

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-2236

STATE OF OHIO,

Appellee,

vs.

CARL SCHWIRZINSKI,

Appellant.

* Supreme Court Case No.:
*
* On Appeal from the
* Wood County Court of
* Appeals, Sixth Appellate
* District
*
* Court of Appeals
* Case No. WD-09-056
*

MEMORANDUM IN SUPPORT OF JURISDICTION,
CARL SCHWIRZINSKI, APPELLANT

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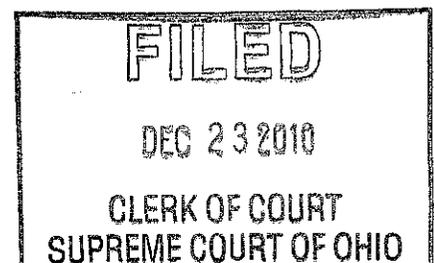
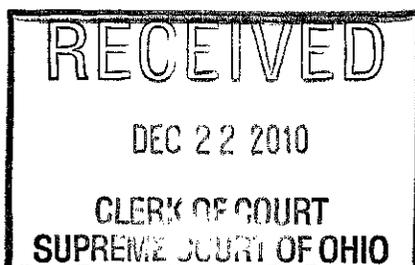


TABLE OF CONTENTS

	<u>Page</u>
WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
STATEMENT OF THE CASE AND FACTS	2
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	5
<u>Proposition of Law No. 1:</u> A criminal defendant is denied his constitutional rights to fair trial and due process when a jury is permitted to return patchwork and non-specific verdicts.	5
<u>Proposition of Law No. 2:</u> When there is no evidence presented as to an element of the offense, and when the only person to testify who has knowledge of whether that element existed denies it, the evidence of guilt on that count is insufficient and the conviction must be vacated.	7
<u>Proposition of Law No. 3:</u> A conviction supported in large part by hearsay and other testimony inadmissible under the Confrontation Clause is obtained in violation of a defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution.	9
<u>Proposition of Law No. 4:</u> When trial counsel's performance is objectively deficient and when there is a reasonable probability that had counsel been competent the outcome of the trial would have been different, the defendant is denied his constitutional right to effective assistance of counsel.	11
CONCLUSION	12
PROOF OF SERVICE	13
<i>State v. Schwirzinski</i> , Wood App. No. WD-09-056, 2010-Ohio-5512 (Nov. 12, 2010)	14

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

Carl Schwirzinski's trial was fundamentally unfair. He was convicted on a patchwork verdict, based in large part on evidence which should not have been admitted at trial, and upon representation so deficient that even as to the one count where the evidence was at least sufficient, there can be no confidence in the verdict. He now faces life in prison without the possibility of parole.

Mt. Schwirzinski does not suggest that this Court should agree to hear his case simply to correct what happened in the trial court or to redress the failure of the court of appeals fully to provide him with redress. Nor does he suggest that the case should be heard merely because he has been sentenced to life without the possibility of parole. Those are serious matters, but they are not the central reason that this case merits the Court's attention.

This Court should take this case so that it can affirm the principle that the rule of law is not to be ignored simply because the charges are severe and the acts alleged deeply offensive. Every person accused of a crime, no matter how heinous, is entitled to a fair trial and competent representation. Every person accused of a crime is entitled to a unanimous verdict tied to the specific acts alleged. Every person accused of a crime is entitled to be tried based on admissible evidence. When a person accused of crime is denied those basic rights, the entire criminal justice system suffers. We all do.

Moreover, and more specifically, this Court should agree to hear the case because there are genuine and important questions to be resolved regarding the analysis of patchwork verdicts and the rules regarding admissibility of hearsay statements when the declarant is called as a witness.

STATEMENT OF THE CASE AND FACTS

On June 11, 2008, seven-year old C.R.¹ went to spend a couple of days at the home of Appellant Carl Schwirzinski, a long-time friend of her grandmother. What happened during that visit is disputed; however, it was alleged that Schwirzinski molested the child. A Wood County Grand Jury returned an indictment charging Schwirzinski with one count of rape of a child under 13 and two counts of gross sexual imposition. The rape charge was accompanied by a specification that the alleged victim was under ten years of age at the time of commission of the offense.

In response to Schwirzinski's motion, the state provided him with a bill of particulars stating precisely what events it was alleging to have occurred in each count of the indictment. In response to Schwirzinski's motion for pre-trial disclosure of any statements made by C.R., the state acknowledged that there was a recording of at least one interview with C.R. but that it was protected by the work-product privilege and could properly be sought only after C.R.'s direct testimony at trial and pursuant to a request under then-current Crim.R. 16(B)(1)(g).

A jury trial was held in June 2009. The state presented evidence of four acts which could have constituted the charges against him. None of the four was even arguably the act identified as Count 2 in the bill of particulars. One of the acts was similar to the act identified as Count 3 in the bill of particulars, but there was no evidence whatsoever of one of the elements of the charged offense, gross sexual imposition, and in fact C.R. affirmatively testified that the relevant element did not occur.

After C.R.'s direct testimony, Schwirzinski's counsel did not make a Crim.R. 16(B)(1)(g) request for her prior statements. Counsel did make such a request, but only after her testimony (on

¹ To maintain her privacy, the child will be referred to throughout this Memorandum by her initials.

direct, cross-examination, redirect, and re-cross) was completed and she had been excused. The court pointed out that a 16(B)(1)(g) request is to be made after direct examination and before cross-examination so that inconsistencies may serve as the basis for cross-examination. The following then occurred.

MR. THEBES [Defense Counsel]: You are right.

THE COURT: So inquiry as to the witness is concluded, what's the purpose of a review at this point? Since she's done testifying?

MR. THEBES: Judge, you are correct. Okay. I will withdraw the motion.

At no time, during opening statements, closing arguments, or in the jury charge did counsel for Schwirzinski, counsel for the state, or the court indicate to the jury that they were to determine whether any particular event (as set forth in the bill of particulars or otherwise) occurred. Rather, they were give generic definitions of rape and of gross sexual imposition and told to decide whether Schwirzinski was guilty of one count of rape and two counts of gross sexual imposition. During their deliberations, the jurors sent a note to the court.

Is each count linked to a specific event question mark or are all of the events of the two days being summed up to these three counts in general? If the acts are linked to a specific count which act is linked to which count.

Although the court noted the existence of the bill of particulars, it determined, with the agreement of defense counsel and the prosecutors, that the uninformative jury charge should stand without clarification.

The jury returned a verdict finding Schwirzinski guilty of all counts and the specification. The trial court sentenced him to life in prison without the possibility of parole on the rape count, and two five-year terms on the two counts of gross sexual imposition. All counts were ordered to be served consecutively.

In a timely appeal to the Sixth District Court of Appeals, Schwirzinski raised five assignments of error.

1. The trial court committed error and Appellant was denied his constitutional rights to fair trial and due process when the court overruled Appellant's motions for judgment of acquittal.
2. Appellant's rights to fair trial and due process were violated when he was convicted on Counts 2 and 3 of the indictment despite the fact that there was insufficient evidence to support conviction on either of those counts and the convictions were against the manifest weight of the evidence.
3. Appellant was denied his constitutional rights to fair trial and due process when the jury was permitted to return patchwork and non-specific verdicts.
4. Numerous instances of inadmissible hearsay testimony in violation of the evidence rules and the Sixth and Fourteenth Amendments to the United States Constitution deprived Mr. Schwirzinski of a fair trial.
5. Appellant's constitutional right to effective assistance of trial counsel was violated by defense counsel's numerous failures to protect Appellant's rights, make timely objections and otherwise advocate on behalf of Appellant.

By Decision and Judgment Entry of November 12, 2010, the Wood County Court of Appeals reversed Schwirzinski's conviction on the second count of the indictment finding that there was no evidence of the act identified as Count 2 in the bill of particulars. In all other respects, the court affirmed. *State v. Schwirzinski*, Wood App. No. WD-09-056, 2010-Ohio-5512.

Mr. Schwirzinski now asks this Court to grant jurisdiction, adopt his propositions of law, vacate his conviction on Court 3 as based on insufficient evidence, and remand the case for a new trial on Count 1.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A criminal defendant is denied his constitutional rights to fair trial and due process when a jury is permitted to return patchwork and non-specific verdicts.

Schwirzinski was charged by indictment with, and found guilty by a jury of committing one count of Rape and two counts of Gross Sexual Imposition.

The state presented evidence of four acts potentially constituting the charges against him. Because the indictment provided no guidance as to what act was charged by which count, Mr. Schwirzinski obtained a bill of particulars detailing which separate act was charged in which count.

Because the jurors never had that information though they asked for it, they must be understood to have returned a "patchwork" verdict. That is, while the jurors may have agreed unanimously that a crime has occurred, they may have disagreed about which facts constituted that crime.

Patchwork verdicts deny a defendant his rights to fair trial and to due process as protected by the Sixth and Fourteenth Amendments, see, e.g., *In re Winship* (1970), 397 U.S. 358 (requiring proof beyond a reasonable doubt of each element of an offense), and by Crim.R. 31(A).

In *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, this Court explained the problems with patchwork verdicts.

... "Jury instructions that effectively relieve the state of its burden of persuasion violate a defendant's due process rights," *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 97, citing *Sandstrom v. Montana* (1979), 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39, and subvert the presumption of innocence and the right to have a jury determine the facts of a case. *Carella v. California* (1989), 491 U.S. 263, 265, 109 S.Ct. 2419, 105 L.Ed.2d 218.

Thus, "a defendant is entitled to have the jury instructed on all elements that must be proved to establish the crime with which he is charged." *State v. Adams* (1980), 62 Ohio St.2d 151, 153, 16 O.O.3d 169, 404 N.E.2d 144. Jurors must also

unanimously agree that the defendant is guilty of the offense charged before the jury can return a guilty verdict. Crim.R. 31(A); *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph three of the syllabus. . . .

Gardner at ¶¶ 36-37.

Gardner draws a distinction between “alternative means” cases and “multiple acts” cases. *Id.* at ¶ 48. In alternative means cases, juror unanimity is not “as to the means by which the crime was committed,” so long as there was “substantial evidence support[ing] each alternative means.” *Id.* at ¶ 49. Thus, for instance, “we have permitted juries to consider alternative theories in determining whether there is sufficient evidence of the mens rea element for murder without requiring unanimous agreement on one particular theory.” *Id.* at ¶ 41 (citing cases).

“In multiple acts cases, on the other hand, several acts are alleged and any one of them could constitute the crime charged. In these cases, the jury must be unanimous as to which act or incident constitutes the crime. To ensure jury unanimity in multiple acts cases, we require that either the State elect the particular criminal act upon which it will rely for conviction, or that the trial court instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt.” (Footnote omitted.) *State v. Jones* (2001), 96 Hawai’i 161, 170, 29 P.3d 351, quoting *State v. Timley* (1994), 255 Kan. 286, 289-290, 875 P.2d 242, quoting *State v. Kitchen* (1988), 110 Wash.2d 403, 410, 756 P.2d 105.

Id. at ¶ 50.

This is clearly a “multiple acts” case. The state presented evidence of four distinct encounters, four altogether separate events, which might have been the subject of the three counts. Two of the counts were charges of Gross Sexual Imposition, each referencing R.C. 2907.05(A)(4). Count 1 charged rape, but the jury was instructed on Gross Sexual Imposition, again R.C. 2907.05(A)(4), as a lesser included offense. Although the trial court charged the jury on the elements of the offenses, neither the court in its charge nor counsel in their closing arguments made

any effort to associate each count with a particular event. The associations could easily have been made because the bill of particulars specified what event was alleged by which count.

The jurors knew there was a problem. During deliberations, they asked a question.

Is each count linked to a specific event question mark or are all of the events of the two days being summed up to these three counts in general? If the acts are linked to a specific count which act is linked to which count.

Although the court immediately noted the existence (and implicitly the relevance) of the Bill of Particulars, counsel all agreed that the jurors should not be given either detail or even clarification. The court, then, declined to provide the jury with the information necessary to avoid a patchwork verdict.

Of course, we cannot question the jurors as to the course of juror deliberations. Evid.R. 606(B). Though it seems likely, there is no way to determine if the jurors returned a patchwork verdict in this case or, in fact, if it does so in any case. Indeed, there is no way to determine, even if the jurors were unanimous in connecting each count with a particular event, what the connection might have been. That is, it cannot be determined what event the jury found to have been the crime charged in, for instance, Count 2.²

Because Mr. Schwirzinski was denied his right to a verdict based on unanimous determinations of which acts and events were the acts and events of conviction, his rights to due process and to a unanimous verdict were violated and he is entitled to a new trial.

Proposition of Law No. 2: When there is no evidence presented as to an element of the offense, and when the only person to testify who has knowledge of whether that element existed denies it, the evidence of guilt on that count is insufficient and the conviction must be vacated.

² The total failure of the state to provide any evidence related to Count 2 as defined in the bill of particulars led the court of appeals to vacate the conviction as to that count.

In Count 3 of the indictment, Schwirzinski was charged with gross sexual imposition. The bill of particulars provided by the state details the charge:

COUNT 3: On or about June 12, 2008, at Wood [C]ounty the defendant, Carl Schwirzinski did have sexual contact with Jane Doe (D.O.B 11/09/2000) for the purpose of sexually arousing or gratifying either himself or Jane Doe, Jane Doe not being the spouse of the said Carl Schwirzinski, or cause Jane Doe, not the spouse of the said Carl Schwirzinski, to have sexual contact with the said Carl Schwirzinski for the purpose of sexually arousing or gratifying either himself or Jane Doe, and said Jane Doe being less than thirteen years of age, whether or not the said Carl Schwirzinski knows the age of Jane Doe, in violation of the Ohio Revised Code Title 29, Section 2907.04(A)(4) and against the peace and dignity of the State of Ohio.

On or about June 12, 2008, at 8833 Fremont Pike, Perrysburg, Wood County, Ohio, the defendant, Carl Schwirzinski, made Jane Doe get on her hands and knees on the bed. The defendant stood behind Jane Doe touching her buttocks with one hand, while touching his penis with his other hand. The defendant ejaculated on Jane Doe's back. Jane Doe was born November 09, 2000, making her seven years of age at the time of the incident.

The offense of gross sexual imposition charged states:

(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 thirteen years of age, whether or not the offender knows the age of that person.

“Sexual contact” is, thus, an essential element of the offense of Gross Sexual Imposition as charged. Revised Code Section 2907.01(B) defines “sexual contact” as

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.

The event clearly referenced by the bill of particulars as Count 3, an event as to which evidence was presented during the State's case, was not proved because there was no evidence

presented of sexual contact. Specifically, although five witnesses offered testimony regarding the event, not one of them indicated that there was “any touching of an erogenous zone of another.”

And C.R. specifically denied that she was touched.

Q Okay. Grandpa Carl is standing behind you. Does he touch you any where?

A No.

Q Okay. What is Grandpa Carl doing?

A Peeing on my back.

(TR IV at 49.)

Because the evidence is unequivocal that there was no touching, it is necessarily the case that there was no sexual contact. The court of appeals found that there was sufficient evidence from which the jury could have inferred touching, and they might have believed that C.R. was either mistaken or lying when she said that she was not touched. However, the evidence is simply unequivocal that there was no touching, and the only person to testify who would actually know, denied it. Under the circumstances, no reasonable juror could have believed the evidence sufficient to prove that element beyond a reasonable doubt. *Winship, supra; Jackson v. Virginia* (1979), 443 U.S. 307.

Proposition of Law No. 3: A conviction supported in large part by hearsay and other testimony inadmissible under the Confrontation Clause is obtained in violation of a defendant’s rights under the Sixth and Fourteenth Amendments to the United States Constitution.

Subject to exceptions, the evidence rules prohibit admission of statements made by an out-of-court declarant offered for the truth of the matter asserted. Evid. R. 802. The Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, likewise prohibits the introduction of at least some out-of-court testimony. *Crawford v. Washington*

(2004), 541 U.S. 36. In this case, much of the state's evidence came in the form of hearsay in violation of the hearsay rules and the Confrontation Clause.

Witness after witness, beginning with Lisa Richardson, C.R.'s mother, testified to things they claimed C.R. said to them. On the occasions when a hearsay objection to the testimony was raised, the trial court overruled it. The child testified, so any hearsay problem was averted, the court reasoned.

In fact, there is no hearsay exception in the Rules of Evidence for statements made out of court and offered for their truth so long as the declarant takes the witness stand at some point. And although there is case law which seems to hold that, the cases do not and should not apply so broadly.

The rationale for allowing hearsay or other out-of-court testimony from a declarant who testifies at trial is that the declarant can be cross-examined about the testimony. The rationale fails completely when the hearsay or out-of-court testimony is introduced only *after* the declarant has testified and been cross-examined. In this case, for instance, and after C.R. had testified and been excused, Detective Gottfried testified to statements she said C.R. made to her. Schwirzinski had no reason or basis to question C.R. about any such statements when she was being cross-examined. And once Gottfried testified to them, it was too late to question C.R. about them.

The evidence against Schwirzinski rests entirely on the allegations of C.R. While the jury might have had questions about her testimony if all they had were her words on the witness stand, they also heard witness after witness report that she told them similar stories. The effect was to substantially bolster an otherwise wholly uncertain case and to deny Schwirzinski his rights to fair

trial, to confront witnesses against him, and to due process, all in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

Proposition of Law No. 4: When trial counsel's performance is objectively deficient and when there is a reasonable probability that had counsel been competent the outcome of the trial would have been different, the defendant is denied his constitutional right to effective assistance of counsel.

A criminal defendant is entitled, under the Sixth and Fourteenth Amendments to the United States Constitution, to the effective assistance of counsel at trial. He is denied that right when counsel's representation is objectively deficient and when the deficiency is prejudicial. See, generally, *Strickland v. Washington* (1984) 466 U.S. 668.

Schwirzinski's trial counsel in this case failed repeatedly in their duty to their client. They failed to challenge the testimony of Julie Cox, who testified as to DNA analysis. They failed to remove unfit jurors. They failed to object to hearsay and Confrontation Clause violations. They failed to argue to the jury or to seek a jury charge or to urge response to a jury question that would avoid the prospect of a patchwork verdict.

Most astonishingly, and knowing that C.R. made prior recorded statements, which might provide fodder for her cross-examination, trial counsel did not make a motion pursuant to Crim.R. 16(B)(1)(g) until *after* her testimony (including cross-examination, redirect, and re-cross) was completed and she had been excused. There can have been no strategic or tactical reason for failing to make a timely request under the rule. Nor can the failure be attributed to a claim that 16(B)(1)(g) is an obscure or rarely used rule. Trial lawyers make 16(B)(1)(g) requests routinely, as a matter of course. Counsel's failure to make the motion at the close of C.R.'s direct testimony is, plainly and simply, egregious incompetence.

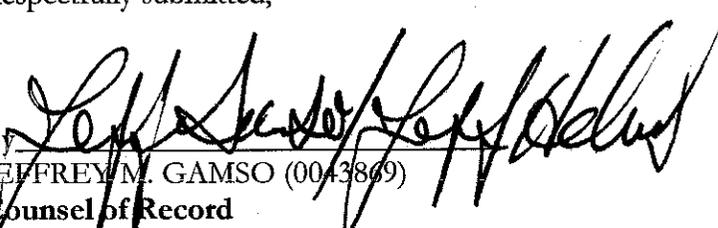
And it was compounded by the failure to make a request after the testimony of any other witness.

A criminal defendant represented by counsel whose performance is so deficient, and so consistently deficient, is denied his rights to effective assistance of counsel, to a fair trial, and to due process all as secured by the Sixth and Fourteenth Amendments to the United States Constitution. See *Strickland, supra*; *United States v. Cronin* (1984), 466 U.S. 648.

CONCLUSION

For all of these reasons, the Court should accept jurisdiction of this case, adopt appellant's propositions of law, reverse the decision of the court of appeals, and either discharge Mr. Schwirzinski or remand the case for a new trial.

Respectfully submitted,

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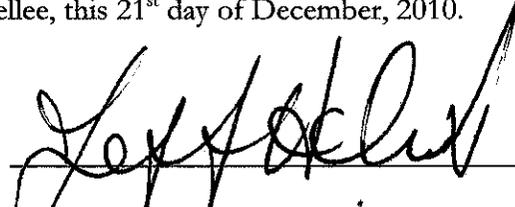
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PROOF OF SERVICE

This is to certify that a copy of the foregoing Notice of Appeal was sent by regular U.S. Mail, postage prepaid to the office of the Wood County Prosecuting Attorney, One Courthouse Square, Bowling Green, Ohio 43402, counsel for appellee, this 21st day of December, 2010.



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IN THE COURT OF APPEALS OF OHIO.
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-09-056

Appellee

Trial Court No. 2008CR0322

v.

Carl Schwirzinski

DECISION AND JUDGMENT

Appellant

Decided: **NOV 12 2010**

Jeffrey M. Gamso and Jeffrey J. Helmick for appellant.

Paul Dobson, Wood County Prosecuting Attorney, Heather M. Baker and Jacqueline M. Kirian, Assistant Prosecuting Attorneys, for appellee.

SINGER, J.

{¶ 1} Appellant appeals his judgment of conviction for rape of a child under age ten and two counts of gross sexual imposition entered on a jury verdict in the Wood

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT
COPY OF THE ORIGINAL DOCUMENT FILED AT WOOD CO.
COMMON PLEAS COURT, BOWLING GREEN, OHIO
CINDY A. HOEFER CLERK OF COURTS
BY Cindy A. Hofer DEPUTY CLERK
THIS 15th DAY OF Nov 2010

**JOURNALIZED
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NOV 12 2010

Vol. 34 Pg. 245

County Court of Common Pleas. For the reasons that follow, we reverse, in part, and affirm, in part.

{¶ 2} Appellant is Carl Schwirzinski. On June 11, 2008, appellant picked up then seven-year-old C.R. from her mother's home for a planned two day play date with a child of a similar age who lived near appellant. Appellant, known to C.R. as "Grandpa Carl," had been a companion of C.R.'s grandmother for a number of years and had previously transported the girl to church and family outings.

{¶ 3} When the child with whom C.R. was to have played went elsewhere with her mother, appellant took C.R. swimming and to a family gathering. C.R. spent the night at appellant's home and went swimming again the next day. That afternoon, appellant returned C.R. to her home.

{¶ 4} According to C.R.'s mother, after appellant left, C.R. told her that Grandpa Carl had "touched her in a bad place." C.R.'s mother's fiancé was also present.

{¶ 5} The fiancé would later testify that, on hearing this, C.R.'s mother became upset and left the house to try to call her mother. At that point, the fiancé testified, C.R. reported that, as soon as she left the house with appellant the day before, he began to touch her between the legs and had "peed" on her.

{¶ 6} After consulting with a friend, C.R.'s mother and her fiancé decided to seek medical attention for the girl. The fiancé collected the clothing C.R. had brought back with her and the two took C.R. to a Toledo hospital.

**JOURNALIZED
COURT OF APPEALS**

NOV 12 2010

Vol. 34 Pg. 246

{¶ 7} At the hospital, C.R. was examined by a physician and a Sexual Abuse Nurse Examiner ("SANE"). At trial, the SANE nurse testified that, at her initial medical interview, C.R. told her appellant put his leg over her and put his bad part on her bad part. C.R. also reported to the nurse that appellant directed her to bend over a bed while he began shaking, then "peed" on her back.

{¶ 8} An external examination revealed redness in C.R.'s vaginal area, but the child was too agitated to obtain a full rape kit. By the time the examination was completed, a detective from the Perrysburg Township Police arrived. The officer re-interviewed C.R. and collected the biological evidence and C.R.'s clothing for analysis.

{¶ 9} Appellant was arrested and, on June 19, 2008, named in a three count indictment charging him with rape, with a victim under age ten specification, and two counts of gross sexual imposition. Appellant pled not guilty and the matter proceeded to trial before a jury.

{¶ 10} At trial, C.R. testified that appellant "peed on my back * * * and when I was sleeping he put his bad part in my butt." Asked to elaborate, the girl testified that she was on her knees with her head down with appellant standing behind her when he pulled up her shirt and was "shaking around" and "[t]here is stuff dripping down." C.R. described the stuff dripping as "hot" and "nasty."

{¶ 11} Concerning the other incident, C.R. testified that she was in bed, on her side, "sleeping, but I wasn't really sleeping. I woke up," when appellant "put his bad part in my butt[.] * * * It hurt."

**JOURNALIZED
COURT OF APPEALS**

NOV 12 2010

Vol. 34 Pg. 247

{¶ 12} C.R. also reported incidents "in the car [appellant] told me to open my leg [sic] and he touched my bad part" and on a couch "[w]hen I gave him a hug, he pushed me back and forth." C.R. demonstrated the same pelvic motion for the back and forth motion on the couch as when appellant "peed" on her.

{¶ 13} The state also presented forensic analysis of a stain found on the back of one of C.R.'s shirts. An analyst testified that the substance was semen, but contained no identifiable sperm which would be needed to identify the DNA of its source. The DNA that was found in the stain was a mixture belonging to C.R., her mother's fiancé and appellant. By far the largest contributor, the analyst testified, was appellant. In the analyst's opinion, this meant that appellant was the likely source of the semen. At the conclusion of the state's case, the court denied appellant's Crim.R. 29 motion.

{¶ 14} In his defense, appellant called a DNA expert who testified that it was not scientifically possible to determine the source of a mixed sample solely on the basis of the individual in the sample with the most pronounced signature. Appellant also called a psychologist who testified that the perceptions of small children were frequently erroneous. Several persons who saw C.R. during the time that she was with appellant testified she appeared to be happy and unaffected when observed. Prior to submission of the matter to the jury, the trial court again rejected appellant's motion for a judgment of acquittal.

{¶ 15} At the conclusion of the trial, the matter was submitted to the jury which, following deliberation, found appellant guilty of all charges and specifications. The trial

**JOURNALIZED
COURT OF APPEALS**

NOV 12 2010

court accepted the verdict and sentenced appellant to a mandatory sentence of life without parole for rape and consecutive five year terms of imprisonment for each count of gross sexual imposition.

{¶ 16} From this judgment, appellant now brings this appeal, setting forth the following five assignments of error:

{¶ 17} "First Assignment of Error

{¶ 18} "The trial court committed error and Appellant was denied his constitutional rights to fair trial and due process when the court overruled Appellant's motions for judgments of acquittal.

{¶ 19} "Second Assignment of Error

{¶ 20} "Appellant's rights to fair trial and due process were violated when he was convicted on Counts 2 and 3 of the indictment despite the fact that there was insufficient evidence to support conviction on either of those counts and the convictions were against the manifest weight of the evidence.

{¶ 21} "Third Assignment of Error

{¶ 22} "Appellant was denied his constitutional rights to fair trial and due process when the jury was permitted to return patchwork and non-specific verdicts.

{¶ 23} "Fourth Assignment of Error

{¶ 24} "Numerous instances of inadmissible hearsay testimony in violation of the evidence rules and the Sixth and Fourteenth Amendments to the United States Constitution deprived Mr. Schwirzinski of a fair trial.

**JOURNALIZED
COURT OF APPEALS**

NOV 12 2010

Vol. 34 Pg. 249

{¶ 25} "Fifth Assignment of Error

{¶ 26} Appellant's constitutional right to effective assistance of trial counsel was violated by defense counsel's numerous failures to protect Appellant's rights, make timely objections and otherwise advocate on behalf of Appellant."

I. Sufficiency and Weight

{¶ 27} Appellant's first two assignments of error are related and will be discussed together. Appellant insists that the trial court erred in denying his motions for a judgment of acquittal presented at the close of the state's case in chief and at the end of the trial. Appellant insists that the state wholly failed to present any evidence in proof of the second count of the indictment as restricted by the bill of particulars and wholly failed to present evidence as to one element of the offense charged in the third count of the indictment.

{¶ 28} Counts 2 and 3 of the indictment both charge gross sexual imposition. The indictment recites these offenses in identical statutory language. The state's response to appellant's request for a bill of particulars as to Count 2 states:

{¶ 29} "On or about June 12, 2008, [appellant] did have sexual contact with [C.R.] while sitting on the couch in the living room. [Appellant] reached his hand under a pillow the victim [C.R.] had placed on her lap and under her bathing suit to rub [C.R.'s] vaginal area. [C.R. was] seven years of age at the time of the incident."

JOURNALIZED
COURT OF APPEALS

NOV 12 2010

Vol. 34 Pg. 250

{¶ 30} With respect to the third count, the state responded:

{¶ 31} "On or about June 12, 2008, [appellant] made [C.R.] get on her hands and knees on the bed. [Appellant] stood behind [C.R.] touching her buttocks with one hand, which [sic] touching his penis with his other hand. [Appellant] ejaculated on [C.R.'s] back. [C.R. was] seven years of age at the time."

{¶ 32} Appellant argues that while the state presented evidence of arguably four separate incidents that might be offenses, it presented no evidence of any events on the living room couch. Moreover, appellant points out, an essential element of gross sexual imposition is "sexual contact" which is statutorily defined as, "* * * 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." R.C. 2907.01(B). Appellant insists that there was no evidence introduced of any "touching" that occurred relative to the events charged in Count 3. In fact, when asked "D[id] he touch you anywhere?" C.R. responded, "No."

{¶ 33} The state is entitled to state a count in the indictment in bare statutory language. Crim.R. 7(B). A defendant seeking to clarify the facts of the criminal allegations contained within the indictment may request a bill of particulars. Crim.R. 7(E). The purpose of the bill of particulars is to "* * * elucidate or particularize the conduct of the accused alleged to constitute the charged offense." *State v. Sellards* (1985), 17 Ohio St.3d 169, 171. The state, upon timely demand, must respond, "* * * setting out the ultimate facts upon which the state expects to rely in establishing its

JOURNALIZED
COURT OF APPEALS

NOV 12 2010

case[.]” *State v. Miller* (1989), 63 Ohio App.3d 479, 485. “The prosecution may amend a bill of particulars at any time, as justice requires, but once the bill is issued, the state, * * * should be restricted in its proof to the indictment and the particulars as set forth in the bill.” *State v. Nickel*, 6th Dist No. OT-09-001, 2009-Ohio-5996, ¶ 34, quoting *State v. Miller*, supra. See, also, *State v. Vitale* (1994), 96 Ohio App.3d 695, 700.

{¶ 34} The standard of review for a denial of a motion for acquittal, pursuant to Crim.R. 29, is the same as that for sufficiency of the evidence. *State v. Nuhfer*, 6th Dist. No. L-07-1125, 2009-Ohio-1474, ¶ 25. “[T]he court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt.” *Id.* (Citations omitted.)

{¶ 35} With respect to Count 2, the only evidence that the state points to in proof was the testimony of C.R., who was asked to “t[ell] me about a time you were on a couch.” C.R. responded that “When I gave [appellant] a hug, he pushed me back and forth.” C.R. said the movement was the same as when he “peed” on her.

{¶ 36} Given reasonable inferences from the other evidence presented, the act C.R. describes could be found to meet the statutory definition of gross sexual imposition. But it is not the act described under Count 2 of the bill of particulars. The only similarity

JOURNALIZED
COURT OF APPEALS

NOV 12 2010

between the act described there and the act to which C.R. testified at trial was that both occurred on a couch. Since the state is restricted in its proofs to the indictment and the bill of particulars and the evidence presented falls outside the perimeters of those documents, we must conclude that there was insufficient evidence to support a conviction on Count 2.

{¶ 37} Consequently, the trial court erred in denying appellant's Crim.R. 29 motions as to Count 2. Accordingly, appellant's first assignment of error is well-taken.

{¶ 38} Concerning the third count of the indictment, appellant argues that the state failed to prove that he had touched C.R. when she was on her hands and knees on the bed. For that reason, appellant insists, there was insufficient evidence of an essential element of gross sexual imposition. Alternatively, appellant suggests, even were we to conclude that the element of touching could be inferred, the finding of guilt on this count is against the manifest weight of the evidence.

{¶ 39} There are a number of pieces of evidence by which the jury could have reasonably inferred that appellant touched C.R. on the bed. If the jury concluded, as it might reasonably, that what C.R. described was appellant ejaculating on her, it could have found that the ejaculate was an extension of appellant and that it touched C.R. The jury may have concluded that the positioning of C.R. on the bed or lifting her shirt could not have been performed without touch. The jury is not required to believe all of the testimony presented, including C.R.'s denial of having been touched. *State v. Antill*

JOURNALIZED
COURT OF APPEALS

NOV 12 2010

(1964), 176 Ohio St. 61, 67. In that respect there was evidence presented by which a reasonable trier of fact could have found that appellant touched C.R.

{¶ 40} Appellant also maintains that the jury's verdict on this count was against the manifest weight of the evidence. When there is a question of whether a verdict is against the manifest weight of the evidence, the appeals court acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. We have carefully reviewed the entire transcript of the trial and the evidence presented and fail to find any suggestion that the jury lost its way or that a miscarriage of justice occurred. Accordingly, appellant's second assignment of error as to Count 3 is not well-taken

II. Patchwork Verdict

{¶ 41} A criminal defendant must be convicted by a unanimous verdict. Sixth Amendment to the Constitution of the United States; Crim.R. 31(A); *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶ 35.¹ Moreover, due process requires that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *Id.* at ¶ 36, citing *In re Winship* (1970), 397 U.S. 358, 364. A "patchwork" verdict occurs when the jury unanimously agrees that a crime has been committed, but

¹Unanimity in a criminal verdict in state proceedings is not a guarantee of the federal constitution. *State v. Gardner*, 2008-Ohio-2787, ¶ 36; *State v. Brime*, 10th Dist No. 09AP-491, 2009-Ohio-6572, ¶ 25. In Ohio, the requirement for a unanimous verdict is by rule. Crim.R. 31(A).

JOURNALIZED
COURT OF APPEALS

NOV 12 2010

individual jurors vary on the facts that constitute the crime. *State v. Johnson* (1989), 46 Ohio St.3d 96, 104-105, certiorari denied (1990), 494 U.S. 1039.

{¶ 42} Appellant argues that, because the indictment and bill of particulars charged three offenses, the state presented evidence of four distinct incidents, and the court did not link any incident to any particular count, there is a probability that the jury delivered a patchwork verdict. Indeed, appellant points out, during deliberations the jury asked if a specific event was linked to a specific count. The court, with the approval of both counsel, declined to respond to the question, advising the jury to rely on the instructions already given.

{¶ 43} While Crim.R. 31(A) requires that jurors unanimously agree on each element of a crime, they need not agree to a single way each element is satisfied. "[A] jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Gardner*, 2008-Ohio-2787, ¶ 38, quoting *Richardson v. United States* (1999), 526 U.S. 813, 817.

{¶ 44} "In determining whether the state has impermissibly interfered with a defendant's Crim.R. 31(A) right to juror unanimity and the due process right to require the state prove each element of the offense beyond a reasonable doubt, the critical inquiry is whether the case involves 'alternative means' or 'multiple acts.'

{¶ 45} ""In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged.

JOURNALIZED
COURT OF APPEALS

NOV 12 2010

Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means. In reviewing an alternative means case, the court must determine whether a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt.

{¶ 46} ""In multiple acts cases, on the other hand, several acts are alleged and any one of them could constitute the crime charged. In these cases, the jury must be unanimous as to which act or incident constitutes the crime. To ensure jury unanimity in multiple acts cases, we require that either the State elect the particular criminal act upon which it will rely for conviction, or that the trial court instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt."" (Footnote omitted.) *State v. Jones* (2001), 96 Hawaii 161, 170, 29 P.3d 351, quoting *State v. Timley* (1994), 255 Kan. 286, 289-290, 875 P.2d 242, quoting *State v. Kitchen* (1988), 110 Wash.2d 403, 410, 756 P.2d 105." *Gardner*, 2008-Ohio-2787, ¶ 48-50.

{¶ 47} The present matter falls within the ambit of a "multiple acts" case. This involves only the gross sexual imposition charges as there was only one rape charged and evidence presented of only one rape. There were, however, two counts of separate gross sexual impositions charged and evidence presented of three separate incidents that could have constituted gross sexual imposition. Even after reversing one of the gross sexual imposition offenses charged, there remains one count and two incidents. This is the circumstance that *Gardner* states requires either an election by the prosecution or an

JOURNALIZED
COURT OF APPEALS

NOV 12 2010

instruction by the court. In this matter, the state made no overt election as to evidence and the court gave only a general instruction as to unanimity.

{¶ 48} In these circumstances, had appellant requested a more specific jury charge or objected to the instructions as given, denial of this would have constituted reversible error. Appellant, however, did not object, nor did he propose other instructions. Crim.R. 30(A) provides, "* * * a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." Absent such objection, we must engage in a plain error analysis.

{¶ 49} Crim.R. 52(B) provides that, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Notice of plain error is to be taken only in extraordinary circumstances and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. "A jury instruction * * * does not constitute a plain error or defect under Crim.R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise." *Id.* at paragraph two of the syllabus; *Gardner*, *supra*, at ¶ 78.

{¶ 50} C.R.'s testimony that appellant touched her while she was in the car was not an allegation included in the bill of particulars. Although the state did not expressly state an election not to depend on this evidence, neither did it mention this testimony in closing argument. The state's emphasis was on the incident wherein appellant was alleged to

JOURNALIZED
COURT OF APPEALS

NOV 12 2010

have "peed" on C.R. As the verdicts suggest, the jury believed the testimony of C.R. In our view, it is highly likely that this belief in the child's testimony extended to this incident, described in the bill of particulars relating to Count 3. Given this, we cannot conclude that, absent the instruction error, the result of the trial with respect to the remaining gross sexual imposition count would have been different. Accordingly, appellant's third assignment of error is not well-taken.

III. Hearsay

{¶ 51} "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Hearsay is not admissible into evidence unless permitted by constitution, statute or rule. Evid.R. 802. Nevertheless, the rules of evidence provide numerous categories of testimony which are declared either as "not hearsay," Evid.R. 801(D), or are within exceptions to the hearsay rule. Evid.R. 803, 804.

{¶ 52} The decision of whether to admit or exclude evidence, including hearsay evidence, rests within the sound discretion of the court and will not be grounds for reversal absent an abuse of that discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus; *State v. Swann*, 119 Ohio St.3d 552, 2008-Ohio-4837, ¶ 33. An abuse of discretion is more than a mistake of law or a lapse of judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

JOURNALIZED
COURT OF APPEALS

NOV 12 2010

Vol. 34 Pg. 258

{¶ 53} In some circumstances the Confrontation Clause may be implicated in the admission of hearsay testimony. However, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. * * * The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶ 127, quoting *Crawford v. Washington* (2004), 541 U.S. 36, 59.

{¶ 54} Appellant complains that the trial court erred in admitting numerous statements that C.R. made to her mother, her mother's fiancé, the investigating officer, the SANE nurse and the examining pediatrician on the day C.R. was brought home by appellant. Since C.R. testified at trial and was available for cross-examination, the Confrontation Clause is not implicated, even for testimony elicited after C.R. left the stand. *Perez*, supra, at ¶ 128.

{¶ 55} With respect to the court's specific rulings, appellant directs our attention to only one instance wherein the court overruled a hearsay objection. When C.R.'s mother was on the stand, she testified that C.R. had called her:

{¶ 56} " * * * she said 'I'm ready to come home.' I said, 'Okay, I thought you were going to stay two nights?' 'No, I'm ready to come home.'"

{¶ 57} To this testimony, appellant's trial counsel interposed a hearsay objection. The state responded that the testimony was "[n]ot being offered for the matter asserted." The court replied, "She'll be testifying and you can cross." The court overruled the

JOURNALIZED
COURT OF APPEALS

NOV 12 2010

objection. Appellant insists that the court's comment does not constitute a cognizable exception to the hearsay rule and is thus erroneous.

{¶ 58} The trial court's comment was, at worst, superfluous. It is readily understandable that the challenged statement was offered not to prove that C.R. wanted to come home, but for the purpose of showing that C.R. made such a statement. In that respect, the testimony was offered to prove that the words were spoken, not for the truth of the matter asserted. Consequently, the statement was not hearsay, and the court's ruling was proper.

{¶ 59} With respect to the remaining statements of which appellant complains, appellant concedes that "[d]efense counsel made no significant hearsay-related objections to any of this testimony."

{¶ 60} Evid.R. 103(A) provides:

{¶ 61} "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and [i]n case the ruling is one admitting evidence, timely objection or motion to strike appears of record stating the specific ground of objection, if the specific ground was not apparent from the context * * *." If no objection appears of record, we must conduct a plain error analysis to determine where there was an error not brought to the attention of the court that affected a substantial right. Evid.R. 103(D). The improper admission hearsay evidence affects a substantial right only if it clearly appears of record that the trier of fact relied upon such evidence for conviction. *State v. Sorrels* (1991), 71 Ohio App.3d 162, 165.

{¶ 62} We have examined each of the statements to which appellant objects. Most fall under well-settled exceptions to the hearsay rule such as excited utterance, Evid.R. 803(2), statements for purposes of medical diagnosis or treatment, Evid.R. 803(4), and, with respect to a physician's testimony based on hospital records, the records of regularly conducted activity. Evid.R. 803(6). Moreover, there is nothing in the record to suggest that the jury relied significantly on anything other than C.R.'s testimony in arriving at its verdict. Accordingly, appellant's fourth assignment of error is not well-taken.

IV. Ineffective Assistance of Counsel

{¶ 63} In his final assignment of error, appellant asserts that he was denied effective assistance of counsel.

{¶ 64} "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction * * * has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. * * * Unless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. Accord *State v. Smith* (1985), 17 Ohio St.3d 98, 100.

{¶ 65} Scrutiny of counsel's performance must be deferential. *Strickland v. Washington* at 689. In Ohio, a properly licensed attorney is presumed competent and the

JOURNALIZED
COURT OF APPEALS

NOV 12 2010

burden of proving ineffectiveness is the defendant's. *State v. Smith*, supra. Counsel's actions which "might be considered sound trial strategy," are presumed effective. *Strickland v. Washington* at 687. "Prejudice" exists only when the lawyer's performance renders the result of the trial unreliable or the proceeding unfair. *Id.* Appellant must show that there exists a reasonable probability that a different verdict would have been returned but for counsel's deficiencies. See *id.* at 694. See, also, *State v. Lott* (1990), 51 Ohio St.3d 160, for Ohio's adoption of the *Strickland* test.

{¶ 66} Appellant suggests that his trial counsel was ineffective because he did not more vigorously challenge the opinion testimony of the state's DNA expert, failed to challenge a juror for cause during voir dire and exercise all of the available peremptory challenges, did not object to hearsay testimony, failed to timely raise a Crim.R. 16(B)(1)(g) request and only perfunctorily argued his Crim.R. 29 motions. With respect to the Crim.R. 29 motions, any deficiency in that matter has been remedied here. We have also noted above that more hearsay objections likely would have been futile.

{¶ 67} The exercise of peremptory challenges or challenge for cause, most certainly was part of trial strategy and must be presumed effective. The same is true of trial counsel's challenge of the state's DNA witness. Counsel presented opposing expert testimony. It is not deficient performance that he did not also request a *Daubert* hearing or move to limit the state expert's testimony.

{¶ 68} Concerning the untimely Crim.R. 16(B)(1)(g) motion for examination of the consistency of C.R.'s prior statements, even if this constituted a deficiency of trial

JOURNALIZED
COURT OF APPEALS

NOV 12 2010

counsel, it cannot be said to have prompted a breakdown in the process that resulted in an unreliable result. Accordingly, appellant's fifth assignment of error is not well-taken.

{¶ 69} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed, in part, and reversed, in part. This matter is remanded to said court for further proceedings consistent with this decision. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

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

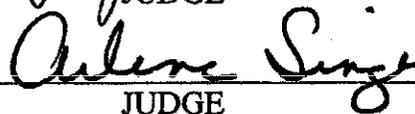
Mark L. Pietrykowski, J.

Arlene Singer, J.

Keila D. Cosme, J.
CONCUR.



JUDGE



JUDGE



JUDGE

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JOURNALIZED
COURT OF APPEALS

NOV 12 2010