

IN THE SUPREME COURT OF OHIO

14-1215

|                 |   |                                  |
|-----------------|---|----------------------------------|
| Mark Schwarzman | : |                                  |
| Appellant,      | : | On Appeal from the Cuyahoga      |
| v.              | : | County Court of Appeals,         |
| STATE OF OHIO,  | : | Eighth Appellate District        |
| Appellee,       | : |                                  |
|                 | : | Court of Appeals Case No. 100337 |

---

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT MARK SCHWARZMAN

---

Mark Schwarzman  
 Inmate No. 643446  
 Belmont Correctional Institution  
 P.O. Box 540  
 St. Clairsville, Ohio 43950  
**APPELLANT PRO SE**

Timothy McGinty  
 Cuyahoga County Prosecutor  
 1200 Ontario Street 9th Floor  
 Cleveland, Ohio 44113  
**COUNSEL FOR APPELLEE-STATE OF OHIO**

**RECEIVED**  
 JUL 16 2014  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

**FILED**  
 JUL 16 2014  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

**TABLE OF CONTENTS**

EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES  
A SUBSTANTIAL CONSTITUTIONAL QUESTION . . . . . 1

STATEMENT OF CASE AND FACTS . . . . . 2

ARGUEMENTS IN SUPPORT OF PROPOSITION OF LAW

I. "THE VERDICTS WERE AGAINST THE MANIFEST WEIGHT OF  
THE EVIDENCE AND WAS THEREFORE INSUFFICIENT TO  
SUPPORT CONVICTION" . . . . . 4

II. "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN  
IT DENIED APPELLANT'S MOTION FOR A MEDICAL TECHNICIAN  
TO DETERMINE THE TRANSMITTAL OF AN INFECTIOUS DISEASE" . . . . . 5

III. "THE APPELLANT WAS PREJUDICED BY  
INEFFECTIVE ASSISTANCE OF COUNSEL" . . . . . 7

IV "THE PROSECUTOR COMMITTED REVERSIBLE ERROR WHEN  
IT VIOLATED RULE 3.8, THE SPECIAL RESPONSIBILITY  
OF A PROSECUTOR . . . . . 12

CONCLUSION . . . . .13

CERTIFICATE OF SERVICE . . . . .15

APPENDIX

OPINION AND JUDGEMENT ENTRY FROM THE CUYAHOGA  
COUNTY COURT OF APPEALS, EIGHTH APPELLATE  
DISTRICT DATED JUNE 5th, 2014. . . . .1-A

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

This case is a case of public or great general interest and involves a substantial constitutional question because the appellant's constitutional rights in the case were clearly violated. The manifest weight of the evidence to prove the defendant actually committed these offenses is constitutionally vague. Certainly the absence of sufficient evidence would mean that the trial court committed plain error and prejudicial constitutional violations against the appellant when the court convicted appellant of crimes that he is innocent of committing. The manifest injustices committed here, if they are allowed to stand could be repeated to any future defendant's in appellant's county.

The trial court must not be allowed to make mistakes and/or commit outright violations of constitutional rights without fear of reprimand or repercussions. Appellant has been grievously wronged by the trial courts refusal to allow trial counsel the time to prepare for the trial, or to introduce clear evidence that is contrary to the state's case. Without a fair trial the jury believed lies presented by the prosecution even though the detective in the case admitted that there were "many holes" in the alleged victims story. That, and the ineffective assistance or counsel's lack of presenting evidence contrary to the states case or to subpoena experts and witnesses established that counsel's performance fell well below an objective standard of reasonable performances.

Legal principals show that the U.S. Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. This guarantee has it's roots in both the Due Process Clause and the right to have compulsory process for obtaining witnesses in the defendant's favor, as provided by the 6th Amendment. A defendant's right to due process in a criminal trial is, in essence the right to a fair opportunity to defend against the state's accusations. Included with these guarantees is the right to cross examine and to present evidence.

Indeed, few rights are more fundamental than that of an accused defendant to present witnesses in his own defense. The right to offer testimony is thus grounded in the 6th Amendment. The right to offer testimony of witnesses and compell their attendance and the right to present the defendant's version of

the facts to the jury so that it may discern where the truth lies. Just as an accused has the right to confront the prosecutions witnesses for the purpose of challenging their testimony, the defendant has the right to present his own witnesses to establish a defense. This is a fundamental element of due process of law.

#### STATEMENT OF CASE AND FACTS

Commencing on the 15th day of July, 2011, Mark Schwarzman, (Hereinafter "Appellant") and his wife of 7 years, Erica Schwarzman, (Hereinafter "Erica S.") decided to end their marriage. Erica S. moves out of the house leaving her three adult children (and two grandchildren) living in the house with the Appellant and his two daughters. Torria, aged 20, (Hereinafter "Torria") the alleged victim, moves out of the Appellants house and into the house of he long-time boyfriend, Harry Briggs' (Hereinafter "Harry") mothers (Debbie Briggs, Hereinafter "Briggs") house. This move happened a full 9 months after Erica S. moved out. At this point Appellant asked Erica S.'s daughter Erica, (Hereinafter "Lil Erica") to also make arrangements for a new place to live in the next 30 days, by August 1st, 2012.

Two weeks later, on the 16th of July at 11:00 P.M., Torria went to the Cleveland Heights Police Department to report an allegation that her stepfather, the Appellant, had repeatedly raped her as a child. The case was assigned to Detective Rick Veccia (Hereinafter "Veccia"). The alleged abuse began in 1999 when she was just eight years old, at the Appellant's 3180 Whitethrom Rd. address. The initial report had Torria telling the police that the rapes occurred early in the morning. It was discovered that Torrias allegations conflicted with the facts that the alleged assaults couldn't have happened as she had originally claimed. 1.) The Appellant didn't buy the home until June of the year 2000 and; 2.) Erica S., her mother would have been home as confirmed by her work schedule. Sometime later after discovering these contradictions, Torria changes her story by claiming the assaults didn't begin in 1999 and her alleged time of the assaults changes from early morning to late at night.

In September of 2012, the Appellant was notified by Veccia of Torria's allegations of abuse. Upon hearing this, he then asked Erica S.'s last daughter to move out as well not feeling very comfortable with Ashley staying there where her sister was alledging these crimes had taken place. Ashley, age 18, already had one child and was pregnant and had regular contact with Torria. Ashley asked Appellant if she could stay at the house until her tax return was received the following year. Appellant declined her request.

Appellant hires attorney Debbie Horton (Hereinafter "Horton") who meets with Detective Veccia and is told there were "many holes" in the alleged victims story, but that he was still proceeding with the case.

The Appellant was notified by Veccia to not have any further communication with Torria. In November, when Ashley was in the process of moving out, Torria arrived unescorted to the Appellant's home to pick up Ashley's remaining things. Torria let herself into the house startling Appellant. The Police were called and Torria was escorted from the property. Once the police had left the scene, Torria again returned to the home and once again the police were called and Torria had to be escorted off the property again.

Appellant was granted a public defender by the name of Myron Watson. The Appellant met with the counsel discussed the many discrepancies of Torria's claim. Appellant met with the trial attorney at each and every pre-trial. At the final pre-trial on May 8th, 2013 the trial date is set and confirmed for June 24th, 2013.

On May 18, 2013 trial attorney Myron Watson contacts Appellant and tells him he must hire a private investigator by the name of Brenda Breckenstaff at a cost of \$750.00. Appellant borrowed the money from a friend because the attorney assured him that Breckenstaff and he worked together on cases and that his chances of winning the case was dependant on it. The private investigator stopped by late in the evening on May 19th, 2013. Appellant gave Ms. Breckenstaff a list of potential witnesses (the same list he had given to attorney Watson) for her to contact and question. Appellant was later disappointed when he discovered that; 1.) the final pretrial had already passed; 2.) not enough time was left before the trial date; 3.) attorney Watson knew that Appellant was indigent and pressured him to hire his friend. 4.) the private investigator did not contact any of the witnesses she was hired to contact.

One week before the trial attorney Watson submitted a "bare bones" request asking for more time. The Motion was denied because the judge felt that the attorney hadn't given the Court an adequate reason for a delay in the trial, even though the counsel had claimed to have subpoenaed important defense witnesses, none were present at the trial. The judge told the attorney that he had 90 days to prepare for the trial, when in reality, the trial date was only 69 days after the first pretrial.

Trial went forward without witnesses for the defense. The trial attorney did not present a reasonable defense and Appellant was found guilty by a jury and convicted of 3 counts of rape and 1 count of attempted rape.

## PROPOSITION OF LAW I

### "THE VERDICTS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS THEREFORE INSUFFICIENT TO SUPPORT CONVICTION"

Even when a verdict is supported by sufficient evidence, an appellate court may nevertheless conclude that the verdict is against the manifest weight of the evidence because the test under manifest weight standard is much broader than that for the sufficiency of evidence. *State v. Banks*, 78 Ohio App. 3d at 175. To determine if a criminal conviction is against the manifest weight of the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial be granted. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997) quoting *Martin* 20 App. 3d at 175. A reviewing court will not reverse a conviction where there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. *State v. Eskridge*, 38 Ohio St.3d 56, 526 N.E.2d 304 (1988) at paragraph two of the syllabus.

The court must weigh the evidence outlined using the following criteria as defined in *State v. Mattiso*, 23 Cit.App.3d (1985):

- 1.) Certainty of evidence.
- 2.) Reliability of the evidence.
- 3.) Interest of the witness.
- 4.) Whether the witnesses were impeached.
- 5.) Whether the evidence was contradiction.
- 6.) Consideration of what was not proved.
- 7.) Which evidence was vague, uncertain, conflicting, fragmented, or not fitting together in a logical order, and
- 8.) A reviewing court is not required to accept the incredible as true.

Essentially, the Appellants argument that the convictions were against the manifest weight of the evidence and it was insufficient to support the conviction allows the court to weigh the evidence for itself rather than simply looking at everything in the vacuum that in the light most favorable to the prosecution. Thus the Appellant reiterates his position that the prosecution did not present enough evidence to prove all essential elements of the charges. For those same reasons as previously stated. Because the prosecution failed to prove these elements the convictions were against the manifest weight of the evidence and must be reversed.

## PROPOSITION OF LAW II

### "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED APPELLANT'S MOTION FOR A MEDICAL TECHNICIAN TO DETERMINE THE TRANSMITTAL OF AN INFECTIOUS DISEASE"

The denial of this medical confrontation violated the Appellant's right to have medical verification of the false allegation, as he is a carrier of an infectious disease in order to satisfy the requirements of Civ.R.26 and Civ.R.35. The Appellant was able to provide any cause, good or otherwise, why the test should be performed and to what, if any, controversy the test related. The Appellant's motion stated that he knew he was infected with genital herpes (Hereinafter "HSV-2") and that the alleged victim should be tested for the HSV-2 virus. It was only after the magistrate denied the discovery. The Appellant argued that the test for HSV-2 would have been relevant to the issues of the alleged case of rape. Evidence furnished by a doctor, or by a standard treatises on medicine or surgery.

The magistrates decision, encouraged by the prosecutor, that the physicians assistant was not qualified to render an assessment, however in Rule 702: Testimony by Experts clearly states "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in an issue, a witness qualified as an expert knowledge, skill, experience, training, education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data (2) the testimony is the product of reliable principles and methods and (3) the witness has applied the principles and methods reliably of the facts of the case." Moreover, Board certification is not a prerequisite to qualifications as an expert witness. See *Alvarado v. Weinberger* C.A. 1 (Puerto Rico) 1975, 511 F. 2d 1046. Therefore, the trial court erred in determining that the discovery request was not irrelevant at the time it was made. There was evidence to indicate that the Appellant infection with HSV-2 was "in controversy" in the case. The Appellant admitted to being a carrier of the infectious disease, and therefore, a test showing whether he had HSV-2 virus would be cumulative, at best. Medical experts may testify in matters concerning which they are qualified even though they are not licensed to practice in jurisdiction involved. *Hayes v. U.S.C.A. 10* (Kan) 1966, 367 F.2d. 216. Furthermore, expert witness needed not be registered or holder of degrees of certification in order to become qualified. *Smith v. Hobart Mfg. Co., E.D. Pa.* 1960 185 F. Supp. 751.

As indicated in Evid.R. 702, various kinds of knowledge, skill, experience, training, or education can qualify one as an expert. **Kraft General Food Inc. v. BC-USA, Inc.** E.D. Pa. 1993, 840 F. Supp. 344, 29 U.S. P.Q. 2d 1919.

Evid. R. 803(4) Statements made for puposes of medical diagnoses or treatment and describing medical history, or past or present symptoms, pain or sensation of the cause or external source thereof insofar as reasonably pertinent to diagnoses or treatment. Evid.R 803(4) 2013 pg. 1103. At in camera hearing to determine whether alleged prior false rape accusations were based on sexual activity or were totally unfounded, defendant was entitled to introduce extrinsic evidence in order to show that prior false rape accusations were made by alleged rape victim were unfounded. Evid.R. 101 (4th paragraph) pg 803, 2013.

Diagnoses contained in hospital records a notation of treatment were admissible under Ohio law, and thus were likewise admissible in a federal court sitting in Ohio. **Stengel v. Belcher** (C.A.6 (Ohio) 1975) 522 F.2d 438, **Certiorari granted** 96 S.Ct 1505, 425 U.S. 910, 47 L.ed. 2d 760, **Certorari dismissed** 97 S.Ct. 514, 429 U.S. 118, 50 L.ed 2d 269.

A witness who is not a physician but who qualifies as an expert under Evid. R. 702 may give evidence that would be relevant to diagnoses of a medical condition if the testimony is within the expertise of the witness. **Shilling v. Analytical Services Inc** (Ohio 1992) 65 Ohio St. 3d 252, 602 N.E. 2d 1154. Physician consulted as a prospective witness may testify to the plaintiffs statements of present condition and past symptoms, not as a proof of the facts stated, but as information relied upon to support opinion. **Gentry v. Watkins-Carolina Trucking Co.** 154 S.E. 2d 112 (S.C. 1967)

While apparently accepting the new theory of admissibility, puport also to require the statement to be consistant with both treatment and diagnosis purpose. **Morgan v. Foretrich**, 846 F.2d 941, 949 (4th Cir. 1988). The Court held that an effective defense sometimes require the assistance of an expert witness. The court found that the obligation of the government to provide an indigent defendant with the assistance of an expert was firmly based on the Equal Protection Clause, especially where the medical evidence presented by the State was in question and the denial hampered the defense.

Under Ohio Crim. Law 51:5, if the defense has obtained discovery of scientific and madical reports, the prosecutor is entitled under Crim R.16(C)(1)(b) to inspect and copy any results or reports of physical or medical examinations and of scientific test or experiments made in connection with the particular case. Also, the reports or results are discoverable only if the defendant intends to introduce them into evidence or if they were prepared by a witness whom

the defendant intends to call at trial and the report or results relate to his testimony. Such reports must be made available to, or in the possession, custody or control of the defendant, and the prosecutor must know of their existence or else could learn of their existence with due diligence. The American Bar Association's Standards note that the "need for full and fair disclosure is especially apparent with respect to scientific proof and the testimony of experts. This sort of evidence is practically impossible for the adversary to test or rebut at trial without an advanced opportunity to examine it closely."

Appellant had a copy of his medical report and demanded that the physician assistant testify, however, the prosecutor suppressed the medical evidence and would not let the physician assistant testify, saying that the physician assistant was not qualified to testify about her diagnoses and treatment. Since the defendant has the right to examine scientific evidence, the prosecution must have a duty to preserve it. Should the prosecutor fail to preserve evidence, the burden regarding the exculpatory value of that evidence shifts to the prosecution should the defendant move for a dismissal.

### PROPOSITION OF LAW III

#### "THE APPELLANT WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL"

The Appellant's trial counsel made errors that were prejudicial and effected the outcome of the trial. These errors went beyond mere trial strategy and caused prejudice to the Appellant. Had it not been for these errors, the result of the trial would have been different.

The standard for determining whether a trial attorney was ineffective requires Appellant to show 1.) that the trial attorney was not functioning as the "counsel" guaranteed under the Sixth Amendment, and, 2.) that the deficient performance prejudiced Appellant's Defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) Counsel's performance is deficient if it falls below an objective standard of reasonable representation. *State v. Tibbets*, 92 Ohio St.3d 146, 164, 749 N.E. 2d 226. (2001) citing *State v. Bradley*, 42 Ohio 3d 136, 538 N.E. 2d 373(1989).

Trial counsel failed on many things. Trial counsel failed to properly file for a continuance in adequate time before the June 24th, 2013 when counsel submitted what the Appellate Court called a "bare bones" Motion for Continuance. The judge told the trial counsel that he had plenty of time (69 days from the 1st pretrial to the trial date) to prepare for trial even though counsel claimed to have subpoenaed the alleged victims school records and the Department of Child-

ren's and Family services to provide records and/or testimony. See App. Opinion paragraph 4.

There is a basic due process right that the defense counsel be afforded the reasonable opportunity to prepare his case. *State v. Sonders*, 4 Ohio St. 3d 143, 144, 4 Ohio B. 386, 447. N.E. 2d 118 (1983). Nevertheless, the court retains control over the disposition of its trial docket such that it is within the sound discretion of the court whether to grant a Motion of Continuance. *State v. Bayless*, 48 Ohio St. 2d 73, 101, 357 N.E. 2d 1035 (1976) vacated in part on other grounds, 438 U.S. 911, 98 S. Ct. 3135, 57 L.Ed. 2d 1155 (1978). The court's refusal to grant a continuance will constitute an abuse of discretion only if the Defendant shows that he was prejudiced. *State v. Kehn*, 50 Ohio St. 2d 11,15, 361 N.E. 2d 1330 (1977).

Why the trial counsel waited so late to ask for a continuance with a "bare bones" Motion stating that "the Defendant has hired an investigator and is conducting additional interviews of prospective witnesses regarding the above-captioned matter" and was awaiting the production of records he subpoenaed from the alleged victim's school and the Department of Children and Family Services was unexplained. The transcript shows that the defense counsel offered no justification for the delay in speaking with family members other than to say that it was the Appellant, not the defense counsel, who retained the investigator. Defense counsel was aware that the May 8th "final" pretrial had already passed and yet still urged the Appellant to hire "his" private investigator, who the counsel stated to the Appellant that without hiring her, he would most likely lose the trial. The \$750.00 that the investigator required as a payment came at a great cost to the Appellant, both financially and at a great cost to his defense because the trial counsel became reliant on the investigator to speak to the potential witnesses. The resulting facts that the trial counsel had only the 69 days to prepare for the trial the Appellant most certainly was prejudiced by counsel's failure to investigate the evidence himself. Counsel's failure to conduct independent investigation of mitigating evidence was ineffective assistance despite petitioners reluctance to present such defense. *Carter v. Bell*, 218 F.3d 581, 596 (6th Cir. 2000). Counsel's failure to introduce exculpatory records into evidence was ineffective assistance because it would have created reasonable probability of different verdict. *Hart v. Gomez*, 174 F.3d 1067, 1073 (9th Cir. 1999) Counsel's failure to prepare defense and call witnesses was prejudicial, especially in light of prosecutions weak case. *Pavel v. Hollins*, 261 f.3d 210, 228 (2nd Cir. 2001)

Since the trial was concluded without hearing subpoenaed evidence and/or testimony that could rebut the allegations, specifically the school records and Department of Children and Family Services, the testimony of the school counselor whom the alleged victim claims she reported the abuse to and family members who lived in the house during the time period that the alleged abuse took place, most certainly prejudiced the Appellant by not presenting evidence and testimony of witnesses that are contrary to the State's case. Counsel's failure to interview obvious defense witnesses, develop mitigating evidence, and investigate sources for impeachment, and counsel's impeachment of own client warranted presumption of prejudice. *Cargle v. Mallin* 317 F. 3d 1196, 1211 (10th Cir. 2003). Counsel's failure to conduct reasonable investigation into "known and potentially important "alibi witness" was prejudicial because investigation would have produced reasonable probability of defendant's acquittal. *Towns v. Smith*, 395 F. 3d 251, 258-60 (6th Cir. 2005). The Appellant's trial counsel made errors that were prejudicial and effected the outcome of the trial. Had it not been for these errors, the result of the trial would have been different.

Counsel's failure to locate and call a known witness was prejudicial because, together with the State's "relatively thin evidence", there was a reasonable probability of a different outcome. *State v. Bertrand*, 453 F. 3d 428, 438 (7th Cir. 2006) Counsel's failure to fully investigate strength of witnesses was ineffective because weaker witness was called to testify instead of the witness with "powerful support" for defense. *White v. Roper*, 416 F. 3d 728, 732, 733 (8th Cir. 2005).

The Sixth Circuit adopted a reasonable attorney standard for assessing the quality of an attorney's assistance. The basic standard articulated in *Beasley v. United States*, 491 F. 2d 687, 696, 26 A.L.R. Fed. 204, (6th Cir. 1974) was whether the attorney is "reasonably likely to render and rendered reasonably effective assistance." The court also established a number of general guidelines for assessing the effectiveness of counsel under this standard. A lawyer must; 1.) perform at least as well as a lawyer with ordinary training and skill in criminal law; 2.) conscientiously protect his client's interest, undeflected by conflicting considerations; 3.) investigate all apparently substantial defenses available to the defendant and assert them in a proper and timely manner; and 4.) advise his client correctly on a clear point of law. *Id.* at: 696.

Appellant reiterates that the trial counsel's performance was in fact deficient and made errors so serious that the counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. These errors deprived Appellant a fair trial and a trial whose result was prejudicial to the Appellant.

L

To establish a claim of ineffective assistance of counsel, a defendant must show that the counsel's performance was deficient and that that deficient performance caused prejudice. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. **Strickland v. Washington** 466 U.S. 668 (1984) See also, **United States v. Cronin** 466 U.S. 648 (1984). Such is clearly the case with this trial and outcome.

Counsel's failure to investigate Defendant's medical background based on mistaken belief that mitigating evidence was inadmissible was Ineffective Assistance because reasonable probability existed that jury would not have convicted Defendant if Counsel had presented mitigating evidence. **Dobbs v. Turpin**, 142 F 3d 1383-91 (11th Cir. 1998).

Petitioner stated he was a carrier of the infectious Disease "Genital Herpes" (herein after 'HSV-2') Petitioner presented trial Counsel with documentation of his diagnoses of the disease. Trial Counsel failed to introduce exculpatory medical records into evidence was ineffective assistance of counsel because it would have created reasonable probability of a different verdict. **Hart v. Gomez**, 174 F 3d 1067, 1073(9th Cir.1999).

Petitioner asked trial Counsel to subpoena the physician assistant who diagnosed the infectious disease in 1997 and to secure an infectious disease expert to explain the highly transmittable nature of HSV-2 to the jury. The Center of Disease Control (CDC) notes that a female under the age of 14 does not have the antibodies to fight off the HSV-2 virus. The alleged victim claims she was raped on a daily basis with unprotected sex for many years, since there is nearly 100% transmittal of the virus. 13 years after the alleged rapes, why did trial Counsel fail to question if either victim or the victim's boyfriend were infected. Counsel's decision not to investigate or consult expert witnesses for defense was unreasonable strategy because there were possible problems with prosecution's case and these could have been shown through expert testimony. **Dugas v. Coplan**, 428 F.3d 317, 332 (1st Cir. 2005). Counsel's failure to call important fact witnesses and medical expert at trial was ineffective assistance because testimony of these witnesses would have rebuttal prosecution's already weak case. **Paver v. Hollins**, 261 F 3d 210, 217-218 (2nd Cir. 2001).

One of the scheduled witnesses for the prosecution, Debbie Briggs, (hereinafter 'Briggs') decided not to testify during the trial, decided to testify instead at the August 5th 2013 sentencing phase. Briggs is the mother of the

alleged victims long-time boyfriend. Trial counsel failed to compel witness to take the stand. Witness cannot make blanket assertion of 5th Amendment privilege, but rather must take stand and assert privilege in response to questions. **U.S. v Gibbs**, 182 F.3d 408, 431 (6th Cir 1999) Court should not have approved witness's blanket invocation of 5th Amendment because witness did not establish good-faith that testimony would be self-incriminating. **U.S. v. Vavages**, 151 F. 3d 1185, 1192 (9th Cir. 1998). see also; **N.River Ins. Co. v. Stefanou**, 831 F. 2d 484, 486-87 (4th Cir. 1987) During Briggs testimony at sentencing, Briggs stated that the victim had told her that the years of alleged rapes were unprotective sex. Counsel's failure to investigate lack of medical evidence to support sexual abuse allegations was ineffective assistance of trial counsel. **Holsomback v. White**, 133 F 3d 1382, 1385-89 (11th Cir. 1998).

Petitioner requested alleged victims middle school counselor to be subpoenaed. Since the alleged victim claimed to have reported the rapes to her school counselor while she was still in Montecello Middle School in Cleveland Heights, Ohio, which was confirmed by Briggs testimony at sentencing. If the alleged rapes were actually reported to a school official, they were under specific rules in procedures. It is required by law that any abuse allegations are to be reported to the authorities, including Childrens Services.

The Cuyahoga County Children Services is required by Ohio law, under ORC Chapter 2151 and 5153, to assess reports concerning children. Reports of neglect/abuse allegations are assigned to trained social workers who have the responsibility to assess the risk of abuse and neglect to the children, determine if the report is accurate or unfounded, and identify any need for services. This determination is made in accordance with Ohio Administrative Code Chapter 5101: 2-36, which may include interviews with children and their parents or other caregivers, and observation of childrens interaction with their parent or caregiver. Information is also sometimes collected from other involved professionals or extended family members. At the conclusion of the assessment, a disposition of substantiated, unsubstantiated, or indicated is reached.

Since it is a requirement by law for the school counselor to report the alleged abuse, it would have been highly unlikely that the counselor would ignore his responsibilities. It's nonsensical to think that the school counselor would risk of losing his position and face possible criminal charges for allowing the alleged abuse to continue. Trial counsels failure to locate and call a known witness was prejudicial because, together with State's "relatively thin evidence" there was a reasonable probability of a different outcome. **Adams v. Bertard**, 543 F 3d 428, 438 (7th Cir. 2006).

The Trial Counsel failed to contact any: school counselor or officials; Dept. of Children and Family Services social workers or advocates; physicians assistants; infectious disease experts and/or; a blood specialist to test alleged victim and her long-time boyfriend for the HSV-2 virus, which should of been present if the allegations of years of rapes with unprotected and protected sexaul abuse had occurred as alleged. The Trial Counsel's failure to fully investigate strength of witnesses was ineffective assistance of counsel because weaker witness was called to testify instead of the witness with "powerful support" for Defense. *White v. Roper*, 416 F.3d 728, 732-33 (8th Cir. 2005).

#### PROPOSITION OF LAW IV

#### "THE PROSECUTOR COMMITTED REVERSIBLE ERROR WHEN IT VIOLATED RULE 3.8, THE SPECIAL RESPONSIBILITY OF A PROSECUTOR"

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded justice and that the guilt is decided upon the basis of sufficient evidence. Applicable law may require other measures by the prosecutor and knowing disregard those of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4. A prosecutor also is subject to other applicable rules such as rules 3.6, 4.2, 4.3, 5.1 and 5.5.

Each crime's evidence is seperate and distinct. the primary issue presented at trial is that there is testimony from the alleged victim that she had spoken to various individuals whom did nothing to act upon this allegation, before or after speaking to the police. Torria testified that she was victimized repeatedly over a lengthy period of time. Torria also testified that she had told her middle school counselor that she was being abused at home. It is nonsensicle to think that the school counselor did nothing to stop the alleged abused. Under Ohio Law, O.R.C. 2151 and 5153 mandated that the school notify the authorities. Why was this never questioned in the court? Why was the subpeonaed records not provided a subpeona for? The fact that the prosecutor was the one pushing for suppression of these discovery items does not change the outcome of the trial. This is one of the many errors of this miscarriage of justice that needs to be reviewed.

## CONCLUSION

While reviewing the sufficiency of the evidence supporting a criminal conviction, a trial court must examine the evidence submitted at trial to determine whether such evidence, if believed, would convince an average person of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. This test raises a question of law and does not allow the court to weigh the evidence. Rather, the sufficiency of the evidence test gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, consider the credibility or believability, and to draw reasonable inferences from basic facts to ultimate facts. Accordingly, the reviewing court does not substitute its judgement for that of a factfinder. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) paragraph two of the syllabus. See also *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979).

The probative value under the **Sixth Amendment** of evidence from a denial of the alleged victim to be subject to a medical test to assure there is no means of an infectious disease existing which clearly outweighed the State's interest under the **Rape-Shield Law**, O.R.C. 2907.02(D), such that it should not have been excluded where it arguably could have shown that the victim had a motive for accusing defendant of sexual offenses. The court should have noted that the alleged victim had not provided any actual documentations in any form nor any medical proof and at least one of her responses on direct questioning conflicted with testimony given by the alleged victim earlier to the police and at trial.

Accordingly, it arguably could have been shown that the victim had a motive to fabricate an accusation against the defendant. The probative value of the excluded evidence outweighed the State's interest in its exclusion. To determine whether the rape-shield law, O.R.C. 2907.02(D), is constitutionally applied in a specific instance, a court must balance the state interest which §2907.02(D) is designed to protect against the probative value of the excluded evidence. Evidence of sexual activity offered merely to impeach the credibility of a witness is not material to a fact at issue in a case and must be excluded. Alternatively, evidence which is probative of a material should not be excluded.

## CONCLUSION - Continued

The Appellant argued that the trial court violated his constitutional right to confrontation by allowing the alleged victim not to be tested for a transmittional infectious disease. The trial court held that the victim's statements to be the decideing factor instead of allowing medical science to be a bigger part of what really transpired, by properly admitted into evidence her statements, describing where instead forms of sexual activity that would have caused a medical professional to be concerned about the possibility of injuries and sexually transmitted diseases, were primarily statements for medical diagnoses and treatment. The alleged victims objective motivation in making the statement was to prevent and not to assist her medical providers in confirming that she had never been infected at all.

The trial court denial for a continuation not only hampered the hired private investigator's ability to contact potential witnesses. The Trial Counsel asked to subpoena Torria's school records, to which the trial court stated he would issue subpoenas, yet never did. The first pre-trial was on April 15th, 2012, with the date set for the 24th of June, 2012, which is only 69 days later, not the 90 days the trial judge had declared that he was going to issue.

Was this the direct results of the trial of the century that had received heavy news coverage around the world coming before this very same judge's determination to clear his docket in order to attend to the trial of Aerial Castro's trial? The ordnance is unconstitutional, not because the judge applied this discretion wisely or poorly in a particular case, but rather because the judge enjoyed too much discretion in every case. And if application of the ordnance represents an exersise of unlimited discretion, then the ordnance is invalid in all its application. Thus, the trial court demonstrated injustice, misconduct, unethical and bias presumptuous acts.

Counsel failed on many instances as were previously noted. There is a basic due process right that the defense counsel be afforded enough time to prepare for a trial it is also the responsibility of the trial counsel to assure that the court does not prejudice a defendant by not challenging the courts discretion. Since the counsel's failure was beyond simple error, it approached unprofessionality and incompetence. The trial counsel was expected to render reasonably effective assistance of counsel, in this case, the attorney did not perform at least as well as a lawyer with ordinary training and skill in criminal law, did not conscientiously protect the Appellant's interests, did not investigate all apparently substantial defenses available, nor did counsel assert them in a proper nor timely matter and he most certainly did not advise his client correctly.

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : CASE NO: \_\_\_\_\_  
Plaintiff-Appellee, :  
v. : On Appeal from the Cuyahoga County  
Mark Schwarzman, : Court of Appeals, Eighth Appellate  
Defendant-Appellant. : District  
: C.A. Case No: CR-12-567998

---

APPENDIX TO

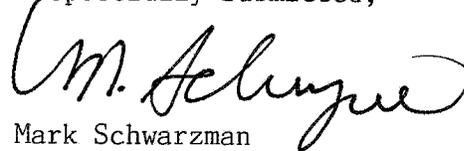
MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT \_\_\_\_\_

---

**CONCLUSION - Continued**

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The Appellant requests that this Court accept Jurisdiction in this case so that the important issues presented here will be reviewed on the merits.

Respectfully submitted,



Mark Schwarzman

**Defendant-Appellant, Pro Se**

**CERTIFICATE OF SERVICE**

I, Mark Schwarzman, certify that a true copy of this Memorandum in Support of Jurisdiction was sent via U.S. Mail to Timothy McGinty, Cuyahoga County Prosecutor, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 9<sup>th</sup> day of July, 2014.



Defendant-Appellant, Pro Se

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
No. 100337

---

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**MARK SCHWARZMAN**

DEFENDANT-APPELLANT

---

---

**JUDGMENT:  
AFFIRMED**

---

---

Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-12-567998

**BEFORE:** Stewart, J., Celebrezze, P.J., and S. Gallagher, J.

**RELEASED AND JOURNALIZED:** June 5, 2014

**ATTORNEY FOR APPELLANT**

Joseph V. Pagano  
P.O. Box 16869  
Rocky River, OH 44116

**ATTORNEYS FOR APPELLEE**

Timothy J. McGinty  
Cuyahoga County Prosecutor

BY: Brian R. Radigan  
Assistant County Prosecutor  
The Justice Center  
1200 Ontario Street, 9th Floor  
Cleveland, OH 44113

FILED AND JOURNALIZED  
PER APP.R. 22(C)

JUN X 5 2014

CUYAHOGA COUNTY CLERK  
OF THE COURT OF APPEALS  
By M. Jacobs Deputy

COPIES MAILED TO COUNSEL FOR  
ALL PARTIES.--COSTS TAXED

MELODY J. STEWART, J.:

{¶1} A jury found defendant-appellant Mark Schwarzman guilty of three counts of rape, one count of attempted rape, and four counts of kidnapping. The victim of the offenses, Schwarzman's stepdaughter, claimed that Schwarzman repeatedly raped her over an eight-year period commencing in 1999 when she was just eight years old. In this appeal, Schwarzman raises eight assignments of error that collectively challenge the sufficiency and weight of the evidence; the indictment's failure to specify the dates on which the alleged crimes occurred; the court's failure to grant a continuance of trial so that trial counsel could complete an investigation; errors regarding the admission of trial testimony; and the imposition of consecutive sentences.

I

{¶2} The first assignment of error addresses the court's refusal to grant a trial continuance. The court scheduled trial for June 24, 2013. On June 18, 2013, Schwarzman filed a motion for a continuance because, as relevant to this appeal, he claimed that an investigator he hired was conducting additional interviews of prospective defense witnesses. When the parties convened for trial, defense counsel told the court that the investigator wished to question family members who resided with Schwarzman and the victim during the time of the alleged sexual abuse. The court denied the motion on grounds that trial

had been pending for more than two months and that Schwarzman could subpoena those persons to testify if he wished.

{¶3} There is a basic due process right that “defense counsel be afforded the reasonable opportunity to prepare his case.” *State v. Sowders*, 4 Ohio St.3d 143, 144, 447 N.E.2d 118 (1983). Nevertheless, the court retains control over the disposition of its trial docket such that it is within the sound discretion of the court whether to grant a motion for a continuance. *State v. Bayless*, 48 Ohio St.2d 73, 101, 357 N.E.2d 1035 (1976), *vacated in part on other grounds*, 438 U.S. 911, 98 S.Ct. 3135, 57 L.Ed.2d 1155 (1978). The court’s refusal to grant a continuance will constitute an abuse of discretion only if the defendant has shown that he was prejudiced. *State v. Kehn*, 50 Ohio St.2d 11, 15, 361 N.E.2d 1330 (1977).

{¶4} On the facts presented, we find no abuse of discretion. The court noted that trial had been set for more than two months and that the parties had a “final” pretrial on May 8, 2013, yet Schwarzman waited until just less than one week before trial to file his motion. The motion itself was bare bones and stated that “the Defendant has hired an investigator and is conducting additional interviews of prospective witnesses regarding the above-captioned matter” and that he was awaiting the production of records he subpoenaed from the alleged victim’s school and the department of children and family services. The transcript shows that defense counsel offered no justification for the delay

in speaking to family members other than to say that it was Schwarzman, not defense counsel, who retained the investigator. Even so, the investigator said that she became involved with the case on May 19, 2013, so she had a full month in which to question the family members. Those family members were all known to Schwarzman and presumably could easily have been located, so there was no apparent reason for the delay. As the court noted, the investigator was not looking for "forensics," but only to interview persons, all of whom could be subpoenaed to testify at trial. On this basis, we find no prejudice from the court's refusal to continue trial.

{¶5} The second assignment of error challenges the specificity of the indictment. The indictment provided two ranges of dates on which the alleged acts of sexual abuse occurred: January 1, 1999 to December 31, 1999 and January 1, 2001 to December 31, 2001 (there were other dates listed in the indictment, but Schwarzman was found not guilty of those offenses). Schwarzman complains that the open-ended dates on a "series of virtually identical counts" did not contain sufficient distinguishing detail to afford him an opportunity to prepare a meaningful defense, thus allowing him to be prosecuted for a course of conduct rather than separate offenses.

{¶6} Schwarzman did not raise any objections to the form of the indictment prior to trial as required by Crim.R. 12(C), so he has waived all but

plain error. See *State v. Yaacov*, 8th Dist. Cuyahoga No. 86674, 2006-Ohio-5321, ¶ 13. To prove plain error, Schwarzman must show not only the existence of an error that is obvious on the record, but that the error was such that but for it, the outcome of trial would have been different. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph two of the syllabus.

{¶7} The sufficiency of an indictment is measured by two criteria under the Due Process Clause: first, it must sufficiently apprise a defendant of the criminal conduct for which he is called to answer; second, the indictment and instructions together must provide adequate specificity so as to allow the defendant to plead acquittal or conviction as a defense against future indictment and punishment for the same offense. *Russell v. United States*, 369 U.S. 749, 763-764, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). Under Crim.R. 7(B), an indictment is sufficient if it “contains a statement that the defendant has committed a public offense” and the statement may be in the words of the applicable section of the statute, “provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged.” See also *Hamling v. United States*, 418 U.S. 87, 117-118, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

{¶8} Schwarzman makes no argument that the indictment failed to contain a statement, couched in the words of the applicable statutes, sufficient to apprise him of the elements of the offenses with which he was charged.

Instead, he argues that the indictments did not contain sufficient distinguishing detail with respect to when those offenses occurred. He claims that the indictment charged acts occurring within the time span of one year, and barring a more limited time frame in which his acts allegedly occurred, he was unable to provide evidence in the form of employment records that may have provided an alibi.

{¶9} An indictment charging sexual offenses against children “need not state with specificity the dates of alleged abuse, so long as the prosecution establishes that the offense was committed within the time frame alleged.” *Yaacov, supra*, at ¶ 17. See also *State v. Triplett*, 11th Dist. Ashtabula No. 2013-A-0018, 2013-Ohio-5190, ¶ 44 (“In cases involving the sexual molestation of minor children, the state is not required to provide exact dates because the victims are simply unable to remember such facts, particularly where the repeated offenses take place over an extended period of time”). As we will show in more detail, the victim testified to time frames in which Schwarzman’s acts occurred. She did not give specific dates of when the abuse occurred, but the precise dates were not required for purposes of constitutional notice obligations.

{¶10} Schwarzman’s citation to the United States Court of Appeals for the Sixth Circuit decision in *Valentine v. Konteh*, 395 F.3d 626 (6th Cir.2005) does not dictate the resolution of this appeal. Valentine was charged with 20 counts of rape and 20 counts of felonious sexual penetration of a child occurring in the

ten-month span between March 1995 and January 1996. He complained that the wide date range specified in the indictment prejudiced his ability to offer alibi defenses. The Sixth Circuit acknowledged that “fairly large time windows in the context of child abuse prosecutions are not in conflict with constitutional notice requirements.” *Id.* at 632. It thus found that the date range itself was not problematic, but that “the prosecution did not provide the defendant with exact times and places.” *Id.* The Sixth Circuit found the lack of any dates particularly problematic because the child victim could only “describe[] ‘typical’ abusive behavior by Valentine and then testified that the ‘typical’ abuse occurred twenty or fifteen times.” *Id.* at 633.

{¶11} *Valentine* has no binding effect on Ohio courts. It has been criticized for applying law that does not apply to Ohio grand juries, misapplying and misrepresenting case authority, and being “distinguished in every subsequent Sixth Circuit decision that cites it on this issue.” *State v. Billman*, 7th Dist. Monroe Nos. 12 MO 3 and 12 MO 5, 2013-Ohio-5774, ¶ 34. Regardless of those criticisms, *Valentine* is distinguishable because the victim’s testimony in this case differentiated the acts of sexual molestation. The victim gave specific testimony as to what Schwarzman’s acts were, unlike that victim in *Valentine* who could only testify to a “typical” act that occurred 15 or 20 times. We therefore find that Schwarzman has failed to show that the lack of specificity in the dates listed in the indictment rose to the level of plain error.

### III

{¶12} Schwarzman next argues that the state offered insufficient evidence to show that the offenses occurred within the time frame alleged in the indictment. He maintains that the victim could only give approximate statements as to when the rapes occurred; for example, that they occurred when she was “approximately ten,” or when she was “approximately in the third grade,” and “approximately 2001.” He also argues that the state failed to prove when the rape alleged in Count 9 of the indictment occurred.

#### A

{¶13} The Due Process Clause of the Fourteenth Amendment “protects a defendant in a criminal case against conviction ‘except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.’” *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), quoting *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The relevant question “is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* This is a highly deferential standard of review because “it is the responsibility of the jury — not the court — to decide what conclusions should be drawn from evidence admitted at trial.” *Cavazos v. Smith*, 565 U.S. \_\_\_, 132 S.Ct. 2, 3, 181 L.Ed.2d 311 (2011).

B

{¶14} The version of R.C. 2907.02(A)(1)(b) in effect at the time Schwarzman committed his crimes stated: “No person shall engage in sexual conduct with another who is not the spouse of the offender when \* \* \* [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person.”

{¶15} “Ordinarily, precise times and dates are not essential elements of offenses,” *State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E.2d 781 (1985), but the date of the offense is an essential element of rape under R.C. 2907.02(A)(1)(b) to prove that the victim was less than 13 years of age at the time of the offense. Unlike rape as defined in R.C. 2907.02(A)(2) that requires the offender to use force or the threat of force, rape under of R.C. 2907.02(A)(1) is not defined by reference to force. Instead, rape under R.C. 2907.02(A)(1) is defined under terms in which the victim is unable to resist or consent to sexual conduct because of intoxication, age, mental, or physical condition. In terms of the victim’s age under R.C. 2907.02(A)(1)(b), the Committee Comment to the section states that the rationale for criminalizing sexual conduct with the prepuberty victim (commonly known as “statutory rape”) is that “the physical immaturity of a prepuberty victim is not easily mistaken, and engaging in sexual conduct with such a person indicates vicious behavior on the part of the offender.”

{¶16} Although the victim's age is an essential element of rape under R.C. 2907.02(A)(1)(b), the state need not establish precise dates of when the offense occurred, as long as a rational trier of fact could find that the victim was less than 13 years of age at the time of the offense. *State v. Nelson*, 8th Dist. Cuyahoga No. 54905, 1989 Ohio App. LEXIS 147 (Jan. 19, 1989); *State v. Bell*, 12th Dist. Butler No. CA99-07-122, 2001 Ohio App. LEXIS 1915 (Apr. 30, 2001).

C

{¶17} The victim testified that she was born in February 1991. When she was eight or nine years old, she, her mother, and two sisters moved into Schwarzman's house to live with him and his two daughters.

{¶18} In 2001, the victim recalled a time that she accompanied Schwarzman to his third-shift job at a retail store. When they arrived home, the victim's mother was at work and her sister and stepsisters were sleeping. As the victim headed up to her bedroom, Schwarzman pulled her by the arm into his bedroom. He undressed her, put on a condom, had her lay on the bed, and engaged in intercourse with her. When he finished, he fell asleep. The victim said she "stayed still" on the bed, not moving until Schwarzman awoke. He saw her sitting on the bed and said, "oh, you want some more." He then raped her again. She did not tell her mother for fear of being beaten.

{¶19} The victim recounted another occasion in 2001 when she was in third grade, when Schwarzman told her to come to the basement. He removed

her clothes, put on a condom, and began to engage in intercourse with her. He was interrupted, however, by the one of the victim's stepsisters. Schwarzman went over to the stepsister (his daughter) and told her not to say anything about what she saw because "daddy will go to jail."

{¶20} A rational trier of fact could find that the victim's testimony showed that Schwarzman's acts of rape occurred when she was less than 13 years of age. This testimony was sufficient evidence of the three counts of rape.

D

{¶21} The sole count of attempted rape relates to an incident in which a nude Schwarzman took the victim into the dining room of their house and was undoing the drawstring of her pants when her younger sister entered the room. After being discovered, Schwarzman ran into the bathroom. The victim said "[I pulled my pants up and I tied them in a knot" so that she could tell her sister that Schwarzman was trying to untie her pants because she was unable to do so.

{¶22} Originally charged as rape in Count 9 of the indictment, the count alleged the date of the offense as January 1, 2001 to December 31, 2001. When asked when this attempted rape occurred, the victim said, "I want to say '04." Likewise, the sister who witnessed the incident testified but was unable to give a year for when it occurred. When asked what school grade she was in at the

time she witnessed the incident, the sister said "I was maybe third or fourth, between third and fifth grade."

{¶23} The victim's 13th birthday occurred in February 2004, so it was possible that the attempted rape occurred before the victim turned 13 years of age. The sister said that she moved into Schwarzman's house in 2001, when she was in the second grade. Even if the sister was in the fifth grade at the time of the attempted rape (and assuming a typical school year running through at least the month of May), it was possible that the victim was not more than 13 years of age at the time of the offense.

{¶24} When ruling on the legal sufficiency of the evidence, we must view the evidence in a light most favorable to the state. On the evidence presented, a rational trier of fact could find that the testimony of either witness made it possible that the attempted rape occurred before the victim turned 13 years of age, even if outside the dates alleged in the indictment. When a defendant is charged with offenses against children under the age of 13, "[t]he only effect the date and time have on the offense is to show that the victims were under the age of thirteen at the time of the offense." *State v. Hupp*, 3d Dist. Allen No. 1-08-21, 2009-Ohio-1912, ¶ 9. That neither the victim nor her sister could remember the exact date of the offense does not render their testimony unpersuasive — any inconsistency goes to the weight of their testimony.

#### IV

{¶25} Schwarzman next argues that the jury's verdict is against the manifest weight of the evidence. He maintains that the state's evidence was uncertain and unreliable, that the witnesses were biased against him, and that the evidence was contradicted and even impeached by one of the state's own witnesses.

#### A

{¶26} The manifest weight of the evidence standard of review requires us to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Otten*, 33 Ohio App.3d 339, 340, 515 N.E.2d 1009 (9th Dist.1986).

#### B

{¶27} Schwarzman correctly notes that the state had no physical evidence to prove that he raped the victim. However, the victim gave testimony that was corroborated in significant respects by other witnesses. For example, the victim testified that Schwarzman used condoms when raping her and that the rapes often occurred in the basement laundry area of their house. The victim's mother testified that she was going through a pile of clothes in the basement

when she picked up one of Schwarzman's jackets. A jacket pocket contained approximately six used condoms, filled with semen and individually-wrapped in tissues. Thinking he was having an affair, the mother confronted Schwarzman. He told her that she was never home: an allegation that presumably affected the frequency of their sexual relations. Schwarzman told the mother that he discussed this lack of sexual intimacy with his boss, and that his boss suggested that Schwarzman masturbate but hide it from her by using a condom. A month after her original discovery of used condoms, the mother found more used condoms in another of Schwarzman's jackets.

{¶28} The discovery of the used condoms was significant for two reasons. First, the victim testified that Schwarzman used them when raping her, so the mother's discovery of the used condoms in a part of the house where the rapes often occurred substantially bolstered the victim's story. Second, the jury could find Schwarzman's explanation for the used condoms unconvincing, choosing instead to believe that his attempt to hide them manifested a consciousness of illicit conduct. In fact, Schwarzman's boss testified and denied telling him to masturbate while wearing a condom. The boss did, however, recall that Schwarzman told him about his wife wanting a divorce after discovering the used condoms. The boss's testimony was consistent with that of the mother, who testified that after finding the used condoms, she told Schwarzman that she wanted a divorce.

{¶29} Another example in which the victim's testimony was corroborated came when she testified that on one occasion when Schwarzman had been raping her on the basement couch, her mother and a friend arrived home unexpectedly. Schwarzman stopped, pulled up his pants, and told the victim to go to the washing machine and pretend to fold clothes. When the mother saw the victim, she asked her "what was going on?" The victim replied that she was laundering clothes for school and then went upstairs. The mother followed a few minutes later and the victim told her that she was upset because a boy had given her a bracelet as a Valentine's Day gift and Schwarzman told her that she had to return it. The mother testified to this incident, saying that when she came home with her friend, the victim ran out of the basement, crying. When asked what was wrong, the victim replied, "Mark." The mother went to the basement and had a conversation with Schwarzman in which she learned about the bracelet and that he ordered the victim to return it, saying that "[t]his is a no boy zone."

{¶30} The victim's testimony about being discovered in the dining room by one of her sisters was corroborated by the sister, who clearly recalled the incident. The sister testified that it was early morning and she noticed that the victim was not in the room they shared. She snuck downstairs and saw Schwarzman and the victim in the corner of the dining room, with the victim standing against the wall. When Schwarzman saw the sister, he ran to the

bathroom "really fast pulling up his pants." The victim told her sister that Schwarzman had been trying to help her untie her pants.

{¶31} The victim's siblings also testified that Schwarzman treated the victim as a favorite. He would introduce the victim to his friends as "his number one, this is my girl," but would refer to her sisters as "his wife's children." The victim's mother confirmed Schwarzman's favoritism, noting that he would give the other girls money for their birthdays, but that he would dress the victim "from head to toe," buying all kinds of clothing. He also offered to pay for the victim's education when he did not make the same offer to his own two children. The jury could have found this testimony showed that, with the victim being the object of Schwarzman's physical desires, his favoritism was a way of grooming her for his advances.

C

{¶32} Schwarzman challenges the victim's version of events by noting that she remained silent about the abuse for eight years and even chose to remain living with him after her mother moved out of the house.

{¶33} The victim testified that she did not disclose Schwarzman's abuse for two reasons: she was afraid of breaking up the family and thought that he was suicidal and would kill himself if she made the truth about him known. The jury could find that explanation convincing. What is more, even if the evidence did not show that Schwarzman groomed the child for sexual

molestation, there was testimony from multiple persons in the household that he treated her as his "number one," showering her with attention and gifts that he did not provide to the other girls in the household. The jury may well have believed that the level of attention that Schwarzman showered on the victim would have excused her, a mere child, from being able to understand why his conduct was wrong.

D

{¶34} One of the state's witnesses, the victim's stepsister who witnessed the rape in the basement, gave the police a statement about the incident. The stepsister said in the statement that Schwarzman saw her as he had intercourse with the victim. Schwarzman pulled his pants up and the stepsister left the basement. He later told her not to say anything about what she saw because he "didn't want to go to jail or something like that." The stepsister recanted her police statement on the witness stand, claiming that the victim put the idea of the incident in her head and that, being a "visual person," the stepsister said she "actually started to see these incidents in my head and believe them." She explained that she agreed to make a statement because she thought it would rekindle the close relationship that she and the victim enjoyed before the victim made her allegations against Schwarzman.

{¶35} The best that can be said for the stepsister's testimony is that she made it impossible for the jury to find her credible: she either lied in her sworn

police statement or she lied in her trial testimony. Or as the court noted, the stepsister could not be considered reliable. Her testimony helped neither party, so it cannot now be used to challenge the credibility of the state's other witnesses.

## E

{¶36} Finally, Schwarzman argues that the victim's inability to give specific times and dates of the rapes meant that the state's evidence was vague. As we earlier noted, it is not unusual for child sexual molestation victims to be vague on the times and dates of when the abuse occurred. This is particularly so when, as here, the abuse was ongoing for a period of years. The specific instances to which the victim testified were corroborated in large part by other witnesses, so the jury did not lose its way by finding the victim's testimony credible.

{¶37} We likewise reject Schwarzman's assertion that the victim lacked credibility because he was simply never home and available to commit the abuse as alleged. The evidence showed that Schwarzman worked two jobs; the first job from 8 a.m. to 5 p.m.; the second job from 11 p.m to 7 a.m. Even with these hours, the victim's testimony was that Schwarzman would summon her for sex in the early morning hours or in the evening when the victim and her sisters would go to bed. So despite Schwarzman's long work hours, he had the

opportunity to rape the victim. In addition, nothing in the evidence suggested that Schwarzman worked seven days a week or that he worked every week.

V

{¶38} The victim's mother testified that she first learned of the victim's accusations against Schwarzman when at a police station, after reading a book (described by the parties as a "diary") that the victim gave her. The state did not question the victim about the diary in her testimony, so Schwarzman objected to its contents as hearsay. The state told the court that it was planning to show the mother "this piece of paper and [ask] her if that is what she read." The court told the state, "[t]hat is all she can say." The mother went on to testify that she first became aware of what happened to the victim after reading the diary. When the state asked, "what was your reaction after reading that document," the court sustained a defense objection and told the state to "move on." Schwarzman argues that the court erred by allowing the state to ask if the mother first learned of the victim's allegations against him after reading the diary, so the diary was hearsay because it was offered to prove the truth of the victim's allegations against Schwarzman.

{¶39} The diary is a written assertion made out of court. However, it was not presented for the truth of the matter asserted and is, therefore, not hearsay. *See* Evid.R. 801(C). The state did not ask the jury to consider the diary entry as direct or indirect evidence of guilt, but only to show when the mother first

learned of the victim's allegations. Indeed, the direct allegations of the diary entry were not presented, so the jury was only aware that there were allegations of something sexual occurring between Schwarzman and the victim. The allegations were thus not presented for the truth of the matter asserted, so the diary entry was not hearsay.

## VI

{¶40} The state called the victim's stepsister to testify, and during her testimony asked her about the police statement she gave that detailed two instances in which she witnessed Schwarzman raping the victim. The stepsister admitted that she gave the statement, but claimed that it was false and brought about because she visualized the victim's allegations to the point where she believed that they actually occurred. The state then sought to impeach the stepsister on grounds that it did not anticipate that she would testify and recant her statement. The court allowed impeachment over objection, but prohibited the state from using the statement as substantive evidence and instructed the jury accordingly. Schwarzman complains that the state failed to show that it was surprised as a predicate for impeachment.

{¶41} Under Evid.R. 607(A), a party may not impeach its own witness with a prior inconsistent statement without showing surprise and affirmative damage. Surprise is shown when a witness's trial testimony is materially inconsistent with the witness's prior statements, and counsel had no reason to

believe that the witness would recant when called to testify. *State v. Holmes*, 30 Ohio St.3d 20, 23, 506 N.E.2d 204 (1987).

{¶42} There is no question that the stepsister's trial testimony was materially inconsistent with the statement she gave the police: the statement detailed two instances in which the stepsister claimed to have witnessed Schwarzman having intercourse with the victim, but the stepsister testified that she fabricated what she described in the statement. That recantation constituted material damage to the state's case.

{¶43} Schwarzman argues that the state had reason to believe that the stepsister would recant her testimony because the stepsister said that she twice called the detective who took the statement in an attempt to recant it. The stepsister's trial testimony showed, however, that she never spoke with the detective: "he never called me back or answered." It was thus unclear whether the detective even received the stepsister's message. With the absence of facts showing otherwise, the court found no basis for concluding that the state knew that the stepsister would recant her testimony. We cannot conclude that the court abused its discretion by finding surprise and allowing the state to impeach the stepsister under Evid.R. 607(A).

## VII

{¶44} Schwarzman called his next-door neighbor as a witness for the defense. The neighbor testified she moved into her house in 2010 and that up

until 2012 when the victim moved out of Schwarzman's house, the victim came to her house "quite often" to see her son. When asked for her "personal observations" of the victim, the neighbor said, "I really did not care for her." When the neighbor began to explain those observations, the state objected. Defense counsel explained that he wanted to impeach testimony by the victim who testified that she did not know the neighbor's son at all. The court sustained the objection on grounds that it was a "tangent" as to why the neighbor did not like the victim. In a proffer, the neighbor testified that she disliked the victim because she appeared to be sending her son mixed messages: despite having a steady boyfriend, she thought the victim would become extremely flirtatious with her son when the victim's boyfriend was away at college.

{¶45} The court did not abuse its discretion by sustaining the objection because the proffered testimony was irrelevant to any fact of consequence at trial. *See* Evid.R. 401. The court could rationally find, consistent with the state's argument below, that Schwarzman appeared to offer the testimony solely to paint the victim as a woman of poor character. That line of testimony would not only have been irrelevant, but remote in time because the victim's acts in 2012 had no relevancy to rapes that occurred in 2001.

{¶46} To the extent that Schwarzman believed the question was proper as a means of impeaching the victim, the court did not abuse its discretion in

disallowing it because the victim did not deny knowing the neighbor's son — she testified that the neighbor had five sons, but she could only remember the names of two of those sons. This contradicted defense counsel's assertion that "she said she didn't even know him." On that basis, we find no abuse of discretion.

## VIII

{¶47} At sentencing, the court merged the four kidnapping counts into their corresponding rape or attempted rape counts. The court imposed eight-year sentences on each of the three rape counts and the single attempted rape count. It ordered Schwarzman to serve Counts 3 and 5 concurrently and further ordered him to serve Counts 7 and 11 concurrently, but ordered Counts 7 and 11 to be served consecutive to Counts 3 and 5. This resulted in a total prison term of 16 years. Schwarzman's assignment of error complains that his sentence is contrary to law because it is disproportionate to his conduct and contrary to the principles and purposes of felony sentencing, but he does not independently argue those points. Instead, he maintains that the record does not support the court's findings for imposing consecutive sentences. He also argues that a minimum sentence would have achieved the objectives of punishing him without imposing an unnecessary burden on state or local resources.

{¶48} R.C. 2953.08 circumscribes appellate review of criminal sentences. Apart from limiting the type of errors that a defendant can claim on appeal, R.C. 2953.08 places tight restrictions on how an appellate court may review claimed sentencing errors. As always, a court of appeals may correct errors of law. See R.C. 2953.08(A)(4). The court's failure to make findings required by statute before imposing a sentence would render the sentence contrary to law. *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 12 (8th Dist.), citing *State v. Jones*, 93 Ohio St.3d 391, 399, 2001-Ohio-1341, 754 N.E.2d 1252.

{¶49} Schwarzman concedes that the court made the required findings necessary to impose consecutive sentences, but argues that those findings were not supported by the record. R.C. 2953.08(G)(2) states that an appellate court "may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing" if it "clearly and convincingly finds" that "the record does not support the court's findings" made when ordering a defendant to serve consecutive sentences under R.C. 2929.14(C)(4).

{¶50} Schwarzman does not say which of the three findings the court made pursuant to R.C. 2929.14(C)(4) are unsupported by the record — his brief states only that "[a]lthough the court made the statutory findings for imposing consecutive sentences and offered some reasons in support, this court should find, clearly and convincingly, that the record does not support the sentencing

court's findings. (Transcript generally, PSI)." Appellant's Brief at 35. This is a conclusion, not an argument as required by App.R. 16(A)(7). Schwarzman does argue that numerous witnesses testified to his "good character" as a family man, but that argument goes nowhere in light of the jury's verdict finding that he raped his ten-year-old stepdaughter on multiple occasions.

{¶51} For similar reasons, we reject Schwarzman's argument that the length of his sentence placed an unnecessary burden on state and local resources in violation of R.C. 2929.11(A). At the outset, we note that it is unclear whether a defendant has standing to argue that a sentence imposes an unnecessary burden on state or local resources. Apart from the obviously self-serving nature of the argument, *see State v. Carlisle*, 8th Dist. Cuyahoga No. 93266, 2010-Ohio-3407, ¶ 32, it would be the state or local officials who actually allocate funds to house prisoners who would be in the best position to argue that a sentence imposes an unnecessary burden on their resources. The state has made no objection that Schwarzman's sentence placed an unnecessary burden on its resources.

{¶52} In any event, although the court did not specifically mention division (A) of R.C. 2929.11 when imposing sentence, it did state that it considered all required factors of the law and it determined that a prison sentence was "consistent with the purpose of R.C. 2929.11." By stating that it had considered all required factors of the law, including a specific mention of

R.C. 2929.11, the court fulfilled its obligations. *See State v. Kamleh*, 8th Dist. Cuyahoga No. 97092, 2012-Ohio-2061, ¶ 61.

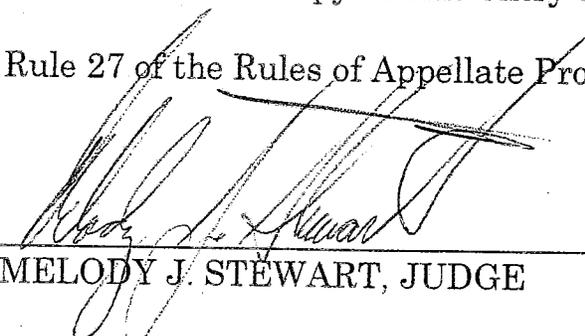
{¶53} Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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



---

MELODY J. STEWART, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and  
SEAN C. GALLAGHER, J., CONCUR