criminal proceedings and when he confronted her on the street after his release. This evidence appropriately demonstrated Simms's intent and motive.

{¶10} Further, the trial court did not admit the full judgment record. The court only admitted evidence concerning the age of the victim, the victim's immediate reporting of the crime, the nonconsensual nature of the crime, the type of prior crime, and Simms's threats to kill the victim. While the first three facts were irrelevant to the retaliation claim and probably should have been excluded, we cannot say that their

⁸ R.C. 2921.05

introduction into the record was unfairly prejudicial or amounted to an abuse of discretion.⁹

{¶11} Accordingly, the first assignment of error is overruled.

{¶12} In the second assignment of error, Simms contends that the trial court abused its discretion and committed plain error when it failed to provide a limiting instruction regarding the proper evidentiary use of Simms's prior conviction. Plain error occurs when, but for the error, the outcome of the trial clearly would have been different.¹⁰ The Ohio Supreme Court has explained that there are three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial: (1) there must be an error, i.e., a deviation from a legal rule, (2) the error must be plain, meaning that an obvious defect in the trial proceedings occurred, and (3) the error must have affected substantial rights, meaning that the trial court's error must have affected the outcome of the trial.¹¹ "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."¹² Clearly the information concerning the rape in this case was essential to the jury for a determination of both intent and the legitimacy of the threat of harm to the victim. On this record, even acknowledging the absence of a limiting instruction of some unspecified wording, we cannot reasonably conclude that the trial result would have been different had an instruction been given. Accordingly, the second assignment of error is overruled.

{¶13} In the third assignment of error, Simms contends that the trial court abused its discretion and committed plain error when it failed to give the jury a limiting instruction

⁹ See *State v. McGrath* (Sept. 6, 2001), 8th Dist. No. 77896; *State v. Munz*, 8th Dist. No. 79576, 2002-Ohio-675.

¹⁰ See *State v. Long* (1978), 53 Ohio St.2d 91, 96-97, 372 N.E.2d 804.

¹¹ See *State v. Noling*, 98 Ohio St.3d 44, 56, 2002-Ohio-7044, 781 N.E.2d 88, at ¶62.

¹² See *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.

regarding inflammatory statements made by the prosecutor during the rebuttal portion of closing argument. When no objection is raised, any challenges to allegedly improper remarks are waived, absent plain error.¹³ Whether a prosecutor's remarks constitute misconduct requires an inquiry into (1) whether the remarks were improper, and (2) if so, whether the remarks prejudicially affected the accused's substantial rights.¹⁴ The touchstone of this analysis "is the fairness of the trial, not the culpability of the prosecutor."¹⁵ Moreover, an appellate court must review a closing argument in its entirety to determine whether prejudicial error exists,¹⁶ rather than taking isolated comments by a prosecutor out of context and giving them their most damaging meaning.¹⁷ Having reviewed the closing argument in its entirety, even if the challenged remarks could be construed as improper, we conclude that there was no prejudicial error. Accordingly, the third assignment of error is overruled.

{¶14} In the fourth assignment of error, Simms contends that he did not receive effective assistance of counsel because his counsel failed to object to the prosecutor's inflammatory remarks during the state's closing argument and to ask for a limiting instruction about the use of his prior record. Reversal of convictions for ineffective assistance requires that the defendant show that (1) trial counsel's performance fell below an objective standard of reasonableness, and (2) the substandard performance prejudiced the defendant.¹⁸ To show prejudice, the defendant must prove that there exists a reasonable

¹³ See *State v. Allen*, 73 Ohio St.3d 626, 639, 1995-Ohio-283, 653 N.E.2d 675; *State v. Greer* (1988), 39 Ohio St.3d 236, 530 N.E.2d 382; *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332; see, also, Crim.R. 30(A).

¹⁴ See *State v. Noling*, 98 Ohio St.3d 44, 61, 2002-Ohio-7044, 781 N.E.2d 88, at ¶91.

¹⁵ *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940.

¹⁶ See *State v. Frazier*, 73 Ohio St.3d 323, 342, 1995-Ohio-235, 652 N.E.2d 1000.

¹⁷ See *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 647, 94 S.Ct. 1868.

¹⁸ See *Stickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052; accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

probability that, were it not for counsel's errors, the result of the trial would have been different.¹⁹ After reviewing the record, we hold that counsel's decisions represented reasonable professional judgment. It was not deficient performance by Simms's counsel, but the credibility of the witnesses, that was paramount to the outcome of this case. Accordingly, the fourth assignment of error is overruled.

{¶15} Therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

HILDEBRANDT and PAINTER, JJ., concur.

Please Note:

The court has recorded its own entry on the date of the release of this Decision.

¹⁹ See *Bradley*, paragraph three of the syllabus.

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

The STATE OF OHIO,	:	
	:	
Appellee,	:	C.A. CASE NO. 21710
	:	
v.	:	T.C. NO. 06 CR 99
	:	
WINN,	:	(Criminal Appeal from
	:	Common Pleas Court)
Appellant.	:	
	:	

OPINION

Rendered on the 24th day of August, 2007.

Mathias H. Heck Jr., Montgomery County Prosecuting Attorney, and Jill R. Sink, Assistant Prosecuting Attorney, for appellee.

Sandra J. Finucane, for appellant.

WOLFF, Presiding Judge.

{¶ 1} Following a three-day jury trial, Davon Winn was convicted of aggravated robbery, aggravated burglary, and kidnapping, all with firearm specifications, and three counts of tampering with evidence. The state dismissed one count of possession of criminal tools due to a faulty verdict form, and Winn was acquitted of one count of carrying a concealed weapon. The trial court sentenced him to an aggregate prison term of ten years. Winn appeals both his convictions and his sentence, presenting four assignments of error.



I

{¶ 2} At about 9:25 on the morning of January 11, 2006, Treva Hummons was lying in bed when she heard a noise at her front door. Her grandson's girlfriend, Teila Huffman, had spent the night and left earlier that morning, so Hummons thought Huffman was returning. As Hummons walked toward the living room, the door opened, and a man entered brandishing a handgun. The man pointed the gun in her face and ordered her back into the bedroom. He told her to lie on the bed and cover her face with a pillow, which she did. Hummons could feel the gun pushed against her head through the pillow while the man kept yelling, "Where's the money?" Hummons said that the only money she had was a \$200 money order on her nightstand.

{¶ 3} Meanwhile, Hummons's neighbor, Charles Perkins, had heard the banging on Hummons's door. He looked through his peephole and saw a man using a pry bar to open her door while two other men stood by. Perkins immediately dialed 911.

{¶ 4} In the midst of ransacking Hummons's home, one of the intruders looked out the window and saw that police had arrived. He warned the others. They hid a gun under Hummons's mattress along with gloves and a mask. They hid another gun in a box and the pry bar behind the dresser. Two of the men, Carlos Whiting and Timothy Body, complied with police orders to come out of the apartment, but Winn stayed in the kitchen until officers went in to get him. Perkins saw Whiting and Body leave the apartment, followed by Winn several minutes later. Perkins believed that it was Winn, by far the shortest of the three intruders, who had used the pry bar on the door.

{¶ 5} At trial, Winn claimed that when seeking a ride home, he was forced into

committing the crimes by Whiting and Body, who believed that Hummons's incarcerated grandson, Toby McLardy, had drugs and money in a safe that he kept in the apartment. Winn previously gave police three other versions of the events of January 11, 2006, each differing from his trial testimony.

II

{¶ 6} Winn's second assignment of error states:

{¶ 7} "Trial counsel was ineffective for failing to make or renew a [Crim.R.] 29 motion because insufficient evidence was presented to prove defendant-appellant's guilt of kidnapping, aggravated robbery, aggravated burglary, and three counts of tampering with evidence and the accompanying firearm specifications in violation of the Due Process Clause, and/or the defendant-appellant was entitled to be acquitted because he proved his affirmative defense of duress by [a] preponderance of the evidence."

{¶ 8} Winn's fourth assignment of error states:

{¶ 9} "Trial counsel was ineffective for failing to request a jury instruction on the affirmative defense of abandonment and/or failing [to] object to the court's jury instructions which did not include such an instruction."

{¶ 10} In his second and fourth assignments of error, Winn contends that his trial counsel was ineffective. First, he insists that counsel should have made and renewed a Crim.R. 29 motion for acquittal both because there was insufficient evidence of his guilt and because he had proven his affirmative defense of duress. Winn also argues that counsel should have ensured that an instruction on the affirmative defense of abandonment was given. We disagree in both regards.

{¶ 11} In order to prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. To show deficiency, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance. *Id.* Moreover, the adequacy of counsel's performance must be viewed in light of all of the circumstances surrounding the trial court proceedings. *Id.* Hindsight may not be allowed to distort the assessment of what was reasonable in light of counsel's perspective at the time. *State v. Cook* (1992), 65 Ohio St.3d 516, 524, 605 N.E.2d 70.

{¶ 12} Even assuming that counsel's performance was ineffective, the defendant must still show that the error had an effect on the judgment. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373. Reversal is warranted only when the defendant demonstrates that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Id.* In this case, Winn fails to meet either prong.

{¶ 13} Because, when faced with a Crim.R. 29 motion for acquittal, a trial court must view the evidence in a light most favorable to the state, "[f]ailure to move for an acquittal under Crim.R. 29 is not ineffective assistance of counsel where the evidence in the State's case demonstrates that reasonable minds can reach different conclusions as to whether the elements of the charged offense[s] have been proved beyond a reasonable doubt, and that such a motion would have been fruitless." *State v. Poindexter*, Montgomery App. No. 21036, 2007-Ohio-3461, ¶ 29. Here, the state

offered sufficient evidence to prove all elements of all offenses with which Winn was charged to warrant submitting the case to the jury.

{¶ 14} In regard to counsel's decision to not seek an instruction on abandonment, we first note that it cannot be said that the jury would have believed Winn's claim of abandonment had the instruction been given, particularly since the abandonment theory directly conflicts with Winn's claim of duress. Therefore, it is likely that counsel made that strategic choice to pursue the duress defense rather than the abandonment theory. Trial strategy decisions such as this will not be the basis of a finding of ineffective assistance of counsel. *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, ¶ 52.

{¶ 15} Finding no lack in Winn's legal representation and discerning no prejudice to his defense, we overrule Winn's second and fourth assignments of error.

III

{¶ 16} Winn's first assignment of error states:

{¶ 17} "The admission of a photograph of a photograph of a person who was purported to be the defendant violated the best evidence rule, Evid.R. 1002, and defendant's right to Due Process as guaranteed by Article I, Section 16 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution."

{¶ 18} In his first assignment of error, Winn argues that the introduction and admission of a photograph of Hummons's living room, which was marked as a state's exhibit, violated the best-evidence rule and that his trial counsel was ineffective for failing to object to the use of the photo. Because testimony regarding the contents of a

photograph depicted within the exhibit was not closely related to a controlling issue, the original of the depicted photograph was not necessary under Evid.R. 1004(4), and counsel was not ineffective for electing not to object to the use of the exhibit. Accordingly, Winn's first assignment of error fails.

{¶ 19} Evid.R. 1002 states: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio." However, there are exceptions to that rule. Relevant to this case is Evid.R. 1004(4), which states: "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if: (4) The writing, recording, or photograph is not closely related to a controlling issue."

{¶ 20} During the state's case in chief, the state offered the exhibit to depict the scene of the crime, and the trial court admitted it as such with no objection from Winn. When Winn took the stand, he denied knowing the victim's grandson, Toby McLardy. Although Winn later conceded that he knew McLardy from the neighborhood, he insisted that the two were not friends. The state called McLardy's girlfriend, Teila Huffman, as a rebuttal witness. Huffman explained that not only were Winn and McLardy friends, but she had seen a framed photograph of the two men together on top of the television in Ms. Hummons's living room. At that point, the state again used its exhibit, in which could be seen a framed photograph on top of the television. Although the contents of the framed photograph were unidentifiable in the exhibit photograph, Huffman identified the framed photograph as the one of Winn and

McLardy about which she had testified.

{¶ 21} When Huffman testified that the photo was one of Winn and McLardy, she implicitly testified that in fact, Winn and McLardy were portrayed in the photo, thus implicating Evid.R. 1002. However, the friendship of Winn and McLardy is not closely related to a controlling issue in this case. There is no question that Winn was involved in the crimes against Hummons. He admitted to being present at the scene, claiming duress as his defense. The question of whether Hummons had a photo of Winn and McLardy on her television set is, at best, an issue collateral to Winn's guilt or innocence of the crimes alleged. Accordingly, the original photograph of Winn and McLardy was not required. Evid.R. 1004(4).

{¶ 22} Winn also presents a cursory statement that trial counsel was ineffective for failing to object to the admission of the photograph of the living room. As already stated, the exhibit was admitted during the state's case in chief to depict the scene of the crime. There was no basis for objection at that point. Even if counsel had objected to use of the photo during Huffman's rebuttal testimony, such use was permissible pursuant to Evid.R. 1004(4). We cannot say that but for Huffman's testimony regarding the photograph, the outcome of the trial would have been different. Therefore, Winn cannot demonstrate the prejudice prong of *Strickland* and *Brady*.

{¶ 23} For these reasons, Winn's first assignment of error is without merit and is overruled.

IV

{¶ 24} Winn's third assignment of error states:

{¶ 25} “The defendant-appellant’s kidnapping conviction violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution and Section 10, Article I, of the Ohio Constitution.”

{¶ 26} Here Winn maintains that his kidnapping and aggravated robbery convictions were required to be merged because the charges are allied offenses of similar import that were committed with the same animus. Because this issue was not raised in the trial court, Winn has waived all but plain error. *State v. Long* (1978), 53 Ohio St.2d 91, 95-96, 372 N.E.2d 804; Crim.R. 52(B). We have previously applied a plain-error analysis in cases concerning alleged allied offenses of similar import and found that a defendant’s substantial rights are violated by conviction for two felonies rather than one when the offenses are allied offenses of similar import and committed with a single animus. *State v. Coffey*, Miami App. No. 2006 CA 6, 2007-Ohio-21, ¶ 14. See, also, *State v. Puckett* (March 27, 1998), Greene App. No. 97 CA 43.

{¶ 27} In applying R.C. 2941.25, the Ohio Supreme Court established a two-part test for determining whether multiple offenses are allied offenses of similar import. First, the court must compare the elements of the offenses in the abstract to determine whether the elements correspond to such a degree that the commission of one crime will necessarily result in the commission of the other. *State v. Rance* (1999), 85 Ohio St.3d 632, 636. If the elements do so correspond, the offenses are allied offenses of similar import, and the defendant may be convicted of and sentenced for both offenses only if he committed the crimes separately or with a separate animus. *Id.* at 638-39.

{¶ 28} The state encourages us to reconsider our recent decision in *Coffee*, wherein we held that kidnapping and aggravated robbery are allied offenses of similar

import, requiring consideration of the second step of the analysis set forth in *Rance*. We decline to do so. While we are aware of differing opinions in other appellate courts, we believe that our decision in *Coffey* was the right one.

{¶ 29} The Ohio Supreme Court has previously compared the elements of kidnapping and robbery and found that kidnapping is implicit within every robbery. *State v. Logan* (1979), 60 Ohio St.2d 126, 130, 397 N.E.2d 1345. “[W]hen a person commits the crime of robbery, he must, by the very nature of the crime, restrain the victim for a sufficient amount of time to complete the robbery.” *Id.* at 131. Thus, kidnapping and aggravated robbery are allied offenses of similar import, and Winn may only be convicted of both crimes if he committed each with a separate animus.

{¶ 30} The second “separate animus” step of the *Rance* analysis was first embodied in the syllabus of *Logan*, wherein the Court held: “In establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25(B), this court adopts the following guidelines:

{¶ 31} “(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;

{¶ 32} “(b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the

underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.”

{¶ 33} In this case, Winn’s movement of Hummons the few steps from her hallway into her bedroom, as well as his restraint of her therein, was merely incidental to the aggravated robbery. Moreover, the restraint was relatively brief. It was not secretive, nor did it involve a substantial movement or increase in risk to Hummons. Certainly, Winn used far less restraint in moving his victim in this case than was seen in *Logan*, wherein the court found the same animus for kidnapping and rape when the defendant forced his victim into an alley, around a corner, and down a flight of stairs. Because Winn’s victim, Hummons, was held in her bedroom in furtherance of the aggravated robbery, we cannot conclude that there was a separate animus for the kidnapping and aggravated robbery in this case.

{¶ 34} Because kidnapping and aggravated robbery are allied offenses of similar import, and because Winn did not commit the two crimes with a separate animus, he could be convicted of and sentenced for only one of those crimes. Winn’s third assignment of error is sustained.

V

{¶ 35} Having overruled three of Winn’s assignments of error and sustained the other, the judgment of the trial court is affirmed in part and reversed in part. We will merge Winn’s kidnapping conviction into his aggravated robbery conviction and vacate the separate sentence imposed on the kidnapping charge. As modified, the judgment of conviction and sentence is affirmed.

Judgment affirmed

[Cite as *State v. Taylor*, 2008-Ohio-484.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Case No. 07CA29
	:	
v.	:	
	:	<u>DECISION AND</u>
Jeremy L. Taylor,	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	File-stamped date: 2-4-08

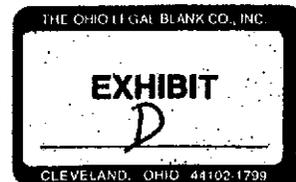
APPEARANCES:

David H. Bodiker, State Public Defender, and Sarah M. Schregardus, Assistant State Public Defender, Columbus, Ohio, for appellant.

James E. Schneider, Washington County Prosecutor, and Alison L. Cauthorn, Assistant Washington County Prosecutor, Marietta, Ohio, for appellee.

Kline, J.:

{¶1} Jeremy L. Taylor appeals his three felony convictions and sentences from the Washington County Court of Common Pleas. Pursuant to a plea agreement, Taylor pled guilty to three offenses in exchange for the state dismissing two specifications. On appeal, Taylor contends that the trial court erred when it found that a R.C. 2905.01(A)(4) kidnapping and a R.C. 2907.05(A)(1) gross sexual imposition are not allied offenses of similar import pursuant to R.C. 2941.25(A). We agree with Taylor that the offenses are allied offenses of similar import under R.C. 2941.25(A). However, the state contends that Taylor waived this issue because he did not raise it at the change of plea hearing. Because the plea agreement did not address either the allied offense or the recommended sentence issues, and because Taylor raised the issue in the trial



court at his sentencing hearing, we find that Taylor did not waive the issue. The state next contends that Taylor invited the error when he asked for concurrent sentences for the two offenses at the sentencing hearing and the court imposed concurrent sentences. Because Taylor requested a total concurrent sentence of 2-years and the court imposed a total concurrent sentence of 8-years, we disagree. Therefore, we hold that the court did not substantially comply with Crim. R. 11 when it accepted Taylor's guilty pleas without making a proper finding under R.C. 2941.25(A), and thus, failed to proceed to address R.C. 2941.25(B). Accordingly, we sustain Taylor's first assignment of error; vacate the trial court's judgment only as it relates to the gross sexual imposition conviction and sentence; find Taylor's remaining assignments of error are not ripe for review; and remand this cause to the trial court for further proceedings consistent with this opinion.

I.

{12} Marietta police responded to a report of an attempted rape. They described the sixteen-year-old (hereinafter "victim") as extremely upset and scared. She advised an officer that as she walked in a park, an unknown male followed her; pushed her to the ground; got on top of her; bit her right breast; grabbed her vaginal area after forcing his hand up her shorts; and dry humped her. She described the dry humping as the man moving his genitals on top of her in such a way that they would be having sex if they were unclothed. She begged the man to stop. Once she got away, she ran to her boyfriend's house, which is where the officers took her report.

{13} The police investigation eventually led them to Taylor, who was twenty-six-years-old. The victim then identified Taylor as the man who attacked her in the park. The police interrogated Taylor. During the interview, he admitted to the attack but did not remember biting the victim on her breast.

{14} The interview led the police to solving another attack that occurred about four years earlier. Another sixteen-year-old (hereinafter "earlier victim") had reported that an unknown man, between the ages of 15 and 20, came from behind her on his bike while she walked/jogged; grabbed her around her neck; and pulled her a little ways. She got away; reported the incident to police; and described her assailant. When police confronted Taylor with the earlier attack, he admitted that he was the person involved.

{15} A Washington County Grand Jury issued a three-count indictment against Taylor for kidnapping (with two specifications), gross sexual imposition, and attempted abduction. The first kidnapping and gross sexual imposition counts involved the recent victim and the attempted abduction involved the earlier victim.

{16} Taylor entered not guilty pleas. Eventually, the state and Taylor reached a plea agreement whereby he would plead guilty to all three counts of the indictment in exchange for the state dismissing the two specifications (which included a life sentence) included with the kidnapping offense. The plea agreement did not address (1) the allied offense issue or (2) sentencing recommendations.

{17} At the change of plea hearing, just after the court explained the penalties involved in each of the three offenses, and before the court heard the explanation of facts, the following dialogue occurred between the court and the state:

THE COURT: Okay. Attorney Rings, are any of them alike and allied?

MR. RINGS: No, Judge. Count 2 – 1 and 2 are on the same incident, but it's a kidnapping and a –

THE COURT: Yeah, they are not alike and allied.

MR. RINGS: – sex – I do not believe they are. And then, of course, Count 3 relates to an incident that took place four years prior.

{¶8} Later in the hearing, Taylor entered guilty pleas to the three offenses and then the parties stipulated to the factual basis for the pleas. The court then had the state make a statement of the facts. Afterwards, Taylor responded that the state's statement of the facts were true. The court convicted Taylor of all three offenses and ordered a pre-sentence investigation.

{¶9} At the sentencing hearing, the state recommended a concurrent sentence for the kidnapping and gross sexual imposition sentences "in the neighborhood of seven years" but consecutive to a recommended three year prison term for the attempted abduction offense. In sum, the state recommended a total sentence of ten years.

{¶10} At the same hearing, Taylor's counsel stated: "With respect to the sentence in this case, Judge, I know at the time of plea, he plead to all counts, they dismissed the spec, but the State had thought that – or it alleged that the gross sexual imposition and the kidnapping were not allied offense[s] or alike and allied, so that put a light bulb in my head to do some research." He stated that he found a 2004 Supreme Court of Ohio case, "State versus Foust[,]" which involved a kidnapping and a rape, that set forth "the test for determining whether kidnapping and rape were committed with a separate

animus as to each other[.]” He then read the test into the record and argued that the kidnapping and the gross sexual imposition were allied offenses of similar import.

{¶11} At the end, instead of asking the court to merge the two offenses into one conviction, Taylor’s counsel asked the court to impose concurrent sentences for the two offenses but with considerably less time than the state’s recommendation. Specifically, he recommended that the court impose a 2-year sentence for the kidnapping to run concurrent to a 1-year sentence for the gross sexual imposition, but consecutive to a 2-year sentence for the attempted abduction. In sum, he recommended a total sentence of four years.

{¶12} The court never responded to Taylor’s “allied offenses” argument. However, the court, after classifying Taylor as a habitual sexual offender, imposed an 8-year sentence for the kidnapping; an 18-month sentence for the gross sexual imposition; and a 4-year sentence for the attempted abduction. The court ordered the kidnapping and gross sexual imposition sentences to run concurrently to each other and consecutive to the attempted abduction for an aggregate sentence of 12-years.

{¶13} Taylor appeals his convictions and sentences and asserts seven assignments of error: I. “The trial court erred by entering convictions for the 2006 offenses against Jeremy Taylor for allied offenses of similar import, kidnapping and gross sexual imposition, in violation of R.C. 2941.25(A).” II. “The trial court erred by imposing non-minimum and consecutive sentences in violation of the Due Process and Ex Post Facto Clauses of the United States Constitution.” III. “The trial court committed plain error and denied Mr. Taylor due process of law by imposing non-minimum and consecutive

sentences.” IV. “The trial court did not have the authority to impose non-minimum and consecutive sentences.” V. “The trial court erred by imposing a non-minimum sentence in violation of the Due Process and Ex Post Facto Clauses of the United States Constitution for an offense that took place in 2002.” VI. “The trial court committed plain error and denied Mr. Taylor due process of law by imposing a non-minimum sentence for an offense that occurred in 2002.” And, VII. “The trial court did not have the authority to impose a non-minimum sentence for an offense that took place in 2002.”

II.

{¶14} Taylor contends in his first assignment of error that the trial court erred when it entered two convictions for the kidnapping and gross sexual imposition offenses. He claims that the court, pursuant to R.C. 2941.25, should have merged the gross sexual imposition offense into the kidnapping offense. In short, Taylor maintains that he should have received one conviction instead of two convictions because the two offenses are allied offenses of similar import. Taylor requests us to merge the two offenses into one offense and vacate the conviction and sentence for the gross sexual imposition. See, e.g., *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, ¶103 (merged conviction for receiving stolen property into conviction for grand theft and vacated receiving stolen property sentence).

{¶15} “[A] defendant who * * * voluntarily, knowingly, and intelligently enters a guilty plea with the assistance of counsel ‘may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.’” (Cite omitted.) *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, ¶78.

{¶16} However, the crux of Taylor's contention is that, before he entered his guilty pleas, the court erred when it concluded that the kidnapping and gross sexual imposition offenses were not allied offenses of similar import. First, we must decide if the court reached the wrong conclusion. Second, if the court did err, then did Taylor voluntarily, knowingly, and intelligently enter his guilty pleas.

{¶17} "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment * * * may contain counts for all such offenses, but the defendant may be convicted of only one." R.C. 2941.25(A). "Under a R.C. 2941.25(A) analysis, the statutorily defined elements of offenses that are claimed to be of similar import are compared *in the abstract*." *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, paragraph one of the syllabus.

{¶18} The elements of the kidnapping offense, as stated in R.C. 2905.01(A)(4), are: "No person, by force, threat, or deception, * * * shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will[.] * * *. R.C. 2907.01(C) defines "sexual activity" to mean "sexual conduct or sexual contact, or both."

{¶19} The elements of the gross sexual imposition offense, as stated in R.C. 2907.05(A)(1), are: "(A) No person shall have sexual contact with another, not the spouse of the offender; [when t]he offender purposely compels the other person * * * to submit by force or threat of force."

{¶20} Here, we find that when the elements of each crime are aligned, the offenses “ ‘correspond to such a degree that the commission of one crime’ ” resulted “ ‘in the commission of the other.’ ” *Rance*, supra, at 638, quoting *State v. Jones* (1997), 78 Ohio St.3d 12, 14. Specifically, the commission of a R.C. 2905.01(A)(4) kidnapping results in the commission of a R.C. 2907.05(A)(1) gross sexual imposition. Likewise, the commission of the gross sexual imposition results in the commission of the kidnapping. See, e.g., *State v. Fischer* (Nov. 24, 1999), Cuyahoga App. No. 75222, citing *State v. Shilling* (Aug. 5, 1997), Franklin App. No. 97APA01-43 (kidnapping and gross sexual imposition are allied offenses of similar import).

{¶21} Therefore, based on the above analysis, the trial court erred when it concluded that the offenses of kidnapping and gross sexual imposition are not allied offenses of similar import under R.C. 2941.25(A). Having made that conclusion in error, the court did not find it necessary to continue with its analysis under R.C. 2941.25(B). The second step of the analysis under R.C. 2941.25(B) provides in relevant part: “Where the defendant's conduct * * * results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment * * * may contain counts for all such offenses, and the defendant may be convicted of all of them.” However, we will not undergo this second step of the analysis because we have nothing to review. See *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356.

{¶22} The state contends that Taylor waived the allied offense issue because he never raised it at the time he entered his guilty pleas. The reason a defendant needs to object is so that the trial court can correct its error. Generally, see, *State v. Johnson*,

112 Ohio St.3d 210, ¶31 (failure to object so that the court can correct its error results in defendant waiving all but plain error). In addition, a defendant may waive the allied offense issue by a plea agreement. *State v. Yost*, Meigs App. No. 03CA13, 2004-Ohio-4687, ¶12, citing *State v. Yeager*, Carroll App. No. 03CA786, 2004-Ohio-3640, ¶60.

{¶23} Here, the state agrees that the plea agreement did not address the issue. Instead, at the time, the state concedes that it thought that the offenses were not allied. The court, not the parties, raised the issue before Taylor entered his guilty pleas. The state told the court at the Crim.R. 11 hearing that it believed the offenses were not allied offenses. The court agreed. While Taylor did not object to the court's finding at the time he entered his guilty pleas, he did object before the court sentenced him. Thus, the court had time to correct its error. Consequently, we find that Taylor did not waive this issue.

{¶24} The state further contends that Taylor invited the court's error when it asked for concurrent sentences and the court imposed the same. See *State ex rel. Smith v. O'Connor* (1995), 71 Ohio St.3d 660, 663 (a party cannot take advantage of an error he or she invited or induced the court to make). We are not persuaded. Taylor asked for a concurrent total sentence of 2-years and the court imposed a concurrent total sentence of 8-years, i.e., 8-years for the kidnapping and 18-months for the gross sexual imposition. Therefore, we find that the court did not impose the concurrent sentence that Taylor requested.

{¶25} Accordingly, we find that Taylor did not invite or induce the error.

{¶26} We now proceed to determine if Taylor voluntarily, knowingly, and intelligently entered his guilty pleas.

{¶27} In determining whether to accept a guilty plea, the trial court must determine whether the defendant knowingly, intelligently, and voluntarily entered the plea. *State v. Johnson* (1988), 40 Ohio St.3d 130, syllabus; Crim.R. 11(C). To do so, the trial court should engage in a dialogue with the defendant as described in Crim.R. 11(C).

Knowledge of the maximum penalty is not constitutionally required for a knowing, intelligent, and voluntary plea. *Johnson* at 133, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 88. However, Crim.R. 11(C)(2)(a) requires that the trial court explain to a defendant, before it accepts the defendant's plea, "the nature of the charge and of the maximum penalty involved. *Johnson* at 133. Furthermore, under Ohio law, "it is axiomatic that a defendant must know the maximum penalty involved before the trial court may accept his guilty plea." *State v. Corbin*, 141 Ohio App.3d 381, 386-387, 2001-Ohio-4140, citing *State v. Wilson* (1978), 55 Ohio App.2d 64; *State v. Gibson* (1986), 34 Ohio App.3d 146.

{¶28} Strict compliance with Crim.R. 11(C) is preferred; however, a reviewing court will consider a plea knowing, intelligent, and voluntary so long as the trial judge substantially complies with the rule. *State v. Boshko* (2000), 139 Ohio App.3d 827. In this context, "substantial compliance" means: "under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *State v. Stewart* (1977), 51 Ohio St.2d 86; *State v. Carter* (1979), 60 Ohio St.2d 34, 38, certiorari denied (1980), 445 U.S. 953.

{¶29} Here, we find that the trial court's error affected Taylor's substantial rights because the court convicted and sentenced him for both the kidnapping and the gross sexual imposition offenses. See, e.g., *Yarbrough*, supra, at ¶102 (convicting and sentencing the defendant for theft and receiving stolen property violated R.C. 2941.25(A) and affected his substantial rights). The plea agreement between the state and Taylor did not resolve the allied offense issue and did not include an agreed or recommended sentence. It simply provided that if Taylor pled guilty to the three offenses, then the state would dismiss the specifications (which carried a life sentence). A court cannot properly explain the nature of the offenses and the maximum penalties involved until it resolves the issue of allied offenses of similar import. Stated differently, until the allied offense issue is resolved, a defendant cannot subjectively understand the implications of his plea. Therefore, we find that Taylor did not voluntarily, knowingly, and intelligently enter his guilty plea to gross sexual imposition.

{¶30} Accordingly, we sustain Taylor's first assignment of error as it relates to R.C. 2941.25(A) but take no position as to R.C. 2941.25(B).

III.

{¶31} Taylor contends in his remaining assignments of error that the trial court erred for various reasons when it sentenced him. Based on our resolution of Taylor's first assignment of error, we find that these issues are not yet ripe for consideration.¹ Therefore, we do not address them.

¹ On remand, the parties may raise issues that affect the kidnapping and attempted abduction convictions and sentences because, at that point, the decisions involving those offenses are no longer final, appealable orders. For example, the state indicated in its brief that the outcome of the allied offenses issue could change its position on the plea agreement because at the time of the agreement it thought that the offenses were not allied offenses of similar

IV.

{¶32} In conclusion, we sustain Taylor's first assignment of error as it relates to R.C. 2941.25(A); vacate his conviction and sentence for the gross sexual imposition offense; and remand this cause to the trial court for further proceedings consistent with this opinion.

**JUDGMENT VACATED IN PART
AND CAUSE REMANDED.**

import. While we do not take a position on that issue or address it here, the state may or may not raise it in the trial court.

Harsha, J., Dissenting:

{¶133} I agree that Taylor did not waive the allied offenses issue, but at the sentencing hearing he expressly invited the error that he now contests. Taylor's counsel did not ask for merger at the sentencing hearing; he asked for concurrent sentencing. The court complied, albeit with a different term of imprisonment. This does not negate the invitation to impose concurrent sentences in my view. While this request may have resulted in ineffective assistance of counsel, that is not the issue before us.

Thus, I dissent.

**THE STATE OF OHIO, APPELLEE, V. FISCHER,
APPELLANT.**

[Cite as State v. Fischer (1977), 52 Ohio App.2d 53]

Criminal procedure - Appeal - Plain error - Conviction for two thefts where one occurred constitutes - Crim.R. 52(B) - Criminal law - Theft of vehicle containing personalty - Act constitutes one offense.

1. The conviction of an accused for two thefts where only one occurred is plain error under Crim. R. 52(B), and such may be noticed by an appellate court although no attempt was made to bring it to the attention of the trial court.

2. The act of stealing a motor vehicle containing personal property constitutes one offense and a defendant may not be additionally convicted of stealing the personalty.

(Nos. CA 640 and CA 641 - Decided June 8, 1977.)

APPEAL: 1st District Court of Appeals, Clermont County.

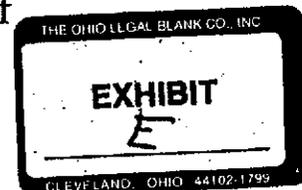
Mr. Robert A. Jones, prosecuting attorney, and Mr. W. Steven Boller, for appellee.

Mr. James N. Perry, for appellant.

Per Curiam.

This cause came on to be heard upon the appeal; the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Clermont County; and the transcript of the proceedings, the briefs and the arguments of counsel.

Defendant was charged with two thefts in two separate indictments: the theft of assorted automotive tools and the theft of a pickup truck. These two indictments, though not consolidated, were



handled and considered as one in the trial court. Fischer's motions to suppress evidence having been heard and denied, he entered pleas of no contest to both indictments, thus preserving the constitutional question raised in seeking the suppression of evidence. He appeals on two grounds: that the court committed error in holding that the affidavit in support of the search war-

Page

54

rant was effective, and the court erred in finding him guilty of two thefts because there was, as a matter of law, only one theft, the tools being in the pickup truck at the time it was stolen.

We overrule the first assignment of error, and sustain the second assignment of error.

As to the first assignment, we conclude that the affidavit presented to the magistrate contains sufficient reliable data to meet the constitutional requirements of probable cause under the Fourth Amendment of the United States Constitution, and that the search and seizure of Fischer's station wagon was reasonable. The affidavit sets forth information received by the affiant-officer from a number of sources: from the owner of the pickup truck, that the truck had been taken from his residence without his consent and had in it a number of automotive tools and equipment, including a red box; from other officers of the same police department, that the pickup truck was found in the general vicinity of the owner's residence, abandoned, with the rear bumper having on it some green paint not there before, and that a station wagon similar to Fischer's vehicle was seen leaving the general vicinity; and from an anonymous phone call, that Fischer was attempting to sell automotive tools, some of which bore the name of the owner, and that he would attempt to sell these tools at a service station in the general neighborhood. In addition, the affiant-officer searched out and found the station wagon, stopped it, found that Fischer was driving it without an operator's license, and observed a red tool box in the rear of that vehicle and a damaged front license plate with part of the green paint on the numbers scraped off.

The police took Fischer and his vehicle in custody, cited him for

driving without a license, and thereafter obtained the search warrant.

It will be noted that the constitutional requirements of probable cause are fulfilled by the direct testimony of the affiant-officer; he observed both the presence of the red tool box and the absence of a certain amount of green

Page

55

paint, both plainly in view, when he was entitled to be where he was, doing what he was then authorized to do. Thus, the warrant could have been issued upon his statements alone without the need to rely on the statements from the anonymous phone caller. The first assignment of error is without merit.

As to the second assignment of error, it was error to convict and sentence Fischer on both of the indictments. R.C. 2941.25(A). The initial theft of the pickup truck was also a theft of everything that was in it at that time; therefore, in the terms of the statute, "the same conduct by defendant can be construed to constitute two or more allied offenses of similar import." This defendant can be convicted of only one offense. It is irrelevant that he could not get the pickup truck started and eventually left it in the road, because the theft was complete, under R.C. 2913.02, when he obtained or exerted control over the truck and its contents without the consent of the owner.

The state objects to the assertion of this assignment of error, claiming that Fischer waived any error because he did not object or otherwise call this error to the attention of the trial judge, and that the sentences were concurrent. We disagree. We believe that in enacting R.C. 2941.25(A), the legislature adopted a fundamental precept of the constitutional requirements of fair trial: there shall be no "shotgun" convictions. The conviction for two thefts where there was only one is plain error under Crim. R. 52(B), which may be noticed although it was not brought to the attention of the trial court. Our conclusion is based on the following definition of "plain error" as found in *State v. Craft* (1977), 52 Ohio App.3d.11, at page 7:

"* * * [P]lain error may be identified as obvious error prejudicial to a defendant, neither objected to nor affirmatively waived by him,

which involves a matter of great public interest having substantial adverse impact on the integrity of and the public's confidence in judicial proceedings."

The second assignment of error is well taken.

Page
56

Having determined that the trial court committed error prejudicial to Fischer in convicting and sentencing him for the theft of the assorted automotive tools, we reverse his conviction of this offense, and dismiss this charge. Concurrently, we affirm the conviction and judgment for the theft of the pickup truck.

Judgment affirmed in part and reversed in part.

BETTMAN, P.J., CRAWFORD and BLACK, JJ., concur.

CRAWFORD, J., retired, was assigned to active duty under authority of Section 6 (c), Article IV, Constitution.

OH

Ohio App.2d

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[Cite as State v. Reid, 2004-Ohio-2018.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83206

STATE OF OHIO :
 :
 Plaintiff-Appellee :
 : JOURNAL ENTRY
 :
 vs. : and
 :
 : OPINION
 PERRY REID :
 :
 Defendant-Appellant :

DATE OF ANNOUNCEMENT
OF DECISION:

April 22, 2004

CHARACTER OF PROCEEDING:

Criminal appeal from
Court of Common Pleas
Case No. CR-432128

JUDGMENT:

AFFIRMED IN PART, REVERSED
IN PART, AND CASE REMANDED

DATE OF JOURNALIZATION:

APPEARANCES:

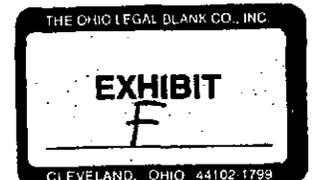
For Plaintiff-Appellee:

WILLIAM D. MASON
Cuyahoga County Prosecutor
JOHN R. KOSKO, Assistant
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellant:

JEROME EMOFF
55 Public Square, Suite 1300
Cleveland, Ohio 44113-1971

PERRY REID, pro se
Inmate No. 451261



Mansfield Correctional Institution
P.O. Box 788
Mansfield, Ohio 44901

COLLEEN CONWAY COONEY, J.

{¶1} Defendant-appellant Perry Reid ("Reid") appeals his convictions and sentences for multiple counts of rape, gross sexual imposition, and kidnapping. Finding some merit to the appeal, we affirm in part, reverse in part, and remand the case for resentencing and merger of allied offenses.

{¶2} In January 2003, Reid was charged with numerous counts of rape, gross sexual imposition, and kidnapping. The following evidence was presented at his jury trial in May 2003:

{¶3} S.P. ("the victim") testified that she was 13 years old and had been living with her stepfather Reid, and her mother, sister, and brother at their home in Broadview Heights for the last four years. She explained that her mother ("Robbie") began working evenings to earn money to go on a missionary trip with her church group. While Robbie was at work, the victim was at home with her siblings and Reid.

{¶4} The victim further testified that Reid regularly engaged in sexual relations with her while her mother was at work. He would enter the bedroom where she was watching television in her night shirt and start massaging her back, legs, and thighs. He would then move her underwear aside and place his fingers inside her vagina. He would also move his own underwear aside and place his penis inside her vagina. She described the sexual encounters

stating: "He would have the sex with me by putting his hands on my bottom and he would like move me around to have the sex."

{¶5} The victim testified that these sexual incidents happened "two, three times a week" for several months. Although she did not specify which months this activity occurred, she stated that it started before her thirteenth birthday in September and continued until November 2002. She also testified that these incidents occurred while the other children were either downstairs watching television or were asleep.

{¶6} Robbie testified that she had been married to Reid for seven years. She had two children from a prior relationship and one child with Reid. The entire family joined an Evangelical Church because she and Reid wanted to improve their lifestyles and raise the children in a religious home.

{¶7} Robbie also testified, without objection, that Reid watched X-rated movies. She admitted that she watched several movies with him prior to joining the church. Robbie also testified, without objection, that she discovered a rope and a bandana hidden in the ceiling of the bathroom in their former apartment. She also found what appeared to be the victim's hair in the bandana. When she asked the victim if she knew what these things were, the victim, who was then nine years old, told her mother that Reid tied her up, wrapped the bandana around her face and used his fingers and tongue to touch her vaginal area. When Robbie confronted Reid about these allegations, he denied them.

Robbie explained that she wanted to believe him because she had two children, was pregnant with a third child, and wanted a stable life for her family.

{¶8} Robbie explained that she was scheduled to leave for her church missionary trip on November 19, 2002. During the two-week trip, the victim and the other children would remain at home with Reid. In early November, the victim told Robbie about the sexual incidents with Reid. Robbie confronted Reid with the accusations and he denied them. Although Robbie initially planned to call the police, after speaking with Reid, she agreed to discuss the matter with a minister.

{¶9} After meeting with various members of the church, Joseph Koch, a pastoral intern at the church, reported the allegations of sexual abuse to the Cuyahoga County Department of Children and Family Services ("CCDCFS"). Ian Lucash ("Lucash"), a social service worker from the CCDCFS, investigated the allegations and testified that he "felt" the victim's disclosure of sexual abuse was "credible." He also opined that the victim's emotional state was consistent with that of a sexually abused child. Although he was not a licensed social worker, he had completed numerous training seminars on various sex abuse issues including forensic interviewing techniques. He testified that he had six years experience with sex abuse cases and had investigated approximately 450 cases of alleged sexual abuse.

{¶10} Robbie took the victim to Southwest General Hospital for an examination. A rape kit was completed, and the hospital personnel called the Broadview Heights Police Department, which received the rape kit and conducted its own investigation. Det. Brieyan K. Brandenburg, of the Broadview Heights Police Department, testified that scientific testing conducted on physical items removed from the victim's residence "came back negative."

{¶11} Dr. Mark Feingold ("Dr. Feingold"), the Director of Child Protection Services in the Alpha Clinic of Metrohealth Medical Center, testified that he examined the victim for evidence of rape and sexual assault. The defense argued at trial that because the victim's hymen was intact, she was a virgin and, therefore, could not have been raped. However, Dr. Feingold explained that the hymen of a teenage girl is elastic and generally is not broken or rubbed away by sexual intercourse on a short-term basis. Dr. Feingold stated that, in his experience, he had seen pregnant teenagers with normal intact hymens. He explained that a woman's hymen does not disappear until after childbirth or years of sexual intercourse. Therefore, he concluded, the fact that the victim's hymen was intact did not rule out the possibility that she was raped on numerous occasions over a period of months. He also stated that there is no medical test for virginity.

{¶12} Reid testified on his own behalf and denied ever raping or sexually assaulting the victim. He admitted that he massaged her legs when the victim broke her knee, but claimed he did so only

in the presence of the other children and never touched her inappropriately.

{¶13} The jury returned a guilty verdict on four counts of rape, four counts of gross sexual imposition, and four counts of kidnapping. Prior to sentencing, Reid filed a motion for new trial, which was denied. The court sentenced him to life in prison on counts one and two of the indictment, which alleged rape of a minor under the age of 13 years, and 10 years on counts eleven and twelve, which alleged rape of a minor over the age of 13. The court further sentenced him to eight years on each of the four kidnapping convictions and five years on counts 35, 36, 37, and 38, which charged gross sexual imposition of a minor under the age of 13, and eighteen months on counts 45, 46, 47, and 48, which charged gross sexual imposition of a minor over the age of 13. All sentences were ordered to be served consecutively.

{¶14} Reid appeals, raising nine assignments of error.

The Victim's Oath

{¶15} In his first assignment of error, Reid argues the trial court erred by permitting the victim, the State's chief witness, to testify without being under oath. The record establishes that the victim was sworn in as a witness. However, apparently because she was only 13 years old, the court, sua sponte, questioned her about her understanding of the oath and her ability to tell the truth. During this colloquy, the following exchange took place:

THE COURT: [S.P.], so you know what it means to receive an oath?

THE WITNESS: Not really. I don't know what it means.

* * *

THE COURT: You know in the court, do you remember when you just raised your hand and you said you were going to tell the truth, we use that to sort of tell people that they have to tell the truth. But this court is willing to accept any kind of bond you want to give me for how you will swear to me that you will tell the truth. * * *

* * *

THE COURT: What do you do if you want to convince somebody that your intentions are to tell the truth?

THE WITNESS: I promise.

THE COURT: You promise?

THE WITNESS: Yes.

* * *

THE COURT: Well, what I want you to do right now is say to me, Judge Saffold - I'm Judge Saffold. That's funny? Can you just say this, Judge Saffold -

THE WITNESS: Judge Saffold.

THE COURT: I promise to tell the truth.

THE WITNESS: I promise to tell the truth.

THE COURT: To the best of my ability.

THE COURT: Will you do that?

THE WITNESS: Yes.

THE COURT: You promise me, right?

THE WITNESS: Yes.

THE COURT: I will accept that as your oath. You remember you told me - I gave you the regular oath, and you know what, you can just disregard it because that doesn't mean anything to you, right?

THE WITNESS: Right.

THE COURT: What you just said means something to you, right?

THE WITNESS: Yes.

THE COURT: You're going to tell me the truth?

THE WITNESS: Yes.

THE COURT: See these people over there, these ladies and gentlemen of the jury, I want you to take a look at them. What you're doing is, by promising, you're also saying to them that what you're going to say is going to be the truth to the best of your ability. OK?

THE WITNESS: OK."

{¶16} As a preliminary matter, we note that defense counsel failed to object to this dialogue. In general, an appellate court will not consider any error which the appellant could have called, but failed to call, to the trial court's attention at a time when the error could have been avoided or corrected by the trial court. See *State v. Byrd* (1987), 32 Ohio St.3d 79; *State v. Awan* (1986), 22 Ohio St.3d 120; *State v. Gordon* (1971), 28 Ohio St.2d 45.

{¶17} However, Crim.R. 52(B) provides: "Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. Plain error exists when it can be said that, but for the error, the outcome of the trial would clearly have been otherwise. *State v. Nicholas* (1993), 66 Ohio St.3d 431, 436, 613 N.E.2d 225; *State v. Watson* (1991), 61 Ohio

St.3d 1, 6, 572 N.E.2d 97; *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894.

{¶18} The Ohio Supreme Court has frequently limited the application of the plain error rule. In *State v. Landrum* (1990), 53 Ohio St.3d 107, 111, 559 N.E.2d 710, the court quoted and relied upon *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, as follows:

"Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."

{¶19} Therefore, we invoke the plain error rule only if we find that the court denied Reid a fair trial, that the circumstances in the instant case are exceptional, and that reversal of the judgment is necessary to prevent a manifest miscarriage of justice.

{¶20} Upon a thorough review of the record, we find that the trial court did not excuse the victim from the obligations of a formal oath. Rather, the court explained the oath obligation to the young witness and impressed upon her the importance of her obligation to tell the truth. Under these circumstances, we do not find any plain error which would justify reversal of the judgment.

{¶21} Accordingly, the first assignment of error is overruled.

Effective Assistance of Counsel

{¶22} In his second assignment of error, Reid argues he was denied the effective assistance of counsel because his trial counsel committed fourteen critical errors during the course of the

trial. Reid argues that, without these errors, the outcome of the trial would have been different. In his third assignment of error, Reid argues that each instance of his counsel's deficient performance constitutes plain error.

{¶23} In a claim of ineffective assistance of counsel, the burden is on the defendant to establish that counsel's performance fell below an objective standard of reasonable representation and prejudiced the defense. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus; *State v. Lytle* (1976), 48 Ohio St.2d 391, 358 N.E.2d 623, vacated on other grounds (1978), 438 U.S. 910, 57 L.Ed.2d 1154, 98 S.Ct. 3135; and *Strickland v. Washington* (1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052. Hence, to determine whether counsel was ineffective, Reid must show that (1) "counsel's performance was deficient," in that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) counsel's "deficient performance prejudiced the defense," in that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052.

{¶24} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301, 209 N.E.2d 164. In evaluating whether a petitioner has been denied effective assistance of counsel, the Ohio Supreme Court has held

that the test is "whether the accused, under all the circumstances, * * * had a fair trial and substantial justice was done." *State v. Hester* (1976), 45 Ohio St.2d 71, 341 N.E.2d 304, paragraph four of the syllabus. When making that determination, a court must determine "whether there has been a substantial violation of any of defense counsel's essential duties to his client" and "whether the defense was prejudiced by counsel's ineffectiveness." *State v. Lytle* (1976), 48 Ohio St.2d 391, 396, 358 N.E.2d 623, and *State v. Calhoun* (1999), 86 Ohio St.3d 279, 289, 1999 Ohio 102, 714 N.E.2d 905. To show that a defendant has been prejudiced, the defendant must prove "that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *Bradley*, at paragraph three of the syllabus, and *Strickland*, *supra*, at 686.

{¶25} Reid argues his trial counsel was ineffective because they failed to argue the case of *State v. Boggs* (1992), 63 Ohio St.3d 418, even though the victim had made "prior, false allegations of rape." Reid argues that *Boggs* holds that the defense may cross-examine a rape victim regarding prior accusations of rape if they are probative of truthfulness. However, Reid fails to demonstrate that his lawyers were deprived of an opportunity to cross-examine witnesses about the victim's alleged prior, false allegations of rape or that the victim ever actually made false accusations of rape.

{¶26} At sidebar, defense counsel advised the court that they sought to introduce evidence of the victim's prior rape accusations "[b]ecause her mother has told that to the social workers." Then, during the cross-examination of the victim's mother, Robbie testified as follows:

"Q: But isn't it true that you told Miss Dickens at the Alpha Clinic that when [S.P.] was even younger, that several of your boyfriends had messed with her? Your phrase, 'messed with her.'

"A: She told me years later that she was messed with.

* * *

Q: And isn't it true that you told Miss Gula that [S.P.] has a reputation for telling lies?

A: That she has lied, yes.

Q: Isn't it true that you told Miss Gula that [S.P.] has a reputation for falsely accusing people of sexual improprieties?

A: No."

{¶27} Based on the foregoing, it is clear that defense counsel was not deprived of the opportunity to attempt to introduce evidence of the victim's alleged prior false allegations of rape. They sought such evidence during the cross-examination of the victim's mother, who admitted that the victim had previously lied, but denied that she ever falsely accused people of rape. Thus, defense counsel successfully elicited evidence challenging the victim's credibility and sought to introduce evidence of her alleged prior false allegations of rape. Simply because the

victim's mother denied such false allegations does not justify a finding of ineffective assistance of counsel.

{¶28} Reid also argues his trial counsel was ineffective because they failed to object to testimony that he watched pornographic videos. While such testimony might be prejudicial, defense counsel's decision not to object appears to have been a tactical one. Rather than objecting, the defense elicited an admission from Reid's wife that she watched pornographic videos with him and, thus, counsel attempted to discredit her. Therefore, the failure to object to evidence that Reid watched X-rated videos did not constitute ineffective assistance of counsel, especially when Reid has failed to show how this failure to object affected the outcome of the trial.

{¶29} Similarly, defense counsel apparently decided not to object to evidence of Reid's alleged sexual assault of the victim four years earlier because they sought to use the evidence to discredit both the victim and her mother. As previously mentioned, the defense attempted to raise the issue that the victim made prior false allegations of rape. Although the victim and Robbie both testified that the victim had previously stated that Reid sexually assaulted her four years earlier, the fact that the prior sexual assault was never prosecuted could discredit both the allegations and the accusers. Therefore, it cannot be said that defense counsel's decision not to object to such evidence is indicative of ineffectiveness.

{¶30} Reid argues that his trial counsel's failure to object to testimony that Reid said he would plead guilty is also indicative of ineffectiveness. However, the record reveals that when Robbie stated that Reid suggested to her that he might plead guilty, one of Reid's lawyers objected and the other asked to approach the bench to discuss the issue at sidebar. Moreover, when Robbie mentioned that Reid said he would plead guilty, she did not indicate that he was guilty but explained that Reid stated he might plead guilty "for the family not to have to go through this." Thus, the testimony would not have changed the outcome of the trial and, contrary to appellate's counsel's contention, Reid's trial counsel appropriately objected to the testimony.

{¶31} Reid also argues that trial counsel's failure to object to two instances of hearsay testimony constituted ineffective assistance of counsel. First, Robbie testified that the victim never specifically told her how often Reid allegedly raped her but that she overheard the victim tell a Children's Services worker that it occurred four times per week. Second, the hospital nurse who examined the victim read into evidence the "assault history" she generated as part of the victim's medical records. She testified that the "assault history" was routinely taken as part of the rape kit, and not necessarily prepared for the purpose of medical treatment.

{¶32} Although this evidence is objectionable as hearsay, Reid fails to show how such inadmissible hearsay changed the outcome of

the trial. Several witnesses testified as to the frequency of Reid's alleged assaults on the victim with some inconsistencies. While Robbie reported she overheard the victim tell the Children's Services worker that Reid raped her four times per week, the victim testified that the incidents occurred two to three times per week.

While Reid was indicted on seventeen counts of rape and sixteen counts of gross sexual imposition, the jury convicted him of only four counts of rape and four counts of gross sexual imposition. Thus, the jury obviously did not completely rely on the hearsay testimony in rendering the verdict. Since Reid cannot show how the hearsay testimony changed the outcome of the trial, we do not find counsel's failure to object to this testimony amounts to ineffective assistance of counsel.

{¶33} Similarly, the "assault history" which the nurse read into evidence was also duplicative of other non-hearsay evidence presented by other witnesses. Reid fails to show how the "assault history" affected the outcome of the trial and, therefore, we do not find ineffective assistance of counsel.

{¶34} Reid claims that his trial lawyer's failure to object to an investigator's testimony that he found the victim's disclosure of sexual abuse to be credible, indicates his counsel was ineffective. In *State v. Boston* (1989), 46 Ohio St.3d 108, the Ohio Supreme Court held that an expert may not comment on the veracity of a child declarant who had been raped because "in our system of justice, it is the fact finder, not the so-called expert

or law witnesses, who bear the burden of assessing the credibility and veracity of witnesses." *Id.*, 46 Ohio St.3d at 129. In *State v. Kovac* (2002), 150 Ohio App.3d 676, 2002-Ohio-6784, the Second Appellate District applied the same rule to non-experts. Thus, the investigator's testimony that he found the victim's disclosure of the sexual abuse "credible" was objectionable, and Reid's defense counsel erred by failing to object for the record.

{¶35} Nevertheless, the admission of statements in violation of *Boston* may be harmless if the declarant testifies and is subject to cross-examination, the State introduces substantial evidence in support of its position, and the declarant's testimony is cumulative to other evidence. See *Kovac*, *supra*, at 687, citing *State v. Kincaid* (Oct. 18, 1995), Lorain App. Nos. 94CA005942, and 94 CA005945; *State v. Palmer*, Medina App. No. CIV.A. 2323-M, 1995 Ohio App. LEXIS 514.

{¶36} Here, the victim testified at trial and was subject to cross-examination. The substance of her testimony as well as the investigator's testimony was cumulative and the State introduced substantial evidence in support of its position. Therefore, counsel's failure to object to opinion testimony on the victim's credibility was harmless.

{¶37} Reid further argues that his lawyers erroneously failed to object to the investigator's statement that "perpetrators generally don't admit" their sex crimes. He claims such testimony was inadmissible because it was "a comment on Appellant's silence and/or his failure to admit the truth of the allegations" in violation of the U.S. Constitution. However, when viewed in context, it is clear that the investigator was not commenting on Reid's silence *per se*, but was merely explaining that in his experience as an investigator of sex crimes, he finds allegations of sexual abuse difficult to substantiate

because “[p]erpetrators generally don’t admit and medical evidence is usually very difficult to find.” We find no constitutional violation here and, furthermore, without evidence that such testimony changed the outcome of the trial, we do not find ineffective assistance of counsel.

{¶38} Reid claims his lawyer erroneously failed to request a limiting instruction when Robbie testified that a member of her church notified Children’s Services of the alleged sexual abuse because “he believed her.” Reid argues that Robbie did not have personal knowledge of this third person’s beliefs and, therefore, was not competent to testify to those beliefs under Evid.R. 602. Reid also argues his trial counsel failed to request an in camera inspection of witness statements pursuant to Crim.R. 16(B)(1)(g) before cross-examining important witnesses. However, Reid again fails to show how these alleged deficiencies in his trial counsel’s performance affected the outcome of the trial.

{¶39} Reid reasserts the issue of the court’s dialogue with the 13- year-old victim about her understanding of her oath and claims that his counsel’s failure to object to this colloquy indicates his counsel was ineffective. However, as previously demonstrated, the court did not excuse the witness from the obligations of her oath but simply emphasized the importance of telling the truth. Therefore, defense counsel had no reason to object.

{¶40} Reid argues his trial lawyers were also deficient because they failed to move for acquittal pursuant to Crim.R. 29 and, therefore, waived any review of the sufficiency of the evidence. Failure to move for acquittal pursuant to Crim.R. 29 waives any sufficiency of evidence argument on appeal. *State v. Colon* (June 21, 2001), Cuyahoga App. No. 78287, citing *State v. Roe* (1989), 41 Ohio St.3d 18, 25, 535 N.E.2d 1351. Nevertheless, because

the record is replete with evidence of Reid's guilt, failure to move for acquittal in this case was harmless.

{¶41} When reviewing the sufficiency of the evidence, the court examines the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132. Here, because there was no objective evidence of Reid's guilt, the outcome of the trial turned on the credibility of Reid and the victim. The victim testified that Reid raped her and touched her vagina with his fingers two to three times a week for a period of several months. Based on this testimony, there is no question that a motion for acquittal pursuant to Crim.R. 29 would be denied and that such denial would be affirmed on appeal. Therefore, defense counsel's failure to make this motion at trial is harmless.

{¶42} Finally, Reid argues his trial counsel was ineffective because they failed to insist upon an opportunity to speak on his behalf at the sentencing hearing. He also argues that his defense counsel's failure to object to the sentence further prejudiced him. However, our review of the record reveals that his trial counsel did make a mitigating statement on his behalf. Also, defense counsel is not required to object to the court's sentence in order to preserve the issue for appeal. Therefore, we do not find any deficiency in counsel's conduct at sentencing.

{¶43} Accordingly, the second and third assignments of error are overruled.

Neutral and Detached Tribunal

{¶44} In his fourth assignment of error, Reid argues he was denied his right to a fair trial because the court failed to remain neutral and detached. Reid claims the court demonstrated hostility towards defense counsel in the presence of the jury and that such hostility prejudiced his defense.

{¶45} "The judiciary must not only remain detached and neutral in any proceeding before it, but the court must also epitomize itself as the paragon of impartiality." *State v. Bayer* (1995), 102 Ohio App.3d 172, 656 N.E.2d 1314, 174. In *State v. Ellis*, Huron App. No. H-91-055, 1993 Ohio App. LEXIS 62, the court explained:

"A trial judge must conduct proceedings before a jury in a scrupulously impartial manner so as not to convey his opinion or bias on the merits of the case. *State ex rel. Wise v. Chand* (1970), 21 Ohio St.2d 113, 119. Remarks made by a trial judge within the hearing of the jury during trial may lend themselves to be interpreted as the judge's opinion on the merits of the case and carry substantial weight with the jury. *State v. Boyd* (1989), 63 Ohio App.3d 790, 794. Where such statements may be construed as a judicial pronouncement on the credibility of a witness or of a defendant or an opinion on the facts of the case, prejudicial error results. *State v. Kay* (1967), 12 Ohio App.2d 38, 49."

{¶46} Reid argues the court demonstrated a bias in favor of the State by admonishing defense counsel in the jury's presence during opening statement. However, during opening statements, defense counsel repeatedly made arguments which were not appropriate for opening statement. The State objected to the argumentative statements and the court warned defense counsel that arguments were not appropriate during opening statement and that, if he continued to argue in opening statement, the court would cut his opening statement short. When defense counsel continued to make arguments despite the court's warning, the court instructed defense counsel to sit down before finishing his opening statement.

{¶47} Although the court's admonition and subsequent order to sit down occurred in the presence of the jury, the court's actions were not the product of bias but the result of defense counsel's noncompliance with the court's order. The jury heard the warnings before the court cut the opening statement short. Therefore, rather than concluding that the court was biased against the defense, the jury would conclude that defense counsel had acted inappropriately.

{¶48} Similarly, Reid claims the court improperly interrupted defense counsel during cross-examination of Robbie. However, again, the admonitions were warranted by defense counsel's improper conduct. For example, during the cross-examination of Robbie, the following exchange took place:

Q: Don't you think that your concern for the safety of your child should have outweighed your concern about the nosiness of your neighbors?

A: That wasn't the only reason behind it.

Q: That was the chief reason you told the prosecutor.

THE COURT: Is that a question or are you testifying?

MS. VENEZIANO: That was something I'm going to withdraw."

{¶49} By withdrawing her statement, defense counsel admitted she acted improperly. She withdrew the statement in the jury's presence leaving the jury to conclude that defense counsel made an inappropriate remark.

{¶50} As the cross-examination of Robbie continued, the court again asked defense counsel if she was testifying and warned her not to make statements during cross-examination:

Q: Now, when Mr. Kosko asked you about your husband's hobbies, you told him that he played Play Station and sometimes he watched X-rated

movies but so did you, right? You watched X-rated movies with your husband, correct?

A: Just a couple of times. And that's what I told him.

Q: Actually you told Mr. Kosko five times, not a couple of times.

A: Couple, five, yes.

Q: Do you remember a couple is two, five is five. A couple and five are not the same?

THE COURT: Are you testifying? I want you to ask her a question and I want you to stop testifying."

{¶51} Although the court admonished defense counsel in the jury's presence, the warnings were justified and brought about by defense counsel's own conduct. There is no evidence that the court was biased against defense counsel based on these admonitions. Moreover, the jury could see the admonitions resulted from defense counsel's actions in contravention of the court's instructions. Therefore, it cannot be said that the jury was influenced by any bias of the court.

{¶52} Reid also argues that the court's bias was demonstrated by the court's questioning of the victim about her understanding of her oath obligation. Reid claims this dialogue gave the jury the impression that the judge established a special relationship with the victim, thereby endowing the victim with an enhanced level of credibility. Reid further claims that the court treated the victim as if it did no other witness.

{¶53} However, the victim was only thirteen years old, and the youngest witness to testify. The jury knew her age and that she had a learning disability. Under these circumstances, the jury could understand why the court might question this witness about her understanding of her oath obligation. Therefore, we cannot say that this dialogue prejudiced the jury.

{¶54} Reid argues the court demonstrated bias by not permitting defense counsel to impeach the victim with a prior inconsistent statement relating to the frequency of the rapes. However, while evidence of the victim's prior inconsistent statements may have been admissible, the court's refusal to admit such evidence was not obvious to the jury because the evidence was excluded when the court sustained the State's objection. The jury would not know the reason for the State's objection or the court's sustaining the objection and, therefore, would not draw any conclusions as to bias.

{¶55} Finally, Reid argues the court demonstrated bias against the defense by refusing to allow them to speak on Reid's behalf at the sentencing hearing. However, as previously stated, the court not only gave defense counsel an opportunity to make mitigating statements on behalf of their client, the court heard those statements without interruption. Moreover, the jury was discharged long before the sentencing hearing and, therefore, could make no conclusions based on those proceedings. Therefore, we do not find that Reid was deprived of a fair trial based on any bias of the court.

{¶56} Accordingly, the fourth assignment of error is overruled.

Consecutive Sentences

{¶57} In his fifth and sixth assignments of error, Reid argues the trial court erred in sentencing him to consecutive prison terms without setting forth the mandatory findings required by R.C. 2929.14(E)(4) and R.C. 2929.19(B)(2)(c).

{¶58} Pursuant to R.C. 2929.14(E)(4), the court may impose consecutive sentences for convictions of multiple offenses only after it makes three determinations: (1) that consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) that consecutive sentences are not disproportionate to the seriousness of

the offender's conduct and to the danger the offender poses to the public, and (3) if the court also finds any of the following:

“(a) The offender committed the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) The harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.”

{¶59} R.C. 2929.14(E)(4). See, also, *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473.

{¶60} When a trial court imposes consecutive sentences under R.C. 2929.14, it must also comply with R.C. 2929.19(B)(2)(c), which requires that the court “make a finding that gives its reasons for selecting the sentences imposed.” The requirement that a court give its reasons for selecting consecutive sentences is separate and distinct from the duty to make the findings required by R.C. 2929.14(E)(4). *Comer*, supra. See, also, *State v. Hudak*, Cuyahoga App. No. 82108, 2003-Ohio-3805, citing, *State v. Brice*, Lawrence App. No. 99 CA21, 2000 Ohio App. LEXIS 1386. Moreover, “a trial court must clearly align each rationale with the specific finding to support its decision to impose consecutive sentences.” *Comer*, supra. These findings and reasons need not “directly correlate each finding to each reason or state a separate reason for each finding” but must be articulated by the trial court so an appellate court can conduct a meaningful review of the sentencing decision. *State v. Cottrell*, Cuyahoga App. No. 81356, 2003-Ohio-5806; *Comer*, supra,

citing, Griffin & Katz, Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan (2002), 53 Case W.Res.L.Rev. 1, 12.

{¶61} In sentencing Reid to consecutive sentences, the trial court stated:

“The court finds that you show absolutely no remorse for this offense. The court finds [sic] to be more serious that the injury to the victim was worsened by the physical or mental condition or age of the victim. That the victim suffered serious physical and psychological harm as a result of the offense.

And when the court considers those two options, the court does consider that you were in the home as her stepfather, that she is a young person, a young victim and apparently loves you and has continued to love you throughout these proceedings, which made her more vulnerable to your predatory nature.”

{¶62} The court then proceeded to impose the sentences for each of Reid’s convictions. The court stated:

“* * * The court makes the following findings with reference to the sentences. This court finds that a consecutive sentence is necessary to protect the public from future crime and to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the dangers the offender poses to the public.

And the court also finds that the harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender’s conduct.

Therefore, all of these sentences will be served consecutively.”

{¶63} As indicated by the above-quoted excerpts, the trial court addressed the factors enumerated in R.C. 2929.14(E)(4), but did not provide its reasoning. It is unclear why the trial court found that a consecutive sentence was necessary to protect the public from future crime or to punish Reid. The trial court also failed to state its reasoning as to the proportionality of the sentence to the seriousness of Reid’s conduct and to the danger

he posed to the public. Therefore, we vacate the consecutive sentence imposed by the trial court and remand this matter for resentencing in accordance with R.C. 2929.14(E)(4), R.C. 2929.19(B)(2), and *Comer*.

{¶64} Accordingly, the fifth and sixth assignments of error are sustained.

Sufficiency and Manifest Weight of the Evidence

{¶65} In his eighth assignment of error, Reid argues the verdicts on counts one and two of the indictment were not supported by sufficient evidence and were against the manifest weight of the evidence.

{¶66} An appellate court's function in reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492. A verdict will not be disturbed on appeal unless reasonable minds could not reach the conclusion reached by the trier of fact. *Id.*

{¶67} In essence, sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 1997-Ohio-52, 678 N.E.2d 541. A criminal conviction is not supported by sufficient evidence when the prosecution has failed to "prove beyond a reasonable doubt every fact necessary to constitute any crime for which it prosecutes a defendant." *State v. Robinson* (1976), 47 Ohio St.2d 103, 108, 351 N.E.2d 88, citing *In re Winship* (1970), 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068. The weight to be given the evidence

and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212.

{¶68} The test to be applied when reviewing a claim that a conviction is against the manifest weight of the evidence was stated by the court in *State v. Martin* (1983), 20 Ohio App.3d 172 at 175, 20 Ohio B. 215, 485 N.E.2d 717, as follows:

"There being sufficient evidence to support the conviction as a matter of law, we next consider the claim that the judgment was against the manifest weight of the evidence. Here the test is much broader. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.* * * See *Tibbs v. Florida* (1982), 457 U.S. 31, 38, 42, 72 L. Ed. 2d 652, 102 S. Ct. 2211."

{¶69} See, also, *Thompkins*, supra, at 387.

{¶70} However, this court must be mindful that the weight of the evidence and the credibility of witnesses are matters primarily for the trier of fact, and a reviewing court must not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the State has proven the offense beyond a reasonable doubt. *DeHass*, supra at syllabus; *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132. The ultimate goal of the reviewing court is to determine whether the new trial is mandated. We should grant a new trial only in the "exceptional case in which the evidence weighs heavily against conviction." *State v. Lindsey*, 87 Ohio St.3d 479, 483, 2000-Ohio-465, 721 N.E.2d 995, 1002.

{¶71} In the instant case, Reid contends the evidence did not support the jury's finding that Reid raped the victim while she was under 13 years of age as charged in counts one and two of the indictment. However, the victim testified that Reid raped her both before and after her thirteenth birthday. Specifically, the victim testified:

Q: How often did it happen that you had sex with Perry?

A: Somewhere along last year. And it was like two, three times a week, something like that.

Q: Two or three times for how long?

A: Couple months.

Q: Do you remember what months they were?

A: I'm not specific. November. I don't know. Not November. I'm not specific about months.

Q: You're not?

A: No.

Q: Do you remember how old you were?

A: Twelve to thirteen.

Q: So it happened before your birthday and after?

A: I think so, yes."

On cross-examination, the victim further explained:

"A: I don't know the month. When - well, my mom was working and I don't remember what time, but maybe a month or something like that later after the - she just began working there.

Q: So when did she begin there, do you know?

A: No, Not really. I think it was June and April I think.

Q: April?

A: Yeah, I think so.

Q: So you're claiming that he started having sex with you roughly a month later. I think you said it was about three times a week?

A: Yes.

Q: And this continued all the way through until November?

A: Yeah."

{¶72} Thus, according to the victim's testimony, Reid first raped her about one month after her mother started working in April, months before her thirteenth birthday. Thus, based on her testimony, Reid raped her several months before she turned thirteen and for a couple months thereafter. Based on this evidence, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered. We also conclude that the State presented sufficient evidence to support each of Reid's rape convictions beyond a reasonable doubt.

{¶73} Accordingly, the eighth assignment of error is overruled.

Allied Offenses

{¶74} In his ninth assignment of error, Reid argues the trial court erred in failing to merge the kidnapping, gross sexual imposition, and rape counts as allied offenses of similar import.

{¶75} Gross sexual imposition and rape may, depending on the circumstances, be allied offenses of similar import. For instance, it is well established that gross sexual imposition is a lesser included offense of rape. *State v. Johnson* (1988), 36 Ohio St.3d 224, 226, 522 N.E.2d 1082; *State v. Jones* (1996), 114 Ohio App.3d 306, 325, 683 N.E.2d 87. Accordingly, under R.C. 2941.25, a defendant may generally not be convicted of and

sentenced for both gross sexual imposition and rape when they arise out of the same conduct. *Id.*

{¶76} In determining whether rape and kidnapping are allied offenses of similar import, the “primary issue * * * is whether the restraint or movement of the victim [which forms the basis of the kidnapping charge] is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense.” *State v. Logan* (1979), 60 Ohio St.2d 126, 135, 397 N.E.2d 1345. In *Logan*, *supra*, the Supreme Court held that, where a victim was forced from an alley down a flight of stairs before being raped, the kidnapping and rape were allied offenses of similar import.

{¶77} In the instant case, the State concedes that the rape and kidnapping convictions should merge as allied offenses of similar import but argues that because the gross sexual imposition offenses preceded each of the rapes, they should not merge. We agree.

{¶78} The victim testified that Reid massaged her thighs and vaginal area before moving her underwear aside to allow the act of penetration. According to this testimony, the sexual contact necessary for the gross sexual imposition conviction was completed before the sexual conduct necessary for the rape convictions started. The sexual contact element of the gross sexual imposition offenses was not incidental to the sexual conduct element of the rapes because the rapes could have been committed without the preceding sexual contact. Therefore, we conclude that the trial court should have merged the convictions for kidnapping and rape, but not for the gross sexual imposition.

{¶79} Accordingly, Reid’s ninth assignment of error is sustained to the extent that the trial court is ordered to merge the kidnapping and rape convictions.

{¶80} In light of our remand for resentencing, the seventh assignment of error challenging the imposition of maximum sentences, is moot.

{¶81} Judgment is affirmed in part and reversed in part. Case is remanded for a new sentencing hearing and merger of the allied offenses.

Judgment affirmed in part
and reversed in part.

ANNE L. KILBANE, P.J., CONCURS.

SEAN C. GALLAGHER, J., CONCURS IN PART AND DISSENTS IN PART.
(SEE SEPARATE OPINION.)

SEAN C. GALLAGHER, J., CONCURRING IN PART AND DISSENTING IN PART

{¶82} I concur with the findings of the majority with respect to Reid's first, second, third, fourth, and eighth assignments of error. I respectfully dissent from the majority holding that sustains Reid's fifth and sixth assignments of error. I would also overrule Reid's seventh assignment of error concerning the imposition of maximum sentences. I would not require the trial court to resentence Reid or restate findings and reasons for the sentence imposed on the record.

{¶83} The majority correctly points out that the findings and reasons required by R.C. 2929.14 and R.C. 2929.19(B)(2)(c) as well as the findings required by R.C. 2929.14(E)(4) need not "directly correlate each finding to each reason or state a separate reason for each finding," but they must be articulated by the trial court so an appellate court can conduct a meaningful review of the sentencing decision. *State v. Cottrell*, Cuyahoga App. No. 81356, 2003-Ohio-5806.

{¶84} The majority claims the trial court addressed the factors of R.C. 2929.14(E)(4) but failed to provide its reasoning. I disagree. The trial court's comments outlined in the majority opinion more than satisfy the statutorily required reasons under both R.C. 20929.14(E)(4) and R.C. 2929.19(B)(2). The court specifically referenced the reasons by stating Reid showed no remorse for his conduct, that the victim's physical and mental condition was worsened by the victim's age, that the victim suffered serious physical and psychological harm, that Reid was the victim's stepfather, that due to his close proximity to her in the home she was more vulnerable, and that because of this relationship, greater harm occurred.

{¶85} It is my view that the reasons support the findings that the sentence was proportional to the seriousness of Reid's conduct and that a consecutive sentence was necessary to punish the offender. I would overrule Reid's fifth and sixth assignments of error and remand the matter solely with respect to merger of the allied offenses addressed under the majority's analysis of the eighth assignment of error. For the same reasons, I would also overrule Reid's seventh assignment of error challenging the imposition of maximum sentences. I believe the reasons support the imposition of maximum sentences under R.C. 2929.14(C) and 2929.19 (B)(2)(d).

This court finds there were reasonable grounds for this appeal. It is, therefore, considered that said appellant and said appellee share the costs herein.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JUDGE
COLLEEN CONWAY COONEY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
	:	
Plaintiff-Appellee,	:	
	:	CASE NO. 2006-A-0033
- vs -	:	
	:	
SONNY HATFIELD,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2004 CR 277.

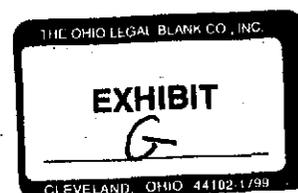
Judgment: Reversed and remanded.

Thomas L. Sartini, Ashtabula County Prosecutor and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

Joseph A. Humpolick, Ashtabula County Public Defender, Inc., 4817 State Road, #202, Ashtabula, OH 44004 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} Appellant, Sonny R. Hatfield, appeals from the judgment of conviction in the Ashtabula County Court of Common Pleas on one count of vehicular homicide, a felony of the fourth degree, in violation of R.C. 2903.06(A)(3)(a), and one count of aggravated vehicular homicide, a felony of the second degree, in violation of R.C.



2903.06(A)(2)(a). For the reasons discussed herein, we reverse and remand the matter for further proceedings.

{¶2} Facts and Procedural Posture

{¶3} On February 24, 2004, at approximately 5:40 p.m., an automobile accident occurred between a Ford Explorer, driven by appellant, and a Honda Civic, driven by Sharon Kingston, at the intersection of Harold Avenue and Beck, Plymouth, and Plymouth-Brown Roads in Plymouth Township, Ashtabula County, Ohio.

{¶4} The intersection of the four roads can best be described as an offset four-way intersection. Plymouth-Brown Road merges into Beck Road heading in a northern (northwestern) direction and is designed to allow traffic to travel unimpeded between Plymouth-Brown and Beck Roads in either direction. Plymouth Road splits off in a westerly direction (leftward) from where Plymouth-Brown Road merges with Beck. Traffic also flows uninterrupted from Plymouth-Brown Road to its westerly fork (Plymouth Road), but eastbound traffic from the Plymouth Road's Y-shaped intersection with Beck and Plymouth-Brown, is required to stop. A "stop sign ahead" warning sign is posted two-tenths of a mile prior to the point where Plymouth Road intersects with Plymouth Brown and Beck Roads.

{¶5} Harold Avenue heads in an east-west direction (to the right) just northwest of Plymouth Road intersection with Plymouth-Brown and Beck Roads. Westbound traffic on Harold Road is regulated by a stop sign where it intersects with Plymouth-Brown and Beck Roads. Traffic is able to cross the intersection from Plymouth Road to Harold Avenue diagonally across Beck Road.

{¶6} Kingston was traveling in a northwesterly direction from Plymouth-Brown toward Beck Road when the two vehicles collided, with the front and front-left portions of appellant's vehicle striking the driver's side of Kingston's Honda. Following the collision, appellant's SUV came to rest across Beck Road, facing eastward toward Harold Avenue. The force of the impact caused Kingston's vehicle to come to rest in a grass field just north of Harold Road, near the Harold Road stop sign, facing westward toward Plymouth Road.

{¶7} Lorraine Pratt, a licensed practical nurse, who was driving westbound on Harold Avenue with her daughters saw Kingston's vehicle sitting in the field on the right hand side of Harold Avenue with the side "smashed in" and "another car parked on *** Beck Road *** facing *** Northwest." She noticed that the woman in the Honda was "not doing very well" and went to assist her. As she approached to examine Kingston, she found her "dazed," unresponsive to verbal cues, and "unable to control her head movements." Pratt also stated that Kingston's "pupils were fixed and dilated." Pratt instructed her oldest daughter to call 9-1-1. When asked if she noticed appellant at the scene, Pratt testified that she first noticed him standing near his vehicle and talking on his cell phone. Pratt described appellant's demeanor following the accident as "very shaken," and that he was pacing back and forth and "moving his hands quite a bit."

{¶8} An EMS crew from the Plymouth Township Volunteer Fire Department was first to arrive on the scene. Bill Allds, Captain of the Plymouth Township Fire & Rescue Team, testified that he saw appellant's car sitting across the middle of Beck

Road facing eastward toward Harold Avenue, and saw the vehicle containing the injured female sitting in the field facing westward toward Plymouth Road.

{¶9} Ascertaining that the driver of the car was the more seriously injured, Allds proceeded to the car to evaluate her condition. He noticed that the crash had caused Kingston to become “entrapped in the vehicle” due to “intrusion into the passenger compartment.” Allds observed that Kingston was cyanotic. He checked her vital signs and determined that Kingston had died. Based upon Allds’ observations, a representative of the Ashtabula County Coroner’s Office was subsequently summoned to the scene.¹

{¶10} While Allds was attending to Kingston, other members of his squad had placed appellant in a backboard and cervical collar and were beginning to evaluate his injuries. After covering Kingston’s vehicle with a blue tarp “to protect the scene as well as the confidentiality of the victim,” he proceeded to ascertain appellant’s condition and coordinate his treatment.

{¶11} Appellant was transported into the squad vehicle where the EMS squad performed trauma surveys. Allds described appellant’s condition as “alert and oriented *** breathing [and] *** able to speak to us in full sentences.” Although Allds testified that

1. Richard Morrell, Chief Investigator of the Ashtabula County Coroner’s Office, testified that he was summoned to the scene of the accident to perform the investigation into Kingston’s death, which included taking photographs and measurements of the scene and transportation of the body to the morgue located at the Ashtabula County Medical Center (“ACMC”). Morrell testified that, as part of his standard procedure, he takes a sample of blood from the victim to be analyzed for alcohol and that Kingston’s result from this tox screen were negative. Morrell further testified that after gathering all pertinent information, he is responsible for preparation of the Coroner’s verdict, which is then reviewed and approved as is or modified as necessary by the Ashtabula County Coroner. In the instant matter, the Coroner’s Verdict determined the cause of Kingston’s death was as a “homicide” due to “trauma to the head, trunk and extremities,” without the necessity of an autopsy.

appellant complained of “blurred vision, headache and being shaky,” his exam results were otherwise “unremarkable,” i.e., a slight rise pulse rate and blood pressure, which were findings one would “normally expect for somebody *** involved in a motor vehicle crash.” Appellant was subsequently placed upon a cardiac monitor and given two IV’s, which Allds described as “standard practice,” and then transported to ACMC for further evaluation and treatment.

{¶12} While the Plymouth Township EMS was attending to the accident victims, representatives from the Ohio State Highway Patrol arrived to investigate the scene of the accident. Trooper Tye Tyson was the first patrolman to arrive on the scene. He was joined shortly thereafter by Trooper Jayson Hayes and Sergeant John Altman. Trooper Tyson proceeded to perform a field sketch of the accident scene and to investigate the scene. Trooper Tyson described the condition of the roadway that evening as “dry” and the weather conditions as “partly cloudy, 35 degrees with no adverse conditions.” When asked how he found the vehicles, Trooper Tyson testified that appellant’s vehicle was in the middle of the roadway at the intersection facing northwest, whereas the vehicle in the field was “facing in a *** southwesterly direction.” Trooper Tyson observed that there were no tire markings in the roadway, save for “markings *** north of Harold Road where the Honda Civic had slid off the road,” and that there were “no brake marks or anything.” Trooper Tyson also testified as to his examination and measurement of a fluid trail left by appellant’s vehicle, and plotting of the debris field left by both vehicles involved in the accident, explaining that the debris field shows “which direction the debris were flying after the accident,” and provides

information as to which direction the force of the accident occurred. Further investigation of the accident revealed that Hatfield was driving under a suspended license.

{¶13} After completing his investigation of the accident scene, the findings of which were included in the Highway Patrol's official report, Trooper Tyson proceeded to the APMC to interview appellant regarding the accident. When Trooper Tyson arrived to speak with appellant, he was in Emergency Care at APMC. Trooper Tyson testified that when he first arrived to meet with appellant, appellant's mother was present.

{¶14} Prior to taking appellant's written statement, Trooper Tyson read appellant his Miranda rights. Tyson then handed appellant a form and requested that he write his own interpretation of the crash. Tyson testified that appellant was able to comply with Tyson's request without difficulty.

{¶15} In his handwritten statement, which was admitted into evidence at trial, and to which Tyson testified, Hatfield reported that he "was turning left off of Plymouth Road and a small white car was coming straight over the hill and we had a head on collision." Next, Tyson asked appellant a series of questions, which he recorded on the report, along with appellant's responses as follows:

{¶16} "Q: You were on Plymouth Road and turning left off of Plymouth Road?

{¶17} "A: Yes, sir.

{¶18} "Q: Did you stop at the stop sign on Plymouth Road?

{¶19} "A: I don't remember. I looked right and went to turn and hit the white car.

Was there a stop sign there? There's not one there, is there?

{¶20} "Q: Did you notice the white car before you hit it?

{¶21} "A: I didn't see the car. There is a dip and you can't see that way?

{¶22} "Q: About how fast were you going?

{¶23} "A: I was going 45, but I slowed down for the turn, so probably about 20 to

25.

{¶24} "Q: So, you didn't hit your brakes or steer away?

{¶25} "A: No, I was turning left and then the collision.

{¶26} "Q: Do you remember using a turn signal?

{¶27} "A: Yes.

{¶28} "Q: Are you familiar with the area?

{¶29} "A: Yes, not very though, enough to get around.

{¶30} "Q: Do you know the owner of the vehicle that you were driving?

{¶31} "A: Yes, it's my vehicle but I haven't got the title switched over yet.

{¶32} "Q: When did you buy the vehicle?

{¶33} "A: One and a half to two months ago.

{¶34} "Q: Were you on the phone at the time of the accident?

{¶35} "A: No.

{¶36} "Q: You knew that your license was suspended?

{¶37} "A: Yes.

{¶38} "Q: Did Keith (Haynes, the vehicle's prior owner) know that your license was suspended?

{¶39} "A: No.

{¶40} "Q: Is the vehicle insured under anyone's name?

{¶41} "A: I don't think so.

{¶42} "Q: Was your seat belt on?

{¶43} "A: No.

{¶44} "Q: What are your injuries?

{¶45} "A: Dizzy spells, lower back, bad headache.

{¶46} "Q: Were you drinking any alcoholic beverages this evening?

{¶47} "A: No, sir.

{¶48} "Q: Did you take any narcotics, marijuana, medication?

{¶49} "A: No, sir.

{¶50} Trooper Tyson then asked if appellant would be willing to submit to a blood test. At first, he agreed, but after disclosing to Trooper Tyson that he uses "drugs and alcohol" and that "[i]t may be in [his] system from yesterday," he retracted his consent.

{¶51} Tyson then contacted Sergeant Altman and informed him that appellant refused to consent to a blood test. Altman showed up at the hospital shortly thereafter to speak with appellant and obtained a second written statement, in the form of a question and answer session, from him. After giving his statement, appellant reviewed and signed it without any changes. Sergeant Altman characterized appellant's demeanor during questioning as "coherent" and stated that appellant understood what he was being asked, did not seem to have slurred speech, and did not seem to be injured or in pain.

{¶52} Sergeant Altman's questions and appellant's answers regarding how the accident occurred were substantially similar to those in Trooper Tyson's interview. However, appellant responded to additional questioning regarding his drug and alcohol use as follows:

{¶53} "Q: Have you had any alcohol or drugs today?

{¶54} "A: Yes, I was at a party last night.

{¶55} "Q: What time did you go to the party?

{¶56} "A: Around 12:00 a.m. or 1:00 a.m. on February 24, 2004.

{¶57} "Q: What time did you leave the party?

{¶58} "A: Before 6:00 a.m.

{¶59} "Q: Where was it?

{¶60} "A: Ashtabula.

{¶61} "Q: How much alcohol and drugs did you consume?

{¶62} "A: Half an ounce of marijuana, seven to eight lines of cocaine, eight to nine mixed drinks.

{¶63} "Q: Over what time frame?

{¶64} "A: From 12:00 a.m. or 1:00 a.m. until I left before 6:00 a.m.

{¶65} "Q: How much sleep did you have today?

{¶66} "A: From about 6:30 a.m. till about 2:00 p.m.

{¶67} "Q: Did you have any drugs or alcohol from the time you left the party until now?

{¶68} "A: No.

{¶69} "Q: Did you consume any alcohol or drugs from the time of the crash until Trooper Tyson talked to you?

{¶70} "A: No.

{¶71} ****

{¶72} "Q: Do you feel you were impaired at the time of the crash?

{¶73} "A: No.

{¶74} "Q: How regularly do you smoke marijuana?

{¶75} "A: Every day.

{¶76} "Q: How regularly do you do cocaine?

{¶77} "A: A few times a week.

{¶78} "Q: How regularly do you consume alcohol?

{¶79} "A: Four or five times a week.

{¶80} "Q: Do you usually drive after drinking or doing drugs?

{¶81} "A: No.

{¶82} Subsequent to this second interview, Sergeant Altman asked appellant for permission to take a blood sample, and appellant agreed.

{¶83} With appellant's consent, two blood samples were taken by Crystal Severino, R.N., at 9:29 p.m., and again at 10:06 p.m., using the Ohio State Highway Patrol's standard-issue Biological Specimen kit. The samples were sent to the Ohio State Highway Patrol Crime Lab, where they tested negative for the presence of alcohol and positive for the presence of cocaine. Appellant was released from the hospital after 11:00 p.m. that evening, after he elected not to stay for further observation.

{¶84} On July 23, 2004, appellant was charged, by way of indictment, with one count of vehicular homicide, a felony of the fourth degree, in violation of R.C. 2903.06(A)(3)(a) and one count of aggravated vehicular homicide, in violation of R.C. 2903.06(A)(2)(a). On August 19, 2004, appellant appeared for his arraignment and entered a plea of not guilty to the charges.

{¶85} On November 22, 2004, appellant filed a motion to suppress “all oral and written statements” given to law enforcement personnel and a motion in limine to prohibit the state from using the results of his blood tests at trial. On February 24, 2005, appellant filed another motion in limine to prohibit the state from using “any testimony concerning any admissions” by appellant regarding “cocaine, marijuana, alcohol or drug use” prior to the accident. On March 4, 2005, the trial court overruled appellant’s motions following a hearing.

{¶86} On July 8, 2005, appellant filed another motion in limine to prohibit the state from introducing evidence of his prior driving record and any photos of Sharon Kingston taken at the scene of the accident. On October 14, 2005, appellant filed yet another motion, this time to “prohibit use of evidence” taken from the crime scene, all testimony with regard to his demeanor on or about February 24, 2004, all statements made by the defendant and “all other evidence that [the state] intends to use.”

{¶87} On March 30, 2006, the trial court ruled on the aforementioned motions. With regard to appellant’s motion in limine to exclude evidence of his prior driving record, the trial court sustained the motion in part to exclude general proof of prior traffic convictions, but to allow evidence of “the status of Defendant’s driving privileges on the

date of [the] incident, and [any] felony traffic convictions within the past ten years," but overruling the motion with regard to the admission of photographs of the victim. The trial court overruled appellant's "motion to prohibit use of evidence."

{¶88} On May 3, 2006, appellant again moved the court to exclude evidence of the blood analysis, based upon *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629. The trial court overruled this motion on May 11, 2006.

{¶89} The case went to a three day trial before a jury on June 16, 2006. After polling the jury, appellant was found guilty of both counts of the indictment. On June 19, 2006, appellant was sentenced to eight years in prison for aggravated vehicular homicide and eighteen months on the vehicular homicide charge, with the sentences to run concurrently, and concurrent with a sentence previously imposed for a conviction for trafficking in marijuana in Case No. 2005 CR 167. In addition, the trial court imposed a lifetime suspension of appellant's driver's license.

{¶90} Appellant timely appealed his judgment of conviction, raising the following assignments of error:

{¶91} "[1.] Evidence of Cocaine and its metabolites that were found in two samples of blood that were taken from appellant roughly four hours after an accident between him and Sharon Kingston and admission of cocaine use at least seven hours prior thereto were not relevant to any of the issues that were before the trial court. Even if they were, their probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues and of misleading the jury.

{¶92} “[2.] The blood that was removed from appellant on the evening of February 24, 2004 and whose analysis [sic] was introduced at trial over defense counsel’s objection was not handled and examined in substantial compliance with standards that are established by the Ohio Department of Health.

{¶93} “[3.] The State of Ohio failed to produce an expert witness to prove that cocaine and cocaine metabolites that were found in two samples of blood that were removed from appellant at 9:29 p.m. and 10:06 p.m. on February 24, 2004 along with his admissions of cocaine use could have had anything to do with his driving abilities at the time that he had an accident roughly four hours or more prior thereto.

{¶94} “[4.] Evidence of driving suspensions that had expired prior to the date that appellant had an accident with Sharon Kingston wasn’t relevant to any of the issues that were involved in the case that he was on trial for [sic]. Even if it was, its probative value was substantially outweighed by the dangers of unfair prejudice, of confusion of the issues and of misleading the jury that heard this case.

{¶95} “[5.] Appellant’s constitutional rights were violated when the trial court gave a special instruction to the jury immediately after the defense rested its case without appellant taking the stand.

{¶96} “[6.] Appellant’s constitutional rights under the Fifth and Sixth Amendment were violated when the trial court refused to allow him to admit the investigative report [of] defense witness Douglas Heard and his Curriculum Vitae into Evidence.

{¶97} “[7.] The trial court below refused to dismiss the second count of appellant’s indictment for Aggravated Vehicular Homicide in violation of R.C.

2903.06(A)(2)(a) because it was not a lesser included offense of the first count of vehicular homicide in violation of R.C. 2903.06(A)(3)(a).

{¶98} “[8.] Two written statements were taken involuntarily from Appellant in violation of his constitutional rights.

{¶99} “[9.] Two samples of Blood were taken from appellant in violation of his constitutional rights.

{¶100} “[10.] Appellant’s rights were violated by remarks made by Ashtabula County Prosecutor Thomas Sartini during rebuttal argument in which he gave his personal opinion as to appellant’s guilt.

{¶101} “[11.] Appellant’s conviction of Aggravated Vehicular Homicide in violation of Revised Code 2903.06(A)(2)(a), as alleged in Count 2 of his indictment, is neither supported by sufficient evidence nor is it supported by the manifest weight of the evidence.

{¶102} “[12.] Appellant’s constitutional rights to a fair trial were violated by the impact of numerous cumulative errors.

{¶103} “[13.] R.C. 2903.06(A)(2)(a) and R.C. 2903.06(A)(3)(A) are allied offenses of similar import and even though appellant could be indicted on both, he could only stand convicted and sentenced on one of these offenses.”

{¶104} For ease of discussion, we will address appellant’s assignments of error out of order.

{¶105} II. Suppression and Other Related Issues

{¶106} Under his eighth assignment of error, appellant argues that the two written statements, taken by Trooper Tyson and Sergeant Altman on the evening of February 24, 2004 should have been suppressed because of the injuries he had sustained and “the alcohol and drugs he consumed” approximately 15 and 21 hours earlier that day rendered such statements involuntary.² We disagree.

{¶107} The mere fact that an individual is questioned in a hospital setting and may be in pain when questioned, is insufficient, without evidence of police coercion, to render an otherwise voluntary statement involuntary. See *State v. Tomkalski*, 11th Dist. No. 2003-L-097, 2004-Ohio-5624, at ¶¶31-33; *State v. Bowshier* (Oct. 16, 1992), 2d Dist. No. 2898, 1992 Ohio App. LEXIS 5268, *11; *State v. O’Linn* (Mar. 16, 2000), 8th Dist. No. 75815, 2000 Ohio App. LEXIS 1064, *14. Moreover, intoxication, even if proven, is an insufficient basis to exclude a voluntary statement absent coercive police activity. *State v. Smith*, 80 Ohio St.3d 89, 112, 1997-Ohio-355.

{¶108} In this case there is no evidence that appellant’s statements were a result of “coercive police activity.” The evidence shows that the officers’ questioning took place over a brief time frame and that each written statement was two pages in length. Appellant was given an opportunity to review the statements he made to the officers and make corrections prior to signing the forms. Appellant made no corrections to the statements, and signed the forms. Furthermore, even though Trooper Tyson explained appellant’s Miranda rights (which appellant understood and duly waived), at no time

2. Under this assignment of error, appellant argues that his confession was involuntary because of his drug and alcohol consumption; curiously, however, under his first and third assignments of error, appellant inconsistently suggests his drug and alcohol consumption were not a factor in the accident.

during questioning did appellant ask officers to stop or ask that he be permitted to speak with a lawyer.

{¶109} In view of the totality of the circumstances, there is no evidence to support appellant's claim that his statements were involuntarily. Therefore, appellant's eighth assignment of error is without merit.

{¶110} Under his ninth assignment of error, appellant argues that the evidence gleaned from the two blood samples should have been suppressed since his condition rendered him "incapable of consent," and also because the blood samples were taken pursuant to Hatfield's "involuntary statement" regarding his alcohol and drug use. Again, we disagree.

{¶111} It is well-settled that the extraction of blood at the behest of authorities involves a search and seizure of the individual involved. See, e.g., *State v. Sweinhagen* (Nov. 7, 1989), 3d Dist. No. 4-88-3, 1989 Ohio App. LEXIS 4244, *3. Thus, with regard to blood testing, "[t]he burden is on the state *** to demonstrate a voluntary consent to a warrantless search." *State v. King*, 1st Dist. No. C-010778, 2003-Ohio-1541, at ¶24 (citation omitted). In the context of consensual searches and seizures, the state is required to demonstrate "that the consent was in fact voluntarily given, and [was] not the result of coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances." *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 248-249.

{¶112} For the same reasons as expressed in our analysis of appellant's eighth assignment of error, we reject appellant's contention that his consent to blood testing

was involuntary. We further point out that, prior to administering the tests, Crystal Severino, a Registered Nurse on duty in the AGMC Emergency Room that evening, stated appellant was “coherent enough to understand what was going on” and “stable as far as his vital signs.” There is no evidence indicating appellant was incapable of consenting or otherwise compelled by the officers to submit to the tests. Based upon the totality of the circumstances, the state met its burden in establishing that appellant voluntarily consented to have blood samples drawn, and the court did not err in allowing this evidence to be admitted on this basis. Accordingly, appellant’s ninth assignment of error is without merit.

{¶113} Under his second assignment of error, appellant challenges the admissibility of the blood evidence on another front. He specifically attacks the admission of the results of his blood tests, arguing that the trial court’s admission of this evidence was prejudicial error, since the state offered no evidence of compliance with administrative code provisions, promulgated by the Ohio Department of Health for the collection and handling of blood, as required by the Ohio Supreme Court’s holding in *Mayl*, supra. We disagree.

{¶114} In *Mayl*, the Supreme Court of Ohio held that “[w]hen the results of blood *** tests are challenged in an aggravated-vehicular-homicide prosecution that depends upon proof of an R.C. 4511.19(A) violation, the state must show substantial compliance with R.C. 4511.19(D)(1) and Ohio Adm. Code Chapter 3701-53 before the test results are admissible.” *Id.* at paragraph one of the syllabus.

{¶115} In the instant matter, the rule of *Mayl* is not invoked since the prosecution did not rely upon proof of a violation of 4511.19(A). Appellant was prosecuted pursuant to R.C. 2903.06(A)(2)(a) (requiring proof that the death was caused “[r]ecklessly”), not R.C. 2903.06(A)(1)(a) (requiring proof that the cause of the death of another while operating a motor vehicle was “the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code.”). As the underlying aggravated vehicular homicide charge did not require proof of an R.C. 4511.19(A) violation, a *Mayl* analysis was inconsequential.

{¶116} Notwithstanding this conclusion, the state did lay a proper foundation for the admission of the blood samples. Specifically, Nurse Severino testified that she collected the blood samples using the standard Highway Patrol issue Biological Specimen collection kit, followed “the procedure according to the directions, initialed and dated the relevant samples and forms and gave the samples to the requesting officer.”

{¶117} Further, Trooper Tyson, who was ultimately responsible for the chain of custody of the samples, testified that he filled out and signed the standard property control form which came with the sample kits, as required, and personally mailed it to the Highway Patrol’s crime lab in Columbus.

{¶118} In addition, Jeff Turnau, a criminalist with the Ohio State Highway Patrol Crime Lab in Columbus, who tested the first sample for the presence of alcohol,³

3. Turnau tested only the first sample, which was negative for the presence of alcohol. As a result, the second sample was not tested.

testified that he followed all relevant procedures with regard to the handling, testing, and documentation of the sample in question. Also, Rebecca Schanbacher, a criminalist with the crime lab who tested both samples for the presence of controlled substances, testified she followed all relevant procedures regarding the handling, testing, and documentation of the samples in question.

{¶119} Since a proper foundation was laid for the admission of the evidence, the trial court did not abuse its discretion in admitting appellant's blood test results. Appellant's second assignment of error is without merit.

{¶120} III. Jury Instructions Relating to Expert Testimony

{¶121} Under his fifth assignment of error, Appellant argues that the trial court erred by giving a jury instruction regarding his expert witness' opinion that was in violation of his Fifth Amendment right not to testify and his due process rights, since "the instruction was *** an unjustified comment on the exercise of Appellant's right not to be a witness at all," as well as on his right to call witnesses on his behalf. We disagree.

{¶122} For purposes of appellate review, "[t]he decision to issue a particular jury instruction rests within the sound discretion of the trial court." *State v. Huckabee* (Mar. 9, 2001), 11th Dist. No. 99-G-2252, 2001 Ohio App. LEXIS 1122, *18. A single jury instruction must not be considered in isolation but must be viewed in the context of the instructions as a whole. *State v. Price* (1979), 60 Ohio St.2d 136, at paragraph four of the syllabus.

{¶123} The trial court admitted the testimony of appellant's expert Douglas Heard regarding the cause of the accident. Heard, a crash reconstructionist, offered the

following opinion as to how the accident occurred: "Mr. Hatfield was traveling on Beck Road *** approaching the intersection at Harold Road as the Honda Civic was coming in the opposite direction, and at that intersection of Harold Road, he attempted to make a left-hand turn onto Harold into the left front corner and side of the Honda Civic operated by Mrs. Kingston." When asked by defense counsel the grounds upon which he based his opinion, aside from the post-impact resting position of the vehicles, his own review of the evidence provided by the prosecution, and his observation of the damage to the front of appellant's vehicle, Heard replied that he based his opinion on the "statements from Mr. Hatfield."

{¶124} The foregoing testimony was admitted, despite the fact that it relied, in large part, on appellant's statement to Heard about how the accident occurred, which directly contradicted the evidence and the testimony of the state. Appellant did not testify in his own defense. As a result, the trial court gave the following special instruction to the jury at the close of the case:

{¶125} "There is some special instruction that I'm going to be required to give you at this point ***.

{¶126} "The first thing is, a defendant in a criminal case has a Constitutional right not to testify. Therefore, you must not draw any inference of guilt from the fact that the defendant did not testify in this case.

{¶127} "On the other hand, there is an expert witness who has testified in this case that he considered certain things that the defendant told him that are not otherwise in evidence.

{¶128} *"In evaluating the opinion of any expert witness, you must consider whether the facts on which the expert based their opinion have been established by, at least, a preponderance of the evidence.*

{¶129} "Therefore, in deciding the weight to give to the expert opinion, you may consider the extent to which the opinion is based on facts that have not been put into evidence. However, you must be careful to limit this consideration to the evaluation of the opinion of the expert. You must not consider this in any way as suggesting any inference of guilt of the defendant." (Emphasis added).

{¶130} This language, by itself, would seem to indicate that the trial court erred by including an instruction that may cause "the jury to confuse the burden of proof necessary for defendant's conviction." *State v. Brown* (1982), 7 Ohio App.3d, 113, 115. However, the statement on which appellant's expert relied, was not a fact "necessary for his conviction." Thus, we see no error.

{¶131} Furthermore, we hold the jury instructions, when reviewed in their totality, were sufficient notwithstanding the potentially problematic directive relating to the expert's testimony. The trial court instructed that "[t]he defendant is presumed innocent until his guilt is established beyond a reasonable doubt." The trial court explained the reasonable doubt standard. The jury was informed, on more than one occasion, of appellant's constitutional right not to testify and the fact that no inference of guilt could be drawn based upon his decision not to testify. The court explained that the portions of the expert opinion were based upon facts not in evidence. This instruction was appropriate since Evid.R. 703 prohibits an expert from basing an expert opinion upon

"facts which are not formally in evidence or personally perceived by that expert." *Hager v. Norfolk & W. Ry. Co.*, 8th Dist. No. 87553, 2006-Ohio-6580, at ¶39. Pursuant to the Ohio Jury Instructions, the trial court instructed the jury appropriately as to the weight to be given to expert testimony. 4-405 OJI § 405.51(3). Based upon the foregoing, we cannot conclude that the trial court abused its discretion in providing the aforementioned special instruction. Appellant's fifth assignment of error is therefore without merit.

{¶132} IV. General Evidentiary and Related Issues

{¶133} Under appellant's fourth assignment of error, he argues the trial court's admission of evidence that he was driving under suspension at the time of the accident, as well as his prior record of driving suspensions, was reversible error since the evidence was not relevant to the element of recklessness. We agree.

{¶134} The record indicates that the trial court admitted appellant's driving record from the Ohio Bureau of Motor Vehicles over the objections of defense counsel. The exhibit demonstrated appellant had seven separate license suspensions, two of which were current at the time of the accident. The record also included a letter containing the notice of appellant's current license suspension, dated December 17, 2003. The admissibility of the record was argued twice; first, prior to trial and again when the state sought to admit its trial exhibits. Defense counsel did not object to the admission of the December 17, 2003 letter, but sought to have the remainder of the exhibit disallowed. Alternatively, defense counsel offered to stipulate to appellant's license suspension existing at the time of the accident.

{¶135} In ruling on counsel's objection, the trial court stated:

{¶136} “[T]he argument about whether or not [the admission of the entire exhibit] goes to character, it does not go to character, but nevertheless, the State is required to prove a culpable mental state that includes heedless indifference to the consequences ***. But I think, it’s for the state to prove that this is not just a casual thing, and I think it’s relevant and probative that somebody who has a long history of numerous driver’s license suspensions who makes a conscious decision on February 24, 2004 to operate a motor vehicle is certainly evidence that a jury ought to be allowed to consider on whether or not that decision to drive a car on that day was taken with heedless indifference to the consequences of fully knowing not just that he had a current active suspension[,] but that he had a history of no right to drive a vehicle at all.

{¶137} “So, I think that it is relevant and the objection is going to be overruled. ****”

{¶138} Courts in Ohio have held that “[w]here an unintentional killing while in the commission of an unlawful act has been established, it is a further requirement that the violation of the statute must have been the proximate cause of the death. – the killing must be such as would naturally, logically and proximately result from the commission of the unlawful act as defined by the statute ***.” *State v. Jodrey* (Apr. 10, 1985), 1st Dist. No. C-840406, 1985 Ohio App. LEXIS 6404, at *5; Thus, “evidence of driving under suspension is not relevant to a charge of vehicular homicide or aggravated vehicular homicide,” since “both require that the defendant’s recklessness or negligence *cause* the death of another,” and “the suspension itself sheds no light on the quality of appellant’s driving at the time of the accident.” *State v. Frommer* (Dec. 19, 1985), 4th Dist. No. 577, 1985 Ohio App. LEXIS 10050, at *3; accord, *Jodrey*, 1985 Ohio App.

LEXIS 6404, at *7 (In the context of an involuntary manslaughter conviction, the appellate court could not “find that the driving under suspension is the proximate cause of a death that occurs when a person drives while under suspension, as reprehensible as that activity certainly is.”) Accordingly, the evidence of appellant’s multiple license suspensions is in no way probative of appellant’s alleged recklessness in causing the victim’s death. The introduction of this evidence was improper. Thus, appellant’s argument, in this respect, is sustained.

{¶139} While the evidence of appellant’s *suspensions* was not relevant to prove recklessness, evidence of the *active suspension* was necessary and therefore relevant to increase the severity of the aggravated vehicular homicide charge from a felony three to a felony two. That is, appellant was charged under R.C. 2903.06(B)(3) in Count Two of the indictment, to wit, aggravated vehicular homicide. R.C. 2903.06(B)(3) provides: “[e]xcept as otherwise provided in this division, aggravated vehicular homicide committed in violation of division (A)(2) of this section is a felony of the third degree. Aggravated vehicular homicide committed in violation of division (A)(2) of this section is a felony of the second degree, if, at the time of the offense, the offender was driving under a suspension imposed under [R.C.] 4510 ***.”

{¶140} This court has held “any factor that serves to elevate the degree of a crime is not a sentencing enhancement, but rather an element of the crime which must be proven beyond a reasonable doubt.” *State v. Greitzer*, 11th Dist. No. 2003-P-0110, 2005-Ohio-4037, at ¶47. Thus, evidence of the active suspension was a necessary element of the state’s case.

{¶141} Here, the defense attempted to admit, by stipulation, that appellant was driving with a suspended license at the time of the offense or admit the portion of State's Exhibit J containing the letter informing appellant of his current license suspension. As discussed above, the court rejected this proof and allowed evidence of appellant's seven license suspensions to go to the jury.

{¶142} In *Old Chief v. United States* (1997), 519 U.S. 172, the United States Supreme Court determined that a defendant's conviction must be reversed where a past conviction is an element of the offense for which the defendant is on trial and the state refuses to accept a defendant's stipulation regarding the conviction. *Id.* at 174. In reaching this conclusion, the Court reasoned that because it is a defendant's legal status that is at issue, the defendant's stipulation satisfied the element of the offense charged. See *Id.* at 186. The Court underscored that its holding represented a limited exception to the general principle that "the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence way." *Id.* at 189. With respect to this general rule, the Court observed:

{¶143} "A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a

break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.” Id.

{¶144} However, “this recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has *** virtually no application when the point at issue is defendant’s legal status, dependent on some legal judgment rendered wholly independently of the concrete events of later criminal behavior charged against him.” Id. at 190. Accordingly, *Old Chief* bars evidence of prior convictions offered solely to prove a defendant’s status as a convicted criminal. Under circumstances where a defendant’s legal status must be proved, the probative value of a defendant’s admission and stipulation to a prior conviction has equivalent value to a fuller record with less potential for prejudice thereby justifying a limitation on prosecutorial discretion. Id. at 190-191.

{¶145} Pursuant to R.C. 2903.06(B)(3), a defendant who had the status of an unlicensed driver by virtue of an active license suspension at the time of the offense can be convicted of a second degree felony under the principle statute if the state proves the defendant’s status beyond a reasonable doubt. Appellant offered to stipulate to this status but was disallowed. Instead, the court permitted the prosecution to put forth evidence of appellant’s driving history in the form of seven past convictions for driving under suspension. The court’s action flies directly in the face of the Supreme Court’s carefully reasoned opinion in *Old Chief*.

{¶146} The admission of appellant’s history of convictions for driving under suspension serves as a textbook instance of the problem *Old Chief* was designed to

prohibit. In overruling defense counsel's objections, the trial court determined that the driving history was admissible to show appellant's actions were "not just a casual thing." Put another way, the history was admitted to illustrate appellant had a propensity to behave in defiance of the law which, in the court's view, would allow for an inference of "heedless indifference" or recklessness. Admitting the record for the purpose articulated by the trial court allowed the jury to generalize appellant's earlier bad acts into evidence of appellant's bad character which raised the likelihood that the jury will convict appellant for crimes other than those charged or, perhaps even worse, convict because appellant is a "bad person" deserving punishment. *Id.* at 181.

{¶147} "The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." *Id.*, quoting, *Michelson v. United States* (1948), 335 U.S. 469, 475-476. Such a maneuver is procedurally illegitimate because such evidence tends to "weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Id.* Under the circumstances, the admission of appellant's entire record of suspensions created an environment in which the jury's verdict could very likely have been premised upon improper considerations.

{¶148} Pursuant to *Old Chief*, we hold the trial court's evidentiary ruling was an abuse of discretion. The state, in refusing to accept the stipulation, violated the Supreme Court's holding in *Old Chief*. For these reasons, appellant's fourth assignment

of error has merit and appellant's convictions must be reversed and remanded for a new trial.

{¶149} Next we shall address appellant's first and third assignments of error since they are mutually concerned with the relevance of certain evidence and testimony admitted at trial.

{¶150} Under his first and third assignments of error, appellant asserts his statement admitting that he "did seven to eight" lines of cocaine between 12:00 a.m. and 6:00 a.m. on February 24, 2004, was irrelevant to the issue of whether he was reckless at the time of the accident. Further, even if it was relevant, appellant asserts that its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and of misleading the jury. Appellant points out that the state failed to produce evidence that his cocaine use would have influenced his driving abilities at the time of the accident. Thus, the jury was left to infer that because he used cocaine between 11 and 17 hours before the accident, he must have been under its influence and therefore acting in a reckless manner.

{¶151} "Relevant evidence is 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *State v. DeRose*, 11th Dist. No. 2000-L-076, 2002-Ohio-4357, at ¶15, quoting Evid.R. 401. However, even where evidence is relevant, it is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A). Evidentiary rulings rest with the sound discretion

of the trial court. *State v. Long* (1978), 53 Ohio St.2d 91, 98. The court's ruling on such matters will not be disturbed absent an abuse of discretion which affects a material prejudice upon the defendant. *Id.*

{¶152} An abuse of discretion consists of more than an error of law or judgment; rather, it implies the court's attitude is unreasonable, arbitrary or unconscionable. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169 (citation omitted). Reversal under an abuse of discretion standard is not warranted merely because an appellate court disagrees with the trial court's resolution. *Id.* On the contrary, reversal is appropriate only if the abuse of discretion renders "the result *** palpably and grossly violative of fact and logic [so] that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222 (citation omitted).

{¶153} R.C. 2903.06(A)(2)(a), the aggravated vehicular homicide statute at issue herein, prohibits a motorist from recklessly causing the death of another while operating or participating in the operation of a motor vehicle. "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result ***." R.C. 2901.22(C).

{¶154} In an effort to prove the element of recklessness, the state used (1) appellant's admission that he had ingested seven or eight lines of cocaine between 12:00 a.m. and 6:00 a.m. on the day in question and (2) the results of appellant's blood tests showing the existence of cocaine metabolites in his system. The state theorized that appellant's awareness that he ingested cocaine between 11 and 17 hours earlier

showed a heedless indifference or a perverse disregard to a known risk, viz., that the cocaine's effects would influence his driving ability such that an accident was likely.

{¶155} This court has held “that a defendant is charged with knowledge that driving *under the influence* of cocaine constitutes credible evidence that a defendant is acting recklessly.” *State v. Adams*, 11th Dist. No. 2003-L-110, 2005-Ohio-1107, at ¶31 (emphasis added). With respect to the issue of relevance, we hold the trial court did not err in admitting appellant's admissions and his blood test results. The blood tests were probative of whether appellant was under the influence of cocaine at the time of the accident and thus tended to prove appellant was acting recklessly in operating a motor vehicle at the time of the accident. Thus, the trial court did not err in admitting the tests.

{¶156} However, the inquiry does not end with this conclusion. Specifically, the state put forth evidence demonstrating appellant had ingested cocaine within the previous 11 to 17 hours and established the presence of metabolized cocaine in appellant's system. Appellant's admissions and the objective evidence of cocaine in appellant's system demonstrate that the state put forth *some evidence* to allow the jury to infer he was under the influence of the drug at the time of the accident. However, the state did not connect this evidence to appellant's state of mind at the time of the accident. The average juror does not possess the pharmacological and/or biochemical knowledge to formulate a reliable opinion regarding the lasting effects of cocaine on a user's body.

{¶157} Under the circumstances, the evidence of appellant's cocaine use and the evidence of the blood tests were relevant and sufficient to meet a minimal threshold of

proof to establish the requisite mens rea. However, we hold, given the state of the evidence, a reasonable jury could not conclude, beyond a reasonable doubt, that appellant was under the influence of the drug *at the time* of the accident. Thus, the state failed to create a reasonable causal nexus between this evidence and appellant's state of mind at the time of the accident.

{¶158} Appellant's first and third assignments of error have merit.

{¶159} In light of the foregoing conclusion, we shall next address appellant's eleventh assignment of error. Under this assigned error, appellant alleges his conviction for aggravated vehicular homicide was neither supported by sufficient evidence nor the manifest weight of the evidence.

{¶160} "[S]ufficiency of the evidence *** challenges whether the state has presented evidence for each element of the charged offense. The test for sufficiency of evidence is whether, after viewing the probative evidence and the inferences drawn from it, in a light most favorable to the prosecution, any rational trier of fact could find all elements of the charged offense proven beyond a reasonable doubt." *State v. Barno*, 11th Dist. No. 2000-P-0100, 2001-Ohio-4319, 2001 Ohio App. LEXIS 4280, at *16, citing *State v. Jones*, 91 Ohio St.3d 335, 345, 2001-Ohio-57.

{¶161} Alternatively, a challenge to the manifest weight of the evidence raises a factual issue and involves "the inclination of the *greater amount of credible evidence*." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52 (emphasis sic) (citation omitted). When considering a challenge to the weight of the evidence, the reviewing court must consider all the evidence in the record, the reasonable inferences, the

credibility of the witnesses, and whether, “in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed ***.” *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶162} Pursuant to R.C. 2903.06(A)(2)(a), no person shall recklessly “cause the death of another or the unlawful termination of another’s pregnancy” while operating a motor vehicle. As alluded to in our previous analysis, the state put forth adequate evidence of the elements of R.C. 2903.06(A)(2)(a) to send the matter to the jury. Accordingly, the jury had sufficient evidence before it to convict appellant.

{¶163} With respect to appellant’s assertion that his convictions were against the weight of the evidence, Section 3(B)(3), Article IV of the Ohio Constitution provides:

{¶164} “A majority of the judges hearing the cause shall be necessary to render a judgment. *** No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.”

{¶165} The instant matter was tried before a jury. However, the appellate panel deciding this case cannot reach total agreement as to the resolution of the appeal. To reverse and remand the matter based upon the weight of the evidence without a full concurrence of all three appellate judges would be unconstitutional. *State v. Miller*, 96 Ohio St.3d 384, 391, 2002-Ohio-4931. Put differently, even were a majority of this panel to agree with appellant’s argument regarding the weight of the evidence, appellant’s assignment of error would be nevertheless overruled due to a lack of unanimity on this issue. *Id.* at 390-391. As we are constitutionally required to overrule

appellant's argument, it is unnecessary for this majority to address the merits of the matter.

{¶166} Appellant's eleventh assignment of error lacks merit.

{¶167} V. Issues Relating to Convictions on Multiple-Counts

{¶168} We next turn to appellant's seventh and thirteenth assignments of error, which will be addressed together. In his thirteenth assignment of error, appellant argues that the two offenses for which he was convicted were "allied offenses of similar import" and thus he should have been convicted only of the "lesser offense," i.e., vehicular homicide. In his seventh assignment of error, appellant argues that the trial court erred to his prejudice by refusing to dismiss the second count of the indictment, (the Aggravated Vehicular Homicide charge) because it is "not a lesser included offense of the first count" (Vehicular Homicide).

{¶169} Under R.C. 2941.25, Ohio's multiple-count statute, the General Assembly intended "**** to permit a defendant to be punished for multiple offenses of *dissimilar import* *** however, [if] a defendant's actions 'can be construed to constitute two or more allied offenses of *similar import*,' the defendant may be convicted (*i.e.*, found guilty and punished) of only one." *State v. Rance*, 85 Ohio St.3d 632, 636, 1999-Ohio-291. (Emphasis sic). However, if a defendant commits offenses of similar import separately or with a separate animus, he may still be punished for both under R.C. 2941.25(B)

{¶170} In *Rance*, the Court observed that the proper test for determining whether crimes are allied offenses of similar import is as follows: "If the elements of the crimes "correspond to such a degree *that the commission of one crime will result in the*

commission of the other, the crimes are allied offenses of similar import.” Id. at 636, quoting, *State v. Jones* (1997), 78 Ohio St.3d 12, 13, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117. (Emphasis added.) In making this assessment, courts must align the elements of each crime in the abstract, not compare them in relation to the specific facts of the case. *Rance*, supra.

{¶171} A review of the relevant statutes reveal that they “proscribe identical conduct, except for the required culpable mental state: ‘recklessly’ for aggravated vehicular homicide, ‘negligently’ for vehicular homicide.” *State v. Beasley* (Aug. 2, 1995), 1st Dist. No. C-940899, 1995 Ohio App. LEXIS 3176, *3-*4.

{¶172} “A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.” R.C. 2901.22(C).

{¶173} “A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.” R.C. 2901.22(D).

{¶174} As is readily apparent from the aforementioned definitions, one cannot act recklessly without also acting with a “substantial lapse from due care,” or failing to “perceive or avoid a risk that his conduct may cause a certain result *** be of a certain

nature *** or fail[] to perceive or avoid a risk that such circumstances may exist.” Put differently, the commission of aggravated vehicular homicide will necessarily result in the commission of vehicular homicide. Therefore, pursuant to *Rance*, et al., the commission of one crime will result in the commission of the other and, consequently, the crimes for which appellant was indicted are allied offenses of similar import.

{¶175} Finally, both crimes were a result of the same act and as such, they were not committed separately. Moreover, the term animus, as it pertains to R.C. 2941.25, is defined as “purpose” or “immediate motive.” *State v. Logan* (1979), 60 Ohio St.2d 126, 131. Here, appellant could not have logically committed aggravated vehicular homicide and vehicular homicide with a separate purpose or different immediate motive. Accordingly, the crimes charged involved no separate animus.

{¶176} In sum, the crimes at issue are allied offenses of similar import that were not committed separately and had no separate animus. Thus, appellant could be convicted (found guilty and punished) of only one. *Rance*, supra, at 136, citing R.C. 2941.25(A). Appellant’s thirteenth assignment of error has merit. Because we sustain appellant’s thirteenth assignment of error, appellant’s seventh assignment of error is rendered moot.

{¶177} VI. Conclusion

{¶178} As a result of the foregoing analysis, appellant’s second, fifth, sixth, eighth, ninth, and eleventh assignments of error are overruled. Appellant’s first, third, fourth, and thirteenth assignments of error are sustained. Further, given our collective analysis of the sustained assignments of error, we hold appellant’s twelfth assignment

of error, alleging cumulative error, is moot. We additionally hold that appellant's tenth assignment of error, alleging prosecutorial misconduct, and sixth assignment of error, alleging crash reconstructionist Douglas Heard's report and CV should have been admitted into evidence, are both moot. Finally, by virtue of our holding on appellant's thirteenth assignment of error, appellant's seventh assignment of error is also rendered moot. Accordingly, the judgment of conviction entered by the Ashtabula County Court of Common Pleas is reversed and the matter remanded for a new trial.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶179} With regard to the disposition of appellant's second, fifth, eighth, and ninth assignments of error, I concur with the majority's opinion. With regard to the majority's disposition of the seventh and thirteenth assignments of error, I concur, in part, and dissent, in part. With regard to the majority's disposition of appellant's first, third, fourth, sixth, tenth, eleventh and twelfth assignments of error, I respectfully dissent, and dissent overall from the majority's conclusion that Hatfield's conviction should be reversed.

{¶180} In the first and third assignments of error, the majority acknowledges and accepts this court's precedent in *Adams*, which states "that a defendant is *** charged

with knowledge that driving under the influence of cocaine constitutes credible evidence that a defendant is acting recklessly.” 2005-Ohio-1107, at ¶31.

{¶181} However, after accepting the validity of this precedent, the majority nevertheless concludes that “the state did not connect this evidence to appellant’s state of mind at the time of the accident,” since “[t]he average juror does not possess the pharmacological and/or biochemical knowledge to formulate a reliable opinion regarding the lasting effects of cocaine on a user’s body.” This would be a valid conclusion, had appellant been convicted of Vehicular Homicide under section (A)(1) of the statute, which requires that the death be caused “as a proximate result of committing a violation of [an OVI offense].” R.C. 2903.06(A)(1). However, such was not the case here. Instead, appellant was charged and convicted under *section (A)(2)* of the statute, which merely requires that the death be caused *recklessly*. R.C. 2903.06(A)(2).

{¶182} As stated by the Second Appellate District, “[r]ecklessness, as it appears in R.C. 2903.06(A)(2) and [as] defined by R.C. 2901.22(C), involves no particular act or conduct. It is, instead, the culpable mental state which, in combination with some particular conduct the law prohibits, permits a finding of criminal liability.” *State v. Schmiesing*, 2nd Dist. No. 1640, 2005-Ohio-56, at ¶21. The majority implicitly acknowledges this distinction in its disposition of appellant’s second assignment of error, when it held that “the rule of *Mayl* is not invoked [in determining the admissibility of blood test results] *since the prosecution did not rely upon proof of a violation of 4511.19(A)*.” (Emphasis added). The majority then proceeds to ignore this distinction by imposing a higher standard of proof than is required.

{¶183} Since appellant was not charged or convicted of Aggravated Vehicular Homicide premised upon on OVI offense, the prosecution was not required to present pharmacological or biochemical evidence “to create a reasonable causal nexus between this evidence and appellant’s state of mind during the accident.” Instead, the prosecution need only present sufficient evidence that appellant, “with heedless indifference to the consequences, *** perversely disregard[ed] a known risk that his conduct [was] *likely to cause a certain result or [was] likely to be of a certain nature.*” R.C. 2901.22(C) (emphasis added).

{¶184} In other words, the relevant inquiry is *not* whether the prosecution presented sufficient evidence that appellant actually *was* driving under the influence of cocaine, but rather, whether the prosecution presented sufficient evidence by which a jury could conclude that appellant was (1) subjectively aware that he was likely to have been under the influence of cocaine when he was driving the vehicle, and (2) that appellant was aware that driving with cocaine in his system was likely to cause death or serious injury to others. This is evident since the proofs and penalties associated with the respective offenses are different. Cf. R.C. 2903.06(B)(2)(b)(i) and R.C. 2903.06(B)(3) (Aggravated Vehicular Homicide under division (A)(1) of R.C. 2903.06 is a felony of the first degree, where, at the time of the offense, the accused was driving under suspension, whereas, under the same circumstances, it is a felony of the second degree under division (A)(2) of the statute).

{¶185} It is well-settled that “[i]n virtually all cases in which an accused’s mental state must be proven, the prosecution relies upon circumstantial evidence as a matter of

necessity." *State v. Hill*, 11th Dist. No. 2005-A-0010, 2006-Ohio-1166, at ¶24 (citations omitted); *State v. Harco*, 11th Dist. No. 2005-A-0077, 2006-Ohio-3408, ¶18 (citations omitted).

{¶186} In the instant matter, the state presented ample circumstantial evidence that appellant was aware of the likelihood that his ingestion of cocaine prior to driving his vehicle was likely to place others at risk of death. Not only was there uncontroverted evidence that appellant had ingested cocaine prior to the accident, but there was also evidence that cocaine and its metabolites were still present in appellant's system when his blood was tested. Most importantly, the state presented evidence that appellant had *twice refused to allow blood samples to be taken after the accident*, which created a reasonable inference that appellant was aware that he was under the influence of cocaine at the time of the accident which killed Mrs. Kingston. From this evidence, a jury could infer that defendant was reckless by ingesting cocaine before driving his vehicle without the benefit of expert testimony. "When the state utilizes circumstantial evidence to prove an essential element of the offense charged, there is no need for that evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." *Harco*, 2006-Ohio-3408, at ¶18 (citation omitted).

{¶187} Appellant's first and third assignments of error are without merit.

{¶188} With regard to appellant's fourth, eleventh, and twelfth assignments of error, I agree with the majority insofar as the trial court erred by admitting evidence of appellant's prior expired suspensions, on the basis that admission of said evidence violated Evid.R. 403(A) and arguably violated *Old Chief*. However, even an *Old Chief*

violation does not automatically warrant reversal of an otherwise valid conviction where the error committed by the trial court is otherwise harmless beyond a reasonable doubt. See *State v. Riffle*, 5th Dist. No. 2007-0013, 2007-Ohio-5299, at ¶32 (which noted that by remanding *Old Chief*, to the court of appeals, rather than the trial court, the Supreme Court implied “no opinion on the possibility of harmless error”).

{¶189} As aptly noted by the Ohio Supreme Court, “there can be no such thing as an error-free, perfect trial, and *** the Constitution does not guarantee such a trial.” *State v. Lott* (1990), 51 Ohio St.3d 160, 166 (citation omitted). Thus, rather than automatically ordering a reversal, this court *should* undertake the analysis as to whether the error was harmless or prejudicial.

{¶190} Under Evid.R. 103(A), and Crim.R. 52(A), error is harmless unless substantial rights of the defendant are affected. *State v. Hicks* (Aug. 16, 1991), 6th Dist. No. L-83-074, 1991 Ohio App. LEXIS 3856, at *13.

{¶191} For nonconstitutional errors, the test is whether “there is substantial evidence to support the guilty verdict even after the tainted evidence is cast aside.” *State v. Cowans* (1967), 10 Ohio St.2d 96, 104. “The Ohio test *** for determining whether the admission of inflammatory and otherwise erroneous evidence is harmless non-constitutional error requires the reviewing court to look at the whole record, leaving out the disputed evidence, and then to decide whether there is other substantial evidence to support the guilty verdict. If there is substantial evidence, the conviction should be affirmed, but if there is not other substantial evidence, then the error is not harmless and a reversal is mandated.” *State v. Davis* (1975), 44 Ohio App.2d 335, 347.

{¶192} “Where constitutional error in the admission of evidence is extant, such error is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of the defendant’s guilt.” *State v. Williams* (1983) 6 Ohio St.3d 281, at paragraph six of the syllabus. Here, there was only one error committed by the court – the admission of appellant’s prior expired suspensions. A review of the other evidence presented reveals that the remaining evidence satisfied both standards for harmless error.

{¶193} With regard to a sufficiency of the evidence challenge, the majority correctly notes that the evidence and inferences drawn therefrom are to be viewed in a light most favorable to the prosecution. *Barno*, 2001-Ohio-4319, 2001 Ohio App. LEXIS 4280, at *16 (citation omitted). Thus, as alluded to earlier, the state need only present evidence by which a reasonable jury could conclude that appellant recklessly “cause[d] the death of another or the unlawful termination of another’s pregnancy” while operating a motor vehicle. R.C. 2903.06(A)(2)(a).

{¶194} With regard to a manifest weight of the evidence challenge, a reviewing court may exercise its discretionary power to reverse a judgment as being against the manifest weight of the evidence only in “those extraordinary cases where, on the evidence and theories presented, and taken *in a light most favorable to the prosecution*, no reasonable [trier of fact] could have found the defendant guilty.” *State v. Bradford* (Nov. 7, 1988), 5th Dist. No. CA-7522, 1988 Ohio App. LEXIS 4576, at *4, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175 (emphasis added). Appellant argued that his convictions were against the manifest weight of the evidence, since there was

conflicting evidence between the state's witnesses and Hatfield's expert regarding the exact manner in which the accident occurred.

{¶195} It is well-settled that when assessing the credibility of witnesses, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. "Indeed, the factfinder is free to believe all, part, or none of the testimony of each witness appearing before it." *Warren v. Simpson* (Mar. 17, 2000), 11th Dist. No. 98-T-0183, 2000 Ohio App. LEXIS 1073, at *8.

{¶196} Here, there was valid, admissible evidence presented that appellant was operating the vehicle under suspension at the time of the accident, notwithstanding his other suspensions. Appellant admitted that he was operating the vehicle in question that collided with Kingston's Honda, and that the crash caused her death. There was uncontroverted evidence that appellant ingested cocaine prior to the accident, and that the cocaine remained in his system after the accident. There was also uncontroverted evidence that appellant twice refused to submit to blood testing, from which a jury could reasonably infer that appellant was subjectively aware he might be under the influence of cocaine when the accident occurred. Finally, there was physical evidence, which, if believed, showed that appellant made no attempt to stop at the stop sign, and that his vehicle hit Kingston's with such force as to knock it off the road.

{¶197} *Based solely on the aforementioned evidence*, the prosecution satisfied all of the requisite elements of the instant offense to allow the case to go to the jury

notwithstanding its error in admitting evidence of appellant's prior expired license suspensions. Moreover, there was nothing in the state's evidence which would lead to a belief that the jury had lost its way in considering it, or, through its verdict, created a manifest injustice warranting reversal of appellant's convictions. Viewed in its totality, the admission of appellant's suspensions was harmless beyond a reasonable doubt. If evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict. *Simpson*, 2000 Ohio App. LEXIS 1073, at *8.

{¶198} Appellant's fourth, eleventh, and twelfth assignments of error are without merit.

{¶199} With regard to appellant's sixth assignment of error, the trial court's exclusion of defense witness Douglas Heard's written report and curriculum vitae does not constitute reversible error.

{¶200} Heard, a crash reconstructionist, offered the following opinion as to how the accident occurred: "Mr. Hatfield was traveling on Beck Road *** approaching the intersection at Harold Road as the Honda Civic was coming in the opposite direction, and at that intersection of Harold Road, he attempted to make a left-hand turn onto Harold into the left front corner and side of the Honda Civic operated by Mrs. Kingston." When asked by defense counsel the grounds upon which he based his opinion, aside from the post-impact resting position of the vehicles, his own review of the evidence provided by the prosecution, and his observation of the damage to the front of Hatfield's vehicle, Heard replied that he based his opinion on the "statements from Mr. Hatfield."

{¶201} Evid.R. 703, governing the basis of an expert's testimony, states that "[t]he facts *** upon which an expert bases an opinion or inference may be *those perceived by the expert or admitted in evidence at the hearing.*" (Emphasis added).

{¶202} A "trial court has the discretion to exclude expert testimony where the testimony would not assist the trier of fact." *State v. Boggess* (Sept. 20, 1989), 9th Dist. No. 89CA004501, 1989 Ohio App. LEXIS 3609, at *4, citing *Bostic v. Connor* (1988), 37 Ohio St.3d 144, at paragraph three of the syllabus. Furthermore, the rules of evidence allow for the exclusion of otherwise relevant evidence "if it is cumulative." *State v. Chandler* (June 27, 1990), 5th Dist. No. CA-709, 1990 Ohio App. LEXIS 2761, at *4, citing Evid.R. 403(B).

{¶203} Here, Hatfield did not testify in his own defense, as was his right under the Fifth Amendment, yet his expert was allowed to introduce testimony not only regarding his credentials as an accident reconstructionist, which presumably would be contained in his curriculum vitae, but also was allowed to render an opinion as to the cause of the crash, based upon Hatfield's hearsay statements despite the fact that these statements clearly contradicted Hatfield's earlier statements to police. Under these circumstances, we cannot conclude that the trial court acted unreasonably, arbitrarily, or unconscionably by not admitting Heard's report and curriculum vitae into evidence, particularly where the state objected to its admission.

{¶204} Appellant's sixth assignment of error is without merit.

{¶205} With regard to appellant's tenth assignment error, the trial court did not commit reversible error by refusing to grant his motion for a mistrial.

{¶206} “The granting or denial of a motion for mistrial rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.” *State v. Treesh*, 90 Ohio St.3d 460, 480, 2001-Ohio-4, citing Crim.R. 33; *State v. Sage* (1987) 31 Ohio St.3d 173, 182. “A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened * * *.” *Treesh*, 90 Ohio St.3d at 480, quoting *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33. Thus, “[t]he granting of a mistrial is necessary only when a fair trial is no longer possible.” *Id.*, citing *State v. Franklin* (1991), 62 Ohio St.3d 118, 127.

{¶207} The standard governing prosecutorial misconduct is whether the comments made by the prosecutor were improper, and, if so, whether they prejudiced appellant's substantial rights. *State v. Lott* (1990), 51 Ohio St.3d 160, 165

{¶208} It is well-settled that a prosecutor is entitled to a certain degree of latitude when making closing remarks. *State v. Liberatore* (1982), 69 Ohio St.2d 583, 589. However, “[i]t is improper for an attorney to express his personal belief as to the credibility of the witness or as to the guilt of the accused.” *State v. Smith* (1984), 14 Ohio St.3d 13, 14 (citation omitted). That said, “[t]he closing argument must be considered in its entirety before determining if the prosecutor's remarks are prejudicial.” *State v. Novak*, 11th Dist. No. 2003-L-077, 2005-Ohio-563, at ¶37.

{¶209} In the instant matter, the prosecutor made the following comment about certain evidence in dispute during his closing argument with regard to Hatfield's defense theory:

{¶210} “Just because there wasn’t mentions of debris field, S-turns and everything else, all of that didn’t come up because Mr. Humpolick had some revelation or come up with some theory that gave us concern. If we didn’t think we could prove this case beyond a reasonable doubt, ladies and gentlemen, I wouldn’t be standing here.”

{¶211} Defense counsel objected and moved for a mistrial. The trial judge sustained the objection, and instructed the jury to disregard the remark, stating that the prosecutor’s “opinions about what he thinks or his conclusions are not something to be considered, but you can consider what conclusions you can draw from that evidence.” The judge then denied defense counsel’s motion for mistrial.

{¶212} Contrary to appellant’s assertions, the prosecution’s comment was not improper “opinion as to the guilt of the accused.” Rather, it was a permissible comment as to what he considered the strength of his own case relative to the theory raised by the defense. “There is no requirement that a prosecutor’s language must be neutral in its characterizations of the evidence or defense strategy.” *Novak*, 2005-Ohio-563, at ¶42 (citation omitted). Even if the prosecutor’s comments were impermissible, the trial court’s action, in sustaining appellant’s objection and instructing the jury to disregard the comment, was sufficient to cure any alleged error.

{¶213} Appellant’s tenth assignment is without merit.

{¶214} Finally, while I agree with the majority’s analysis of appellant’s seventh and thirteenth assignments of error, I write only to note that the proper remedy in such a case is to vacate the multiple sentences imposed and order the trial court to enter a

judgment of conviction for one offense and sentence accordingly. See e.g. *State v. Matthews*, 1st Dist. Nos. C-060669 and C-060092, 2007-Ohio-4881, at ¶35.

{¶215} Pursuant to the foregoing analysis, appellant's conviction should be affirmed.