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APPELLANT'S PROPOSITION OF LAW AND MERIT BRIEF

This matter comes before this court as a discretionary appeal.

INTRODUCTION

Cases involving child sexual abuse present unique problems for prosecutors, law enforcement and the courts. The complainants in such cases are often of tender years with an impaired ability to recall and recount events with specificity, along with a memory that can be easily compromised.¹ Sometimes the underlying allegations do not come to light until well after the abuse has stopped and memories have faded. The abuse involved often occurs as part of a pattern unfolding over the course of many months and even years.

For the same reasons, defending against allegations of child abuse can be equally difficult. The question becomes – How can the State pursue its legitimate interest in prosecuting such serious crimes in a manner that is consistent with a defendant's constitutional rights? Certainly, that interest is not met when the prosecutor attempts to clarify carbon-copy charges in slapdash fashion mid-trial based on the evidence elicited in his case-in-chief. As we note further herein, such a remedy fails to address the defendant's fundamental need for notice as well as the possibility of a future double jeopardy violation. To meet the accused's right to notice, he must be advised before trial of the specific acts alleged, as well as where and when they allegedly occurred. An indictment containing multiple indistinguishable allegations, like the one Mr. Freeman faced, fails to meet this need.

¹ See, Poole, Debra A. and Lamb, Michael E. 1998: Children as Witnesses: The Tragedy and the Dilemma: The Backdrop for Investigative Interviews. In *Investigative Interviews of Children*. Washington, D.C.: American Psychological Association, 15; and Suddath, Robert 2003: The Child as a Witness: Factors that May Influence Children's Testimony. Rosner, Richard (ed), *Principles and Practice of Forensic Psychiatry*. London: Arnold, 427.

STATEMENT OF THE CASE AND FACTS

On April 3, 2008, a Cuyahoga County grand jury issued a 29-count indictment 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.²

Mr. Freeman was arrested in March of 2008 after P.S., age 10 (Jane Doe I), and I.S. (Jane Doe II), age 9, daughters of his then girlfriend, Maria Singleton, accused him of sexually abusing them over a six month period, beginning in September of 2007. During interviews with law enforcement, child protection and social workers, the girls claimed that Mr. Freeman engaged in multiple instances of sexual conduct and contact with them beginning in September of 2007. They also claimed that Mr. Freeman and Maria Singleton repeatedly engaged in sexual activity in front of them while they watched television in their mother's bedroom.

Ms. Singleton's sons, 8-year-old VS and 6-year-old TS, were also questioned. It is unclear what the boys first told the police. Records from the Department of Children and Family Services (DCFS) indicate that the boys were silent about any abuse during initial interviews. (Supplemental Record, 1 envelope, filed 7/8/09) When the case went to trial the following year, however, the boys' accounts generally corroborated their sisters' claims.

Mr. Freeman entered not guilty pleas and proceeded to a jury trial. The prosecution

² On November 25, 2008, a second indictment (CR 518221) charged Freeman with two counts of gross sexual imposition (GSI), in violation of R.C. 2907.05(A)(4), which alleged that Mr. Freeman had sexual contact with the minor brothers of the siblings involved in the April 3, 2008 indictment. At the State's request, the court consolidated the two cases prior to Mr. Freeman's trial. (Tr. 5)

called Maria Singleton, who had pleaded guilty to several dissemination counts, along with her four children. Two social workers also testified. (Tr. 422, 430) A forensic nurse from University Hospital testified concerning the girls' physical examinations. (Tr. 529, 530-534) In these examinations, the nurse found physical evidence to arguably corroborate some of the girls' abuse claims. (Tr. 538, 550, 555-558)

Numerous samples taken from the girls' clothing and bedding were subjected to forensic analysis, as were comparative exemplars from Mr. Freeman. Initial DNA testing on these items revealed nothing. Subsequent Y-STR testing indicated that Charles Freeman could not be excluded from an Amylase (saliva component) sample taken from IS's underwear. (Tr. 620; State Exs. 31 & 36). The state also introduced Mr. Freeman's custodial statement during which he admitted to some of the misconduct, but denied sexually penetrating either sister. (Tr. 651-660; State Ex. 43)

Before resting, the State amended the indictment to make Counts 1-9 apply to P.S. (rather than simply Counts 1-3). As a consequence, Counts 10-19 then applied to IS. The two GSI counts pertaining to TS and VS became Counts 30 and 31. The defense rested without presenting a case. (Tr. 682) The jury reached guilty verdicts on all counts. The Court then sentenced Mr. Freeman to 19 consecutive sentences of life without the possibility of parole followed by consecutive terms of imprisonment on the remaining counts.

Mr. Freeman appealed that judgment to the Eighth District Court of Appeals. On August 12, 2010, that court rejected Mr. Freeman's challenge to the indictment's sufficiency and largely affirmed Mr. Freeman convictions. Nevertheless, the court concluded that "the evidence was insufficient to support certain of his convictions" – specifically, those under Counts 12 and 14 -

19. *State v. Freeman*, Cuyahoga App. No. 92809, 2010 Ohio 3714, ¶38 (Appendix - A3). These counts – like the rest of counts 10-19 contained identical allegations of sexual conduct involving I.S. (initially Jane Doe II). The majority vacated those counts and remanded the matter so that the trial court could resentence Mr. Freeman accordingly. In doing so, the court did not explain why it reached this conclusion with respect to these particular counts, rather any of the others.

This Court granted Mr. Freeman leave to appeal on the proposition of law below. Where relevant to that proposition, additional facts are provided in the discussion that follows.

LAW AND ARGUMENT

Proposition of Law:

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.

Charles Freeman was charged with 19 identical counts alleging sexual conduct with Jane Doe I and Jane Doe II. The counts contained nothing to distinguish them, charging the same conduct over the same time period. Mr. Freeman's trial counsel requested a bill of particulars after noting that the indictment's vagueness prevented the defense from "determin[ing] the nature and cause of the charges against him." (Appendix – A35) The State responded with a bill of particulars that parroted the indictment and offered nothing in the way of clarification. (Appendix – A37)

Mr. Freeman was forced to defend himself without knowledge of what he was really accused and when it allegedly occurred. Indictments, like this one, alleging numerous identical offenses create notice and fairness concerns for the defendant at trial, but they also render it impossible to determine whether the offenses are allied for purposes of merger, and in the event the jury hangs on some but not all counts, double jeopardy considerations may bar any further prosecution of the case. Addressing this issue before trial, either with a carefully pruned indictment or more specific bill of particulars, would have obviated all of the above noted concerns.

Due Process Principals forbid the use of Multiplicative Indictments

Due process requires 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. To that end, a valid indictment must address the following criteria: (1) “whether it contains the elements of the offense intended to be charged,” (2) whether it “it 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 rights articulated in *Russell* apply to both state and federal charges. *DeVonish v. Keane* (C.A.2, 1994), 19 F.3d 107, 108; and *Valentine v. Konteh*, 395 F.3d 626, 631 (C.A. 6, 2005).

The charging instrument in Mr. Freeman’s case failed to meet *Russell*’s constitutional mandate. 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 other 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 were similarly undifferentiated.

Complainants’ Testimony

The evidence presented at trial failed to individualize the incidents of abuse alleged. Rather, the child complainants simply testified about a series of undifferentiated abuse incidents

involving multiple types of sexual misconduct. Neither child could provide an estimate or an idea of the incidents' frequency. Few specifics regarding the time of day or location were provided, and, other than the six-month timeframe initially alleged, no sense of when the incidents may have occurred was offered.

While the prosecution introduced evidence to corroborate the general nature of the misconduct alleged, any specifics came from two witnesses, I.S. and P.S. With some prodding from the prosecutor, P.S. (Jane Doe I) suggested that Mr. Freeman was involved with the family in September or October or from around Halloween. (Tr. 253) P.S. described numerous incidents involving Freeman where he had sexual contact – i.e. gross sexual imposition (GSI) – with her. (Tr. 270-273; 273-275; 279) But Freeman, having been indicted exclusively with rape – rather than GSI – was not charged in connection with these incidents.

P.S.'s testimony addressing the charged counts was decidedly vague. She testified that Mr. Freeman put his mouth on her privates more than two times, and that these incidents apparently occurred in her room. (Tr. 276-277) P.S. also testified that Freeman tried to put his penis into her "butt" on two occasions, both times in her bedroom. (Tr. 278) She also recalled that she had to put her mouth on Freeman's penis twice, that this occurred in her mother's bedroom, and that everyone was present at the time. (Tr. 280) In addition, according to P.S., Freeman would come into her room at night and put his fingers into her private parts. (Tr. 281)

I.S.'s testimony (Jane Doe II) about the abuse was even more hazy. Again, with the prosecutor's leading, I.S. recalled that Freeman visited their house frequently, starting sometime during the month before Halloween, 2007. (Tr. 322) According to I.S. she would wake up *every morning* and Freeman would be on her bed or P.S.'s bed and he would put his private part in her

private part and leave it there for about “a second or 15 minutes.” (Tr. 319) According to I.S., Freeman would also make her “suck his private part” also for “like 15 minutes.” (Tr. 320-321) I.S. said that she saw Freeman do the same things to P.S. (Tr. 325) I.S. testified about another incident where she and P.S. were in her mother’s room watching Maria and Freeman have sex. At one point, when her mother left to use the bathroom, I.S. claimed Freeman puts his finger and penis into P.S.’s private part. (Tr. 326-329)

No doubt, the girls described a pattern of sexual abuse. But Mr. Freeman was charged with 19 specific and discrete incidents of rape involving two children under the age of 10. Neither child provided the specifics needed to clarify what the prosecution maintained Mr. Freeman had done to them. P.S. testified that some incidents happened twice or more than twice. But again, no effort was made to narrow down for the jury when P.S. thought any particular incident occurred. I.S. simply testified about acts that she claimed happened routinely, recalling no specifics, beyond the sexual misconduct she alleged.³

In addition to being utterly lacking in specifics, I.S.’s testimony was problematic for other reasons. Importantly, a great deal of I.S.’s testimony was not corroborated by P.S. For instance, I.S. testified that Mr. Freeman often molested her and/or her sister in the mornings. Her sister, on the other hand, never claimed that such abuse occurred. Moreover, even when I.S. was able to note a specific incident, her recollection of what occurred sharply conflicted with the account P.S. provided. This conflict is illustrated by I.S.’s testimony surrounding abuse of P.S. that she claimed she witnessed in her mother’s bedroom. According to I.S. she and her sister were together watching their mother and Freeman have sex. When their mother left the room,

³ Moreover, nowhere in this record, does the prosecutor specifically identify the evidence supporting its claim that there were nine discrete instances of disseminating harmful material to minors.

I.S. saw Mr. Freeman put his penis and finger inside P.S.'s private part during the incident. By contract, P.S testified that she was alone when she interrupted her mother and Mr. Freeman during intercourse, and that her mother was present when Mr. Freeman beckoned her over and started to rub her private parts. (Tr. 270-273)

Based on the evidence presented, I.S. and P.S. appear to have been offering conflicting accounts about the same incidents. Nevertheless, because the indictment is so vague, the prosecution might respond these accounts involve two different incidents. Therein lies the problem. If the girls were describing the same alleged incident, then their contradicting accounts render the underlying allegations suspect. If the state can escape such a reliability challenge by making the indictment vague, then there is no incentive to issue a clear indictment. Moreover, indicted charges that can be leveled so vaguely that the lawyers are forced to guess at the charge to which the evidence allegedly pertains, is not likely to lead the jury to a just and unanimous verdict beyond a reasonable doubt.

Amending the Indictment Post trial, Closing Argument and Jury Instructions Failed to Remedy the Indictment's Vagueness

When the State concluded its case-in-chief, the prosecutor amended counts 4 - 9 to reflect that P.S., rather than I.S., was the alleged victim. When this case was presented to the grand jury, it found probable cause to believe that P.S. was victimized three times, not nine times. In summation, the prosecutor told the jury that it should find that P.S. was victimized a total of nine times. This post trial amendment significantly altered the charges against Mr. Freeman. Certainly, it gives rise to questions surrounding the evidence the grand jury heard.

The prosecutor's closing argument and jury instructions did little to clarify the charges. Having introduced all of its evidence, the prosecution undertook to identify for the jury the type

of sexual conduct it claimed Mr. Freeman had perpetrated in each count. With respect to P.S. the prosecution asked the jury to find two counts each of cunnilingus (Counts 1,2), fellatio (Counts 3, 4), digital penetration (Counts 6, 7), vaginal penetration (Count 8,9), and one count of anal penetration (Count 5). (Tr. 695, 706) For I.S., the prosecution maintained two counts each of cunnilingus (Counts 10, 11), fellatio (Counts 12, 13), vaginal penetration (Counts 18, 19), three counts of digital penetration (Counts 14 – 16) and one count of anal penetration (Count 17)

Although the jury ultimately found Mr. Freeman guilty of every count, a review of the testimony does not support the verdicts. For example, although P.S. did testify that Freeman put his fingers in her vagina, she never testified that Freeman put his penis in her vagina. The jury, however, found him guilty of doing so (Counts 8, 9) twice. Similarly, there was no testimony from either sister that Freeman performed cunnilingus on I.S., but the jury found him guilty of committing this offense (alleged in Counts 10, 11) twice.

The Eighth District majority concluded that 1) the indicted counts were sufficiently differentiated; but 2) notwithstanding that differentiation, there was insufficient evidence to support Counts 12, and 14-19. While Mr. Freeman welcomes the intermediate court's recognition of the fact that there was insufficient evidence to sustain some of the charges, the Court's choice of Counts 12 and 14-19 is unfathomable given this record. The court offered no explanation for its choice to dismiss these particular counts – nor could have explained this decision. Certainly, since Counts 12 and 13 alleged the same sexual misconduct, one is left to wonder why the court dismissed Count 12 rather than 13; or Counts 10-13, as opposed to 14-19.

Further, the seemingly random nature of the counts dismissed simply highlights the problems attending carbon copy indictments generally and this one specifically. In fact, the Sixth

Circuit has held that when there is an acquittal either by a jury or by a reviewing court on some counts in a copy cat indictment, there is no way to tell upon which counts the defendant was convicted and on which he was acquitted and all the convictions fail. See, *Isaac v. Grider* (C.A. 6, 2000) 211 F.3d 1269. As this case stands now, there is no way to tell where the Eighth District believed the prosecution's evidence fell short.

An Indictment that Fails to Include Sufficient Information so that One Count can be Differentiated from another Violates Due Process Notice and Jeopardy Provisions.

As noted above, in the wake of *Russell v. United States*, 369 U.S. 749, indictments must contain the elements of the offense charged, sufficiently apprise the offender what he must be prepared to meet at trial, and do so with sufficient clarity so that in the event of an acquittal the same allegations cannot be resurrected. *Id.* at 763-764. Applying these clearly established constitutional principles, the Sixth Circuit more recently held an indictment containing multiple, undifferentiated charges violated the accused's rights to notice and the protection against double jeopardy in *Valentine v. Konteh*, 395 F.3d 626, *supra*.

The *Valentine* case involved 20 counts each of rape and felonious sexual penetration, "identically worded so that there was no differentiation among the charges." Like Mr. Freeman's case, rather than identifying specific individual instances of misconduct, the indictment Mr. Valentine faced simply claimed a "generic pattern of abuse rather than forty separate abusive incidents." *Id.* at 643. The court ruled that the State could not properly convict Valentine of perpetrating a pattern of abuse, and vacated all but two of the charges. In doing so, the court suggested that it was "doubtful that the indictment ...sufficiently apprises the defendant of what he must be prepared to meet." *Id.* at 632. More to the point, the court observed that

“when prosecutors opt to use such carbon-copy indictments, the defendant has neither adequate notice to defend himself, not sufficient protection from double jeopardy. *Id.* at 636.

Likewise, in *State v. Hemphill*, Cuyahoga App. No. 85431, 2005-Ohio-3726, the Eighth District appeared to adopt similar reasoning. There, the defendant was charged with a total of ninety-nine counts alleging a series of rape, GSI and kidnapping incidents with a victim less than thirteen years of age. *Id.* at ¶ 2. As Mr. Freeman does here, the defendant in *Hemphill* maintained that the indictment lacked the requisite specificity to notify him of the crimes charged. The Eighth District concluded it could not “accept a numerical estimate which was unconnected to individual, distinguishable events.” *Id.* at ¶ 88. As a result, it reversed all but one count of gross sexual imposition, one count of rape. See, also *State v. Tobin* (Mar. 23, 2007) Greene App. No. 2005 CA 150, 2007-Ohio-1345 (counts in the indictment which are identical to each other, and tracks the language of the statute coupled with a bill of particulars which simply tracks the language of the indictment fail to provide adequate notice to the defendant).

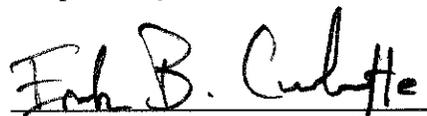
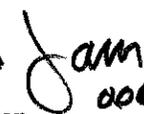
Haphazard attempts to distinguish between some incidents will not put an otherwise multiplicative indictment into compliance with *Russell's* directives. As in Mr. Freeman's case, the prosecutors in both *Hemphill* and *Valentine* prodded the complainant to distinguish between some alleged incidents. In *Valentine*, for example, the complaining witness testified that sometime she was molested in the living room, other times in her bedroom, her siblings' bedroom, and/or her parents' bedroom. The prosecution maintained that this testimony allowed a jury to distinguish between some of the counts. The court rejected this analysis, holding that that even if a jury is able to distinguish between some of the occurrences by the victim's testimony, the undifferentiated carbon copy indictments require reversal most of the convictions.

The date upon which an offense is alleged to have been committed is essential to the offense. *State v. Plaster* (2006), 164 Ohio App. 3d 750. Mr. Freeman acknowledges that in cases involving alleged child sexual abuse, prosecutors are entitled to leeway when it comes to proof of specific dates and times. It remains, however, incumbent upon the State to prove that the number of offenses it elected to charge occurred during the period specified. The prosecution in this case could have charged fewer incidents and pleaded them with more specificity. Instead, the prosecution undertook to hurl as many misconduct allegations – both charged and uncharged - at Mr. Freeman in an effort to strengthen the appearance and gravity of its case. There are consequences to such a strategy, however. Certainly, the prosecution is not relieved of its obligation to plead and present its case with specificity because it opts to bury the defendant under a mountain of charged misconduct.

CONCLUSION

In light of the foregoing, Defendant-Appellant Charles Freeman asks that this Court reverse his convictions and remand this case to the trial court to ascertain whether and the extent to which any of the charges alleged in Counts 1-19 can be retried.

Respectfully submitted,

 per 
Erika B. Cunliffe, Asst. Public Defender
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0069870

CERTIFICATE OF SERVICE

A copy of the foregoing Brief was served upon William Mason, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 14th day of March, 2011.

 ERIKA B. CUNLIFFE
per Jun 0069870

IN THE SUPREME COURT OF OHIO

STATE OF OHIO :

Plaintiff-Appellee :

vs :

CHARLES FREEMAN :

Defendant-Appellant :

10-1671

On Appeal from the
Cuyahoga County Court of
Appeals, Eighth Appellate
District 92809

NOTICE OF APPEAL OF APPELLANT CHARLES FREEMAN

FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

~~**FILED**
SEP 23 2010 *IK*
CLERK OF COURT
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NOTICE OF APPEAL OF APPELLANT

Appellant CHARLES FREEMAN hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals case No. 92809 journalized August 12, 2010.

This case involves a felony, raises a substantial constitutional question, and is one of public or great general interest.

Respectfully submitted,



ERICKA CUNLIFFE, ESQ.
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was served upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, OH 44113 on this 23 day of September, 2010.



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AUG 12 2010

Judge R. McMonagle

FILED

Court of Appeals of Ohio

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CLERK OF COURTS
CUYAHOGGA COUNTY

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA



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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AUG 12 2010

GENERAL COUNSEL
COURT OF APPEALS
DEP.

VOL 0710 PG 0286

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.

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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

¹In 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.

²Maria 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 BCI³ 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.

³The 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.

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"[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.

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

⁵In *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.

⁶This 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, ¶198 (“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-elicite 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,

⁷Defendant 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

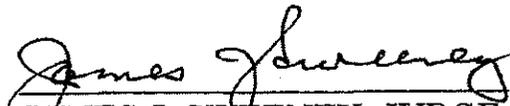
Judgment affirmed in part, reversed in part, and case remanded with instructions to vacate convictions on Counts 12 and 14 through 19, with convictions being affirmed on all other counts consistent with this opinion.

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, 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

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

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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

⁹In *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

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*.

¹⁰I 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.

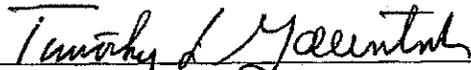
In the five years since the Eighth District was told that our application of clearly established federal law was both "incorrect and unreasonable," we continue to affirm convictions based upon carbon-copy indictments. I would follow the clearly established federal law made applicable to us in *Valentine*, 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

¹¹It 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 than 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.

8. The names, addresses and telephone numbers, titles and job classifications of all persons who have investigated this matter.

Defendant says that indictment is vague, indefinite, uncertain and insufficient, 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 with what crime, if any, he is charged, and so that this defendant will be protected in his constitutional rights, the prosecuting attorney should be required to particularize.

Respectfully submitted,


TIMOTHY J. GAUNTNER (#0014066)
- Attorney for Defendant -
14516 Detroit Avenue
Lakewood, Ohio 44107
(216) 221-8474

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Bill of Particulars was served on the office of the Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this 13th day of May, 2008.


TIMOTHY J. GAUNTNER
- Attorney for Defendant -



IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
CRIMINAL DIVISION

FILED
JUL 17 11 23 AM '08

STATE OF OHIO

Plaintiff,

-vs-

CHARLES FREEMAN, and
MARIA SINGLETON,

Defendant(s).

CASE NO. CR 508859

JUDGE RICHARD McMONAGLE

BILL OF PARTICULARS

Responding to the request of the Defendant(s), Charles Freeman, for a Bill of Particulars, the Prosecuting Attorney says that the State of Ohio will prove on the trial of the above-entitled case, the following:

That on or about September of 2007 to March of 2008, and at the location of 1111 Galewood Drive, in the City of Cleveland, Ohio, the Defendants, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe I, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe I, to-wit: date of birth, July 11, 1998.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, July 11, 1998.

2. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe

I, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe I, to-wit: date of birth, July 11, 1998.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, July 11, 1998.

3. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe I, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe I, to-wit: date of birth, July 11, 1998.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, July 11, 1998.

4. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe II, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe II, to-wit: date of birth, October 8, 1999.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, October 8, 1999.

5. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe II, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe II, to-wit: date of birth, October 8, 1999.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, October 8, 1999.

6. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe II, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe II, to-wit: date of birth, October 8, 1999.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, October 8, 1999.

7. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe II, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe II, to-wit: date of birth, October 8, 1999.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, October 8, 1999.

8. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe II, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe II, to-wit: date of birth, October 8, 1999.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, October 8, 1999.

9. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe II, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe II, to-wit: date of birth, October 8, 1999.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, October 8, 1999.

10. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe II, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe II, to-wit: date of birth, October 8, 1999.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, October 8, 1999.

11. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe II, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe II, to-wit: date of birth, October 8, 1999.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, October 8, 1999.

12. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe II, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe II, to-wit: date of birth, October 8, 1999.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, October 8, 1999.

13. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe

II, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe II, to-wit: date of birth, October 8, 1999.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, October 8, 1999.

14. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe II, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe II, to-wit: date of birth, October 8, 1999.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, October 8, 1999.

15. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe II, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe II, to-wit: date of birth, October 8, 1999.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, October 8, 1999.

16. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe II, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe II, to-wit: date of birth, October 8, 1999.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, October 8, 1999.

17. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe II, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe II, to-wit: date of birth, October 8, 1999.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, October 8, 1999.

18. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe II, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe II, to-wit: date of birth, October 8, 1999.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, October 8, 1999.

19. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendant, Charles Freeman, unlawfully engaged in sexual conduct with Jane Doe II, not his spouse, whose age at the time of the said sexual conduct was under 13 years, whether or not the offender knew the age of Jane Doe II, to-wit: date of birth, October 8, 1999.

FURTHERMORE, the Grand Jurors further find and specify that the defendant purposely compelled the victim to submit by force or threat of force.

FURTHERMORE, the Grand Jurors further find and specify that the victim was under the age of ten (10) years, to-wit: date of birth, October 8, 1999.

20. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendants, Charles Freeman and Maria Singleton, unlawfully while in the physical proximity of juveniles, to-wit: Jane Doe I, date of birth, July 11, 1998 and/or Jane Doe II, date of birth, October 8, 1999 and/or John Doe I, date of birth, December 15, 2000 and/or John Doe II, date of birth, May 25, 2002, did recklessly allow the juvenile to peruse any material or view any live performance that is obscene, Charles Freeman and Maria Singleton having knowledge of the character or content of said material or performance.

21. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendants, Charles Freeman and Maria Singleton, unlawfully while in the physical proximity of juveniles, to-wit: Jane Doe I, date of birth, July 11, 1998 and/or Jane Doe II, date of birth, October 8, 1999 and/or John Doe I, date of birth, December 15, 2000 and/or John Doe II, date of birth, May 25, 2002, did recklessly allow the juvenile to peruse any material or view any

live performance that is obscene, Charles Freeman and Maria Singleton having knowledge of the character or content of said material or performance.

22. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendants, Charles Freeman and Maria Singleton, unlawfully while in the physical proximity of juveniles, to-wit: Jane Doe I, date of birth, July 11, 1998 and/or Jane Doe II, date of birth, October 8, 1999 and/or John Doe I, date of birth, December 15, 2000 and/or John Doe II, date of birth, May 25, 2002, did recklessly allow the juvenile to peruse any material or view any live performance that is obscene, Charles Freeman and Maria Singleton having knowledge of the character or content of said material or performance.

23. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendants, Charles Freeman and Maria Singleton, unlawfully while in the physical proximity of juveniles, to-wit: Jane Doe I, date of birth, July 11, 1998 and/or Jane Doe II, date of birth, October 8, 1999 and/or John Doe I, date of birth, December 15, 2000 and/or John Doe II, date of birth, May 25, 2002, did recklessly allow the juvenile to peruse any material or view any live performance that is obscene, Charles Freeman and Maria Singleton having knowledge of the character or content of said material or performance.

24. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendants, Charles Freeman and Maria Singleton, unlawfully while in the physical proximity of juveniles, to-wit: Jane Doe I, date of birth, July 11, 1998 and/or Jane Doe II, date of birth, October 8, 1999 and/or John Doe I, date of birth, December 15, 2000 and/or John Doe II, date of birth, May 25, 2002, did recklessly allow the juvenile to peruse any material or view any live performance that is obscene, Charles Freeman and Maria Singleton having knowledge of the character or content of said material or performance.

25. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendants, Charles Freeman and Maria Singleton, unlawfully while in the physical proximity of juveniles, to-wit: Jane Doe I, date of birth, July 11, 1998 and/or Jane Doe II, date of birth, October 8, 1999 and/or John Doe I, date of birth, December 15, 2000 and/or John Doe II, date of birth, May 25, 2002, did recklessly allow the juvenile to peruse any material or view any live performance that is obscene, Charles Freeman and Maria Singleton having knowledge of the character or content of said material or performance.

26. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendants, Charles Freeman and Maria Singleton, unlawfully while in the physical proximity of juveniles, to-wit: Jane Doe I, date of birth, July 11, 1998 and/or Jane Doe II, date of birth, October 8, 1999 and/or John Doe I, date of birth, December 15, 2000 and/or John Doe II, date of birth, May 25, 2002, did recklessly allow the juvenile to peruse any material or view any live performance that is obscene, Charles Freeman and Maria Singleton having knowledge of the character or content of said material or performance.

27. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendants, Charles Freeman and Maria Singleton, unlawfully while in the physical proximity of juveniles, to-wit: Jane Doe I, date of birth, July 11, 1998 and/or Jane Doe II, date of birth, October 8, 1999 and/or John Doe I, date of birth, December 15, 2000 and/or John Doe II, date of birth, May 25, 2002, did recklessly allow the juvenile to peruse any material or view any live performance that is obscene, Charles Freeman and Maria Singleton having knowledge of the character or content of said material or performance.

28. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendants, Charles Freeman and Maria Singleton, unlawfully while in the physical

proximity of juveniles, to-wit: Jane Doe I, date of birth, July 11, 1998 and/or Jane Doe II, date of birth, October 8, 1999 and/or John Doe I, date of birth, December 15, 2000 and/or John Doe II, date of birth, May 25, 2002, did recklessly allow the juvenile to peruse any material or view any live performance that is obscene, Charles Freeman and Maria Singleton having knowledge of the character or content of said material or performance.

29. FURTHERMORE, on or about September of 2007 to March of 2008, and at the same location, the Defendants, Charles Freeman and Maria Singleton, unlawfully while in the physical proximity of juveniles, to-wit: Jane Doe I, date of birth, July 11, 1998 and/or Jane Doe II, date of birth, October 8, 1999 and/or John Doe I, date of birth, December 15, 2000 and/or John Doe II, date of birth, May 25, 2002, did recklessly allow the juvenile to peruse any material or view any live performance that is obscene, Charles Freeman and Maria Singleton having knowledge of the character or content of said material or performance, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

See Response to request for discovery for further information.

The Prosecuting Attorney says further that under the laws governing Indictments and Bills of Particulars, the Prosecuting Attorney is not required to disclose through a Bill of

Particulars, the other evidentiary matters requested in the Defendant's Motion for a Bill of Particulars.

BILL MASON
CUYAHOGA COUNTY PROSECUTOR

By: *Anna Faraglia*
ANNA FARAGLIA #0067420
Assistant County Prosecutor
Justice Center, Courts Tower
1200 Ontario Street, 9th Floor
Cleveland, Ohio 44113
(216) 348-4462

SERVICE

A copy of the foregoing Bill of Particulars has been mailed and filed on this 13th day of May, 2008, and mailed to: Timothy Gauntner, Attorney for the Defendant, 14516 Detroit Avenue, Lakewood, Ohio 44107.

Anna Faraglia
ANNA FARAGLIA
Assistant County Prosecutor