[Cite as *State v. Dew* , 2009-Ohio-6537.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 62
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
GREGORY DEW,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 07 CR 1262.
JUDGMENT:	Affirmed in Part, Reversed in Part and Vacated in Part.
APPEARANCES:	
For Plaintiff-Appellee:	Attorney Paul J. Gains Prosecutor Attorney Ralph M. Rivera Assistant Prosecutor 21 W. Boardman St., 6th Floor Youngstown, OH 44503
For Defendant-Appellant:	Attorney Richard G. Lillie Attorney Gretchen A. Holderman Lillie & Holderman 75 Public Square, Suite 1313 Cleveland, OH 44113
JUDGES: Hon. Mary DeGenaro Hon. Joseph J. Vukovich Hon. Cheryl L. Waite	
	Dated: December 1, 2009

[Cite as *State v. Dew* , 2009-Ohio-6537.]
DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this court. Appellant, Gregory S. Dew, appeals the decision of the Mahoning County Court of Common Pleas that convicted him of four counts of rape, two counts of gross sexual imposition, and one count of corruption of a minor and sentenced him accordingly. On appeal, Dew argues that the trial court erred by denying his motion to suppress a phone conversation between him and one of the victims that was intercepted and secretly recorded by police. Dew also argues the trial court erred by denying his motion for relief from prejudicial joinder. Further, Dew contends his convictions for rape and gross sexual imposition were based upon insufficient evidence, with respect to the "force" element of those crimes. Finally, Dew argues that his conviction on all counts was against the manifest weight of the evidence.

{¶2} Upon review, Dew's third assignment of error is meritorious, in part. More specifically, Dew's gross sexual imposition conviction involving Patient B, and his rape conviction involving Patient C are not supported by sufficient evidence, because the State failed to set forth evidence of "force or threat of force." However, all of Dew's other assignments of error are meritless. Dew's remaining convictions are not against the weight or the sufficiency of the evidence. The trial court properly denied the motion to suppress, as the applicable law—that of Ohio—allows police to record a phone conversation between a consenting informant and a non-consenting defendant without a warrant. The trial court did not abuse its discretion by denying Dew's motion for relief from improper joinder since the evidence of each set of crimes was simple and direct. Accordingly, the judgment of the trial court is affirmed in part, reversed in part and vacated in part.

Facts

{¶3} On October 13, 2006, Gymnast A and Gymnast B contacted Boardman Township Police to report they had been sexually abused by Dew during the 1990's, when Dew served as their gymnastics coach. Gymnast B agreed to set up a phone call with Dew, which was secretly recorded by Boardman police. Dew also made both oral and written statements to police on March 15, 2007.

{¶4} On March 22, 2007, the Mahoning County Grand Jury indicted Dew on three counts of sexual battery, pursuant to R.C. 2907.03(A)(9)(B) with respect to Gymnast A. This indictment was subsequently dismissed because the version of the sexual battery statute under which Dew was charged was not in effect when the alleged acts were committed back in the early 1990's. However, prior to the dismissal of that indictment, the Grand Jury reconvened and issued a superceding indictment on May 10, 2007, charging Dew with three counts of rape, pursuant to R.C. 2907.02(A)(2)(B), involving Gymnast A; one count of corruption of a minor, pursuant to former R.C. 2907.04(A), involving Gymnast A, and, one count of gross sexual imposition, pursuant to R.C. 2907.05(A)(1), involving Gymnast B.

{¶5} During the course of the police investigation in Case No. 07-CR-378, three other women came forward with allegations against Dew: Patient A, Patient B, and Patient C. These allegations stemmed from Dew's more recent conduct while he was treating these women as their chiropractor. As a result of these allegations, in a case styled 07-CR-1262, the Grand Jury issued a superceding indictment, which, as amended, charged Dew with three counts of gross sexual imposition, pursuant to R.C. 2907.05(A)(1)(B) involving Patient B; twelve counts of gross sexual imposition, pursuant to R.C. 2907.05(A)(1)(B), involving Patient A, and, three counts of rape, pursuant to R.C. 2907.02(A)(2)(B), involving Patient C.

{¶6} The two cases were subsequently consolidated and joined for trial. Dew pled not guilty to the charges in both superceding indictments, and waived his speedy trial rights. Dew filed several pre-trial motions, among them, a motion to suppress the recorded conversation between Gymnast B and Dew; a motion to suppress Dew's written and videotaped statements made to Boardman Police; and, a motion for relief from improper joinder, all of which were overruled, following a hearing.

{¶7} The following evidence was adduced at trial. Gymnast A testified she first met Dew in 1986 when she was eleven years old and Dew was twenty-six years old, when Dew began coaching her in gymnastics. Dew coached her for approximately five years, until 1992 when he moved to Iowa to attend a chiropractic college. Gymnast A

spent a significant amount of time training at the YGC and explained that Dew controlled many aspects of her life, such as what she ate, drank, when she slept, and how she wore her hair and clothing. Outside of the gym, Dew would pay attention to her grades in school and chaperone school dances. Gymnast A said she trusted Dew and looked up to him. She stated that Dew liked when people called him "Mr. Wonderful," that everyone thought he was a "great person." Gymnast A testified that her parents separated in 1989-1990 after a twenty-two year marriage and that she looked to Dew as a confidant and often discussed the divorce with him.

{¶8} Gymnast A testified that, over time, as she progressed to a higher level of gymnastics, at the age of thirteen years old, she spent a lot of time with Dew and that he began to profess his love for her and comment about how he liked her body. This progressed to Dew telling Gymnast A about dreams and sexual fantasies he had about her. When Gymnast A was fifteen years old, Dew began telling her that the two of them were "in love" and that when you are in love you do certain things for the other person, including things of a sexual nature. Gymnast A stated that Dew would make these comments to her discreetly while she was at the YGC for practice. Gymnast A testified that Dew then started kissing her, touching her, and instructing her how to touch his penis. One time when Gymnast A went to Dew's home for lunch between practices, Dew attempted vaginal intercourse with her, but she stopped him because it hurt.

{¶9} Gymnast A stated that, at around that same time, Dew began performing oral sex on her and digitally penetrating her vagina. Gymnast A stated she would also perform oral sex on Dew. She stated that the oral sex and digital penetration took place at the YGC, at Dew's home in Boardman and in Dew's vehicle. Gymnast A stated that when these sexual acts occurred, Dew would tell her she was beautiful and try to reassure her that he loved her. Gymnast A also described a specific incident that occurred at a hotel when she was travelling for a competition. Due to space constraints, Dew shared a hotel room with Gymnast A and her mother, with the two women sharing the bed and Dew sleeping on the floor. Gymnast A stated that in the middle of the night, Dew reached under the covers, digitally penetrated her vagina and performed oral sex on

her while she lie next to her sleeping mother. Gymnast A testified that at least one act of oral sex occurred between March 10, 1990 and December 31, 1990, that at least one act of oral sex occurred between January 1, 1991 and December 31, 1991, and that at least one act of oral sex occurred between January 1, 1992 and September 1992, all in Mahoning County. She was never married to Dew.

{¶10} Gymnast A described an incident that took place in 1992 at Dew's Boardman home shortly before he departed for school in Iowa. She stated that Dew held a going-away party at his house and that she spent the night there along with fellow Gymnast B, who was a year younger than her. Gymnast A testified that Dew began kissing both her and Gymnast B and that this progressed to touching and grabbing. She testified that Dew told both girls how much he loved them and how great they were. Gymnast A testified that she was able to stay overnight at Dew's home because she told her parents she was staying the night at Gymnast B's home. According to Gymnast A, Dew's wife was not home that evening.

{¶11} Gymnast A said that she was intimidated by Dew because of his large build, and the fact that others saw him as a role model and respected him. She also felt intimidated because she knew that Dew carried a knife and a gun. Gymnast A stated that Dew did not directly threaten her with these weapons, but that he showed them to her, telling her he carried them for protection. Gymnast A stated she believed if Dew told her to do something, that it was the "right" thing to do.

{¶12} She decided to come forward with allegations to police because upon becoming a gymnastics coach herself, she realized the wrongfulness of Dew's conduct. Upon learning that Dew had moved back to Ohio and was in a position of authority over others, Gymnast A said she felt "really bad" that she had not come forward sooner.

{¶13} On cross, Gymnast A admitted she lied to her parents in order to stay overnight at Dew's house with Gymnast B for the going-away party. She admitted Dew told many people that he loved them, and that it was common for Dew to hug people. She admitted her parents owned the YGC, but said nonetheless she was alone with Dew often.

{¶14} Gymnast B testified she began gymnastics training at the YGC at the age of three, and met Dew when she was eight or nine years old, at which time he coached her part-time. By age thirteen, Dew became her full-time coach, and she spent about twenty hours per week training under him. Gymnast B also testified that many people called Dew "Mr. Wonderful." She said Dew told her what to do inside the gym and to some extent outside of the gym. She stated there was a disciplinary system in place at the gym, and that if gymnasts were not on-task they would have to do push-ups, conditioning or run laps.

{¶15} Gymnast B stated that over time her relationship with Dew began to change. She described one incident where she was standing on a four-foot high platform in the gym and Dew told her he would not let her down until she told him she loved him. She stated that at first she refused to say it, but that eventually she complied because, "he was a lot bigger than me and wasn't letting me down."

{¶16} Gymnast B explained that Dew began to tell her sexually-oriented stories and used sexual innuendos. Dew would also rub her abdominal muscles during practice and one time grazed her breast. Gymnast B stated this behavior made her feel awkward, because she knew it was wrong and weird; scared because Dew was her coach and she did not want to get him in trouble; but also special because of the additional attention she was receiving from Dew.

{¶17} One time at a hotel while travelling for a competition, Gymnast B went in a hot tub with Dew. She said that Dew placed his hand underneath her bikini bottom, at the top of her buttocks, and told her he liked her "fuzziness." She stated this made her feel awkward, scared, and uncomfortable.

{¶18} Gymnast B stated she did not feel comfortable telling her parents about Dew's conduct. She said she looked up to Dew, and did not want to get him in trouble, despite the fact that she knew his actions were wrong. Gymnast B testified that shortly before Dew moved to Iowa, when she was fifteen years old, she also learned about Dew's relationship with Gymnast A.

{¶19} Gymnast B described several other incidents where Dew touched her

inappropriately. One time at a highway rest-stop Dew grabbed her and kissed her. Another time, while giving her a massage at her mother's condominium, Dew unhooked her bra and touched the sides of her breasts. Gymnast B stated she felt confused, scared, disappointed, and sickened by Dew's actions.

{¶20} Gymnast B described another incident where she kissed Dew in the aerobics room at the YGC. She remembered being so nervous that she was shaking. When Dew asked why she was shaking, she said she was nervous and scared because she did not feel the behavior was proper. She said Dew told her that as long as they loved each other, it was okay. Gymnast B described another incident at a graduation party when she went for a walk with Dew and kissed him. She stated Dew attempted to put his hand down her pants but that she resisted.

{¶21} Gymnast B also described the going-away party where she and Gymnast A stayed overnight at Dew's house. She testified that Dew would alternate between kissing her and kissing Gymnast A. Gymnast B stated that when Gymnast A left the room Dew had Gymnast B's shirt off and was touching her breasts and kissing her breasts. She said Dew told her and Gymnast A he loved them and that it was all okay. She said Dew had a way of convincing the two of them that as long as they all loved each other, "everything was fine no matter what we did." She said if Dew told them to do something, they would do it.

{¶22} Gymnast B testified that her home life at the time those incidents occurred was difficult. She said between ages eleven and thirteen her parents divorced and her mother remarried. She looked to Dew as a father-figure and spent a lot of time at the YGC with him, where she often discussed her parents' divorce. She stated that all of the incidents she described occurred during the spring and summer of 1992.

{¶23} Gymnast B testified she kept in contact with Dew after he moved to Iowa at the end of the summer of 1992. Gymnast B kept the letters Dew sent her over the years, and these were subsequently admitted into evidence. Among other things, Dew asked Gymnast B to send "lovely pictures, refers to her "fuzzy butt cheeks." Gymnast B alleged that Dew also asked her to engage in a sort of pen-pal version of fellatio.

{¶24} After her senior year in high school, she met with Gymnast A and Dew when both were visiting the Youngstown area. Gymnast B testified that Dew explained to them that he knew his actions were wrong, that it should not have happened, that he told his wife, and that he had sought counseling. According to Gymnast B, at the end of that meeting Gymnast A told Dew she never wanted to see him again. Gymnast B subsequently saw Gymnast A on her own a few times while in college, and said that one time Gymnast A broke down crying. Gymnast B said both women then decided they could not maintain a friendship because it was too emotional for them both.

{¶25} Gymnast B testified she contacted Gymnast A in March 2006 because she wanted to see if Gymnast A was suffering from similar emotional issues due to her past relationship with Dew. Gymnast B said she decided to come forward because she did not want similar incidents with Dew to happen to anyone else. Gymnast B had also learned that Dew was a chiropractor in the Mahoning Valley and that kids from the YGC were seeking treatment from Dew, a situation Gymnast B perceived as unsafe.

{¶26} Gymnast B spoke to Boardman Police in 2006 to report Dew's conduct. Upon Detective Doug Flara's suggestion, she set up a phone call with Dew that would be secretly recorded by the police. A recording of that phone call was then played for the jury and was subsequently admitted into evidence over Dew's objection. During that conversation, Dew and Gymnast B discussed the going-away party at Dew's home. Dew recalled that when Gymnast A left the room, Gymnast B's shirt was off, but her pants were on. He stated that night where he "had her shirt off" was the only "physical contact" between them that he could remember. He stated that the "physical thing I did with you guys was 100% wrong." Dew also discussed his relationship with Gymnast A. He stated that Gymnast A started the affair by kissing him, and that he tried to stop it four or five times to no avail. He stated that he and Gymnast A never had sexual intercourse. When Gymnast B responded that "even oral sex is sex," Dew remarked that "yeah, that's why I said *intercourse*." He stated he was only "physical" with Gymnast A about eight or ten times, most of which occurred after he married in November 1990. He admitted he had "oral contact" with Gymnast A. Later, Dew specifically admitted having "oral sex" with

Gymnast A.

{¶27} On cross-examination, Gymnast B stated that after Dew moved to Iowa, she felt he retained some control over her, even though he was no longer her coach. She agreed this control could have been "in her mind" at that point. When asked about the platform incident that occurred at the YGC, Gymnast B agreed she physically could have dismounted from the platform without Dew's assistance. She agreed that Dew said "I love you" to a lot of people. She admitted that, prior to contacting police, she had researched whether Dew's conduct constituted a crime and whether the statute of limitations had run. She agreed she has seen a therapist and that she has had troubled relationships with men. She testified that although she did refer to Dew as a "father figure," she also probably had a crush on him at one time.

{¶28} Gymnast B admitted that "to a degree" she was jealous of Gymnast A, because Gymnast A was older, a better gymnast and had more of Dew's attention. When asked if Dew ever forced her to do anything, she stated: "Physically? * * * No." She admitted that the letters between her and Dew never specifically mentioned any sexual acts between the two of them, other than kissing. She admitted she also wrote letters to Judy, Dew's wife. She agreed that she asked Dew for a letter of recommendation in 2000.

{¶29} On redirect, Gymnast B agreed that although Dew never "held a gun to her head," she was a teenager, and Dew was an adult in a position of authority, and therefore she did what he wanted her to do.

{¶30} Carole Corrigan, a gymnastics coach at the YGC from 1983 to 1998 testified about the role of gymnastics coaches generally, and stated that coaches are responsible for the safety of the students, and that if a coach instructs a student to do something, that they do it. She worked with Dew at the YGC and said his duties included teaching the students the various gymnastics elements, doing drills with them, and ensuring their safety with various skills. She stated Dew would also travel with the gymnasts to competitions and prepare them for competitions. She conceded she never saw anything improper happen between Dew and Gymnast A. On cross, Ms. Corrigan agreed that

Gymnast A's mother owned and operated the YGC and that it was a very busy place.

{¶31} Patient C testified she received chiropractic care from Dew at his clinic in Mahoning County. She said the first few times she was treated by Dew she received a "normal adjustment" on her back, which did not really relieve her pain because the problem was actually with her tailbone. After receiving several treatments, Dew told Patient C that he could perform an internal coccyx adjustment that could help with the tailbone pain. Patient C said she was familiar with this type of procedure because her late sister had it successfully performed on her. Patient C described the internal coccyx adjustment as an adjustment of the tailbone (coccyx) that is performed "digitally through the rectum."

{¶32} Patient C said Dew performed the first internal coccyx adjustment on her in May 2005, and that it was quick and not really painful. However, the second or third time Dew performed the procedure she experienced more pain and bled from her rectum for several days thereafter. She said a chaperone was always present during these procedures, and Dew's finger was always gloved. Over objections, she stated that she now believes that incident constituted abuse, although she did not realize it at the time. However, Patient C said she continued to allow Dew to perform the procedure even after the painful experience.

{¶33} Patient C then described three occasions where Dew placed his finger inside her vagina while performing the internal coccyx adjustment procedure. The first occurrence happened at the beginning of 2006. She testified she presented for the internal coccyx adjustment and lie face-down on the examination table, draped with a gown. Instead of placing his finger in her rectum as usual, Dew very quickly placed his finger inside her vagina, then removed the finger, placed it inside her rectum, and performed the internal coccyx adjustment as usual, all without comment.

{¶34} The second incident happened at a subsequent appointment after Dew had attempted to perform the coccyx adjustment rectally. Patient C testified that Dew informed her "I can't get it. I'll have to go up the other way." Patient C said she then consented to Dew performing the adjustment through her vagina, because she trusted

him. She stated Dew proceeded to do the adjustment vaginally, but that he did not change his glove in between. Patient C testified that the third incident happened much like the second, and that it "felt kind of like a gynecologist exam," and was slightly painful. She stated that Dew "just poked around a little and I thought he was using a different method to get my tailbone lined up."

{¶35} She stated she decided to come forward after seeing a story on the news about Dew's arrest. She said she then realized she had been abused. She testified it took her a while to come forward because she was embarrassed and because she felt bad for Dew's family.

{¶36} On cross, Patient C agreed Dew always afforded her the opportunity to decline or accept the procedures. She also agreed she had been experiencing tailbone pain for twenty-five years and that the internal coccyx procedure was the only thing that helped her. She testified that Dew treated her for approximately two years, and she continued to voluntarily seek treatment from Dew even after the incidents of vaginal penetration. She explained she had some concerns about those incidents at the time but dismissed them because of the presence of the chaperone and because she thought Dew was a nice guy.

{¶37} Patient B testified she received chiropractic treatment from Dew between September 2006 and January 25, 2007 to treat her back, neck and hip problems. She stated that several times she was treated by Dew directly after performing physical therapy exercises and that Dew commented that he liked it when she got all sweaty. She testified that one time when Dew was performing a massage on her, he pulled down her underwear to massage her buttocks and commented that she was wearing matching undergarments and she must have done so for his benefit. She stated these comments began in November or December 2006 and that she initially found them weird and unprofessional. However, she said she trusted Dew, that he was doing a good job on her back, and that he was "pretty much in charge," so she figured she could deal with his "strangeness." She then began having problems with her hips due to spending a lot of time on airplanes, and Dew treated her by massaging her bare buttocks. At the time she

felt okay about that particular treatment because she knew Dew held a degree permitting him to perform massages.

{¶38} Patient B testified that at a visit on January 25, 2007, Dew "crossed the line" with her. Dew undid her clothing and gave her a massage while she was strapped down on the table. She said that Dew ran his fingertips along the sides of her bare breasts in a tickling motion. She said she was scared and froze, afraid to move. She stated that she started to sweat out of fright, and that Dew told her he could tell she was getting all excited because she was sweaty. She said Dew then told her: "if you roll over, I can take care of the rest of your problems for you." Patient B stated that she was literally so scared she could not move, and in fact, did not move until Dew put her clothes back on and readjusted her bra. She said Dew then manipulated her neck, and when he was done she left the office, and never returned for another appointment

{¶39} Patient B admitted she has a civil suit pending against Dew. She stated she first went to police and reported the incident but was told by the detective that other unrelated charges were pending against Dew and therefore criminal charges resulting from her allegations might not go forward. Thus, Patient B said she decided to commence the civil suit against Dew to make sure he "paid" for his conduct in some way. She stated she was really affected by Dew's actions and that she did not sleep for weeks. She said she was worried because Dew knew where she lived and knew she had children. She said she was afraid Dew would come after her. Patient B testified she never went back to Dew's office after the incident that took place on January 25, 2007.

{¶40} On cross, Patient B agreed that nobody ever heard the "weird" statements Dew made to her. Patient B agreed that when Dew had her strapped down on the examination table, the strap was only around her ankles and that it would have been easy to slip it on or off. She agreed that Dew's office was very busy and there were always a lot of people there. When defense counsel asked her if she was aware that the "tickling" she described was actually a legitimate procedure called "nerve stoking" or "effleurage," Patient B stated: "What he was doing was not nerve stroking. You don't make comments like that when you're nerve stroking."

{¶41} Patient B agreed that a guilty verdict in this case would likely be helpful to her civil suit against Dew. She agreed that for several months prior to her initiation of treatment with Dew she had been suffering from mental and emotional problems, in therapy and taking sleep and anxiety medications, which could cause side-effects.

{¶42} Two employees at Dew's clinic, Crystal Moisson and Jennifer Schaffer testified that after Dew was suspended from practicing there, Dew called them to request that his lab coat be retrieved or washed. Ms. Schaffer testified that Dew was talking very quickly, and that she had heard him talk that way in the past once before, when he was unprepared for something and trying to get out of trouble.

{¶43} Dr. Thomas Montgomery, a chiropractic physician from Cortland, Ohio testified as an expert for the State. He first discussed Dew's treatment of Patient C. He characterized the internal coccyx adjustment procedure as "pretty rare," and "very painful," and generally performed on the patient only once. He said he performed it only two times in twenty-eight years of practice. Based on a review of Patient C's medical records he did not believe that that the repeated use of the internal coccyx adjustment procedure was warranted.

{¶44} Dr. Montgomery testified that within his discipline to a reasonable degree of chiropractic certainty, the internal coccyx adjustment procedure would never be performed vaginally. He said he is familiar with many schools of chiropractic thought and had never heard of the vaginal procedure. He stated that mechanically speaking it would "make no sense" to perform the internal coccyx adjustment through the vagina, because "you'd only be moving further away from the problem, not closer." He further stated that a chiropractor's finger would never end up in a patient's vagina relative to an internal coccyx adjustment or any other chiropractic procedure.

{¶45} With regard to Patient B's treatment, Dr. Montgomery testified that based on a review of her records he saw no indication of a condition warranting a massage of the lower buttocks. He testified that to a reasonable degree of chiropractic certainty, there would never be a need to stroke the sides of a patient's breasts. He said he is familiar with a technique called effleurage, which consists of light stroking of the skin, and that it

can be part of a chiropractic continuum of care. However, he stated the use of that procedure on the sides of the breasts would not be indicated by Patient B's medical records, and that it constituted inappropriate treatment.

{¶46} On cross, Dr. Montgomery conceded that it would be possible to manipulate the coccyx through the vagina. Dr. Montgomery testified that although he personally would not perform a massage on a patient like Patient B, that it could be done and would not be totally inappropriate. He agreed that chiropractors are taught in school to use skin-on-skin manipulation, that it would not be inappropriate to ask a patient to remove a garment, and that it is possible during treatment that the doctor's hand might accidently graze the breast areas. Dr. Montgomery testified that he was unaware of vaginal coccyx adjustment procedures being taught in chiropractic schools or being legal in some states.

{¶47} Detective Doug Flara of the Boardman Police Department testified about his investigation of the allegations against Dew. He said he was involved in the recording of the telephone conversation between Gymnast B and Dew. Upon Det. Flara's request, Dew came to the station for questioning, of his own free will, and made two written statements, which were subsequently admitted into evidence. Det. Flara read the following passage from Dew's written statement regarding Gymnast B and Gymnast A:

{¶48} "I was the gymnastics coach for Gymnast A and Gymnast B in 1990. During that time, there were several instances where I touched Gymnast A inappropriately. There was a time when I touched Gymnast B inappropriately as well. I touched Gymnast A in the chest and groin region. At one time I tried digital penetration, but stopped due to the causing her discomfort. I touched Gymnast B's chest. This interaction was consensual. The incidents with Gymnast A occurred over a period -- a prolonged period of months, and mainly included hugging and kissing. I do not recall significant oral sexual contact occurring with either person."

{¶49} Det. Flara's conversation at the station that day with Dew was recorded and was played for the jury at trial. During the interview, Dew gave a clinical explanation of his treatment of Patient B. He denied any misconduct, and attempted to explain Patient B's allegations by stating she had misconstrued the treatment, perhaps because she was

overworked, depressed, and had a history of sexual abuse.

{¶50} When questioned about Gymnast A., Dew admitted he had a relationship with her, and said it consisted of mainly kissing and hugging. However, he also admitted touching Gymnast A's chest and genitalia. He claimed he never had intercourse with Gymnast A, and never penetrated her. When asked about the going-away party at his house, Dew admitted he touched Gymnast A's genital regions and touched both girls' chests. When asked about having oral sex with Gymnast A, Dew first said he could not remember if that happened. Subsequently, he stated it was possible that oral sex occurred, but he could not recall a specific time and place where it occurred. Dew then stated that if oral sex did occur, it was short and brief – nothing ongoing. Dew admitted he possibly penetrated Gymnast A's vagina with his finger, but denied penetrating her with his penis. When confronted with Gymnast A's statement that he had attempted vaginal intercourse with her, Dew stated that perhaps she mistook his finger for his penis. He admitted to "rubbing Gymnast B's chest" at the going-away party. Notably, Dew also told Det. Flara that when you coach someone in gymnastics, you are "saving their lives on a daily basis," meaning they are counting on you to physically save them, because they perform "death-defying stunts." Dew stated this "creates a huge bond of trust" between the coach and the gymnast.

{¶51} On cross, Det. Flara agreed he made several comments to "soften Dew up" during his the interview, namely, that "you know how teenage girls can be," and that Gymnast B and Gymnast A told him they consented to the sexual activity (when in fact they never said that). Det. Flara said he made the consent comment in an effort to inspire more conversation and to get Dew to tell the truth.

{¶52} The State then rested its case, and Dew made a Crim.R. 29 motion as to all counts, which was subsequently overruled.

{¶53} Dew's wife Judy testified in her husband's defense. She met Dew when she was a teacher at the YGC. She stated Dew often hugged people and told everybody he loved them. She said she knew Gymnast A and observed Gymnast A being very "possessive" of Dew, meaning Gymnast A was always near him and wanted his attention.

Judy stated this behavior worsened after she married Dew. Judy testified she knew Gymnast B and never suspected anything improper happening between her husband and Gymnast B. Judy testified she knew Dew corresponded with Gymnast B after their move to Iowa, and that she herself wrote to Gymnast B, as well. Judy claimed she was at home with her young son the night of the going-away party with Gymnast A and Gymnast B, and recalled Dew taking the girls back to the YGC the following morning. She recalled getting up in the middle of the night several times to tell them to be quiet and to breastfeed her son. She said she consented to Gymnast A and Gymnast B coming over that night, but was not happy about it because she and Dew were scheduled to move to Iowa the next morning. Judy testified she loves her husband very much, but would not lie for him. She stated her family is very religious, and that their church holds them to very high standards, meaning they do not smoke, drink alcohol, drink caffeine or watch R- or X-rated films. She stated she does not believe any of the allegations against Dew are true.

{¶54} Doreen Stanley, who was a receptionist at Dew's clinic for almost two years, testified that she never heard complaints of a sexual nature while working for Dew, and that she never felt uncomfortable with him as a patient. She remembered Patient C, and stated she never observed Patient C uncomfortable or unhappy. She recalled that another employee would always accompany Patient C into the exam room with Dew for treatment. She characterized Dew's office as "a zoo," with people constantly coming in and out for various treatments. On cross, Ms. Stanley agreed she never went into the exam rooms with Dew, and that she was at the front desk most of the time. She stated she would often interrupt Dew to ask him to sign paperwork or answer a question. She stated she would not believe it if she was told Dew had sexual relations with a fifteen-year-old girl, and that she thought Dew was "truly a nice guy."

{¶55} Dew also testified in his own defense. He first talked about his relationship with Gymnast A. Dew testified that beginning in 1990, Gymnast A became "aggressive towards [him] physically." He said this behavior began when one night at the gym Gymnast A "threw both her arms around [him] and kissed [him] on the mouth." He stated

that approximately one week later Gymnast A told him it was a good thing he did not tell her mother what happened because her mother would fire him if she found out. Dew alleged that Gymnast A was very unhappy about his marriage and his wife's pregnancy, and that she became very possessive of him after these events occurred. However, Dew denied ever leading Gymnast A to believe there was a relationship between them. Dew agreed he told Gymnast A he loved her, and stated he tells that to everyone.

{¶56} He claimed there was never time nor opportunity for him to sneak away with Gymnast A during practice, and that her allegations that any inappropriate conduct took place in his car or at his home were untrue. He further stated he did not live in Boardman during the summer of 1990, and that therefore nothing could have happened there at that time. His bank statements from this time period were later entered into evidence, in an apparent attempt to prove his residence. Further, Dew denied that Gymnast A ever touched his penis, sat on his lap, or engaged in oral sex with him. He denied inappropriately touching Gymnast A in the hotel room while her mother lay asleep next to her.

{¶57} He agreed he would comment about Gymnast A and Gymnast B's bodies, but claimed this is something a gymnastics coach must do. Dew claimed he never told gymnasts what to eat or how much to sleep. He said he was never authoritarian, never disciplined gymnasts, and did not keep a knife or gun in his car. He admitted he kept a pocketknife in his gym bag, but stated: "it was not a weapon," rather a "cool tool." He said he never gave Gymnast A any reason to believe that if she did not have sexual relations with him of any sort that he would somehow endanger her safety at the YGC.

{¶58} Dew then attempted to explain some of the statements he made during the tape-recorded conversation with Gymnast B. He said when he stated he had relations with Gymnast A eight or nine times that he meant hugging and kissing, more specifically incidents where Gymnast A would jump on him and kiss him. He described the difference in his mind between "oral sex" and "oral contact." He said "oral sex" means mouth contact on the genital regions. By contrast he said that the "oral contact" (to which he referred during the taped conversation) meant any oral contact on areas of the body

between the knees and the neck. He claimed that in his religious training growing up such so-called oral contact was forbidden.

{¶59} Dew went on to describe one incident of inappropriate "oral contact" with Gymnast A, which he said occurred in 1991 at a hotel room when they were travelling for a competition. He said the gymnasts were at the hotel pool and that Gymnast A came up to his room to ask if she could use some towels from his bathroom. He said that Gymnast A then told him she wanted him to be the first person to have sex with her and that she "jumped up on [him] and pulled her bathing suit aside and kind of pushed her chest into [his] face." Dew stated he pushed Gymnast A off of him and told her to leave.

{¶60} Dew then talked more about his interview with Det. Flara. He stated he did not sleep the night before and did not eat breakfast that morning. He said he was up researching so he would be prepared to discuss Patient B's allegations. He said he did not expect to be questioned about Gymnast A and Gymnast B. He said he had never been in trouble before, never been in a police station and had never been interrogated by police. He said he agreed to talk to Det. Flara about Gymnast B and Gymnast A because he was brought up to respect authority figures. He claimed that despite all of his advanced education, he did not really realize the ramifications of making a statement to police. Dew claimed that when he spoke to Det. Flara about other instances of inappropriate contact, he meant kissing. Dew stated that sometimes Gymnast A would go though bouts of depression and he would "let her kiss [him]."

{¶61} Dew then spoke about the going-away party at his house. He stated he allowed Gymnast B and Gymnast A to come over that night because they wanted to see him one last time before he moved away. He testified his wife and son were both present that night, and that it was his understanding that both Gymnast A and Gymnast B's parents knew of their whereabouts. He stated that after Judy left the living room, Gymnast A kissed him, in front of Gymnast B. Dew testified he felt uncomfortable about this, but did not ask the girls to leave because he did not want to hurt their feelings. Instead, Dew said he decided to kiss Gymnast B, in an attempt to make Gymnast A upset and stop her advances towards him. He said that at the end of the night, when the lights

were out, Gymnast A went to the bathroom and he went to the kitchen. He said that unbeknownst to him, Gymnast B had removed her shirt while he was out of the room. He said he only realized her shirt was off when he went to kiss her good-night and his hand accidently cupped her bare breast.

{¶62} Dew denied the other allegations made by Gymnast B. He admitted giving her massages in the context of coaching, but denied touching her breasts during the massages. He provided explanations for some of the comments he made to Gymnast B in his letters to her. For example, he said that by asking for "lovely pictures" he did not mean nude photographs.

{¶63} With regard to Patient C, Dew testified he tried several less invasive procedures before attempting the internal coccyx adjustment. He stated he initially advised Patient C of the nature of this procedure and that she gave him permission to adjust her by inserting his finger in her rectum. He stated a chaperone was always in the room during these procedures and his finger was always gloved. He discussed the one incident where Patient C had pain and bleeding after one of the adjustments. He stated that prior to that day he had performed several internal coccyx adjustments and that they had only produced short-term relief. He stated that in order to have more long-term improvement, he felt he would need to "go a little bit deeper" into the rectal cavity. He stated that when he attempted to go deeper, his knuckles pushed into Patient C's pelvic floor, which is what caused the pain. Nonetheless, he felt Patient C did improve after that treatment, and said that from September 2005 to January 2006, Patient C did not need to come in for treatment.

{¶64} Dew testified that in January 2006, Patient C slipped on some ice in her driveway and reinjured her tailbone, which caused her to resume treatment. Dew said he started to perform the internal coccyx adjustment again, but with little success. Dew testified he told Patient C that he was going to attempt the adjustment vaginally, and that she consented. Dew stated his reasoning for performing the adjustment vaginally was to avoid putting too much pressure on Patient C's pelvic floor, which could (and did in the past) cause her pain. Dew then opined that as a practical matter a woman cannot always

tell the difference between something being inserted in the vagina versus something being inserted in the rectum, since the two openings are so close in proximity. Dew stated Patient C did improve after the vaginal adjustment and that he continued to treat her thereafter with the rectal adjustments. He stated that based upon Patient C's long history of pain, it made sense to treat her this way. Dew agreed that an internal coccyx adjustment procedure is rare, but said he was taught it in school and it is his understanding the procedure is still being taught there. He testified it is lawful for him to perform the internal coccyx adjustment in Ohio.

{¶65} On cross, Dew agreed that his chiropractic practice requires him to tell patients what to do, and that the patients comply with his directives. He also agreed that as a gymnastics coach one of his functions was to protect the gymnasts from injury. He testified he was up all night researching and preparing for police questioning about Patient B's allegations, but that he was unprepared to discuss the allegations made by Gymnast A and Gymnast B. He also agreed he had over a year to prepare his testimony on the stand, but conceded the truth does not have to be rehearsed. He claimed it was within the scope of his practice, both as a chiropractor and a physician's assistant, to examine a woman's breasts and adjust a woman's tailbone by inserting a finger into the vaginal cavity.

{¶66} Dew agreed that his relationship with Gymnast A lasted from 1990-1992, and that Gymnast A was fourteen years old when he was twenty-eight years old. When asked if it would be "pretty gross" if he carried on a sexual relationship with young girls, he responded: "Define 'gross.'" Dew testified that he is six feet one inch tall and that both Gymnast A and Gymnast B are small in stature. He agreed he was always the adult in the relationship with them. Further, Dew conceded that during his interview with Det. Flara he never mentioned the incident where Gymnast A supposedly jumped on him and put her chest in his face. He testified that at the going-away party with Gymnast A and Gymnast B he did not intend to touch Gymnast B's breast, that it was purely accidental. He alleged that Patient B's motivation in bringing allegations against him was a large financial stake in the civil suit.

{¶67} Dew was then asked about a former patient named Patient D. He agreed that in 2006 he wrote a letter regarding Patient D, which he then sealed with instructions that no one should open it without his permission. Dew said he wrote this letter to explain his treatment of Patient D in case she ever came forward with allegations of misconduct against him. After a discussion outside the presence of the jury, the court allowed this letter in for impeachment purposes, over objections from the defense. Dew agreed that he wrote in this letter that Patient D would jump her pelvis towards his hand during examinations. On redirect, Dew read the text of this letter in its entirety.

{¶68} Hannah Kirk, a massage therapist who worked for Dew at his Boardman clinic, testified she performed massages on Patient B and that Patient B never seemed anxious, fearful or uncomfortable about her treatments with Dew. She stated she was sometimes present as a chaperone during Patient C's internal coccyx adjustments, and that she never noticed anything inappropriate about the procedures. Ms. Kirk testified she was also Dew's patient and never felt uncomfortable with him. On cross, Ms. Kirk agreed there would be no reason to stoke the sides of a woman's breasts when performing the effleurage massage technique. On redirect, she agreed that effleurage can feel like tickling.

{¶69} Dr. Fred Edge, a licensed chiropractor and medical doctor from Pennsylvania with 32 years of experience testified as an expert witness for the defense. Like Dew, he attended Palmer College of Chiropractic. Dew also worked for Dr. Edge's Pennsylvania clinic for ten years, and Dr. Edge said he never received any complaints about Dew. Dr. Edge admitted that twenty years ago his license was suspended, but then stayed, after he was found guilty of several tax violations. On cross, Dr. Edge admitted that in addition to the currency reporting transaction violations and tax evasion charges, he was also convicted of four counts of using a false Social Security Number with the intent to defraud

{¶70} Dr. Edge said he reviewed Patient C's and Patient B's treatment records. He opined, based on his professional experience, Dew properly treated Patient B. He agreed that fondling a patient's breast would never be appropriate, but stated a doctor's

hand could accidently graze the patient's breast during treatment. He agreed effleurage might feel like tickling. He testified that it might be significant if a patient were taking medication and did not disclose that to the chiropractor. He also agreed that if a patient had a history of sexual abuse it might make chiropractic treatment uncomfortable.

{¶71} Dr. Edge testified he performed an internal coccyx adjustment procedure before, but agreed it is not a procedure performed frequently. He stated both he and Dew were taught about the internal coccyx adjustment at Palmer College. Dr. Edge stated he is not licensed in Ohio, but it is his understanding that both in Ohio and Pennsylvania a chiropractor may perform any procedure taught in school unless it is specifically prohibited by state law. He opined Dew had followed all protocols when performing the procedure on Patient C. He stated it is his understanding that the internal coccyx adjustment procedure, either through the rectum or through the vagina, is not prohibited in the state of Ohio. The defense then introduced a copy of a current Washington State Statute which permits vaginal coccyx adjustments under certain circumstances.

{¶72} On cross, Dr. Edge agreed it is possible for someone with a history of sexual abuse, like Patient B allegedly had, to have no problems with chiropractic treatment. He testified he would be surprised to learn that as of 2003 vaginal coccyx adjustments are not recommended. However, he conceded that vaginal adjustments are "always the lowest order and [have] always been taught that way." Further, he agreed that he was Dew's boss and that Dew's actions as an employee reflects upon him.

{¶73} The defense then rested its case and counsel and the court discussed jury instructions. The defense objected to the court's choice of jury instructions for the "force" element of the crimes. After closing arguments and the jury charge, the jury began deliberations. Ultimately, the jury found Dew guilty of three counts of rape and one count of corruption of a minor with respect to Gymnast A ; one count of gross sexual imposition with regard to Gymnast B; one count of gross sexual imposition with respect to Patient B; and, one count of rape with respect to Patient C. The jury acquitted Dew of all twelve counts of gross sexual imposition with respect to Patient A; two counts of gross sexual imposition with respect to Patient B; and, two counts of rape of Patient C.

{¶74} After a sentencing hearing, the trial court sentenced Dew to an aggregate term of forty-three years imprisonment: ten years on each of the four rape counts, and eighteen months for each of the two gross sexual imposition counts, with all sentences to run consecutively. The trial court merged the corruption of a minor with the rape conviction, and accordingly imposed no sentence for that charge. Further, Dew was classified as a Tier III sexual offender. Subsequently, Dew's motion for bond pending outcome of the present appeal was denied by the trial court and then denied by this court.

Motion to Suppress

{¶75} In his first assignment of error, Dew argues:

{¶76} "The indictment and prosecution of the case against appellant were predicated upon evidence gained in violation of the Fourth Amendment to the United States Constitution."

{¶77} Dew argues that the trial court erred by failing to suppress the tape-recorded phone conversation between Gymnast B and Dew. After coming forward with allegations against Dew, Gymnast B set up a phone call with him, which was to be monitored and recorded by Boardman Police. When Dew called Gymnast B on October 26, 2006, Gymnast B was already on the line with Boardman Police, and when she clicked over, a "three-way call" was created, allowing Boardman Police to record the entirely of the conversation, unbeknownst to Dew. Dew argues this recording should have been suppressed because it was obtained without a warrant.

{¶78} "Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact." *State v. Long* (1998) 127 Ohio App.3d 328, 332, 713 N.E.2d 1. "At a suppression hearing, the evaluation of evidence and the credibility of witnesses are issues for the trier of fact." *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. We are bound to accept the trial court's factual determinations made during the suppression hearing so long as they are supported by competent credible evidence. *State v. Harris* (1994), 98 Ohio App.3d 543, 546, 649 N.E.2d 7. Accepting these factual determinations as true, an appellate court must then "independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court

erred in applying the substantive law to the facts of the case." Id.

{¶79} In this case, Dew moved to suppress the tape recording because he believed absent a warrant, the contents of the recording were inadmissible. He urged the court to apply Pennsylvania or California law to decide whether to suppress the recording. Dew argued that both California and Pennsylvania law require a warrant for the secret taping of a conversation, unless both parties to the conversation consent to the taping. Dew contended that either of those two states' laws should apply because he claimed he was driving through Pennsylvania when he made the call, while Gymnast B was undisputedly in California when she received the call. Dew claimed that the fact that the recording took place in Ohio was not enough to trigger the application of Ohio's wiretap statute, which is less strict than Pennsylvania's or California's in that it permits the secret recording of a phone conversation by police with consent of just one of the parties.

{¶80} After a hearing, where both sides presented legal arguments only, the trial court overruled the motion to suppress the tape recording, finding that the "applicable law requires only the permission of one of the parties to the conversation to allow interception of the conversation by a third party."

{¶81} On appeal, Dew argues that the secret recording of his phone conversation by police, done without a warrant, contravened his Fourth and Fourteenth Amendment rights and thus, the recording, through the operation of the exclusionary rule, should have been inadmissible at trial. The Fourth Amendment to the United States Constitution, as applicable to the states via the Fourteenth Amendment, protects individuals against unreasonable search and seizure. See, also, Section 14, Article I, Ohio Constitution. However, neither the federal constitution, nor the Ohio constitution requires the suppression of evidence obtained by the warrantless recording of a telephone conversation between a consenting police informant and a non-consenting defendant. *State v. Geraldo* (1981), 68 Ohio St.2d 120, 22 O.O.3d 366, 429 N.E.2d 141, at syllabus, following *U.S. v. White* (1971), 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453.

{¶82} Nor does Ohio statutory law mandate suppression. Ohio's wiretap statute, R.C. 2933.53 governs and provides the following with regard to warrant requirements:

{¶83} "The prosecuting attorney of the county in which an interception is to take place or in which an interception device is to be installed, or an assistant to the prosecuting attorney of that county who is specifically designated by the prosecuting attorney to exercise authority under this section, may authorize an application for an interception warrant to a judge of the court of common pleas of the county in which the interception is to take place or in which the interception device is to be installed.* * *" R.C. 2933.53(A)

{¶84} The statute provides a specific exception to the interception warrant requirement where: "[t]he interception of a wire, oral, or electronic communication by a law enforcement officer if the officer is a party to the communication *or if one of the parties to the communication has given prior consent to the interception by the officer*." R.C. 2933.53(F)(2) (emphasis added.)

{¶85} Dew contends that Ohio law is inapplicable to this case because it was undisputed that Gymnast B was in California when she made the call and Dew was allegedly in Pennsylvania when he received the call. We find this argument unpersuasive. The interception of the phone call took place in Ohio, and Dew was tried in an Ohio court. R.C. 2933.53 makes no mention of the location of the callers, but rather focuses on the location of interception. See R.C. 2933.53(A). Thus, we hold that the trial court was correct in applying Ohio law. And as indicated by the plain language of R.C. 2933.53(F)(2), a warrant is not required where one of the parties has given prior consent to the police interception. Here, it is undisputed that Gymnast B gave her consent for the taping.

{¶86} Dew also argues that the warrantless recording of the conversation contravenes the "point and purpose" of the Federal Wiretap Act, Section 2511 Title 18, U.S.Code, et seq., since that statute prohibits the use as evidence of any illegally intercepted communications. However, Dew's argument is based on the false premise that the recording violated Ohio law. The trial court correctly overruled Dew's motion to suppress the tape recording. Accordingly, Dew's first assignment of error is meritless.

Joinder

{¶87} In his second assignment of error, Dew argues:

{¶88} "Appellant was severely prejudiced and denied due process of law when the court denied his motion for relief from improper joinder, refused to sever the unrelated charges, and forced Appellant to try the cases together before one jury."

{¶89} Dew contends that the trial court erred by denying his motion for improper joinder and failing to sever the gymnast-related charges from the patient-related charges. Pursuant to Crim.R. 13, the court may order two or more indictments be tried together, if the offenses could have been joined in a single indictment, and the procedure shall be the same as if the prosecution were under such single indictment. In accordance with Crim.R. 8(A), two or more offenses may be charged in the same indictment if the offenses "are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." Crim.R. 8(A). The law generally favors joinder pursuant to Crim.R. 8(A). See *State v. Torres*, 66 Ohio St.2d 340, 20 O.O.3d 313, 421 N.E.2d 1288.

{¶90} However, if it appears the defendant is prejudiced by joinder, the trial court may order separate trials. Crim.R. 14. The defendant bears the burden of proving prejudice and of proving that the trial court abused its discretion in denying severance. *Torres* at syllabus.

{¶91} A prosecutor can negate a defendant's claims of prejudicial joinder in several ways. *State v. Coley* (2001), 93 Ohio St.3d 253, 259, 754 N.E.2d 1129. First, the state could show the evidence regarding one of the joined offenses would be admissible in trial of the other offense due to the exceptions to other acts evidence contained in Evid.R. 404(B). Id. at 259-260. Alternatively, the state can negate prejudicial joinder merely by showing that evidence of each crime (or as here, each set of crimes) is simple and direct. Id. at 260, citing, e.g., *State v. Johnson* (2000), 88 Ohio St.3d 95, 109-110, 723 N.E.2d 1054 (assaults against female neighbors); *State v. Franklin* (1991), 62 Ohio St.3d 118, 123, 580 N.E.2d 1 (burglaries in same neighborhood). See, also, *State v. Bell*, 7th Dist. No. 06-MA-189, 2008-Ohio-3959, at ¶21 (evidence of each rape was simple and

distinct.)

{¶92} Dew argues that evidence of crimes pertaining to the gymnast-victims would not have been admissible, pursuant to Evid.R. 404(B), in a separate trial of the crimes pertaining to the patient-victims, and vice versa. Dew further contends that the evidence of each set of crimes was not simple and direct. With regard to his first argument, pursuant to Evid.R. 404(B), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The State contends that the other crimes/acts evidence would have been admissible to show a common scheme, or modus operandi on the part of Dew. However, applying that exception to this case would be tenuous at best.

{¶93} The Ohio Supreme Court rejected a similar argument in *Schaim*, supra. In *Schaim,* the defendant was indicted on two counts of forcible rape involving his adopted daughter, one count of gross sexual imposition involving his younger daughter, and two counts of gross sexual imposition involving an employee. Defense counsel moved to sever the counts into three groups for trial however the trial court denied the motion. The Ohio Supreme Court rejected the notion that evidence relating to each crime would have been admissible pursuant to Evid.R. 404(B)(4) had the trials been separated, simply because the defendant displayed a pattern of molesting women. Id. at 60-62.

{¶94} Similarly, in the instant case, Evid.R. 404(B) does not support joinder. As Dew points out, the gymnast-related crimes took place over a decade before the patient-related crimes. And while they both involve sexual abuse of women over whom Dew held a position of power or authority, this is insufficient to trigger one of the Evid.R. 404(B)(4) exceptions.

{¶95} However, we conclude that joinder was nonetheless proper in this case because evidence of each set of charges was simple and direct. "[W]hen simple and direct evidence exists, an accused is not prejudiced by joinder regardless of the nonadmissibility of evidence of these crimes as 'other acts' under Evid.R. 404(B)." *State*

v. Lott (1990), 51 Ohio St.3d 160, 163, 555 N.E.2d 293. In this case, the evidence relating to the crimes against the gymnasts was separate and distinct from the evidence relating to the crimes against the patients. With respect to the set of charges relating to the gymnasts, both victims testified, and other evidence included Dew's written and oral statements to police, the recorded phone call between Gymnast B and Dew, and letters from Dew to Gymnast B. With respect to the case involving the patients, the evidence included the testimony of all victims, and that of competing expert witnesses. Although the crimes against the chiropractic patients and the gymnasts were of a similar nature, it is difficult to see how the jury would have had problems segregating the evidence. Further, the Ohio Supreme Court has held that where, as here, a jury acquits on some counts, this can demonstrate the jury's ability to segregate the evidence. *State v. Schiebel,* (1990), 55 Ohio St.3d 71, 88, 564 N.E.2d 54. Moreover, Dew fails to explain how he would have defended either case differently had the two cases not been joined. See *Franklin* at 123.

{¶96} Dew's argues that the evidence of the two sets of crimes was not simple and direct, because the jurors had to apply different definitions of "sexual conduct" to decide the rape allegations involving Gymnast A and those involving Patient C, due to the varying time-frames. However, this argument is meritless because the focus of the analysis should be on whether the evidence of the two crimes was simple and direct, not whether the law was confusing. Moreover, the trial court clearly and concisely explained to the jury the differences between the "sexual conduct" definition applicable to Gymnast A, and that applicable to Patient C.

{¶97} Thus, the trial court did not abuse its discretion by denying Dew's motion to sever trial on the two sets of charges. Accordingly, Dew's second assignment of error is meritless.

Sufficiency

{¶98} In Dew's third assignment of error, he asserts:

{¶99} "Appellant's conviction was not supported by sufficient evidence and against the manifest weight of the evidence."

{¶100} This assignment of error has two sub-parts, each of which will be discussed in turn. In the first part of Dew's third assignment of error, he contends his rape and gross sexual imposition convictions are not supported by sufficient evidence because there was no evidence demonstrating force or threat of force. Dew also argues that the trial court's jury instructions with regard to force were flawed.

{¶101} "Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict." *State v. Smith* (1997), 80 Ohio St.3d 89, 113, 684 N.E.2d 668. Thus, sufficiency is a test of adequacy. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. Whether the evidence is legally sufficient to sustain a verdict is a question of law. Id. "In reviewing the record for sufficiency, '[t]he 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.'" *Smith* at 113 (citation omitted).

{¶102} In this case, with the exception of the corruption of a minor count, all of the other crimes of which Dew was convicted require an element of force or threat of force. See R.C. 2907.02(A)(2) (rape) and R.C. 2907.05(A)(1) (gross sexual imposition). R.C. 2901.01(A)(1) defines the "force" element for both rape and gross sexual imposition as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." Further, the prosecution "need not prove physical resistance to the offender" in prosecutions for rape and gross sexual imposition. R.C. 2907.02(C), R.C. 2907.05(D).

{¶103} The Ohio Supreme Court has addressed the issue of "force" or "threat of force" several times. In *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, the Court held that the amount of force necessary to commit the offense "depends upon the age, size and strength of the parties and their relation to each other." Id. at paragraph one of the syllabus. Specifically, in cases involving the "filial obligation of obedience to a parent," a lesser showing of force may be sufficient. Id. Given the inherent coercion in parental authority when a parent abuses his or her child, the requisite force "'need not be

overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the * * * victim's will was overcome by fear or duress, the forcible element * * * can be established.'" Id. at 58-59, quoting *State v. Fowler* (1985), 27 Ohio App.3d 149, 154, 27 OBR 182, 500 N.E.2d 390.

{¶104} In *Schaim*, 65 Ohio St.3d 51, the Court clarified its holding in *Eskridge* by stating that *Eskridge* was "based solely on the recognition of the amount of control that parents have over their children, particularly young children," and noting that "[e]very detail of a child's life is controlled by a parent, and a four-year-old child knows that disobedience will be punished, whether by corporal punishment or an alternative form of discipline. Because of the child's dependence on his or her parents, a child of tender years has no real power to resist his or her parent's command, and every command contains an implicit threat of punishment for failure to obey. Under these circumstances, a minimal degree of force will satisfy the elements of forcible rape." *Schaim* at 55, citing *Eskridge*.

{¶105} Applying that logic, the Court in *Schaim*, found there was insufficient evidence of force where the defendant raped his adopted daughter, who was an adult at the time of the alleged rape, even though she alleged the defendant had also abused her while she was a child. The Court held that "[a] threat of force can be inferred from the circumstances surrounding sexual conduct, but a pattern of incest will not substitute for the element of force where the state introduces no evidence that an adult victim believed that the defendant might use physical force against her." Id. at 55.

{¶106} In *State v. Dye* (1998), 82 Ohio St.3d 323, 695 N.E.2d 763, the Supreme Court further held that the lesser showing of force principles established in *Eskridge* also applied to situations where a parent-child relationship was absent, but the adult defendant stood in a position of authority over the child-victim. In such a case, the Court found that force or threat of force could be met "without evidence of express threat of harm or evidence of significant physical restraint." Id.

{¶107} Applying the principles set forth in *Eskridge*, in *State v. Haschenburger*, 7th Dist. No. 05 MA 192, 2007-Ohio-1562, this court found there was sufficient evidence

of force or threat of force to support rape convictions where the defendant was a close family friend, spent considerable time at the victim's home, and although had no disciplinary authority per se over the victim, was considerably bigger than she, had a bad temper and as a result, the victim was fearful of him. Id. at ¶59-63

{¶108} Courts have also applied *Eskridge* to situations involving physician-defendants and patient-victims. For example, in *State v. Pordash*, 9th Dist. No. 04CA008480, 2004-Ohio-6081, the court applied *Eskridge* to a case where a chiropractor was convicted of raping several patients. Specifically, the court stated:

{¶109} "'As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established.' *State v. Eskridge* (1988), 38 Ohio St.3d 56, 59, 526 N.E.2d 304, citing *State v. Martin* (1946), 77 Ohio App. 553, 68 N.E.2d 807. In the instant case, each victim described in detail the intense fear they experienced during their encounters with Appellant at his office. While Appellant is correct that the doctor-patient relationship does not create an inference of force, that is not to say that it is entirely irrelevant. The relationship of the parties is a relevant fact when examining whether the element of force has been proven. *Eskridge*, 38 Ohio St.3d at 58. Appellant was a chiropractor, specializing in treatment of the spine. At the time of each rape, he was, just prior to committing the sexual act, acting in his capacity as each victim's treating physician. Further, each victim knew of Appellant's extensive background in martial arts. As such, each victim testified that they feared that any resistance would lead to serious bodily harm. Accordingly, we cannot say that the jury lost its way in finding that the victims' wills had been overcome by fear, establishing the element of force." *Pordash* at ¶12.

{¶110} Also instructive with regard to the force element, is this court's opinion in *State v. Bajaj*, 7th Dist. No. 03CO16, 2005-Ohio-2931, a case where a physician was convicted of sexual battery of a patient, pursuant to R.C. 2907.03(A)(1), which prohibits "sexual conduct with another, not the spouse of the offender" when "the offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution." As this court noted, "sexual battery is rape

with a lesser mens rea and 'coercion' rather than simply 'force.'" *Bajaj* at ¶21, citing *State v. Wilkins* (1980), 64 Ohio St.2d 382, 386-387, 415 N.E.2d 303; and *State v. Stricker*, 10th Dist. No. 03AP-746, 2004-Ohio-3557. In *Bajaj*, this court held that a doctor-patient relationship, standing alone, is insufficient to demonstrate the requisite coercion for sexual battery. *Bajaj* at ¶44-46. It can be extrapolated from this holding that a doctor-patient relationship, standing alone, also cannot establish the higher standard of "force or threat of force" required for rape and gross sexual imposition.

{¶111} Thus, in sum, force is "a relative term that depends on the totality of the circumstances in a certain case." *State v. Rupp*, 7th Dist. No. 05MA166, 2007-Ohio-1561, at ¶49. Although the case law holds that a somewhat lesser showing of force is required when the defendant stands in a position of authority over the victim, the focus of the inquiry is whether the victim's will was overcome by fear or duress. See, e.g., *Eskridge* at 58-59.

{¶112} As an initial matter, Dew challenges the trial court's jury instructions with regard to the force element. When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. The term "abuse of discretion" means more than an error of law or judgment, but rather implies the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Clark* (1994), 71 Ohio St.3d 466, 470, 644 N.E.2d 331.

{¶113} In this case, the jury instructions do not constitute an abuse of discretion. Contrary to Dew's assertions, the trial court did not instruct the jury that the relationship between the defendant and victim, standing alone, could create the inference of force. Rather, the court properly stated the law as set forth above, which is that where the defendant holds some position of authority over the victim, the force may be more subtle or psychological in nature. Further, the court properly instructed the jury that to find force, it must find that the victim's will was overcome by fear or duress. Thus, we now turn to the sufficiency arguments.

{¶114} There was sufficient evidence of force or threat of force with regard to Dew's three rape convictions involving Gymnast A. Viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found this element proven beyond a reasonable doubt. Gymnast A testified that Dew had significant control over many aspects of her life, both in and out of the gym. She stated he told her what to wear, what to eat and drink, and how much to sleep. As Gymnast A's coach, Dew was certainly in a position of authority over her. Dew was also much bigger and older. Moreover, Gymnast A testified she was intimidated by Dew because due to his size and because he told her he carried a knife and a gun. The totality of the evidence shows that Dew groomed and manipulated Gymnast A over a period of years to succumb to his sexual demands, and, additionally, that Gymnast A was intimidated by Dew and knew that he carried weapons. Any rational trier of fact could have found beyond a reasonable doubt that Gymnast A's will was overcome by fear or duress.

{¶115} In addition, there was sufficient evidence of force with regard to Dew's gross sexual imposition conviction involving Gymnast B. Dew held a position of authority over Gymnast B as her coach, and exercised control over aspects of her life. Further, the evidence shows Dew manipulated Gymnast B over a period of many years, and was larger and older than her. Dew himself admitted during his interview with Det. Flara that his gymnasts placed a great deal of trust in him and relied on him to keep them safe, while they performed "death-defying stunts." Further, Gymnast B described an incident where Dew told her she could not come down a high platform at the gym until she professed her love for him. Gymnast B testified that Dew's conduct made her feel awkward and scared. And although she said Dew never physically forced her to do anything, she said that she relented to his demands because he was in a position of authority over her. Thus, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that Gymnast B's will was overcome by fear or duress.

{¶116} With regard to Dew's conviction of gross sexual imposition involving Patient B we must conclude there was insufficient evidence of force or threat of force.

Patient B testified that Dew inappropriately touched the sides of her breasts during a chiropractic examination. She alleged that when Dew touched her she was extremely frightened and began to sweat. She said she could not move, that she was literally "scared stiff," and did not know what to do. After the incident, Patient B never again returned to Dew's office for treatment. She said she feared Dew would come after her, and that she was worried because he knew where she lived and knew she has children.

{¶117} Notably, however, Patient B never stated she believed Dew would cause her contemporaneous harm if she resisted his touching. As we stated in *Bajaj*, supra, a physician-patient relationship does not in and of itself act as a substitute for the requisite force element to sustain a rape or gross sexual imposition conviction. Similarly, neither does a chiropractor-patient relationship. See *Bajaj,* supra. The scenario involving Patient B is distinguishable from that involved in the Ninth District's *Pordash* case. In *Pordash*, the court held there was sufficient evidence of force to support a chiropractor's rape convictions involving several patients where all of the victims testified that they knew the defendant had an extensive background in martial arts and they feared any resistance would lead to serious bodily harm. *Pordash* at ¶12. By contrast, Patient B did not testify that she feared resisting Dew would lead to immediate harm.

{¶118} That Patient B felt scared is insufficient, standing alone, to infer a threat of force, as this element involves more than merely a subjective component. See *Rupp*, supra. In other words, just because a person is too fearful to react does not mean the actor is purposefully compelling that person to submit by implicit threat of force. Rather, in addition to the victim professing that her will was overcome by fear or duress and the jury believing this, there must be objectively quantifiable behavior from the defendant which allows a rational person to infer that a threat of force was made. Id. at ¶41, 43, 51, 55.

{¶119} Here there were no objective actions performed by Dew which establish an implicit threat of force was used to overcome the victim's will by fear or duress. There was no evidence of an attempt to frighten Patient B or to imply that resistance would lead to force. Cf. id. at ¶52 (intent to instill fear and thus submission where defendant had just

told the victim stories about shooting a store clerk in the head without remorse, helping his cop-killer friend to escape a national manhunt, and getting released on parole); *State v. Arias*, 9th Dist. No. 04CA008428, 2004-Ohio-4443, at ¶10 (intent to instill fear where the defendant told the victim that he had previously strangled a woman to death and that he suffocated a fellow inmate in prison).

{¶120} As such, the totality of the circumstances do not allow a rational person to find that Dew purposely compelled Patient B to submit by implicitly threatening force in a manner that overcame her will by fear or duress. Dew's gross sexual imposition conviction involving Patient B was not supported by sufficient evidence.

{¶121} With regard to Dew's rape conviction involving Patient C, we must also conclude there was insufficient evidence of force or threat of force. Patient C testified about three incidents where she felt she was improperly treated by Dew. The first time, Patient C presented for the internal coccyx adjustment procedure and lie face-down on the examination table, draped with a gown. She stated that instead of placing his finger in her rectum as usual, Dew very quickly placed his finger inside her vagina, then removed the finger, placed it inside her rectum, and performed the internal coccyx adjustment as usual, all without comment.

{¶122} The second incident happened at a subsequent appointment after Dew had attempted to perform the coccyx adjustment rectally. Patient C testified that Dew informed her "I can't get it. I'll have to go up the other way." Patient C said she then consented to Dew performing the adjustment through her vagina, because she trusted him. She stated Dew proceeded to do the adjustment vaginally, but that he did not change his glove in between. Patient C testified that the third incident happened much like the second, and that it "felt kind of like a gynecologist exam," and was slightly painful. She stated that Dew "just poked around a little and I thought he was using a different method to get my tailbone lined up."

{¶123} However, Patient C testified that she consented to both the vaginal and rectal procedures. Notably, Patient C never said she feared Dew, was intimidated by him, or that she believed resistance would lead Dew to cause her harm. Dew's status as

Patient C's treating chiropractor, standing alone, is insufficient to infer a threat of force. See *Bajaj,* supra. Notably, the State does not advance much of an argument about force with regard to the rape of Patient C, other than asserting that the "force" stems from the fact that Dew exceeded the scope of proper treatment. However, the State does not cite any case law in support of that assertion. The issue of whether Dew exceeded the scope of proper treatment relates more to the "sexual conduct" element of the crime, and not the "force" element. "Sexual conduct" includes "*without privilege to do so*, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another." R.C. 2907.01(A) (emphasis added.)

{¶124} Thus, even viewing the evidence in the light most favorable to the prosecution, i.e., taking as true that the vaginal coccyx adjustment constituted improper treatment, the State has not provided sufficient evidence of force or threat of force. Although Dew may have used fraud or deception to secure Patient C's consent to the vaginal adjustment procedure, this does not satisfy the force element of rape.

{¶125} This is not to say that Dew's actions with regard to Patients B and C do not constitute some crime. Dew's conduct would likely fall squarely into the offense of sexual imposition, pursuant to R.C. 2907.06(A)(1), which states:

{¶126} "No person shall have sexual contact with another, not the spouse of the offender; * * * when any of the following applies:

{¶127} "(1) The offender knows that the sexual contact is offensive to the other person, * * * or is reckless in that regard.

{¶128} However, Dew was not charged with the crime of sexual imposition. He was charged with *gross* sexual imposition, and rape, both of which require proof of force or threat of force. And as explained above, the State has not provided sufficient evidence of force or threat of force to support Dew's convictions of these crimes. Accordingly, Dew's convictions of gross sexual imposition of Patient B, Count 13 of the indictment in Case No. 07-CR-1262, and rape of Patient C, Count 16 of the indictment in Case No. 07-CR-1262, are reversed and vacated.

Manifest Weight

{¶129} In the second part of his third assignment of error, Dew argues that even if this court finds sufficient evidence with respect to the force element of the crimes, his convictions on all counts are nonetheless against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins*, supra at 387.

{¶130} "Weight of the evidence concerns the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other." Id. (emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. Id. However, a conviction will only be reversed as against the manifest weight of the evidence in exceptional circumstances. Id. This is so because the trier of fact is in a better position to determine credibility issues, since he personally viewed the demeanor, voice inflections and gestures of the witnesses. *State v. Hill* (1996), 75 Ohio St.3d 195, 204, 661 N.E.2d 1068; *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 39 O.O.2d 366, 227 N.E.2d 212.

{¶131} Ultimately, "the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact 'unless it is patently apparent that the factfinder lost its way.'" *State v. Pallai*, 7th Dist. No. 07MA198, 2008-Ohio-6635, at ¶31, quoting *State v. Woulard*, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964, at ¶81. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. No. 99CA149, 2002-Ohio-1152, at ¶13, citing *State v. Gore* (1999), 131 Ohio App.3d 197, 201, 722 N.E.2d 125.

{¶132} As an initial matter, since we are reversing for insufficient evidence Dew's convictions for gross sexual imposition involving Patient B, and rape involving Patient C

we need not perform a manifest weight analysis for these counts. Turning then, to the remaining convictions, we hold they are not against the manifest weight of the evidence.

{¶133} With respect to Gymnast A, Dew was convicted of three counts of rape pursuant to R.C. 2907.02(A)(2), which states: "[n]o person shall engage in sexual conduct with another when the offender purposely compels another person to submit by force or threat of force." During the time-period when the rapes were alleged to have taken place, R.C. 2907.01 defined "sexual conduct" as including vaginal and anal intercourse, and oral sex. See Former R.C. 2907.01. Gymnast A testified at least one act of oral sex occurred with Dew between March 10, 1990 and December 31, 1990, that at least one act of oral sex occurred between January 1, 1991 and December 31, 1991, and that at least one act of oral sex occurred between January 1, 1992 and September 1992. Dew admitted during his taped conversation with Gymnast B that he had "oral sex" with Gymnast A. During trial, Dew attempted to retract that statement somewhat, stating he meant something much more innocuous. Further, Dew attempted to portray Gymnast A as the aggressor, and described an incident where she allegedly jumped on him and shoved her chest in his face.

{¶134} In addition, while Dew maintained that the sexual acts were purely consensual, Gymnast A testified about the control that Dew maintained over many aspects of her life, both in and out of the gym. She also explained the manipulative techniques Dew used to facilitate the acts, and stated she was intimidated by Dew because he was bigger than her and she knew he carried a gun and a knife. Ultimately, Gymnast A's version of the events is more believable. Dew's convictions of three counts of rape with respect to Gymnast A are not against the manifest weight of the evidence.

{¶135} Correspondingly, Dew's conviction of one count of corruption of a minor relating to Gymnast A is not against the manifest weight of the evidence. At sentencing, the trial court merged the corruption of a minor conviction with the rape conviction. When a trial court dispatches with a count through merger, any error in the jury's verdict on the merged count is rendered harmless beyond a reasonable doubt. *State v. Powell* (1990), 49 Ohio St.3d 255, 263, 552 N.E.2d 191 (superseded by constitutional amendment on

other grounds); see, also, *State v. Wolff,* 7th Dist. No. 07MA166, 2009-Ohio-2897, at ¶70. Therefore, even if Dew's conviction of corruption of a minor were erroneous, any error would be harmless beyond a reasonable doubt.

{¶136} Dew was also convicted of two counts of gross sexual imposition, one with respect to Gymnast B and one with respect to Patient B. Although these crimes occurred during different time periods, the definition of gross sexual imposition and its elements remained the same. R.C. 2907.05(A)(1) defines gross sexual imposition as "sexual contact with another, not the spouse of the offender, when * * * the offender purposely compels the other person, * * * to submit by force or threat of force." "'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." R.C. 2907.01(B)

{¶137} Gymnast B testified that Dew touched her breasts during the going-away party at his house with Gymnast A. She also testified that he touched her breasts while giving her a massage and touched her buttock while the two were in a hot-tub together. She stated that these incidents made her feel scared, and that Dew's position of authority over her as her coach caused her to succumb to his demands. Dew denied the massage and hot-tub incidents ever happened. However, during the recorded phone call, Dew admitted he "had her shirt off," during the going away party and further said that "physical thing I did with you guys was 100% wrong." In his written statement to police he stated: "[t]here was a time when I touched Gymnast B inappropriately as well. * * * I touched Gymnast B's chest." Dew also admitted "rubbing" Gymnast B's chest during his interview with Det. Flara.

{¶138} At trial, Dew claimed that this touching was not intentional; that he was unaware of Gymnast's B's nudity due to the darkness and accidently cupped her breast during an innocent hug. We conclude that Dew's version of events is much less believable than Gymnast's B's, especially considering the statements he made to her on tape and the suggestive comments he made to her in the letters. Thus, Dew's conviction of one count of gross sexual imposition with respect to Gymnast B is not against the

manifest weight of the evidence.

Conclusion

{¶139} Dew's third assignment of error is meritorious, in part. Specifically, Dew's gross sexual imposition conviction involving Patient B, and his rape conviction involving Patient C are not supported by sufficient evidence. Accordingly, we reverse and vacate Dew's convictions on Counts 13 and16 of the indictment in Case No. 07-CR-1262. All of Dew's other assignments of error are meritless. Dew's remaining convictions are not against the weight or the sufficiency of the evidence. The trial court properly denied the motion to suppress as Ohio law allows police to record a phone conversation between a consenting informant and a non-consenting defendant without a warrant. Finally, the trial court did not abuse its discretion by denying Dew's motion for relief from improper joinder, since the evidence of each set of crimes was simple and direct. Accordingly, the judgment of the trial court is affirmed in part, reversed in part and vacated in part.

Vukovich, P.J., concurs.

Waite, J., concurs.