[Cite as *State v. Adams,* 2014-Ohio-5854.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 13 MA 130
V.	)	
	)	OPINION
DAVID ADAMS,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 09CR1282
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellee	Paul Gains Prosecutor Ralph M. Rivera Assistant Prosecutor 21 W. Boardman St., 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant	Attorney John B. Juhasz 7081 West Boulevard, Suite #4 Youngstown, Ohio 44512-4362

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 31, 2014

[Cite as *State v. Adams*, 2014-Ohio-5854.]
DONOFRIO, J.

{¶1} Defendant-appellant, David Adams, appeals from a Mahoning County Common Pleas Court judgment convicting him of eight counts of rape and sentencing him to 80 years in prison, following a jury trial.

{¶2} In November 2009, a Mahoning County Grand Jury indicted appellant on eight counts of rape, first-degree felonies in violation of R.C. 2907.02(A)(2)(B). The indictment alleged appellant raped his step-daughter repeatedly over a two-year period. Appellant initially entered a not guilty plea.

{¶3} Appellant and plaintiff-appellee, the State of Ohio, reached a plea agreement shortly before appellant's trial was set to begin. Pursuant to the plea agreement, appellant entered an *Alford* plea to all eight counts and the state agreed to recommend an aggregate sentence of 15 years in prison. The trial court accepted the plea.

{¶4} Prior to sentencing, appellant filed a motion to vacate his plea. The trial court denied the motion and the case proceeded to sentencing. The trial court sentenced appellant to 15 years in prison (three years on each of the eight counts with the first five counts to be served consecutively and the last three counts to be served concurrently).

{¶5} Appellant appealed from this judgment arguing the trial court abused its discretion in overruling his motion to vacate his *Alford* plea. This court agreed. We reversed the trial court's judgment, vacated appellant's plea, and remanded the case. *State v. Adams*, 7th Dist. No. 12 MA 9, 2012-Ohio-5979.

{¶6} On remand, the matter proceeded to a jury trial. During the trial, the court allowed the state to amend the indictment in order to change the dates to conform to the evidence. The jury found appellant guilty on all eight counts. The trial court proceeded to sentencing. The court sentenced appellant to ten years on each count, to be served consecutively, for a total of 80 years in prison.

{¶7} Appellant filed a timely notice of appeal on August 22, 2013.

{¶8} Appellant raises three assignments of error, the first of which states:

> THE TRIAL COURT DENIED APPELLANT DUE PROCESS OF

LAW, EQUAL PROTECTION AND BENEFIT OF THE LAWS, THE RIGHT TO JUSTICE WITHOUT DENIAL, AND THE PROHIBITION AGAINST MULTIPLE PUNISHMENTS WHEN IT SENTENCED APPELLANT TO MAXIMUM CONSECUTIVE TERMS TOTALING 80 YEARS, AND THERE WERE NO ADDITIONAL OR INTERVENING FACTS TO JUSTIFY THE DRASTIC SENTENCE ENHANCEMENT, THUS, TRIGGERING THE PRESUMPTION THAT THE RE-SENTENCING WAS VINDICTIVE.

{¶9} Appellant argues the trial court's sentence of 80 years was vindictive. He points out that the court originally sentenced him to only 15 years. Appellant cites to *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), where the Supreme Court found that where there are no additional facts discovered by the trial court between two sentencing hearings that would impact the sentence and justify a more severe sentence upon re-sentencing, there is a presumption that due process is violated and the second, harsher sentence is vindictive. He points out that the trial court failed to give any reason for increasing his sentence from 15 to 80 years following his successful appeal. Appellant asserts the trial court was required to put its reasons for the longer sentence on the record so that this court would have an adequate record to review to ensure the trial court's sentence was not vindictive. Appellant asserts the trial court failed to overcome the presumption of vindictiveness.

{¶10} Additionally, appellant argues that the Equal Protection Clause "compels a rule barring a sentence in excess of the one invalidated in the first appeal." He contends he was discriminated against by the trial court because he chose to exercise his right to appeal. Appellant urges that we must sentence him to 15 years in prison or remand his case to the trial court with orders to impose a 15-year sentence.

{¶11} Our review of felony sentences is a limited, two-fold approach, as outlined in the plurality opinion in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶26. First, we must examine the sentence to determine if it is

"clearly and convincingly contrary to law." *Id*. (O'Conner, J., plurality opinion). In examining "all applicable rules and statutes," the sentencing court must consider R.C. 2929.11 and R.C. 2929.12. *Id*. at ¶¶ 13-14 (O'Conner, J., plurality opinion). If the sentence is clearly and convincingly not contrary to law, the court's discretion in selecting a sentence within the permissible statutory range is subject to review for abuse of discretion. *Id*. at ¶17 (O'Conner, J., plurality opinion). Thus, we apply an abuse of discretion standard to determine whether the sentence satisfies R.C. 2929.11 and R.C. 2929.12. *Id*. at ¶17 (O'Connor, J., plurality opinion).

{¶12} The offenses in this case occurred between 2006 and 2009. At that time, the possible prison sentences for a first-degree felony were three, four, five, six, seven, eight, nine, or ten years. Former R.C. 2929.14(A)(1). Thus, the trial court's sentence of ten years on each count of rape was the maximum permissible sentence under the statute.

{¶13} Appellant does not argue that the court erred in imposing maximum, consecutive sentences, per se, nor does he argue that the court failed to consider the appropriate statutory factors in sentencing him. Instead, his only argument is that the court's sentence was vindictive because it increased from 15 years when he entered an *Alford* plea to 80 years when he elected to exercise his right to a jury trial.

{¶14} Appellant bases his argument on *Pearce*, 395 U.S. 711, which involved two cases. In the first case Pearce stood trial and was convicted of assault with intent to commit rape. The trial court sentenced him to a prison term of 12 to 15 years. Several years later, Pearce filed a successful postconviction petition and was granted a new trial. He was once again convicted. This time, the trial court sentenced him to eight years in prison. When this time was added to the time Pearce had already spent in prison, it resulted in a longer sentence than originally imposed. Also under consideration in *Pearce*, was Rice's case. Rice was convicted of four counts of burglary and the court sentenced him to an aggregate ten-year prison term. Several years later, his conviction was set aside and he was retried. This time the court sentenced him to an aggregate sentence of 25 years.

{¶15} The Supreme Court accepted the cases for review, in part, to examine the constitutional limitations upon the imposition of a more severe punishment after conviction for the same offense upon retrial. *Id*. at 715-716. In examining this issue, the Court first held "that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction." *Id*. at 723. The Court went on to find, however, that the imposition of a penalty upon the defendant for having successfully pursued an appeal would violate the Due Process Clause. *Id*. at 724. The Court then held that whenever a court imposes a more severe sentence upon a defendant after a new trial, the court must put its reasons for doing so on the record and "[t]hose reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id*. at 726.

{¶16} Twenty years later, however, the Supreme Court re-examined the issue. In *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989), Smith pleaded guilty to rape and burglary and a sodomy charge was dropped. The trial court sentenced him to concurrent sentences of 30 years. After sentencing, Smith successfully moved to withdraw his guilty plea. He went to trial on all three charges and was convicted. The trial court then sentenced Smith to a term of life imprisonment for the burglary conviction, plus a concurrent term of life imprisonment on the sodomy conviction and a consecutive term of 150 years on the rape conviction. The Alabama Supreme Court held the increased sentence created a presumption of vindictiveness similar to that in *Pearce*, supra.

{¶17} The United States Supreme Court disagreed. It specifically held, "no presumption of vindictiveness arises when the first sentence was based upon a guilty plea, and the second sentence follows a trial." *Smith* at 795. Instead, the burden is on the defendant to show actual vindictiveness. *Id*. at 800. The Court pointed out that,

> when a greater penalty is imposed after trial than was imposed after a prior guilty plea, the increase in sentence is not more likely than not

> attributable to the vindictiveness on the part of the sentencing judge. Even when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial. A guilty plea must be both "voluntary" and "intelligent," *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969), because it "is the defendant's admission in open court that he committed the acts charged in the indictment," *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747 (1970). But the sort of information which satisfies this requirement will usually be far less than that brought out in a full trial on the merits.

Id. at 801. The Court further observed that during the course of a trial, the trial court can gather "a fuller appreciation of the nature and extent of the crimes charged" and the defendant's conduct may give the court insight into his moral character and suitability for rehabilitation. *Id*. And it noted that after trial, the factors that may have pointed to leniency as consideration for the guilty plea are no longer present. *Id*.

{¶18} In this case, the original sentence was imposed after appellant entered a plea but the resentencing occurred after a trial. Thus, pursuant to *Smith*, in this case there is no "presumption of vindictiveness" as appellant asserts. Instead, the burden was on appellant to demonstrate actual vindictiveness. He did not do so.

{¶19} Appellant cannot point to any evidence of actual vindictiveness. He relies solely on the increase in his sentence. Moreover, several things changed from the time of appellant's plea.

{¶20} Firstly, at appellant's original sentencing hearing, the state recommended a 15-year prison term, which was part of appellant's plea deal. (Dec. 2, 2011 Sentencing Tr. 2). At appellant's second sentencing hearing however, the state recommended maximum, consecutive sentences of 80 years. (Tr. 731).

{¶21} Secondly, when appellant entered his *Alford* plea, the court never heard from the victim. The victim's mother did offer a brief statement on her daughter's

behalf at the original sentencing hearing (Dec. 2, 2011 Sentencing Tr. 3-4), but the victim did not address the court. At the second sentencing hearing, however, the trial court, in addressing appellant, stated:

> [T]here are certainly reasons tactically why Criminal Rule 11 agreements are reached, and one of those, especially in cases like this, is an attempt to prevent a trier of fact or a court where a verdict of guilty has been returned in hearing some of the evidence and testimony which the court can now consider under Section 2929 of the Revised Code in determining the appropriate sentence. Because one of the things that I must consider and that I am considering is the extent of harm to [the victim]. I was not aware until I heard her testify as to the years of abuse that took place. You have categorically denied these accusations. A jury has unanimously found you guilty of all eight counts. And, quite frankly, you can't fake what she said.
>
> * * *
>
> No young girl should be exposed to what you did.

(Tr. 734). Thus, when the court sentenced appellant after his trial, it did so after having listened to the victim testify about the abuse she suffered at appellant's hand.

{¶22} Thirdly, when a defendant in a case such as this enters into a plea agreement, it saves the victim from having to testify in court before a jury as to the embarrassing acts that were committed against her or him. Consideration is often given in a plea agreement for sparing the victim from having to provide these details to a jury. But once the victim has to testify in front of a jury, this consideration no longer exists.

{¶23} Given these circumstances and the fact that appellant failed to prove actual vindictiveness, the trial court did not err in sentencing appellant to a greater sentence after his trial than it did after his plea.

{¶24} Accordingly, appellant's first assignment of error is without merit.

{¶25} Appellant's second assignment of error states:

> APPELLANT WAS DENIED DUE PROCESS BECAUSE THE INDICTMENT, BILL OF PARTICULARS, JURY INSTRUCTIONS, AND VERDICT FAILED TO DIFFERENTIATE BETWEEN THE DIFFERENT TYPES OF CONDUCT SAID TO CONSTITUTE RAPE.

{¶26} Here appellant contends the indictment failed to distinguish among the different types of conduct in this case that constituted rape. The jury verdicts were the same. Appellant contends that when the jurors signed the verdicts, they had no idea which count they were considering (fellatio, cunnilingus, digital penetration, or vaginal intercourse). Therefore, he asserts we cannot be assured that the jurors reached unanimous verdicts on all counts. He contends that for each of the eight counts, there is no way to be assured that all 12 jurors agreed on one type of conduct. Appellant acknowledges that his trial counsel failed to object, but asserts this was plain error. He states the trial court has an obligation to ensure that if a defendant is convicted, there is proof beyond reasonable doubt found by all 12 jurors. Appellant further asserts that the "carbon copy" indictment was not cured by the bill of particulars, jury instructions, or jury verdict forms. Appellant asserts he was denied due process and his convictions cannot stand.

{¶27} As appellant notes, he did not object to this issue in the trial court. Therefore, we must conduct a plain error review. Crim.R. 52(B). Plain error is one in which but for the error, the outcome of the trial would have been different. *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978).

{¶28} An indictment is sufficient if it (1) contains the elements of the offenses; (2) gives the defendant adequate notice of the charges; and, (3) protects the defendant against double jeopardy. *Russell v. U.S.*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).

{¶29} Each count in an indictment must contain, and is sufficient if it contains, a statement that the accused committed a public offense specified therein. R.C.

2941.05. The statement can "be made in ordinary and concise language without any technical averments or any allegations not essential to be proved," or it can "be in the words of the section of the Revised Code describing the offense," or it can be "in any words sufficient to give the accused notice of the offense of which he is charged." R.C. 2941.05.

{¶30} The indictment in this case alleges for each of the eight counts that between certain dates appellant "did engage in sexual conduct with" the victim and that appellant purposely compelled the victim "to submit by force or threat of force, in violation of Section 2907.02(A)(2)(B).

{¶31} The indictment mirrored the language of the applicable statute for each of the eight counts. It also included the applicable Revised Code section appellant was accused of violating. There is no apparent defect on the face of the indictment. "There is no inherent defect in an indictment that charges a defendant with repetition of the same crime over a defined period of time." *State v. Billman*, 7th Dist. Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶33.

{¶32} Additionally, on appellant's request, the state filed a bill of particulars. The bill of particulars expanded on the indictment, stating:

> On or about or between July 1, 2007 and November 30, 2008, in the garage, the cottage and the main house at 5057 New Rd., Austintown, Mahoning County, Ohio, DAVID T. ADAMS did engage in sexual conduct with [the victim] * * * by penetrating her vagina with his finger and/or forcing her to perform or receive oral sex, this happened multiple times during this time frame, and the said DAVID T. ADAMS purposely compelled [the victim] to submit by force or threat of force, by performing these acts against her will, using his weight and age to overcome her will and using his authority over her, being that he was her stepfather.
>
> Said action constitutes Rape in violation of R.C. 2907.02(A)(2)(B) as alleged in Counts 1-4, of the Indictment and

against the peace and dignity of the State of Ohio.

On or about or between May 1, 2009 and August 31, 2009, in the garage, the cottage and the main house at 5057 New Rd., Austintown, Mahoning County, Ohio, DAVID T. ADAMS did engage in sexual conduct with [the victim] * * * by penetrating her vagina with his penis and finger and/or forcing her to perform or receive oral sex, this happened multiple times during this time frame, and the said DAVID T. ADAMS purposely compelling [the victim] to submit by force or threat of force, by performing these acts against her will, using his weight and age to overcome her will and using his authority over her being that he was her stepfather.

Said action constitutes Rape in violation of R.C. 2907.02(A)(2)(B) as alleged in Counts 5-8, of the Indictment and against the peace and dignity of the State of Ohio.

{¶33} After appellant received the bill of particulars, he did not seek any further clarification of the charges against him. The bill of particulars added: (1) the locations where the rapes were alleged to have occurred (the garage, the cottage, and the main house where appellant resided with the victim); (2) the types of conduct that constituted the rapes (for Counts one through four, penetrating the victim's vagina with his finger and/or forcing her to perform or receive oral sex and for Counts five through eight, penetrating the victim's vagina with his penis and finger and/or forcing her to perform or receive oral sex); and (3) how appellant forced the victim to succumb by using (his weight and age to overcome her will and using his authority over her being that he was her stepfather).

{¶34} Appellant relies almost exclusively on *Valentine v. Konteh*, 395 F.3d 626 (C.A.6, 2005), in support of his position. In that case, Valentine was convicted of 20 counts of rape, each of which was identically worded in the indictment, and 20 counts of felonious sexual penetration, each of which was also identically worded in the indictment. The state failed to distinguish factual bases for the charges in the bill

of particulars or at trial. The victim testified at trial that Valentine forced her to perform oral sex "about" 20 times, that he digitally penetrated her "about" 15 times, and that he anally penetrated her "about" ten times. In a habeas corpus petition, Valentine argued in part that his constitutional right to due process of law was denied when he was tried and convicted on an indictment which did not distinguish between conduct on any given date.

{¶35} The Sixth Circuit determined Valentine's indictment was constitutionally defective, because the undifferentiated charges failed to give him adequate notice of the charges and did not protect him against double jeopardy. It found,

> [t]he indictment, the bill of particulars, and even the evidence at trial failed to apprise the defendant of what occurrences formed the bases of the criminal charges he faced. Valentine was prosecuted and convicted for a generic pattern of abuse rather than for forty separate abusive incidents

Id. at 634.

{¶36} Appellant's reliance on *Valentine*, however, is erroneous. This court has found that *Valentine* is not good law and we need not follow it:

> Appellant's reliance on *Valentine* is misplaced. As the state notes, although a federal circuit court decision may be persuasive, it is not binding on this Court. *State v. Burnett*, 93 Ohio St.3d 419, 423-424, 755 N.E.2d 857 (2001) ("Ohio appellate courts are not bound by lower federal court opinions," paraphrasing *State v. Glover*, 60 Ohio App.2d 283, 396 N.E.2d 1064 (1978). The factors weighing against the persuasive value of *Valentine*, however, are overwhelming: the *Valentine* decision does not rely on applicable law; the reasoning used by the court has been discredited under AEDPA ("Antiterrorism and Effective Death Penalty Act of 1996" (28 USC 2254)); and the decision

> has been distinguished in every subsequent Sixth Circuit decision that cites it on this issue.
>
> Most importantly, the *Valentine* decision was based on Fifth Amendment law that does not apply to the Ohio Grand Jury indictment requirement. *Fulton* and *Hurtado*, supra. *Valentine* also misapplies existing federal law and misrepresents a number of the cases on which it relies. These cases actually address the double jeopardy concerns created by duplicative or duplicitous counts in an indictment and the discrepancy created by a directed verdict that does not identify which count it addresses, or by an acquittal that is similarly deficient. Hence, this case has no persuasive value, here.

Billman, 7th Dist. Nos. 12 MO 3, 12 MO 5, at ¶¶34-35. See also, *State v. Stefka*, 7th Dist. No. 10 MO 7, 2012-Ohio-3004, 973 N.E.2d 786; *State v. Clemons*, 7th Dist. No. 10 BE 7, 2011-Ohio-1177, ¶39, fn. 2 ("*Valentine* is not binding on Ohio courts. * * * [And] as the dissent in *Valentine* noted, it is the province of the jury to determine if multiple acts occurred where they are estimated as opposed to individually detailed.")

{¶37} Moreover, at trial, the victim testified as to numerous specific instances of rape.

{¶38} The victim testified about the first time appellant touched her. It occurred sometime in the summer of 2006. (Tr. 382, 403, 404). She stated that up until that time, appellant had only asked her to take her clothes off, but he had not touched her. (Tr. 350). But one day, while she and appellant were in the garage and her sisters were in the house, she asked him if she could visit with some friends. (Tr. 351). Appellant told her to take off her pants and then he touched her vagina. (Tr. 352).

{¶39} The victim also testified about the second time appellant touched her. She stated that it was a couple weeks after the first touching incident. (Tr. 413). The victim stated that once again she asked his permission to go somewhere and appellant made her take off her pants and started touching her and this time he

unzipped his pants and made her touch him too. (Tr. 414). She stated it was exactly the same as before. (Tr. 413). And once again, the victim stated she and appellant were alone in the garage. (Tr. 413).

{¶40} The victim also testified specifically about the two times appellant forced her to have vaginal intercourse, one of which also included oral sex. The first time, she stated, she had asked appellant if she could go to her friend's house. (Tr. 356). He told her she had to wait and that her friend could pick her up in an hour. (Tr. 357). Appellant then told her he wanted to have sex with her. (Tr. 357). The two were alone in the downstairs living room. (Tr. 358). Appellant first performed oral sex on the victim. (Tr. 373). Appellant then had vaginal intercourse with her and he stopped when she told him it hurt. (Tr. 358). The second time appellant forced the victim to have vaginal intercourse occurred a couple weeks later. (Tr. 359). The victim testified that appellant told her that she "owed him" and ordered her to take off her clothes. (Tr. 360). She stated that appellant then forced her to have sex with him. (Tr. 360). The third time appellant forced the victim to have vaginal intercourse with him occurred after appellant walked in on her taking a shower. (Tr. 361). The victim stated that appellant eventually left while she got out of the shower and got dressed but that he then came back and ordered her to take her clothes off. (Tr. 361-362). He then forced her to have vaginal intercourse with him on the bed in the small house. (Tr. 362).

{¶41} The victim also testified that over several years, appellant digitally penetrated her, performed oral sex on her, and forced her to perform oral sex on him. (Tr. 351-352, 353-354). She testified that appellant performed oral sex on her more than ten times. (Tr. 370-371).

{¶42} Hence, the victim's testimony described in detail the various acts appellant was accused of committing.

{¶43} Given appellant's failure to object, the fact that the indictment is sufficient, the bill of particulars' further detail of the charges, *Valentine's* inapplicability, and the victim's specific testimony, appellant's due process rights were

not violated. Accordingly, appellant's second assignment of error is without merit.

{¶44} Appellant's third assignment of error states:

> THE TRIAL COURT DENIED APPELLANT'S RIGHTS TO DUE PROCESS AND TO INDICTMENT BY A GRAND JURY WHEN IT PERMITTED MODIFICATION OF THE DATES IN THE INDICTMENT.

{¶45} The indictment alleged that Counts one through four occurred between July 1, 2007 and November 30, 2008. The victim's testimony, however, revealed that these acts began during the summer before she entered the eighth grade, which was the summer of 2006, instead of 2007, as alleged in the indictment. (Tr. 382-383). The state then moved to amend the indictment to expand the dates relating to Counts one through four. Appellant's counsel objected. (Tr. 399-400). The trial court allowed the state to amend the indictment to conform to the evidence. (Tr. 659). It instructed the jury that for Counts one through four, the conduct was alleged to have occurred between May 1, 2006, and November 30, 2008. (Tr. 705, 709, 710, 711).

{¶46} In his last assignment of error, appellant contends the trial court erred in instructing the jury on the amended indictment but not journalizing the amended indictment. He contends the indictment was never legally amended and what the jurors convicted him of was not what the grand jury indicted him on.

{¶47} Appellant goes on to argue that the indictment charged multiple undifferentiated charges of rape premised on acts alleged to have occurred during 2007 and 2008. He asserts there is no way to review this record and determine the evidence that supports each individual conviction.

{¶48} Appellate courts review a trial court's decision to permit the amendment of an indictment for an abuse of discretion. *State v. Beach*, 148 Ohio App.3d 181, 2002-Ohio-2759, 772 N.E.2d 677, ¶23. Abuse of discretion connotes more than an error of law; it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶49} Crim.R. 7(D) allows the amendment of an indictment at any time before, during, or after a trial "in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged."

{¶50} There was no change in the name or identity of the crime charged in this case. The only change was to the beginning of the time frame in which Counts one through four were alleged to have occurred. Thus, the amendment complied with Crim.R. 7(D).

{¶51} Additionally, this case involved the repeated rape of a child over a substantial period of time. As the Eighth District observed:

> "[W]here such crimes constitute sexual offenses against children, indictments 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." *State v. Barnecut* (1988), 44 Ohio App.3d 149, 152, 542 N.E.2d 353; see also *State v. Gus*, Cuyahoga App. No. 85591, 2005-Ohio-6717. This is partly due to the fact that the specific date and time of the offense are not elements of the crimes charged. *Gus*, supra at ¶6. Moreover, many child victims are unable to remember exact dates and times, particularly where the crimes involved a repeated course of conduct over an extended period of time. *State v. Mundy* (1994), 99 Ohio App.3d 275, 296, 650 N.E.2d 502; see *State v. Robinette* (Feb. 27, 1987), Morrow App. No. CA-652; *Barnecut*, supra. "The problem is compounded where the accused and the victim are related or reside in the same household, situations which often facilitate an extended period of abuse." *Robinette,* supra. Thus, "an allowance for reasonableness and inexactitude must be made for such cases considering the circumstances." *Id*.; *Barnecut*, supra at 152, 542 N.E.2d 353.

State v. Yaacov, 8th Dist. No. 86674, 2006-Ohio-5321, ¶17.

{¶52} Additionally, the trial court's failure to journalize the amendment was harmless error. Generally speaking, an indictment does not even need to include the date or range of dates of the alleged crime. *State v. West*, 7th Dist. No. 05 JE 57, 2007-Ohio-5240, ¶24.

{¶53} Accordingly, appellant's third assignment of error is without merit.

{¶54} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

DeGenaro, P.J., concurs.