**ORIGINAL**

IN THE SUPREME COURT OF OHIO

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| STATE OF OHIO | : | **10-1671** |
| Appellee | : | On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals CA: 92809 |
| -vs- | : | |
| CHARLES FREEMAN | : | |
| Appellant | : | |

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT CHARLES FREEMAN**

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## WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND AN ISSUE OF GREAT GENERAL AND PUBLIC INTEREST

This case involves serious charges and allegations of reprehensible crimes. The penalties meted out for such offenses were breathtakingly severe. After a jury found him guilty in this case, Mr. Freeman was sentenced to serve the balance of his life in prison. Mr. Freeman's first Proposition of Law challenges the carbon copy nature of the instrument with which he was charged. The indictment, alleging numerous, indistinguishable instances of misconduct over a period of time, was so uninformative that it prevented Mr. Freeman from defending himself. The indictment violated a more than one constitutional right. Yet, as the Court of Appeals dissenting opinion noted, in the five years since *Valentine v. Konteh* (2005), 395 F.3d 626 - the decision forbidding such indictments, was issued, Ohio's trial and appellate courts have refused to follow the clear law established there under. Critical rights under the State and Federal Constitutions have suffered as a consequence.

As discussed in his second and third propositions of law, a combination of trial court error and ineffective assistance of counsel further undermined the trial's fairness.

In his fourth Proposition of Law, Mr. Freeman asks this Court to accept jurisdiction over this case because when the trial court imposed all of his sentences consecutively, it failed to make the requisite findings for doing so under R.C. 2929.14(E)(4) and 2929.41(A). Although this Court previously severed those statutes as unconstitutional in *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, Mr. Freeman maintains that *Oregon v. Ice* (2009), 555 U.S. _, 129 S.Ct. 711, overruled that decision. This issue is currently before this Court in *State v. Kenneth Hodge*, 2009-1997, and Mr. Freeman asks that this court accept and hold this matter pending resolution of that case. Mr. Freeman's fifth Proposition of Law challenges the overall

constitutionality of the extraordinarily lengthy sentence imposed in this case, and whether it violates his right to due process and a fair trial.

Mr. Freeman's sixth and seventh Propositions of Law raise the same issue currently before this Court in *State v. Dunlap*, 122 Ohio St.3d 1409, 2009 Ohio 2751, and he asks that this Court accept jurisdiction over these propositions and hold them pending its ruling in that case.

## STATEMENT OF THE CASE AND FACTS

On April 3, 2008, a Cuyahoga County grand jury issued a 29-count indictment, under CR 508859, charging Defendant-Appellant Charles Freeman with multiple sex offenses related to the abuse of two minor female siblings. Specifically, indictment counts 1 – 19 charged rape of a child under 13-years of age, in violation of R.C. 2907.02(A)(1)(b); and counts 20 – 29 charged disseminating obscene matter to juveniles in violation of R.C. 2907.31 (A)(3). Counts 1 – 3 alleged that the rape involved a Jane Doe I, and Counts 4 – 19 alleged that the rape involved a Jane Doe II.[1]

Mr. Freeman entered not guilty pleas in both cases and proceeded to a jury trial. The four siblings and their mother, Maria Singleton, testified as prosecution witnesses. The gist of the story they told boiled down to the following:

Mr. Freeman met Ms. Singleton in September, 2007 at the supermarket where Freeman worked security. The two became intimate and Mr. Freeman often visited the house where Singleton and her kids lived. Mr. Freeman brought the children presents, including a video game called "Mortal Combat" and an "X-Box." The family would play the game in Maria's room. At some point they, the children, Mr. Freeman, and Maria, all began playing the game naked. Maria and Charles would have sex in front of the children. Eventually, Charles began to fondle the

[1] That matter was consolidated with a second indictment (CR 518221) alleging two counts under

children. The girls claimed that Freeman penetrated them with his fingers and penis and forced them to perform fellatio on him.

The conduct alleged was eventually brought to the attention of authorities and the girls were examined by a forensic nurse. During those examinations, the nurse noted redness on PS's anus and external genitalia as well as some redness on the back of her throat. A similar examination of IS also noted redness in the back of the throat, no acute trauma on the vagina, and an anal tag. The nurse completed a rape kit on each girl and forwarded them to the police for analysis.

Various samples taken from the girls and their clothing were subjected to forensic testing and DNA analysis. Exemplars from Mr. Freeman were tested as well. DNA testing indicated that Charles Freeman could not be excluded from an Amylase (saliva component) sample taken from IS's underwear. The state also introduced Mr. Freeman's inculpatory statement through the officer who interrogated him.

Before resting, the State amended the indictment so that Counts 1-9 applied to PS and Counts 10-19 applied to IS. The two GSI counts pertaining to TS and VS became Counts 30 and 31. The defense rested without presenting a case. The jury reached guilty verdicts on all counts. The court sentenced Mr. Freeman to consecutive sentences on all counts, including 19 *consecutive* sentences of life without the possibility of parole.

Finding Mr. Freeman indigent, the trial court appointed the Cuyahoga County Public Defender to perfect and pursue an appeal. On August 12, 2010, the Eighth District Court of Appeals issued a decision affirming in part, reversing in part, and remanding with instructions. Mr. Freeman now seeks leave of this Court to appeal from the decision.

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R.C. 2907.05(A)(4) involving the Jane Does' two minor brothers, TS and VS.

## LAW AND ARGUMENT

***Proposition of Law I:*** *WHEN THE STATE'S CHARGING INSTRUMENT ALLEGES NUMEROUS IDENTICAL OFFENSES OCCURRING OVER AN EXTENDED PERIOD OF TIME IT VIOLATES THE ACCUSED'S RIGHTS TO NOTICE AND A FAIR TRIAL WHILE FAILING TO PROTECT AGAINST DOUBLE JEOPARDY.*

Mr. Freeman was charged with 19 virtually identical rape counts involving Jane Doe I and Jane Doe II. Other than the time frame during which these events were alleged to have occurred – between September of 2007 and March 2008 – there was nothing to distinguish them. The bill of particulars, which parroted the indictment in every particular offered nothing in the way of clarification. Mr. Freeman was forced to defend himself in this case without knowing what he was really accused of and when it allegedly occurred.

On appeal the majority rejected out of hand Mr. Freeman's claim that the charges violated his right to notice. On the other hand, it did conclude that evidence was lacking with respect to the rape allegations in Counts 12, and 14-19, and, consequently vacated those counts. As noted above, these Counts, all involving Jane Doe II or IS are indistinguishable, and because the charges were so vague, there is no way of knowing what conduct was supposed to be implicated in these counts, and, for that matter, why they were vacated. Given the record, there is no reasonable explanation why the Court chose those Counts and not Counts 10, 11, and 13.

Because Mr. Freeman's indictment was so vague, he had no way of knowing before trial which incident was alleged in the various counts. To prove its case, at the very least, the State had to differentiate between the charges within a duplicative indictment like this one. The indictment did not describe what, when or where the activity transpired, nor did the prosecution clarify how it arrived at that number of charges. All but two of the 19 rape convictions should have been reversed. Instead, the Eighth District vacated seven of the rape count involving IS.

But the counts involving PS were every bit as vague, as were the multiplicative disseminating to minors counts.

The dissenting opinion disagreed with the majority's attempt to rectify the indictment's insufficiency by vacating seven of the rape counts – seemingly at random. The dissent countered that due to the multiplicative nature of the indictment, it was impossible to ascertain what alleged conduct was not sufficiently proven. The dissent also struggled with the majority's outright and inexplicable rejection of the idea that carbon copy indictments violate the right to notice. Finally, the dissent concluded by the Court was systematically failing to follow the clearly establish directives of *Valentine v. Konteh* (C.A. 6, 2005), 395 F.3d 626. Specifically, the dissent concluded its remarks by observing that, "[i]n the five years since the Eighth District Was told that our application of clearly established federal law was both 'incorrect and unreasonable,' we continue to affirm convictions based upon carbon-copy indictments." *State v. Freeman*, Cuyahoga App. No. 92809, p. 30.

No principle of procedural due process is more clearly established than that requiring the prosecution to provide notice of the specific charge, and a chance to be heard in a trial on the issues raised by that charge. *Cole v. Arkansas* (1948), 333 U.S. 196, 201. The Fifth Amendment to the United States Constitution and Section 10, Article I, Ohio Constitution state no person can be held to answer to a felony unless he is first presented with an indictment from a grand jury.

The United States Supreme Court has determined that the sufficiency of the indictment is based on the following criteria: (1) "whether the indictment contains the elements of the offense intended to be charged," (2) "and sufficiently apprises the defendant of what he must be prepared to meet," and, (3), "in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal

or conviction." *Russell v. United States* (1962), 369 U.S. 749, 763-764." The due process rights announced in *Russell* apply to both state and federal charges. *De Vonish v. Keane* (C.A.2, 1994), 19 F.3d 107, 108.

The 19-rape counts with which Mr. Freeman was charged were identical except for the identity of the complaining witnesses. According to Counts 1-3, from September of 2007 until March of 2008, Mr. Freeman "engaged in sexual activity with Jane Doe I, d.o.b. July 11, 1998, by purposefully compelling her to submit by force or threat of force." The rest of the rape counts alleged the Mr. Freeman "engaged in sexual activity with Jane Doe II, d.o.b. October 8, 1999, by purposefully compelling her to submit by force or threat of force." The nine disseminating obscene materials to minor's counts are identical.

The evidence presented at trial did little to otherwise individualize the incidents of abuse alleged. Rather, the child complaining witnesses simply testified about a series of undifferentiated abuse incidents involving multiple types of sexual misconduct offenses. No child could provide an estimate or an idea of the incidents' frequency. Few specifics regarding the time of day, date or location were provided. Yet at conclusion of the State's case, and over defense counsel's objection, the prosecutor amended counts 4 though 9 to reflect that PS, rather than IS, was the alleged victim. When this case was presented to the grand jury, it found probable cause to believe that PS was victimized three times, now the prosecutor was telling the jury that it should find that PS was victimized six more times. This post trial amendment dramatically altered the charges against Mr. Freeman. It violated due process and Mr. Freeman's right to a grand jury indictment.

The complaining witnesses in this case made haphazard attempts at distinguishing between some of the occurrences. But as *Valentine* made clear, even if a jury is able to

distinguish between some occurrences based on the complainant's testimony, the fact that undifferentiated carbon copy indictments are used requires reversal on all but one conviction. Under *Valentine*, the Eighth District's decision to vacate only seven of the indictment's rape counts was irrational and legally unjustifiable. Mr. Freeman asks this Court to accept this appeal and clarify an issue that had and continues to perplex this State's Court of Appeal.

***Proposition of Law II:*** *THE INTRODUCTION OF INADMISSIBLE, IMPROPER AND PREJUDICIAL EVIDENCE VIOLATED THE ACCUSED'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL*

The trial court erred in this case by repeatedly allowing the jury to hear evidence it should have barred, which thereby made the prosecution's case appear stronger that it was and compromised the overall fairness of the proceedings.

**A. Improper victim impact evidence unfairly tainted the jury.** A jury can be influenced by outside considerations and biases through exposure to victim impact evidence, that is introduced only to show what impact the crimes charged had upon the victim or the victim's family. This Court has expressly banned the introduction of victim impact evidence at all stages. *State v. Fautenberry* (1995), 72 Ohio St. 3d 435, 440; and *State v. Post* (1987), 32 Ohio St. 3d 380, 382 (the Ohio Revised Code barred victim impact evidence at trial).

The prosecution elicited the victim impact evidence though Nicole Navarro, a social workers that had been involved with the Singleton's before the sexual abuse allegations came to light. Navarro testified that she visited the kids after this prosecution commenced. Ms. Navarro testified that PS was "grieving" and IS was "angry" over what had happened to them. The boys as well, were characterized as "angry" and "upset." This evidence was not admissible.

When improperly-admitted evidence is the kind that a jury would reasonably have

considered in the deliberations, then admitting it is not harmless error, no matter what other evidence might have been admitted. *Chapman v. California* (1967) 386 U.S. 18, 23-24. Ms. Navarro's depiction of the pain these young complainants suffered after coming forward impacted the case's outcome.

**B. Allowing the prosecution to improperly bolster its case with the child complaining witnesses' prior consistent statements.** Through another social worker and a forensic nurse, the prosecutor introduced details the children provided about the abuse. The worker testified that the abuse allegations were substantiated. The nurse provided additional details that the girls had provided during her examination. This testimony bolstered the abuse allegations giving them undeserved credibility.

The statements were inadmissible hearsay. Prior consistent statements may be admitted only under limited circumstances, to rebut an express or implied charge of recent fabrication or improper influence or motive, for example. Nevertheless, they are only inadmissible if they were uttered before the incident that prompted the improper influence or motive. Evid.R. 801(D)(1)(b). Evid.R. 801(D)(1)(b) makes clear that the consistent statements that the offering party seeks to introduce to rehabilitate their witness must have been made "*prior to the emergence of the improper influence or motive*" to fall within the scope of Evid.R. 801(D)(1)(b).

In this case, the defense questioned the allegation's credibility, stressing that Maria influenced her children to come forward with the allegations. Nevertheless, the consistent statements all occurred after the allegations were made, not before. They were hearsay, their admission was improper and the Eighth District erred in rejecting this issue.

***Proposition of Law III:*** *TRIAL COUNSEL'S ACTS AND OMISSIONS DEPRIVED MR. FREEMAN OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE LEGAL ASSISTANCE*

The Sixth Amendment to the United States Constitution and Section 10, Article I, Ohio Constitution guarantee all criminal defendants the right to effective assistance of counsel. See, *Gideon v. Wainwright* (1963), 372 U.S. 335. That right is denied when a defense attorney's performance falls below an objective standard of reasonableness and prejudices the defense. *Strickland* v. *Washington* (1984), 466 U.S. 668, 687. Prejudice from counsel's lapses is established by showing a reasonable probability that but for counsel's unprofessional errors; the result of the proceeding would have been different. *Strickland,* at 694. Counsel's lapses did not constitute sound trial strategy and must be regarded as ineffective assistance of counsel and reversible error. *Groseclose v. Bell* (C.A. 6, 1997), 130 F.3d 1161, 1170.

Trial counsel's performance was deficient in at least two important respects: 1) counsel failed to cross-examine VS and TS (the boys) regarding the fact that they did not mention that they had been abused when DCSF first interviewed them about their sisters' allegations; and 2) counsel failed to highlight the fact that the complaining witnesses were repeatedly interviewed by DCFS social workers throughout the fall of 2007, when the abuse was purportedly going on, but they made no outcry.

**A. Failure to Impeach VS and TS with previous statements omitting allegations of abuse.** Prior to trial, requested and received the DCFS records compiled during its investigation of this case specifically and this family generally. Those records make it clear that, on March 18, 2009 and, again, on March 21, 2008, in the wake of PS and IS's sex abuse allegations, DCFS workers interviewed all four children, individually. Although IS and PS recounted their abuse claims, neither of their brothers confirmed their accounts. While both boys

did complain that Mr. Freeman was mean and conveyed their dislike for the man, neither claimed he sexually abused them.

The testimony provided by TS and VS at trial provided valuable corroboration of the girls' accounts. That testimony was also the *only* evidence supporting the GSI counts. Impugning the credibility of the boys' stories was critical to defending Mr. Freeman. The DCFS records provided valuable information that should have been presented to the jury, either on cross-examination of the boys or through the social workers who interviewed them, both of whom testified at trial. Trial counsel failed his obligation to Mr. Freeman by not exploring and exploiting this impeaching evidence.

**B. Failure to highlight the fact that DCFS interviewed all four child witnesses more than once during the fall of 2007 and into the winter of 2008, when the kids later claimed they were being abused, yet the children did not accuse Mr. Freeman of abuse until March 2008.** The DCFS records also indicate that the department had been investigating the Singleton family for a considerable period of time before the March 2008 allegations. The department had previously taken custody of Maria Singleton's three other children. Neighbors had called the department to report that Maria had a drug problem; that she was failing to supervise her children; and that the children were not attending school.

The children were interviewed repeatedly from October of 2007 to February of 2008 to investigate neglect allegations unrelated to the sex abuse. Not once during all those visits did any child report the abuse that the indictment claimed began in September and continued until March.

The fact that the children remained silent while later claiming that they were abused, is a pertinent fact that undermines the credibility of their allegations, lends credence to the notion

that their mother pressured them to make the allegations because Mr. Freeman had left her to marry someone else, and overall hurts the prosecution's case. This is information that the jury should have heard, that it was entitled to hear, and it would have benefited Mr. Freeman. Trial counsel was lax in failing to elicit this information from the witnesses who testified.

***Proposition of Law IV**: CONSECUTIVE SENTENCES ARE CONTRARY TO LAW AND VIOLATE DUE PROCESS WHERE THE TRIAL COURT IMPOSES THEM WITHOUT MAKING AND ARTICULATING THE FINDINGS AND REASONS NECESSARY TO JUSTIFY THEM.*

Mr. Freeman's sentence is contrary to law because the trial court imposed consecutive sentences without making the findings required by R.C. 2929.14(e)(4). In *State v. Foster* (2006), 109 Ohio St. 3d 1, this Court held that R.C. 2929.14(E)(4) and R.C. 2929.41(A) violated the Sixth Amendment and, to remedy that violation, excised those provisions. In the interim, however, The United States Supreme Court decided *Oregon v. Ice* (2009), 555 U.S. __, 129 S.Ct. 711. That decision demonstrates that R.C. 2929.14(E)(4) and R.C. 2929.41(A) were not unconstitutional and should not have been severed. Since those statutory provisions are constitutional, this Court should remand the case for a new sentencing hearing at which Mr. Freeman would be entitled to a presumption favoring concurrent sentences, pursuant to R.C. 2929.41(A), which could only be overcome by the very specific fact-finding demands of R.C. 2929.14(E)(4).

This Court has precisely this issue before it in *State v. Kenneth Hodge*, 2009-1997. The proposition of law accepted in that case was as follows:

> By abrogating *State v. Foster*, *Oregon v. Ice* automatically and retroactively revived Ohio's consecutive sentencing statutes, R.C. 2929.14(E)(4), 2929.19(B)(2)(c), 2929.41(A), and 2953.08(G).

Mr. Freeman raises the same point in this appeal. Under the circumstances, he asks that this Court accept this issue for review and, at the very least, hold the matter pending its resolution of the *Hodge* case.

**Proposition of Law V:** *THE TRIAL COURT VIOLATES DUE PROCESS BY IMPOSING A LONGER PRISON SENTENCE SIMPLY BECAUSE THE DEFENDANT OPTED TO TAKE HIS CASE TO TRIAL.*

The trial court punished Mr. Freeman for taking this case to trial when it imposed maximum and consecutive terms on all 31 counts. It is well-established that "a defendant is guaranteed the right to a trial and should never be punished for exercising that right or for refusing to enter a plea agreement[.]" *State v. O'Dell* (1989), 45 Ohio St. 3d 140, paragraph two of the syllabus.

A trial court is duty bound to avoid creating "the appearance that it has enhanced defendant's sentence because he has elected to put the government to its proof." *Id.* Where such appearance has been created, the appellate court must determine whether the record contains "an unequivocal statement as to whether the decision to go to trial was or was not considered in fashioning the sentence." *Id.* "Absent such an unequivocal statement, the sentence will be reversed and the matter remanded for resentencing." *Id.* There was no such statement in Mr. Freeman's case.

The trial court offered no justification for the breathtakingly lengthy sentence it imposed. At sentencing, Mr. Freeman attempted to explain what, in his mind had happened in this case. Essentially, he maintained that the DNA evidence (to the extent that it implicated him) was fabricated; that his inculpatory statement was the product of trickery and manipulation by the interrogating officer; and that Maria forced the kids to allege abuse as revenge for the fact that he was leaving her for someone else.

The trial court first noted the weight of the evidence presented as follows:

> I'm not going to argue with you. The jury weighted everything, they weighted the testimony of the four youngsters. They weighted the testimony of Maria. So if you want to throw out the confession, you can throw out the confessions; if you want to throw out the DNA, you can throw out the DNA out. They still weighted the testimony of these four youngsters who were qualified of being capable to testify here.

The court then imposed sentences on each and every count (19 life without parole terms; nine 18 month terms; and two 5 year terms) consecutively. The court imposed this maximum, consecutive sentence without any reasoning at all. The Eighth District discounted the sentences, finding that it wouldn't have matters if the court has imposed all the sentences concurrently. Nevertheless, punishing a defendant for taking his case to trial is illegal and this Court should rectify the trial court's decision to do so.

**Proposition of Law VI:** *THE ACCUSED'S STATE CONSTITUTIONAL RIGHT TO A GRAND JURY INDICTMENT AND STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS ARE VIOLATED WHERE HIS INDICTMENT FOR GSI OMITS AN ELEMENT OF THE OFFENSE.*

Gross sexual imposition against a child under 13 is not a strict liability offense. The act of sexual contact must be recklessly performed. Mr. Freeman's trial on two GSI counts was structurally flawed because the essential *mens rea* element of "recklessly," attendant to the act of sexual contact was omitted. This defect occurred in indictment and persisted throughout the proceedings to the jury instructions.

R.C. 2901.21(B) states that "[w]hen the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense..." With respect to the

offense of GSI under R.C. 2907.05(A)(4), the General Assembly explicitly stated that there would be no *mens rea* attendant to the element of the victim's age. But the General Assembly made no similar statement regarding the element of sexual contact.

Mr. Freeman, acknowledges that this Court recently overruled *State v. Colon*, 118 Ohio St.3d 26, 2008 Ohio 1624, in *State v. Horner*, slip opinion, 2010 Ohio 3830 – holding that an indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state. *Id.* at Syllabus 1. Nevertheless, this precise issue presented in this appeal was accepted for review by this Court in *State v. Dunlap*, 122 Ohio St.3d 1409, 2009 Ohio 2751. Although the *Dunlap* matter has been fully briefed and argued, this Court has not issued a decision in the case. Under the circumstances, Mr. Freeman asks this Court to accept his appeal and hold it for decision on the *Dunlap* matter.

***Proposition of Law VII:*** *THE ACCUSED'S STATE CONSTITUTIONAL RIGHT TO A GRAND JURY INDICTMENT AND STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS ARE VIOLATED WHERE HIS INDICTMENT FOR THE OFFENSE OF RAPE UNDER R.C. 2907.02(A)(1) OMITS AN ELEMENT OF THE OFFENSE.*

An indictment alleging the offense of rape in violation of R.C.2907.02(A)(1), which fails to include the required culpable mental state of "recklessness" as it relates to a defendant's conduct violates the accused's rights to due process of law and a proper grand jury indictment. The indictment charging Mr. Freeman with rape does not allege that it was undertaken recklessly. The "sexual conduct" element of the rape offense under R.C.§2907.02(A)(I)(b), therefore, never alleged that the conduct was committed recklessly as required by law.

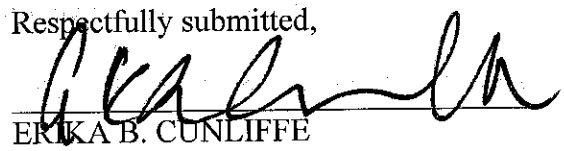
As noted above, Mr. Freeman, recognizes that this Court recently overruled *State v. Colon*, 118 Ohio St.3d 26, 2008 Ohio 1624, in *State v. Horner*, slip opinion, 2010 Ohio 3830 – holding that an indictment that charges an offense by tracking the language of the criminal

statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state. at Syllabus 1. Nevertheless, proposition tracks the one presented in *State v. Dunlap*, 122 Ohio St.3d 1409, 2009 Ohio 2751, and Mr. Freeman asks that you hold accept jurisdiction of the matter pending it resolution of *Dunlap*.

## CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant Appellant Charles Freeman asks this Court grant him leave to appeal and accept jurisdiction on any or all of the Propositions of Law presented.

Respectfully submitted,



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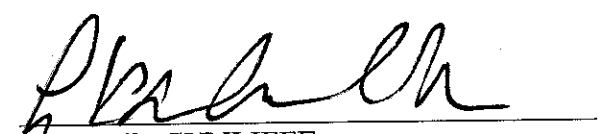
## CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Brief and Assignments of Error was served by ordinary mail upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 23rd day of September, 2010.



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Judge R. McMonagle

AUG 1 2 2010

FILED

# Court of Appeals of Ohio

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2010 AUG 16 P 2:43

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CLERK OF COURTS
CUYAHOGA COUNTY

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 92809**

## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## CHARLES FREEMAN

A561884

DEFENDANT-APPELLANT

**JUDGMENT:**
AFFIRMED IN PART; REVERSED
IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-508859 and CR-518221

8-16-10

**BEFORE:** Sweeney, J., McMonagle, P.J., and Cooney, J.

**RELEASED AND JOURNALIZED:** August 12, 2010

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JAMES J. SWEENEY, J.:

Defendant-appellant, Charles Freeman ("defendant"), appeals his conviction and sentence on 19 counts of rape, ten counts of disseminating matter harmful to juveniles, and two counts of gross sexual imposition. For the reasons that follow, we affirm in part, reverse in part, and remand with instructions.

## I. Procedural History

In separate indictments that were consolidated for trial, defendant was accused of the following offenses: 19 counts of rape involving victims under the age of ten in violation of R.C. 2907.02(A)(1)(b); ten counts of disseminating obscene matter to juveniles in violation of R.C. 2907.31(A)(3); and two counts of gross sexual imposition in violation of R.C. 2907.05(A)(4). It was alleged that the rapes and disseminating offenses occurred between September 2007 and March 2008, and the gross sexual impositions occurred during September 2008.

The indictment identified the victims of the rape counts as Jane Doe I, d.o.b. July 11, 1998, and Jane Doe II, d.o.b. October 8, 1999. Other than those distinctions (i.e., the Doe designations and dates of birth), the rape counts were identically worded.

The victims of the gross sexual imposition counts were identified as John Doe I, d.o.b. December 15, 2000, and John Doe II, d.o.b. May 23, 2002. All four Does were identified as the victims of the disseminating charges.

At trial and over defendant's objection, the court granted the State's motion to amend the indictments to identify Jane Doe I as P.S., the victim of Counts 1, 2, and 3, and Counts 4 through 9 (which originally related to P.S.'s sister, I.S.). Counts 10 through 19 were amended to identify Jane Doe II as I.S. John Doe I was identified as V.S., the victim of the first gross sexual imposition count, and John Doe II was identified as T.S., the victim of the second gross sexual imposition count.[1]

## II. Trial Testimony

The victims are all siblings and the children of "Maria." At the time of trial, the children ranged in age from six to ten years old, with P.S. being the oldest girl, then her sister, I.S., followed by her brothers V.S. and T.S., respectively. Their father died years earlier, and during the time of the alleged offenses, they resided in a Cleveland home with their mother and defendant.

The defendant met Maria in September 2007 through his job as a security officer at a grocery store where the family shopped. He began dating Maria and visited her home after work frequently. During his visits, he would often play a video game on Playstation with the family. Each of the four children and

[1]In accordance with this Court's policy, the child victims of these sexual offenses shall not be identified by name.

Maria testified that the defendant made them play the game while naked in Maria's bedroom. Maria permitted this to occur.[2]

Maria testified that there were at least two occasions when her daughters were allowed or told to watch as she and defendant engaged in sexual intercourse. According to Maria, defendant "wanted to teach them what sex was about and how dangerous it was."

P.S. and I.S. testified, and Maria admitted, that the defendant required P.S. and I.S. to remove his clothes when he came over after work. According to Maria, defendant felt "it was a good job for the girls to be touching him." She said that the defendant would follow the girls to their bedrooms naked but would not allow her to go inside. Maria did not interfere because defendant "manipulated her," turned her kids against her, and told her he was smarter because he had a college degree.

P.S. and I.S. testified to numerous sexual assaults committed upon them by defendant. They stated that the assaults occurred in various places in their home, including their bedrooms, the bathroom, and Maria's bedroom. Both girls also testified that defendant threatened them not to tell anyone.

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[2]Maria was charged as a codefendant on the counts of disseminating matter harmful to juveniles. She entered a guilty plea prior to defendant's trial and, as part of her plea, testified against him.

Further, both brothers, V.S. and T.S., testified that they saw defendant sexually assault their sisters. The brothers also testified that defendant touched the boys' private parts, and that defendant threatened them not to tell anyone.

Maria denied ever seeing the defendant sexually assault or inappropriately touch any of her children. Although I.S. told her otherwise, Maria said she did not believe her and thought she was "playing." But when P.S. also reported sexual abuse to another relative in March 2008, Maria took her daughters to the hospital and reported it. The children were then removed from Maria's custody and placed with a paternal aunt, where they remained at the time of trial.

The investigating detective took a written statement from defendant after a waiver of rights. The statement contains contradictory statements but also contains certain admissions. In particular, defendant stated that he had his mouth on P.S.'s vagina twice, each time in the presence of her mother. He admitted he tried to insert his penis into P.S.'s vagina on one occasion. He admitted he had his mouth on I.S.'s vagina twice, but denied ever trying to insert his penis into I.S.'s vagina. His statement also contained an admission to having sex with Maria in front of P.S. and I.S. on more occasions than five but less than ten occasions.

A forensic nurse testified about her physical examinations of I.S. and P.S. She reviewed the medical records containing narratives that essentially corroborated the trial testimony of these victims. The exam revealed petechiae in both girls' throats, indicative of something being stuck inside. I.S. also had evidence of a previous vaginal tear.

A forensic scientist employed by BCI[3] analyzed physical evidence obtained from rape kits conducted on the girls. I.S.'s vaginal samples tested positive for seminal fluid and Amylase (an enzyme indicative of the presence of saliva) was found on both girls' underwear. No semen was detected from P.S.'s rape kit. Later testing could not exclude defendant as a contributor to the DNA profile obtained from I.S.'s underwear. There was not enough DNA from P.S.'s underwear to conduct a similar analysis. Another forensic scientist was unable to make a determination as to the DNA.

The jury found defendant guilty on all counts, and the trial court sentenced him to serve 19 consecutive life-without-parole terms for the rape convictions, consecutive to ten consecutive 18-month prison terms for the disseminating obscene matter to juveniles convictions, consecutive to two consecutive five-year prison terms for the gross sexual imposition convictions.

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[3]The Bureau of Criminal Identification and Investigation.

Defendant now appeals, raising numerous errors for our review, which will be addressed together where appropriate for discussion.

III. Law and Analysis

In his first and second assignments of error, defendant maintains his due process rights were violated because the gross sexual imposition and rape charges against him omitted the mens rea elements.

R.C. 2907.05(A)(4), governing gross sexual imposition, provides:

"(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

"* * *

"(4) The other person, or one of the other persons, is less than 13 years of age, whether or not the offender knows the age of that person."

Defendant argues that strict liability attaches to the portion of the statute regarding victims under 13 years of age, but contends that a mens rea element (recklessly, according to him) is necessary with respect to committing the alleged sexual contact. He relies on the Ohio Supreme Court's decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, clarified by 119 Ohio St.3d 204, 2008-Ohio-3748, 893 N.E.2d 169.

"[T]he degree of culpability required for * * * the mental state of the offender is a part of every criminal offense in Ohio, except those that plainly impose strict liability." *Colon*, 2008-Ohio-1624, ¶12, citing *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, 803 N.E.2d 770, ¶18. In *State v. Dunlap*, Cuyahoga App. No. 91165, 2009-Ohio-134, ¶5, this Court stated that it "and others, have repeatedly held that R.C. 2907.05, gross sexual imposition involving a victim under the age of 13, is a strict liability offense and requires no precise culpable state of mind. *All that is required is a showing of the proscribed sexual contact*. (Emphasis added.) *State v. Aiken* (June 10, 1993), 8th Dist. No. 64627; *State v. Laws* (Dec. 22, 1998), 10th Dist. No. 98AP-306." See, also, *State v. Crotts*, Cuyahoga App. No. 81477, 2006-Ohio-1099, ¶6, discretionary appeal not allowed, 109 Ohio St.3d 1497, 2006-Ohio-2762, 848 N.E.2d 859.

We are not persuaded by defendant's argument that without inclusion of a culpable mental state as to the sexual contact element an innocent hug that results in an inadvertent graze against a female's chest could constitute gross sexual imposition. "'Sexual contact' means any touching of an erogenous zone of another, including without limitation, the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, *for the purpose of sexually arousing or gratifying either person*." (Emphasis added.) R.C. 2907.01(B). Thus, an "innocent hug" with an "inadvertent graze" without the "purpose of sexually

arousing or gratifying either person" would not constitute sexual contact under the gross sexual imposition statute.[4]

Defendant's argument relative to the mens rea element of the rape charges is likewise without merit. R.C. 2907.02(A)(1)(b), governing rape, provides:

"(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

"* * *

"(b) The other person is less than 13 years of age, whether or not the offender knows the age of the other person."

Defendant urges us to find that the culpable mental state for committing rape of a child under 13 requires including the recklessness mens rea in the indictment. Specifically, defendant contends that the indictment should provide that the accused recklessly engaged in sexual conduct with a victim under the age of 13. But engaging in sexual conduct with a child under the age of 13 is a strict liability offense. See *State v. Bruce*, Cuyahoga App. No. 92016, 2009-Ohio-6214, ¶90 (an indictment against a defendant for rape under R.C.

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[4]"A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A).

2907.02(A)(1)(b) when the victim is less than 13 years old is not defective for failing to specify a mens rea element because the offense is a strict liability one).

In light of the above, the first and second assignments of error are overruled.

For his third assignment of error, defendant attacks the sufficiency of his indictment on the grounds that the carbon copy counts of the indictment violated his due process rights.

In *Russell v. United States* (1962), 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240, the United States Supreme Court set forth the following considerations for determining the validity of an indictment: (1) "whether the indictment contains the elements of the offense intended to be charged"; (2) "whether the indictment sufficiently apprises the defendant of what he must be prepared to meet"; and (3) "in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." Id. at 763-764.

In asserting that his due process rights were violated, defendant relies on the Sixth Circuit's decision in *Valentine v. Konteh* (C.A.6, 2005), 395 F.3d 626, for the proposition that "'the multiple, undifferentiated charges in the indictment violated [his] rights to notice and his right to be protected from double jeopardy." Defendant also relies on *State v. Hemphill,* Cuyahoga App.

No. 85431, 2005-Ohio-3726,[5] in urging us to vacate some of his convictions for the reason that "the indictment was not pled with sufficient specificity and the evidence against him was insufficient."

It is defendant's belief that *Valentine* and *Hemphill* require all but two of his rape convictions be vacated.

The distinct due process components involved in examining the sufficiency of an indictment include notice and double jeopardy. The vast majority of cases from our district that have applied *Valentine* have been resolved under a double jeopardy analysis. E.g., *State v. Hilton*, Cuyahoga App. No. 89220, 2008-Ohio-3010; *State v. Ogle*, Cuyahoga App. No. 87695, 2007-Ohio-5066; *State v. Yaacov*, Cuyahoga App. No. 86674, 2006-Ohio-5321; *Hemphill*, 2005-Ohio-3726. The only case from this Court that has addressed the notice aspect of due process in terms of a carbon copy indictment has rejected it. *State v. Wilson*, Cuyahoga App. No. 92148, 2010-Ohio-550, appeal not allowed, 125 Ohio St.3d 1450, 2010-Ohio-2510.

To the extent defendant is attempting on appeal to challenge the indictment for insufficiency of notice, he has waived it. Defendant never objected to the sufficiency of the indictment nor otherwise raised the issue of

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[5]In *Hemphill*, the defendant was charged with multiple carbon copy counts of rape, GSI, and kidnapping. At trial, the State offered the testimony of the child victim. Defendant challenged his multiple convictions maintaining he was convicted of a generic pattern of abuse rather than specific, separately proven offenses. This Court found that the victim gave only a numerical estimate and the evidence was lacking as to any specificity concerning actual numbers or separate incidents; accordingly, all convictions were vacated but two counts of rape and one count of GSI.

deficient notice before the trial court. He did not file a motion to dismiss on this basis nor did he move for a more specific bill of particulars. Whatever information the State provided in response to his discovery requests, defendant accepted without objection. We can only assume from this record that defendant was sufficiently apprised of the charges against him.

The State did differentiate the counts at trial, which satisfies the due process concerns in accordance with *Valentine,* which found: "[t]he due process problems in the indictment might have been cured had the trial court insisted that the prosecution delineate the factual bases for the 40 separate incidents either *before or during the trial.*" (Emphasis added.) *Valentine,* 395 F.3d at 634; see, also, *Wilson,* 2010-Ohio-550; and *State v. Barrett,* Cuyahoga App. No. 89918, 2008-Ohio-2370.

From the differentiated counts, we are able to discern some merit to defendant's claim that the evidence was insufficient to support certain of his convictions. See *Yaacov,* 2006-Ohio-5321; *Ogle,* 2007-Ohio-5066, ¶43. Specifically, there was a lack of evidence in this record to support convictions under Counts 12 and 14 through 19, which shall be vacated.

Finally, we note that defendant also complains under this error that the trial court erred by permitting the amendment of Counts 4-9 of the complaint to

change the identity of the victim from I.S. to P.S.[6] In advancing this component of his argument, defendant cites no additional authority beyond what he generally relies upon in challenging the sufficiency of his indictment. The State counters that the amendment was proper and consistent with Crim.R. 7(D) because it did not change either the substance or the identity of the crimes charged. "It is well settled that an amendment to an indictment which changes the name of the victim changes neither the substance nor the identity of the crime charged." *State v. Valenzona*, Cuyahoga App. No. 89099, 2007-Ohio-6892, citing *State v. Owens* (1975), 51 Ohio App.2d 132, 149, 366 N.E.2d 1367, citing *In re Stewart* (1952), 156 Ohio St. 521, 103 N.E.2d 551. See, also, *State v. Henley*, Cuyahoga App. No. 86591, 2006-Ohio-2728; *Cleveland v. Glenn*, 126 Ohio Misc.2d 43, 2003-Ohio-6956, 801 N.E.2d 943; *State v. Mader* (Aug. 30, 2001), Cuyahoga App. No. 78200. Because defendant does not contend that the amendments changed either the identity or the substance of the crimes charged and does not cite any authority that would otherwise support a finding of error in this regard, this part of his argument lacks merit.

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[6]This is a different objection than claiming his indictment was insufficient for lack of notice discussed previously.

Based on the foregoing, we sustain this error in part and overrule it in part. Defendant's convictions on Counts 12 and 14-19 are vacated; convictions on all other counts are affirmed

For his fourth assigned error, defendant contends that the trial court erred by admitting prejudicial victim impact evidence, allowing the prosecution to bolster the complaining witnesses' claims with prior consistent statements, and by admitting "un-crossexaminable" hearsay statements the complaining witnesses made to a forensic nurse.

The admission of evidence is within the sound discretion of the trial court, subject to reversal only upon a finding of an abuse of discretion. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶101.

Defendant first asserts that the trial court erred by admitting testimony of the county social worker as being improper victim-impact evidence. He contends that the admission of this evidence violated his rights to a fair trial and due process and relies on *Payne v. Tennessee* (1991), 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720, and *State v. Fautenberry* (1995), 72 Ohio St.3d 435, 650 N.E.2d 878.

In *Fautenberry*, the Ohio Supreme Court found that "evidence which depicts both the circumstances surrounding the commission of the murder and also the impact of the murder on the victim's family may be admissible during

both the guilt and the sentencing phases." Id. at 440; see, also, *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶98 ("Evidence relating to the facts attendant to the offense is 'clearly admissible' during the guilt phase, even though it might be characterized as victim-impact evidence.")

Even if victim-impact evidence is admitted in error, this does not constitute reversible error unless the defendant shows there is some reasonable probability that the outcome would have been different. *State v. Sova* (Apr. 9, 1998), Cuyahoga App. Nos. 71923 and 71924.

Defendant believes the jury was improperly swayed by the following testimony of the social worker: that she became involved with the family in the fall of 2007 because the children were not attending school; that she interviewed all four children individually; that she visited the children in March 2008 and observed that P.S. was "grieving"; that I.S. was "angry"; and that the boys were "angry" and "upset."

The social worker's testimony about how she became involved with the family was not improper victim-impact testimony but rather explained why she, who did not typically handle sexual abuse allegations, was involved with this matter. She did mention that P.S. was grieving but correlated this to P.S.'s feelings about her mother. Furthermore, we do not find that the exclusion of the social worker's brief testimony as to her perceptions of the children's emotional

state in March 2008 would have had any reasonable probability of altering the outcome of the jury's verdict in this case, particularly in light of the other evidence contained in this record. The defendant's argument concerning this testimony is without merit.

Next, defendant maintains that the trial court erred by allowing the testimony of another social worker and the forensic nurse, claiming that it was hearsay and improperly bolstered the children's credibility with prior consistent statements. The State contends that the testimony was admissible pursuant to Evid.R. 803(4). The statements at issue were made to a social worker and a nurse following, and as a result of, the sexual abuse allegations.

This Court has consistently held that a young rape victim's statements to social workers, clinical therapists, and other medical personnel are admissible under Evid.R. 803(4), when made for purposes of medical diagnosis or treatment. *State v. Muttart,* 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.Ed.2d 944; *State v. Arnold,* Slip Op. No. 2010-Ohio-2742; *Presley v. Presley* (1990), 71 Ohio App.3d 34, 593 N.E.2d 17; *State v. Kurpik* (June 27, 2002), Cuyahoga App. No. 80468; *State v. Grider* (Feb. 10, 2000), Cuyahoga App. No. 75720; *State v. Hogan* (June 8, 1995), Cuyahoga App. No. 66956; *State v. Shepherd* (July 1, 1993), Cuyahoga App. No. 62894; *State v. Duke* (Aug. 25, 1988), Cuyahoga App. No. 52604; *State v. Cottrell* (Feb. 19, 1987), Cuyahoga App. No. 51576; *State v. Negolfka* (Nov. 19,

1987), Cuyahoga App. No. 52905. This is true whether the statements are consistent or inconsistent with the victim's trial testimony. See *State v. Durham,* Cuyahoga App. No. 84132, 2005-Ohio-202. Accordingly, defendant's argument to the contrary lacks merit and the fourth assignment of error is overruled.

In his fifth assignment of error, defendant contends his counsel's representation fell below the standard of competent representation because his attorney did not cross-examine the children about their failure to allege the abuse sooner.

The Cuyahoga Department of Children and Family Services assigned a social worker to the family in October 2007 to investigate matters unrelated to this case. The alleged offenses occurred between September 2007 to March 2008 and in September 2008. The defendant maintains his counsel should have attempted to elicit testimony from the child victims that they failed to make any sexual abuse allegations until March 2008 despite opportunity to do so.

All of the children were asked on direct examination why they did not come forward with their allegations against defendant sooner. Each of them gave a plausible explanation. P.S. said defendant told her not to tell because it was a secret. I.S. said she told her mother, who did nothing about it, which her mother confirmed. I.S. also said the defendant told her she would get a "whooping" if she told. V.S. said he did not say anything because the defendant told him he would

cut off their heads with a sword if they told anyone.[7] Finally, T.S. said he told his mother about what the defendant did to him, but she did nothing. T.S. did not tell anyone else because he was embarrassed.

It would have been foolish for defense counsel to re-elicit this damning testimony and explanations from the children on cross-examination. Accordingly, the decision not to cross-examine the children about the alleged omissions did not amount to ineffective assistance of counsel, which requires a showing that (1) the performance of defense counsel was seriously flawed and deficient; and (2) the result of appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

In light of the above, the fifth assignment of error is overruled.

For his sixth assigned error, defendant contends the trial court erred by not making statutory findings required by Senate Bill 2, although such provisions were excised by the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. He relies on the United States Supreme Court's decision in *Oregon v. Ice* (2009), 129 U.S. 711, 129 S.Ct. 711, 172 L.Ed.2d 517, for the proposition that the findings were excised in error and, therefore,

[7]Defendant did keep a sword in his car, and V.S. said he saw the sword.

should have been made. We have declined to adopt this position until the Ohio Supreme Court provides otherwise. See, e.g., *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379, at ¶29 (concluding that, in regard to *Ice*, "we decline to depart from the pronouncements in *Foster*, until the Ohio Supreme Court orders otherwise"); see, also, *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, ¶35 ("*Foster* did not prevent the trial court from imposing consecutive sentences; it merely took away a judge's duty to make findings before doing so. The trial court thus had authority to impose consecutive sentences on Elmore").

The sixth assignment of error is therefore overruled.

In his final assignment of error, defendant contends that the trial court improperly considered his decision to go to trial as a factor in imposing his sentence.

There is nothing in the record that would support the defendant's contention that the trial court imposed a sentence within the statutory range as punishment for exercising his right to trial. Defendant relies solely on the fact that the trial court ordered him to serve all of his sentences consecutively. We note that while he was ordered to serve all of his sentences consecutively, in reality, the imposition of concurrent sentences would have the same effective result — a term of life in prison without the possibility of parole.

In light of the above, the seventh assignment of error is overruled.

IV. Conclusion

Judgment affirmed in part, reversed in part, and case remanded with instructions to vacate convictions on Counts 12 and 14 through 19, with convictions being affirmed on all other counts consistent with this opinion.

It is ordered that appellant and appellee share equally the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for further proceedings.

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

James J. Sweeney

JAMES J. SWEENEY, JUDGE

COLLEEN CONWAY COONEY, J., CONCURS;
CHRISTINE T. McMONAGLE, P.J., DISSENTS
IN PART WITH SEPARATE DISSENTING OPINION

CHRISTINE T. McMONAGLE, P.J., DISSENTING IN PART:

*Respectfully, I dissent from the majority opinion on the third assignment of error. In this assignment, Freeman attacks the sufficiency of the indictment on the grounds that the carbon-copy counts of the indictment violated his due process rights under the Fourteenth Amendment. I agree.*

*Valentine v. Konteh* (C.A.6, 2005), 395 F.3d 626, originated in the Eighth District as *State v. Valentine* (July 17, 1997), Cuyahoga App. No. 71301. Michael Valentine was charged in an indictment containing identical and undifferentiated counts, and, like Freeman, was convicted of all counts and sentenced to multiple consecutive life sentences. He first raised the issue of the undifferentiated counts before the Eighth District;[8] the Eighth District held that the law did not require any more in an indictment than a recitation of the statute itself. Specifically, this appellate court said:

"Regarding the state's failure to specify the type of sexual conduct, the Ohio Supreme Court has determined that * * * Crim.R. 7(B) authorizes indictments to utilize the words of the applicable section of the statute. *State v. Murphy* (1992), 65 Ohio St.3d 544, 583. The indictment in this case utilizes the wording of Revised Code Sections 2907.02 and 2907.17, which provided

[8]It does not appear from the opinion that this issue was raised before the trial court.

Valentine with statutory notice of the charges against him. Consequently, the state did not deprive him of his rights to due process." *Valentine*, Cuyahoga App. No. 71301. However, this appellate court in *Valentine* did dismiss five counts on the issue of insufficient evidence, as does the majority in the instant case.

Valentine attempted to get this issue before the Ohio Supreme Court; they declined jurisdiction, declaring there was "no substantial constitutional question." *State v. Valentine* (1997), 80 Ohio St.3d 1466, 687 N.E.2d 295. However, pursuant to a writ of habeas corpus filed in the United States District Court, Valentine obtained review of the issue. The district court found that the Eighth District's "**application of clearly established federal law was not only incorrect, but unreasonable.**" *Valentine v. Huffman* (2003), 285 F.Supp.2d 1011, 1027. In reaching this conclusion, the district court cited the controlling law contained in *Russell v. United States* (1962), 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240. *Russell* requires that an indictment: (1) contain the elements of the offense charged (not an issue in this case — the indictment did in fact charge each and every essential element of the crime),[9] (2) provide the defendant adequate notice of

[9]In *State v. Colon*, 118 Ohio St.3d 26, 2009-Ohio-1624, 885 N.E.2d 917, clarified in 119 Ohio St.3d 204, 2008-Ohio-3748, 893 N.E.2d 169, the Ohio Supreme Court held that the omission of an essential element (recklessness) in an indictment is at the very

the charges against which he must defend; (the seminal issue in the case before us), and (3) provide protection against double jeopardy by enabling the defendant to plead an acquittal or conviction to bar future prosecutions for the same offense. Id. See, also, *Isaac v. Grider* (C.A.6, 2000), 211 F.3d 1269.

The United States Supreme Court further stated that "[t]he object of the indictment is to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances. *U.S. v. Cruikshank* (1875), 92 U.S. 542, 558." *Valentine v. Huffman* at 1024.

The United States Supreme Court further noted that under the second mandate of *Russell*, "[u]ndoubtedly, the language of the statute may be used

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least plain error, and accordingly may be raised at the appellate level for the first time. The majority here suggests that since the defect in the indictment was not raised at the trial level, it was waived for purposes of our appellate review. The very definition of plain error is that it may be raised for the first time on appeal. *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332; *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 448 N.E.2d 452.

in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the description, with which he is charged." *United States v. Hess* (1888), 124 U.S. 483, 487, 8 S.Ct. 571, 31 L.Ed. 5126; see, also, *Valentine v. Huffman* at 1024-1025. Apropos of this mandate, the district court in *Valentine v. Huffman* discussed how the carbon copy indictments gave no notice to the defendant sufficient to present an alibi (if one was to be established) or an alternative theory to one of guilt (if such was to be the case), or any other specific defense or defenses. Significantly, however, the district court did not decide *Valentine* on this second mandate.

*Valentine* was decided on the third mandate of *Russell*, that of double jeopardy. (With some counts dismissed, it is impossible to determine with such carbon copy indictments, which counts were convictions, and which acquittals. See *State v. Ogle*, Cuyahoga App. No. 87695, 2007-Ohio-5066, which under similar facts, reached the same conclusion.) "The Ohio Court of Appeals did not specify which 5 counts were dismissed, nor could it given that the counts were identical and there was no way to distinguish among them." *Valentine v. Huffman* at 1027.

In short, while commenting on the lack of notice, *Valentine* at the district court level was decided on the double jeopardy portion of the due

process clause of the Fourteenth Amendment. Valentine was granted his writ of habeas corpus and ordered released. Id. at 1027.

The government appealed to the Sixth Circuit Court of Appeals, which upheld the decision of the district court, but modified the writ to exclude all but one of the carbon copy counts. (A single count cannot be carbon copy.)

In Freeman's case, there are multiple, identical charges. The majority contends that the state did delineate the factual bases for the multiple counts of rape pertaining to I.S. and P.S. during trial, during closing arguments and in the jury verdict forms.[10] But delineating the differences during trial or at the conclusion of the case certainly does not "apprise the defendant of what he must be prepared to meet." Notice during or at the conclusion of trial is no kind of notice at all.

It is true that counsel argued differentiation of some of the counts in closing arguments, and differentiation of counts was arguably afforded in some of the jury verdict forms; however, this impacts only the third factor discussed in *Russell*, that is, "[i]n case any proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." See, also, *Ogle*, supra.

[10]I have serious question as to the adequacy of the delineation in the verdict forms; however, that issue has not been raised by Freeman and will not be resolved here.

In-trial or post-trial differentiation is not sufficient to satisfy due process notice. This is not a case where a child is unable to testify to exact dates or times; courts have great tolerance and understanding of that difficulty. This is a case where the available differentiating information, e.g., cunnilingus, vaginal penetration, digital penetration, in the bedroom, in the bathroom, etc., was in fact available, but specifically and purposefully denied the defendant prior to trial.

The state has offered no explanation why such information was not included in the indictment, or at the very least, on a pretrial bill of particulars. A motion for bill of particulars, filed by Freeman on April 9, 2008, requested "the alleged overt acts attributed to the defendant in the commission of the offense charged in the indictment" and "the overt acts alleged to have been committed by the defendant that support the allegations in the indictment."

The state's response reiterated the carbon-copy indictment, provided no differentiation between the counts, and concluded that "under the laws governing indictments and bills of particular, the prosecuting attorney is not required to disclose through a bill of particulars, the evidentiary matters requested in defendant's [motion for a] bill of particulars."

Freeman filed a second motion for bill of particulars on May 15, 2008, this time requesting "specific facts related to the conduct of the defendant * * *" and stating that "defendant says the indictment is vague, indefinite, uncertain, in general terms and conclusions and that from the indictment, defendant cannot determine the nature and cause of the charges against him; that he is to prepare an intelligent defense thereto, and in order that this defendant may be fairly informed of what the state claims and what crime, if any, he is charged, and so that the defendant will be protected in his constitutional rights, the prosecuting attorney should be required to particularize." Neither the state nor the court responded at all to this request. Although Freeman twice requested differentiating information prior to trial, the state did not provide it, and the court did not order it.

The majority in this case concludes that "the State did differentiate the counts at trial, which satisfies the due process concerns with *Valentine*, which found that '**[t]he due process problems in the indictment might have been cured had the trial court insisted that the prosecution delineate the factual bases for the 40 separate incidents either before or during trial.**'" Majority opinion, citing *Valentine v. Konteh* at 634. However, the majority fails to address two matters; the first is that it is unclear whether this quote from *Valentine* is referring to the double jeopardy portion

of the due process clause, the notice portion of the due process clause, or both. I *might* concede cure on the double jeopardy attack; I do not concede at all cure on the notice provision.

Secondly, the majority opinion ignores the use of the word "might," and treats the statement as holding that the due process issues *would* have been cured had the trial court insisted that the prosecution delineate the factual bases for the 40 separate incidents "either before or during the trial." The use of the word "might" indicates that the observation is dicta and not holding. "The controversy hinges upon the use of the word, might, which is * * * not direct, positive and dictatorial, but is doubtful, permissive, possible and contingent * * *." *State v. Andrews* (1911), 21 Ohio Dec. 567, 11 Ohio N.P. (N.S.) 605.

Dicta contained in opinions simply expresses the personal view of the writer, and parts of an opinion that are mere dicta ordinarily have no precedential value or effect. *State v. Wilson* (1979), 58 Ohio St.2d 52, 60, 388 N.E.2d 745; *Kemp v. Matthews* (1962), 183 N.E.2d 259, 261, 89 Ohio L. Abs. 524.

Further, there is dicta in *Valentine v. Konteh* saying just the opposite: "As the District Court decided this case on 'Double Jeopardy' grounds, it did not rule on whether the indictment provided Valentine with adequate notice.

Yet the court did suggest that it was '**doubtful that the indictment in this case' sufficiently apprises the defendant of what he must be prepared to meet.**" (Emphasis added.) Id. at 632. Contrary to the assertion of the majority, I believe that the Sixth Circuit ruling is that carbon-copy indictments violate both the double jeopardy **and** the notice provisions of the due process clause of the Fourteenth Amendment: "For the reasons stated above, we affirm the District Court's ruling that the indictment charging Valentine with multiple, identical and undifferentiated counts violated the constitutional requirements imposed by due process. We agree with the District Court's determination that 'the Ohio Court of Appeals' application of clearly established federal law was not only incorrect, but unreasonable.' **When prosecutors opt to use such carbon-copy indictments, the defendant has neither adequate notice to defend himself, nor sufficient protection from double jeopardy.**" (Emphasis added.) Id. at 636.

I likewise dissent from the holding of the majority that "[i]n the only case from this Court that has addressed the notice aspect of due process in terms of a carbon copy indictment has rejected it. *State v. Wilson,* Cuyahoga App. No. 92148, 2010-Ohio-550, appeal not allowed, 125 Ohio St.3d 1450, 2010-Ohio-2510." With due respect to the majority, I do not believe that the

Eighth District is free to reject "clearly established United States Supreme Court precedent." *Valentine v. Huffman*, supra. This court did that in *Valentine* on the same issue and was admonished that our "application of clearly established federal law was not only incorrect, but unreasonable." *Valentine v. Konteh*, at 636.

In sum, this case is identical to the *Valentine* matter, save some evidence here of differentiation at trial that *might* impact an analysis on double jeopardy grounds only. In neither matter was there a pretrial bill of particulars differentiating between the counts; here, the state actually resisted differentiating the counts prior to trial.

In *Cruickshank*, *Russell*, and *Valentine*, the United States Supreme Court and the Sixth Circuit Court of Appeals have ruled that facts must be included **in an indictment** in order to differentiate the allegations of one count from another, and that this is a matter of constitutional due process. While *Valentine* may hint in dicta that the error in failing to differentiate counts in an indictment might be harmless if differentiation was afforded in a bill of particulars, or in the case of the double jeopardy issue only, with evidence during or at the conclusion of trial, the seminal holding in all these cases is that the indictment itself must contain the differentiating language.

In the five years since the Eighth District was told that our application of clearly established federal law was both "incorrect and unreasonable," we continue to affirm convictions based upon carbon-copy indictments. I would follow the clearly established federal law made applicable to us in *Valentine,* and would vacate as follows: all but one count of rape upon P.S., all but one count of rape upon I.S., and all but one count of disseminating matter harmful to juveniles.[11]

[11]It should be noted that Freeman "confessed" to two counts of cunnilingus and one count of vaginal penetration on P.S. and two counts of cunnilingus on I.S. in his statement to police, although he himself does not differentiate the acts. He likewise "confessed" to "more than five but less then ten" counts of disseminating matter harmful to juveniles. While it is tempting to uphold convictions on the counts to which Freeman allegedly "confessed," due to the carbon-copy nature of the counts in the indictment and the finding of the majority that there is insufficient evidence as to certain counts, I am unable to discern which counts those might be.