[Cite as *State v. J.J.S.*, 2024-Ohio-2645.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 23AP-441 (C.P.C. No. 20CR-1643)
v.	:	(REGULAR CALENDAR)
[J.J.S.],	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 5, 2024

On brief: *G. Gary Tyack*, Prosecuting Attorney, and *Michael A. Walsh* for appellee. **Argued:** *Michael A. Walsh*.

On brief: *Todd W. Barstow* for appellant. **Argued:** *Todd W. Barstow*.

APPEAL from the Franklin County Court of Common Pleas

EDELSTEIN, J.

{¶ 1} Defendant-appellant, J.J.S., appeals from the June 23, 2023 judgment of conviction entered by the Franklin County Court of Common Pleas after a jury found him guilty of gross sexual imposition. Appellant argues his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. He also contends he received ineffective assistance of counsel at trial.

{¶ 2} Because we agree that appellant's trial counsel was ineffective in opening the door to the state's pervasive presentation of highly prejudicial propensity evidence that would have otherwise been excluded from trial, we reverse the judgment below and remand the matter to the trial court for further proceedings consistent with this decision.

I. FACTS AND PROCEDURAL HISTORY

{¶ 3} By indictment filed April 10, 2020, plaintiff-appellee, the State of Ohio, charged appellant with one count of gross sexual imposition, in violation of R.C. 2907.05, a felony of the third degree. Specifically, the state alleged appellant had sexual contact with an eight-year-old girl, B.M., in June 2019 while both were attending a birthday party hosted by appellant's adult daughter A.W. and her husband M.W. in the backyard of their home.

{¶ 4} The case proceeded to a jury trial on May 15, 2023. Because there was no physical evidence or eyewitnesses to corroborate B.M.'s account of the unlawful sexual contact, the state's primary evidence against appellant was the live testimony of B.M. (then 12 years old) about the June 2019 incident, testimony from other witnesses about B.M.'s disclosure shortly after the incident occurred, and B.M.'s video-recorded forensic interview with a licensed social worker on June 5, 2019.

{¶ 5} At the time of the incident, B.M. was a neighborhood friend of appellant's grandchildren. On June 2, 2019, A.W. and M.W. hosted a sleepover birthday party at their home for their daughter. (*See* May 16, 2023 Tr. Vol. II at 286; May 17, 2023 Tr. Vol. III at 412.) B.M. and appellant were in attendance, along with other neighborhood kids and members of A.W.'s family. Towards the end of the evening, some children went to sleep in tents pitched in the backyard while others—including B.M.—fell asleep around the bonfire. (*See* Tr. Vol. II at 122-26. *See also* Tr. Vol. II at 288-89.)

{¶ 6} Appellant remained outside around the fire long after the other adults left the party and A.W. and M.W. retired inside. (*See* Tr. Vol. II at 122-26, 293-94; Tr. Vol. III at 353-55.) A.W. testified she expected appellant would leave when M.W. went inside and did not learn appellant had stayed the night until the next morning, when she saw appellant asleep on her living room couch. (Tr. Vol. II at 294. *See also* Tr. Vol. III at 355.)

{¶ 7} According to B.M., when she fell asleep outside by the fire, appellant was sitting in a chair across the fire from her. (Tr. Vol. II at 126, 133.) B.M. testified that she woke up to appellant—who she identified in the courtroom and using photographs taken on the night of the incident (Tr. Vol. II at 141-47)—laying near her and rubbing her thigh. (Tr. Vol. II at 133-35. *See also* Tr. Vol. II at 145-46.) She described moving his hand away from her twice before he began touching her hair. (*See* Tr. Vol. II at 135-36.) At that point, B.M. testified she got up and ran inside. (Tr. Vol. II at 136-37.)

{¶ 8} After returning home the next day, B.M. told her custodial grandmother C.E. about the incident with appellant. (Tr. Vol. II at 138-40, 144-46, 178-81.) According to C.E., B.M. told her that appellant touched her "[i]n [her] private area" and "squeezed it really, really hard until it hurt." (Tr. Vol. II at 180.)

{¶ 9} C.E. called law enforcement to report the incident, and officers promptly responded. (Tr. Vol. II at 144-45, 182-83; Tr. Vol. III at 411-12.) Detective John Ball testified he first spoke with B.M. and her grandmother on June 4, 2019 when the case was assigned to him for investigation. (*See* Tr. Vol. III at 412-13. *See also* Tr. Vol. II at 183-85.) After making contact with C.E., Detective Ball referred B.M. to Nationwide Children's Hospital Child Assessment Center ("CAC") for a forensic interview with Kerri Wilkinson, a licensed social worker. (*See* Tr. Vol. III at 413-14; Tr. Vol. II at 221.)

{¶ 10} B.M. appeared for the forensic interview with Ms. Wilkinson at CAC on June 5, 2019. (Tr. Vol. II at 238-39.) A video recording of that interview was played for the jury and admitted without objection. (*See* Ex. C1; Tr. Vol. II at 239-42.) During that interview, B.M. described the events that occurred on June 2, 2019. Specifically, she reported waking up to appellant "rubbing her legs and squeezing her 'flower,' "—which C.E. indicated was their word for vagina—on top of her clothes. (Ex. C1. *See* Ex. C2 at 6.) At trial, Ms. Wilkinson testified about the disclosures B.M. made during that interview and explained the import of B.M.'s responses to her questioning. (*See* Tr. Vol. II at 239-47.) A copy of Ms. Wilkinson's report created in connection with that interview was also presented and admitted into evidence at trial. (Ex. C2; Tr. Vol. II at 237-38, 247-49.)

{¶ 11} At the conclusion of the forensic interview, Dr. Farah Brink performed a physical examination of B.M. (*See* Ex. C2 at 3-6.) Dr. Brink testified her physical examination of B.M. was unremarkable. (*See* Tr. Vol. III at 385-86; Ex. C2 at 3-6.) Because B.M. alleged the touching occurred over her clothing, Dr. Brink did not attempt to collect DNA evidence. (Tr. Vol. III at 389-90.)

{¶ 12} Around this same time frame, C.E. called A.W. to confront her about what happened at her home. (*Compare* Tr. Vol. II at 139, 296-98, *with* Tr. Vol. II at 183-84.) Initially, A.W. doubted the veracity of B.M.'s allegations against appellant. (*See* Tr. Vol. II at 184, 297-98.) And, at trial, A.W. testified that, prior to B.M.'s disclosure, she was not aware of anyone else making similar allegations against appellant. (Tr. Vol. II at 300.) But,

as discussed more thoroughly in our analysis of appellant's second assignment of error, A.W. subsequently learned of similar allegations by appellant's adult stepdaughters, A.R. and A.S., about sexual abuse that occurred approximately three decades earlier, when they were around B.M.'s age and living with appellant and their mother (appellant's wife, N.S.). (*See* Tr. Vol. II at 185-89, 201-02, 205-08, 266-83, 301-05, 318-25.)

{¶ 13} After the state rested, defense counsel moved for acquittal, pursuant to Crim.R. 29(A), arguing the state's evidence failed to show there was a "touching of any type of area on [B.M.'s] body, so not enough to come up to gross sexual imposition." (Tr. Vol. III at 445.) The trial court denied that motion and admitted the state's proffered exhibits without objection. (Tr. Vol. III at 445-48.) The defense then rested without calling any witnesses, and the trial court again denied appellant's subsequent renewed motions for acquittal. (*See* Tr. Vol. III at 451, 532.)

{¶ 14} Following deliberations, the jury found appellant guilty of gross sexual imposition. (Tr. Vol. III at 534-35.) At the June 22, 2023 sentencing hearing, the trial court imposed a mandatory prison sentence of 54 months. The trial court memorialized appellant's conviction and sentence in its June 23, 2023 judgment entry.

{¶ 15} Appellant timely appealed from that judgment of conviction and raises the following two assignments of error for our review:

> [I.] THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF GROSS SEXUAL IMPOSITION, AS THAT VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WAS ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> [II.] APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE, THEREBY DENYING HIM HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

II. ANALYSIS

{¶ 16} Appellant challenges the sufficiency and manifest weight of the evidence supporting his conviction in his first assignment of error and contends he received ineffective assistance of trial counsel in his second assignment of error. Because our disposition of appellant's second assignment of error renders his first assignment of error moot, we address his second assignment of error first.

A. Second Assignment of Error

{¶ 17} Appellant argues in his second assignment of error that he was prejudiced by the ineffective assistance of his trial counsel. Specifically, appellant contends that by misrepresenting key facts during opening statements, his trial counsel opened the door to otherwise inadmissible and highly prejudicial evidence of other sexual abuse allegations made against appellant by his adult stepdaughters, A.R. and A.S., about incidents that occurred approximately 30 years earlier. For the following reasons, we find merit in appellant's claim.

1. Legal Standards

{¶ 18} A defendant asserting a claim of ineffective assistance of counsel must establish: (1) counsel's performance was deficient or objectively unreasonable, as determined by " 'prevailing professional norms;' " and (2) that the deficient performance of counsel prejudiced the defendant. *State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, ¶ 77, quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

{¶ 19} To show trial counsel's performance was deficient or unreasonable, the defendant must overcome the presumption that counsel provided competent representation and must show counsel's actions were not trial strategies prompted by reasonable professional judgment. *Strickland* at 689. "As a result, trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance." *State v. Sallie*, 81 Ohio St.3d 673, 675 (1998), citing *State v. Thompson*, 33 Ohio St.3d 1, 10 (1987). Tactical or strategic decisions, even if unsuccessful, do not generally constitute ineffective assistance of counsel. *State v. Frazier*, 61 Ohio St.3d 247, 255 (1991). Rather, the errors complained of must amount to a substantial violation of counsel's essential duties to his client. *See State v. Bradley*, 42 Ohio St.3d 136, 141-42 (1989).

{¶ 20} Prejudice results when " 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Bradley* at 142, quoting *Strickland* at 694. " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Id.*, quoting *Strickland* at 694.

2. Analysis

{¶ 21} Appellant argues his trial attorney was ineffective for opening the door to highly prejudicial other-acts evidence by first bringing up other sexual abuse allegations made by his stepdaughters, A.R. and A.S., and then ***misrepresenting*** when those allegations were reported during opening statements. As a result of that error, the state was permitted to present a considerable amount of other-acts evidence, including testimony from one of appellant's stepdaughters about the prior sexual abuse.

{¶ 22} During her opening statements, the trial prosecutor made no reference to any other sexual abuse allegations against appellant by anyone other than B.M. Inexplicably, appellant's trial counsel brought up, ***for the first time***, during his opening statements allegations made by appellant's adult stepdaughters about sexual abuse that occurred approximately 30 years earlier and for which appellant had never been criminally prosecuted. (*See* Tr. Vol. II at 102-09.) Specifically, trial counsel stated:

> It's kind of interesting because all along during this case, this child knows information that there's no way that she would know unless somebody was telling her this information.
>
> Grandmother gets together, they get on the internet and try to figure out and call my client's daughter [A.W.] over. They also called a stepdaughter [A.S.] over and had this big powwow and they're talking about this, they're talking about that. The stepdaughter goes, well, it happened to me too.
>
> ***This is important because this is a whole proof that whatever happened to this child happened because the stepdaughter said it happened to her.***
>
> Now, the stepdaughter when she says this, she's 35 years old, and she claimed it happened when she was like five years old. ***Never tells anybody.***

> The interesting part about it -- and you'll hear about this -- is that her mother [N.S.] and [appellant], although they are separated, they're married. You would think that if a woman knew that somebody was messing with their child, they would divorce them. They're married. They're still married. So there's something wrong with that story.
>
> What else is kind of wrong is they are waiting for the detective and it's the grandmother, my client's daughter [A.W.], and the stepdaughter [A.S.], they're all sitting there waiting and all sitting there talking and they're all coming up with these stories. They try to do everything to make my client look guilty.

(Emphasis added.) (Tr. Vol. II at 103-04.) Defense counsel then proceeded to tell the jury:

> I think the most important thing that you got to listen to is during [B.M.'s forensic] interview * * * [B.M.] says, well, all these kids were asleep, nobody saw anything, but the proof is it happened to adult kids, [appellant's] stepdaughters. How would she know that considering that that alleged incident occurred * * * closer to 30 years before this alleged incident? How would she know that unless someone told her that? That's what this case is all about.

(Emphasis added.) (Tr. Vol. II at 106.) And, in concluding his opening statements, appellant's trial counsel represented as follows:

> And what we're going to do * * * is show you that there's two sides to this story, there's no proof that [appellant] ever touched this child, he would never do that, and ***he never touched his stepdaughter.***
>
> And that's the other interesting thing. The stepdaughter [A.S.] comes up with this story that supposedly he touched her 30 years ago. Never tells her mom. She claims that her sister [A.R.] was also a victim of this. Sister is not going to come in here and testify to that. Never tells her [step]sister [A.W.], although [appellant] has been invited over to that house all the time and there's kids over at that house. Do you think -- if you knew somebody was a sexual pervert and he's perpping [sic] on kids, you wouldn't tell the family that has kids that this had happened? No. ***All of this comes out after this alleged incident and all of this is just to make [appellant] look bad.***

(Emphasis added.) (Tr. Vol. II at 108-09.)

{¶ 23} Immediately following defense counsel's opening statements, the state argued it should be permitted to introduce evidence regarding the allegations of appellant's stepdaughters because the "defense just opened the door to prior bad acts" by "talk[ing] about all of this prior abuse of his stepdaughter[s]." (Tr. Vol. II at 110.)

{¶ 24} On review of the record, it is clear the state had no pre-trial intention to introduce evidence of appellant's alleged prior sexual abuse of his stepdaughters at trial. Indeed, nothing in the record before us suggests the state provided defense counsel with written notice of its intention to use this other-acts evidence prior to trial, as required by Evid.R. 404(B)(2)(c). Though that rule excuses lack of pre-trial notice on a showing of good cause, the ***only*** cause for the state's untimely disclosure in this case was defense counsel's opening the door to the presentation of such evidence in his opening remarks.

{¶ 25} To be sure, the trial prosecutor did not reference—or even allude to the existence of—any other allegations against appellant during her opening remarks. (*See* Tr. Vol. II at 95-100.) And the state did not subpoena appellant's stepdaughters or his wife to testify at trial. (*See* Tr. Vol. II at 110-11.) Indeed, in addressing this issue during a sidebar conference, the trial court noted the state "was going to redact" the portions of B.M.'s video-recorded forensic interview that referenced the stepdaughters' allegations against appellant. (*See* Tr. Vol. II at 111.) Though acknowledging the stepdaughters were not on the state's pre-trial witness list and never filing a pre-trial motion to suppress this other-acts evidence (presumably, because the state never provided the defense with written notice of its intention to use such evidence), appellant's trial counsel apparently misunderstood ***not just*** the factual circumstances surrounding the stepdaughters' disclosures, but also the application of evidentiary rules that would bar the admission of such evidence:

> [PROSECUTOR]: It's the State['s] position that defense just opened the door to prior bad acts, , so I would like to make sure I get this straight with the Court and with defense line of questioning of my witnesses, because he's now just talked about all of this prior abuse of his stepdaughter. I do have them -- I can have them testify.
>
> [DEFENSE]: Yesterday [the trial prosecutor] said that she was going to introduce the CAC tape and all I talked about is what's on that tape. There's nothing new.

[The state] knew about this. ***I haven't opened up the door to anything.***

THE COURT: You did say in your opening that you're not going to hear from the other sister [A.R.] because nothing happened to her.

[DEFENSE]: She's not on the witness list. Nobody talked to her.

THE COURT: All right. So you're going to object to [the state] amending [its] witness list?

[DEFENSE]: Yes.

THE COURT: Who are you going to add to your witness list?

[PROSECUTOR]: I would like * * * [A.S.] and [A.R.]. * * * Also maybe [N.S.], who is the wife [defense counsel] talked about in opening statements.

THE COURT: Okay.

[PROSECUTOR]: Then, Your Honor, I'm asking the Court to be permitted to go into these allegations on my questioning, specifically [A.W.], who has no knowledge of this.

[DEFENSE]: All of this is on their tapes. I got all of this information off their tapes. This is nothing new, everything that I talked about the mother [N.S.]. This alleged incident, all of this is recorded on the tapes from the State.

THE COURT: At first [the trial prosecutor] was going to redact it and then you talked about it in opening. You did open the door too.

[DEFENSE]: Well, she was going to play the tape.

THE COURT: Wait a minute. You did open the door in your opening statement by saying that you're not going to hear from so and so and not going to hear from so and so about prior allegations. You opened the door, so * * * we will add them.

(Emphasis added.) (Tr. Vol. II at 110-12.) Though the state posits that opening the door to the presentation of this other-acts evidence during his opening remarks was trial strategy employed by appellant's counsel, that contention is belied by defense counsel's express statement otherwise and apparent confusion about what evidence the state would be presenting at trial, as set forth above. (*See* Tr. Vol. II at 110-12.)

{¶ 26} We note the only video recording played by the state during trial was B.M.'s forensic interview with Ms. Wilkinson at CAC on June 5, 2019. In that interview, B.M. briefly mentioned the allegations by appellant's stepdaughters. Specifically, when explaining that no one witnessed appellant touch her, B.M. stated others believed her "because [appellant] used to do it to his little girls." (Ex. C1 at 16:55.) When asked how she knew this, B.M. responded: "Because one of his little girls – like now they're grownups right now, she's like 35 right now, maybe 36 – and she said that it's true because that happened to her when she was little." (Ex. C1 at 17:00.) In comparison, defense counsel's opening remarks about the allegations made by appellant's two stepdaughters far exceeded the scope of the statements B.M. made during her forensic interview at CAC.[1] And, as the trial court pointed out, the state intended to redact B.M.'s statements about the allegations made by appellant's stepdaughters from the video recording played for the jury until appellant's trial counsel brought them up. (*See* Tr. Vol. II at 111.)

{¶ 27} To be clear, defense counsel did not suggest B.M. made up the allegations at issue in this case ***after*** she heard about claims made by appellant's stepdaughters. Rather, appellant's trial counsel told the jury that, ***after*** B.M. disclosed the incident to adults and the police, appellant's stepdaughters came forward, for the first time, with similar accusations against appellant about incidents alleged to have occurred over 30 years ago. (*See* Tr. Vol. II at 109.) Essentially, the opening remarks of appellant's trial counsel attacked the credibility of the stepdaughters' allegations ("Why didn't they say something when things first happened?") and globally theorized that they were concocted "just to make [appellant] look bad." (*See* Tr. Vol. II at 109.) For this reason, the trial court permitted the state to present other-acts evidence to refute the veracity of defense counsel's

[1] The only other reference B.M. made to appellant's stepdaughter during her CAC interview was at the end, when B.M. described the stepdaughter telling B.M. she was "brave because [she] told everybody." (*See* Ex. C1 at 37:10.)

claim that "[a]ll of this comes out after this alleged incident [involving B.M.]" by showing that appellant's stepdaughters disclosed the abuse long before B.M. made any disclosure. (*See* Tr. Vol. II at 109-12.)

{¶ 28} To address and rebut claims made by appellant's trial counsel during his opening remarks, the state was allowed to present testimony from B.M., C.E., A.W., and Detective Ball describing allegations they heard appellant's stepdaughters make against appellant about sexual abuse that began when they were approximately four or five years old. (*See* Tr. Vol. II at 160-62, 185-89, 201-02, 205-08, 301-06, 318-25; Tr. Vol. III at 425-26, 429-34, 442-43.) The state was also permitted to play B.M.'s forensic interview video without redacting the portions where B.M. referenced the stepdaughters' sexual abuse claims against appellant. (*See* Ex. C1.) And finally, the state was allowed to call one of appellant's stepdaughters, A.R., to testify in considerable detail about the sexual abuse she and her sister, A.S., suffered at the hands of appellant for many years when they were young. (*See* Tr. Vol. II at 267-83.)

{¶ 29} Prior to trial, the state had no intention of introducing this other-acts evidence at appellant's trial. Even if it had, this other-acts evidence most surely would have been declared—absent defense counsel's opening of the door—inadmissible and highly prejudicial propensity evidence under Evid.R. 404(B) and 403(A). (*See* Tr. Vol. II at 112, 170.)

{¶ 30} Indeed, Evid.R. 404(B) provides: "Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." "This type of evidence is commonly referred to as 'propensity evidence' because its purpose is to demonstrate that the accused has a propensity or proclivity to commit the crime in question." *State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, ¶ 21, citing *State v. Curry*, 43 Ohio St.2d 66, 68 (1975). Evid.R. 404(B) categorically bars the use of other-acts evidence to show propensity in a criminal trial. *Hartman* at ¶ 20-21, quoting *Curry* at 68. And, more broadly, Evid.R. 403(A) requires the exclusion of evidence when "its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶ 31} While it is generally true that deference is given to trial counsel's tactical decisions, evidence of other crimes that comes before the jury due to defense counsel's

neglect, ignorance, or disregard of key facts or defendant's rights—and that bears no reasonable relationship to a legitimate trial strategy—can be sufficient to render counsel's performance deficient. *See, e.g.*, *State v. Hester*, 10th Dist. No. 02AP-401, 2002-Ohio-6966, ¶ 10, citing *State v. Rutledge*, 10th Dist. No. 92AP-1401, 1993 Ohio App. LEXIS 2851 (June 1, 1993), citing *State v. Martin*, 37 Ohio App.3d 213, 214 (10th Dist.1987).

{¶ 32} In this case, appellant's trial counsel did not merely reference the stepdaughters' allegations during opening remarks. He posited that "all of this is just to make [appellant] look bad" and told the jury that appellant's stepdaughters did not report being abused by appellant until ***after*** B.M.'s disclosure. (*See* Tr. Vol. II at 109.) He either misremembered or was unaware of the relevant facts and evidence, as they did not support his assertion. While it is true that A.W. did not know about appellant's stepdaughters' claims until after B.M. reported the incident (*see* Tr. Vol. II at 277, 300), A.R. testified she told her mother about appellant sexually abusing her when she was in fifth grade—which would have been at least 20 years prior to B.M.'s reporting (*see* Tr. Vol. II at 267, 273-74). A.R. also testified about confronting appellant during a counseling session with A.S., their mother, their biological father, and appellant when A.R. and her sister were adults. (Tr. Vol. II at 274-76. *See also* Tr. Vol. II at 323-24.) Significantly, A.R. told the jury that appellant admitted to "fondling" A.R. and A.S. during that counseling session. (Tr. Vol. II at 281.) And critically, A.R. denied meeting or knowing anything about B.M. prior to the day she testified at appellant's trial. (Tr. Vol. II at 276.)

{¶ 33} By bringing up the stepdaughters' allegations of sexual abuse against appellant, erroneously suggesting the stepdaughters made up the allegations after learning of B.M.'s claims, inaccurately representing to the jury that appellant's stepdaughters "[n]ever [told] [their] mom," and telling the jury the stepdaughters were "not going to come in here and testify" about these other incidents, appellant's trial counsel opened the door to the introduction of otherwise inadmissible and highly prejudicial other-acts evidence. (*See* Tr. Vol. II at 108-09.) Thus, we respectfully disagree with the dissent's suggestion that trial counsel's inaccurate portrayal of relevant facts could somehow fall within the ambit of reasonable trial strategy. (*See* Dissent at ¶ 51-52.) Not only was defense counsel's erroneous representation swiftly rebuked by the state's presentation of otherwise inadmissible and unrefuted other-acts evidence, but it also impinged on the credibility of

appellant's trial counsel. Under these facts and circumstances, we see no viable trial strategy in promulgating a factually unsupported theory and, in so doing, opening the door to the state's presentation of highly prejudicial other-acts evidence.

{¶ 34} Indeed, we do not conclude trial counsel's performance satisfies the deficient performance prong of *Strickland* simply because there was no evidence to substantiate the factual basis for the defense's attempt at challenging B.M.'s credibility. Rather, we find the performance of appellant's counsel at trial was deficient because evidence concerning the timing of stepdaughters' disclosure ***categorically refuted*** the factual predicate on which the defense's credibility attack was premised. A.R. testified she told her mother about the abuse when she was in fifth grade—decades before the incident with B.M.—and revisited the matter again as an adult when she and A.S. confronted appellant during a therapy session. (*See* Tr. Vol. II at 272-76.) And, according to A.R., A.S. told their mother about appellant abusing her sometime before A.R. first disclosed, which caused a "very big fight" between appellant and A.R.'s mother. (Tr. Vol. II at 272.) Thus, there was no viable factual basis for appellant's trial counsel to suggest appellant's stepdaughters did not disclose the abuse until after B.M. reported the incident in June 2019.

{¶ 35} The dissent posits that defense counsel would not have known the specifics of A.R.'s testimony until it occurred at trial. (Dissent at ¶ 51.) That is often true in criminal trials where pre-trial discovery depositions are not available. But, while appellant's trial counsel may not have been able to anticipate every detail of A.R.'s testimony, it is clear from the record before us that defense counsel had substantial information about the gist of these allegations before trial. Defense counsel's opening remarks reflect he was aware that appellant's stepdaughters had alleged they were sexually abused by appellant when they were young. (*See* Tr. Vol. II at 103-09.) Indeed, Detective Ball described speaking to A.S. and learning "that while they were children, the two stepdaughters, that they were exposed to some of the similar behavior while they lived with [appellant]." (Tr. Vol. III at 425-26. *See also* Tr. Vol. III at 429-33, 439.) Trial evidence also indicated appellant knew about his stepdaughters' claims long before this case was indicted. (*See* Tr. Vol. II at 268-76.) Thus, appellant himself was a resource for at least some details—namely, the timing of his stepdaughters' disclosure. (*Compare* Dissent at ¶ 51.)

{¶ 36} That is not all. On review of the record, we find defense counsel's statements suggest he failed to grasp the evidentiary limitations on the other-acts evidence at issue in this case. As described above, the record confirms the state did not intend, in advance of trial, to present evidence relating to appellant's stepdaughters' allegations. Indeed, had the state so intended, it would have notified the defense in writing, prior to trial, in the manner provided by Evid.R. 404(B)(2). *See* Evid.R. 404(B)(2)(c). In practice, the state's filing of its notice of intention to use other-acts evidence is often the catalyst for the defense's pre-trial filing of a motion *in limine* to exclude it from trial. The state also would have certainly subpoenaed appellant's stepdaughters for trial and included them on its witness list before trial commenced. But it did neither. And, the state would not have agreed to redact the portions of B.M.'s recorded interview referencing the other-acts evidence had it intended to play the recording in its entirety. Surely, too, the state would not have omitted any reference to appellant's stepdaughters' allegations in its opening remarks had it planned to present such evidence at trial. It was not until defense counsel repeatedly referenced—and misrepresented—this other-acts evidence during his opening remarks that the state's case came to include evidence and testimony about appellant's alleged prior sexual abuse of his stepdaughters.

{¶ 37} We also note the other-acts evidence at issue in this case does not fall within any of the permitted purposes expressly enumerated by Evid.R. 404(B)(2) ("motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident") or in R.C. 2945.59 ("[i]n any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved."). To be sure, the trial prosecutor did not claim—either before (via the notice required by Evid.R. 404(B)(2)) or during trial—that evidence about appellant's alleged abuse of his stepdaughters was being offered for any of the permitted purposes recognized by Evid.R. 404(B)(2) or in R.C. 2945.59. Rather, the other-acts evidence presented in this case was only admitted for the limited purpose of rebutting defense counsel's inaccurate claim that appellant's stepdaughters disclosed being abused after B.M. reported the incident. (*See* Tr. Vol. II at 109.)

{¶ 38} The timing of the stepdaughters' disclosure was not material to the jury's determination of appellant's guilt of the charged offense involving B.M. or establishing any of the purposes permitted by Evid.R. 404(B)(2) or R.C. 2945.59. However, defense counsel's opening remarks inexplicably put the timing of the stepdaughters' disclosure at issue in this case. (*See* Tr. Vol. II at 109.) But, defense counsel's factual representations regarding the timing of the stepdaughters' disclosure were wrong, as proven by the state's unrefuted evidence. And, although the state was permitted to present other-acts evidence for the purpose of rebutting defense counsel's inaccurate statements, the jury was never instructed that it could only consider the evidence about the stepdaughters' allegations for the limited purpose for which it was offered. (*Compare* Dissent at ¶ 52.)

{¶ 39} Based on the foregoing, we find the performance of appellant's trial counsel was deficient under the facts and circumstances of this. At issue, then, is whether such failure constituted prejudicial error. For the following reasons, we conclude that it does.

{¶ 40} In the absence of any physical or corroborating evidence, the state's case almost exclusively hinged on the jury's determination of B.M.'s credibility. However, because of defense counsel's error during his opening statements regarding otherwise impermissible propensity evidence, the state was permitted to present a copious amount of highly prejudicial other-acts evidence with the effect of bolstering the credibility of B.M.'s testimony. Based on these facts, it is reasonably probable the other-acts testimony regarding appellant's alleged prior sexual abuse of his stepdaughters for several years, beginning when they were as young as five, affected the outcome of the case.

{¶ 41} Quite pointedly, C.E. described A.W. as being skeptical about the veracity of B.M.'s allegations initially but then accepting them as true a couple of days later because "it came from a different source that it also happened to them too." (Tr. Vol. II at 185. *See also* Tr. Vol. II at 297-98, 300-06.) This is precisely the concern with propensity evidence: even though actual proof of guilt is wanting, a verdict of guilty can be reached when the finder of fact is presented with accusations made by several and solicited to ruminate on why these claims from different people would exist if they were not so. *See, e.g., State v. Hartman*, 2020-Ohio-4440 at ¶ 20, quoting *State v. Hector*, 19 Ohio St.2d 167, 174-75 (1969).

{¶ 42} Significantly, A.R. testified that appellant admitted to sexually abusing her and her sister, and appellant's trial counsel failed to make any attempt to remove or limit the purpose of this testimony from the jury's consideration. (*See* Tr. Vol. II at 274-75.) More broadly, defense counsel did not object to the state's unfettered presentation of other-acts evidence and did not request a limiting instruction in connection with that evidence. (*Compare* Dissent at ¶ 52.) Again, we emphasize that the jury was neither instructed on the limited purpose for which the other-acts evidence was offered by the state nor advised of the limited scope for which such evidence could be considered when determining appellant's guilt.

{¶ 43} For these reasons, we find that counsel's deficient performance in opening the door to the unfettered presentation of other-acts evidence about the alleged sexual abuse of his stepdaughters was highly prejudicial. Indeed, we cannot think of "a more prejudicial circumstance in which to inject alleged past indiscretions with minor-aged girls into a case," as "the prejudicial testimony was directly related to the offense charged." *State v. Pawlak*, 8th Dist. No. 99555, 2014-Ohio-2175, ¶ 97. Thus, notwithstanding B.M.'s "specific testimony going to all the essential elements of the offense of gross sexual imposition" and the testimony from other witnesses detailing B.M.'s prior accounts (*see* Dissent at ¶ 53-55), we nonetheless find it reasonably probable that the jury's verdict was impermissibly based on the pervasive other-acts evidence presented at appellant's trial.

{¶ 44} Indeed, the jury was not instructed on the limited and proper purposes for which it could consider the other-acts evidence presented by the state. Without the necessary limiting instruction, the jury was permitted to infer that appellant has a propensity for sexually abusing young girls. *See, e.g.*, *Hartman* at ¶ 46. Such inference is impermissible. *See id.*

{¶ 45} " 'A hallmark of the American criminal justice system is the principle that proof that the accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime.' " *Hartman* at ¶ 20, quoting *Curry* at 68, citing 1 Underhill's Criminal Evidence, Section 205, 595 (6th Ed.1973). "That philosophy is premised on our understanding of human nature: the typical juror is prone to 'much more readily believe

that a person is guilty of the crime charged if it is proved to his satisfaction that the defendant has committed a similar crime.' " *Id.*, quoting *Hector* at 174-75.

{¶ 46} It is these principles that guide our resolution of this issue, and ultimately lead us to find a reasonable probability—that is, "a probability sufficient to undermine confidence in the outcome"—that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland* at 694. Given the considerable amount of propensity evidence presented at appellant's trial, limited evidence of appellant's guilt for the gross sexual imposition of B.M., and absence of any instruction on how the jury should use this propensity evidence, these serious errors by appellant's trial counsel ***undermine our confidence in the outcome***. As such, we find appellant was prejudiced by trial counsel's deficient performance in this case.

{¶ 47} Based on these facts and circumstances, we conclude trial counsel was ineffective and thus we must sustain appellant's second assignment of error.

B. First Assignment of Error

{¶ 48} In his first assignment of error, appellant argues his conviction for gross sexual imposition was based on insufficient evidence and was against the manifest weight of the evidence. Having found merit to appellant's ineffective assistance of counsel claim warranting reversal of his conviction, however, our disposition of appellant's second assignment of error renders his first assignment of error moot. For this reason, it is overruled. *See* App.R. 12(A)(1)(c).

III. CONCLUSION

{¶ 49} Having sustained appellant's second assignment of error and overruled appellant's first assignment of error as moot, we reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to the trial court for further proceedings consistent with this decision.

Judgment reversed; *cause remanded.*

BOGGS, J., concurs.
LUPER SCHUSTER, J., dissents.

LUPER SCHUSTER, J., dissenting.

{¶ 50} Because I would find appellant is unable to demonstrate he received the ineffective assistance of counsel, I respectfully dissent.

{¶ 51} The majority characterizes defense counsel's decision to discuss the prior abuse allegations against appellant in opening statements as inexplicable and not within the realm of any viable trial strategy. Having reviewed the record, I am more hesitant about such a conclusion. Defense counsel knew of the existence of these prior allegations and, more importantly, knew that the revelation of the prior allegations factored into when and whether other individuals involved in this case told B.M. about the prior allegations. Further, defense counsel knew the case would hinge on B.M.'s testimony and credibility, and he was faced with the possibility that these allegations could come to light at some point during the trial even if not through planned admission by the state, whether through B.M.'s testimony, the recording of B.M.'s forensic interview, or through C.E.'s or A.W.'s testimony. Given this context, I view defense counsel's discussion of the allegations of prior abuse in his opening statement as a strategic attempt to control the narrative and get ahead of possible surprises, as well as an attempt, even if unsuccessful, to present a challenge to B.M.'s credibility without directly attacking her character. Thus, I am cautious to characterize this strategy, more generally, as unreasonable. To the extent the majority faults defense counsel for factually mischaracterizing the substance of the prior allegations and the timeline of the stepdaughter's disclosure, I would note that defense counsel would not have known the specifics of A.R.'s testimony until it occurred at trial. Additionally, both C.E. and A.W. testified they did not know of the stepdaughter's allegations until after B.M. reported the incident. Thus, I would not find defense counsel's factual understanding of the prior allegations was so egregious as to constitute deficient performance.

{¶ 52} The majority further notes defense counsel failed to request a limiting instruction. I am mindful, however, that "trial counsel's decision not to request a limiting instruction on other acts evidence can represent a tactical decision not to draw additional attention to the other acts testimony." *State v. Thompson*, 10th Dist. No. 18AP-211, 2019-Ohio-2525, ¶ 22, citing *State v. Rawls*, 10th Dist. No. 03AP-41, 2004-Ohio-836, ¶ 42, citing *State v. Schaim*, 65 Ohio St.3d 51, 61 (1992), fn. 9.

{¶ 53} More importantly, even if I were to agree with the majority that appellant's counsel's overall performance was deficient under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), we are nonetheless constrained by the second prong of *Strickland* which requires appellant to demonstrate a reasonable probability that, but for his counsel's performance, the outcome of the proceeding would have been different. *See State v. Abdullahi*, 10th Dist. No. 21AP-350, 2024-Ohio-418, ¶ 49. In finding prejudice, the majority discusses the general damage caused by other-acts evidence and the lack of a limiting instruction. I would find that the presence of the other-acts evidence did not "undermine confidence in the outcome [of the trial]" and that, even without the other-acts evidence, the state presented ample evidence of appellant's guilt. *Strickland* at 694 ("[a] reasonable probability is a probability sufficient to undermine confidence in the outcome").

{¶ 54} Here, B.M. provided specific testimony going to all the essential elements of the offense of gross sexual imposition. Her testimony was corroborated by her forensic interview, and her account of the events remained largely consistent when she reported it to her grandmother and to the forensic examiners. Where the victim provides specific testimony that, standing alone, is enough to establish the defendant's guilt, a court will not find prejudice under the second prong of *Strickland* from trial counsel's failure to request a limiting instruction on other-acts evidence. *Thompson* at ¶ 22 (failure to request a limiting instruction on other-acts evidence may be a tactical decision), citing *State v. Hughes*, 10th Dist. No. 14AP-360, 2015-Ohio-151, ¶ 69 (where defendant testifies at trial and presents "admittedly damaging testimony," there was no prejudice under the second prong of *Strickland* because "the state had already presented ample evidence of appellant's guilt"). I would find that even without any of the evidence related to the stepdaughter's prior allegations, there was ample evidence to convict appellant. *See State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, ¶ 32 ("an improper evidentiary admission under Evid.R. 404(B) may be deemed harmless error on review when, after the tainted evidence is removed the remaining evidence is overwhelming").

{¶ 55} Moreover, given the thoroughness of B.M.'s testimony and the consistency of her account from the time she first reported the incident all the way through her trial testimony, I would not find the presence of the other-acts evidence at trial was so onerous as to impede the jury's ability to independently evaluate B.M.'s credibility. *See State v.*

Stewart, 10th Dist. No. 19AP-615, 2020-Ohio-5344, ¶ 42 (" ' "[e]rror in the admission of other acts [evidence] is harmless when there is no reasonable possibility that the [evidence] contributed to the accused's conviction" ' "), quoting *State v. S.A.A.*, 10th Dist. No. 17AP-685, 2020-Ohio-4650, ¶ 28, quoting *State v. Tench*, 156 Ohio St.3d 85, 2018-Ohio-5205, ¶ 177. Accordingly, appellant cannot demonstrate a reasonable probability that, but for his trial counsel's errors, the result of the proceedings would have been different. *See Hughes* at ¶ 74 (although appellant demonstrated his counsel's overall performance was deficient, appellant could not overcome the fact that the victim testified clearly about what happened, and, "[i]n light of the victim's testimony, * * * appellant is unable to demonstrate the requisite prejudice under the second prong of *Strickland*").

{¶ 56} Because I would conclude appellant cannot demonstrate the requisite prejudice under the second prong of the *Strickland* test, I would overrule appellant's second assignment of error. Additionally, because I would overrule appellant's second assignment of error, I would not find appellant's first assignment of error to be moot. Instead, I would consider the merits of appellant's first assignment of error and conclude the state presented sufficient evidence to convict appellant of gross sexual imposition and that his conviction was not against the manifest weight of the evidence. Thus, I would additionally overrule appellant's first assignment of error.

{¶ 57} For these reasons, I respectfully dissent.