

[Cite as *State v. Sinclair*, 2003-Ohio-3246.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. Case No. 2002-CA-33
vs. : T.C. Case No. 01-CR-462
RICK SINCLAIR : (Criminal Appeal from Common
Defendant-Appellant : Pleas Court)

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OPINION

Rendered on the 20th day of June, 2003.

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BROGAN, J.

{¶1} Rick Sinclair appeals from his conviction and sentence in the Greene County Common Pleas Court on two counts of raping a victim under the age of thirteen in violation of R.C. §2907.02(A)(1)(b).

{¶2} Sinclair advances six assignments of error on appeal. First, he contends that the trial court violated his statutory right to a speedy trial. Second, he

argues that the trial court erred in allowing the State to introduce evidence of uncharged sexual activity with the victim. Third, he claims the trial court erred in overruling his motion for a new trial as a result of juror misconduct. Fourth, he asserts that the trial court erred in permitting hearsay testimony from a doctor who examined the victim. Fifth, he contends that the conduct of the prosecutor and ineffective assistance of his trial counsel deprived him of his right to a fair trial. Sixth, he challenges the legal sufficiency and manifest weight of the evidence to support his convictions and also argues that State's failure to file a bill of particulars deprived him of a fair trial.

{¶3} The record reflects that Sinclair was indicted on September 6, 2001, on five counts of raping a victim under the age of thirteen, with the final count alleging the use or threatened use of force. The charges involved events that occurred at Sinclair's home in Fairborn, Ohio. In the summer of 1999, eleven-year-old J.S. and his family moved into a home adjacent to Sinclair's residence. Sinclair soon befriended J.S., who previously had been physically and emotionally abused by relatives. In a short time, J.S. began spending much of his free time at Sinclair's house. On at least several occasions, J.S. also accompanied Sinclair to a cabin in Kentucky, where they spent weekends hiking, hunting, and fishing.

{¶4} In the fall of 2000, Fairborn police began investigating allegations that J.S.'s step-father, Michael Bowser, had sexually molested J.S.'s sister. Fairborn police also had received certain unspecified information about Sinclair and J.S.'s family from the Huber Heights police department. (Trial transcript at 147, 153). While investigating both sets of information, Fairborn police interviewed J.S., who

revealed that Sinclair had been engaging in oral sex with him. (Id. at 249). J.S. later added that Sinclair had been engaging in anal sex with him as well. (Id.). At trial, J.S. testified that from November, 1999, through October, 2000, Sinclair had engaged in oral and anal sex with him on many occasions. (Id. at 219-222, 246-247). With regard to the allegations of oral sex, J.S.'s fifteen-year-old sister provided corroboration for his testimony. She testified at trial that she twice saw Sinclair and J.S. engaging in oral sex in Sinclair's bedroom. (Id. at 348-349).

{¶5} The State also presented corroborating testimony from Brian Woodring, who had shared a Greene County jail cell block with Sinclair following his arrest for the sexual abuse of J.S. According to Woodring, Sinclair admitted in the jail that he had engaged in oral sex with J.S. (Id. at 378). College student James Vincent also testified for the State. Vincent told the jury that he had developed a friendship with Sinclair on the internet and that Sinclair admitted having a sexual relationship with a boy. (Id. at 265-266). When Vincent later met Sinclair in person, Sinclair appeared to be dejected. During this meeting, Sinclair explained that he was upset because he "wasn't allowed to see his boy" anymore.¹ (Id. at 265). Vincent then asked whether "that was the boy that he mentioned that he was having sex with," and Sinclair "responded that he was not having sex with anyone else." (Id. at 265-266). Finally, physician Kevin Sharrett testified as an expert witness for the State. The record reflects that on June 21, 2001, Sharrett performed a rectal

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The record reflects that prior to this meeting between Sinclair and Vincent, Sinclair had an altercation with J.S.'s step-father, Michael Bowser. The altercation concerned the amount of time that J.S. was spending at Sinclair's house, and it

examination on J.S. In the course of the examination, Sharrett noted tenderness and a complaint of pain around a thickened fold of skin extending into the anal cavity. (Id. at 282). According to the doctor, this finding was abnormal for a child, and it was consistent with, among other things, anal intercourse. (Id. at 283).

{¶6} For his part, Sinclair testified at trial and denied engaging in any sexual activity with J.S. (Id. at 556, 565, 574). Nevertheless, the jury convicted him on the first two counts of the indictment, while acquitting him on the last three counts, including the count that alleged the use or threatened use of force. The trial court subsequently sentenced Sinclair to consecutive nine-year terms of imprisonment and designated him a sexual predator. He then filed a timely notice of appeal, advancing the six assignments of error set forth above.

{¶7} In his first assignment of error, Sinclair argues that the trial court denied him his statutory right to a speedy trial. This argument implicates R.C. §2945.71, which generally requires an accused against whom a felony charge is pending to be brought to trial within 270 days of his arrest. R.C. §2945.71(C)(2). This statute also provides that “each day during which an accused is held in jail in lieu of bail on the pending charge shall be counted as three days.” R.C. §2945.71(E). Finally, we note that the time within which an accused must be brought to trial may be extended by “[a]ny period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused,” and by “[t]he period of any continuance granted on the accused’s own motion[.]” R.C. §2945.72(E) and (H).

resulted in the curtailment of J.S.’s ability to visit Sinclair.

{¶8} In the present case, Sinclair initially was arrested on November 7, 2000, and his trial commenced on November 13, 2001. Although these dates do reveal the existence of a possible speedy trial issue, we find no violation of Sinclair's right to a speedy trial. Proper resolution of this issue is somewhat complicated, however, because the State indicted Sinclair four times under different case numbers. Some of the indictments included charges other than those for which he was convicted in this case. As a means of analysis, we will review each indictment separately and consider its impact on our speedy trial analysis:

Trial Court Case No. 2000 CR 710

{¶9} As noted above, Fairborn police initially arrested Sinclair on November 7, 2000, for the sexual abuse of J.S. (See Doc. #17 in Tr. Ct. Case No. 2000 CR 710). On November 17, 2000, the State indicted him in case number 2000 CR 710 on three counts of rape. (Doc. #1). This indictment addressed the time period and the offenses for which the jury ultimately convicted Sinclair in the present case. With regard to this indictment, the record reflects that 37 days passed from the time of Sinclair's arrest until he posted bond on December 14, 2000. Under R.C. §2945.71(E), this time must be tripled because he was held in jail in lieu of bail on the pending charge. As a result, we find that 111 days passed for speedy trial purposes.

{¶10} Sinclair remained free on bond from December 14, 2000, to January 8, 2001, when he requested a continuance and waived his speedy trial time to March 21, 2001. (See Doc. #37). As a result, another 25 days passed for speedy

trial purposes.² Speedy trial time then ran for another eight days from March 21, 2001, through March 29, 2001, when the State entered a nolle prosequi in case number 2000 CR 710.³ (Doc. #67). Even viewing the record in a light most favorable to Sinclair, no more than **144 speedy trial days** ran in that case.

Trial Court Case Number 2001 CR 104

{¶11} On March 1, 2001, the State filed a five-count indictment against Sinclair in case number 2001 CR 104. (Doc. #1). This indictment involved a different victim and concerned abuse unrelated to J.S. that allegedly had occurred from 1993 through 1995. Police arrested Sinclair on this indictment on March 6, 2001. (See Return of Warrant, Doc. #7). He appears to have remained incarcerated on this indictment until March 29, 2001, when the State entered a nolle prosequi in case number 2001 CR 104. Nevertheless, because case number 2001 CR 104 never was joined with case number 2000 CR 710 and involved charges wholly unrelated

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On March 15, 2001, Sinclair filed a motion to bifurcate case number 2000 CR 710 and case number 2001 CR 104 (discussed above), which had been filed on March 1, 2001, and involved allegations of sexual abuse in the mid-1990s with a different victim. Sinclair's attorney filed this motion in response to a motion for joinder of cases 2000 CR 710 and 2001 CR 104 and prior to any ruling by the trial court regarding joinder of the two cases. Although the motion to bifurcate likely tolled the speedy trial time in case number 2000 CR 710, Sinclair argues on appeal that a motion to bifurcate should have no such effect. For present purposes, we simply will assume, arguendo, that a motion to bifurcate does not toll the speedy trial time. We may indulge in this assumption because it does not change the outcome of our speedy trial analysis.

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As noted *infra* in our analysis of the indictment in case number 2001 CR 104, Sinclair was in custody under a separate indictment and on unrelated charges during these eight days. In light of that fact, he is not entitled to triple counting of the eight days. See, e.g., *State v. Thompson* (Oct. 20, 1995), Clark App. No. 94 CA 70.

to those for which Sinclair ultimately stood trial and was convicted, this indictment had no impact on his speedy trial time in the present case.

Trial Court Case Number 2001 CR 143

{¶12} On March 22, 2001, the State filed a 16-count indictment against Sinclair in case number 2001 CR 143. This indictment included counts pertaining to the sexual abuse of J.S. and unrelated counts alleging the sexual abuse of another individual in the mid-1990s. In essence, this indictment combined all of the allegations contained in case number 2000 CR 710 and case number 2001 CR 104.

{¶13} A warrant was issued for Sinclair's arrest in connection with this indictment on March 22, 2001, and he was arrested the following day. (See warrant and return, Doc. #7). Sinclair remained in jail in lieu of bond on this indictment for 32 days from March 23, 2001, through April 24, 2001. While still incarcerated on April 24, 2001, he requested a continuance and waived speedy trial time through June 25, 2001. (Doc. #37). Thereafter, on June 25, 2001, the State entered a nolle prosequi on those counts alleging sexual abuse in the mid-1990s of someone other than J.S., and Sinclair waived speedy trial time on the remaining counts (i.e., the counts involving J.S.) through September 10, 2001. (Doc. # 69, 72). The following day, June 26, 2001, Sinclair was released on bond in connection with case number 2001 CR 143. (Doc. #76). On September 10, 2001, the State entered a nolle prosequi on the remaining counts of this indictment. (Doc. #92).

{¶14} A review of the foregoing procedural history reveals that the only possible speedy trial time that could have run in connection with case number 2001 CR 143 is the 32-day period from March 23, 2001, through April 24, 2001. Indeed,

Sinclair waived all time after the latter date until the State entered its nolle prosequi on September 10, 2001. With regard to the 32-day period, Sinclair filed numerous motions that appear to have tolled the speedy trial clock during most of that time. In particular, on April 3, 2001, he filed the following thirteen motions: (1) a motion to compel disclosure of exculpatory evidence, (2) a motion for disclosure of witness statements, (3) a motion for a bill of particulars, (4) a motion to obtain school records, (5) a motion for appointment of an investigator, (6) a motion for bond reduction, (7) a motion to compel information, (8) a motion for determination of the competence of witnesses, (9) a motion in limine, (10), a second motion in limine, (11) a motion for complete discovery, (12) a motion to review records of Children's Services, and (13) a motion for disclosure of impeachment information.⁴ Finally, we note that Sinclair filed a motion to bifurcate on April 16, 2001. (Doc. #32). Therein, he asked the trial court to try the sexual abuse allegations involving J.S. separately from the sexual abuse allegations involving a different victim in the mid-1990s. On appeal, Sinclair insists that his motion to bifurcate should not toll the

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Sinclair also filed a demand for discovery on March 26, 2001, and a request for *Kyles* and *Brady* information on April 3, 2001. (Doc. #10, 27). These filings toll the speedy trial clock. See, e.g., *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040 (holding that a demand for discovery is a tolling event under the speedy trial statute). In the present case, however, we need not even consider these filings, as the numerous actual motions filed by Sinclair on April 3, 2001, had the same tolling effect. Additionally, the record does not make clear precisely when the State satisfied Sinclair's discovery demand or provided the requested *Kyles* and *Brady* information. Consequently, for purposes of our analysis herein, we have not tolled the speedy trial clock as a result of Sinclair's demand for discovery and request for *Kyles* and *Brady* information. Even without taking these filings into account, Sinclair's right to a speedy trial was not violated.

running of the speedy trial clock. Upon review, we will assume, arguendo, that a motion to bifurcate does not toll the speedy trial time. As noted above, we may indulge in this assumption because it does not change the outcome of our speedy trial analysis. (Doc. #14-26). Thereafter, on April 5, 2001, Sinclair also filed a motion for appointment of co-counsel. (Doc. #28).

{¶15} The trial court ruled on most of the foregoing motions on April 10, 2001. (Doc. #29). On that date, however, the trial court did not rule on (1) the first motion in limine, which concerned evidence of Sinclair's criminal record, or (2) the motion for appointment of co-counsel. The record reflects that the trial court ruled on the co-counsel motion on April 13, 2001. (Doc. #30). The trial court did not rule on the motion in limine concerning Sinclair's criminal record prior to his seeking a continuance on April 24, 2001, and waiving speedy trial time first through June 25, 2001, and then again through September 10, 2001, when the State entered the nolle prosequi.

{¶16} Even viewing the record in light most favorable to Sinclair, it appears that no more than 11 speedy trial days ran from March 23, 2001, when he was arrested in connection with the indictment in case number 2001 CR 143, until April 3, 2001, when he filed thirteen motions. Given that Sinclair was in jail in lieu of bail solely on the indictment in that case, he is at least arguably entitled to triple counting of those days under R.C. §2945.71(E).⁵ Assuming that the triple-count

provision does apply, then 33 days expired for speedy trial purposes. The filing of Sinclair's thirteen motions on April 3, 2001, unquestionably tolled the speedy trial time up to April 10, 2001, when the trial court disposed of most of the motions. Speedy trial time remained tolled even after that date, however, because the motion in limine regarding Sinclair's criminal record still remained pending on April 24, 2001, when he waived speedy trial time through June 25, 2001. Sinclair then waived speedy trial time again through September 10, 2001, the date that the State entered the nolle prosequi. As a result, no more than **33 days** of speedy trial time expired under case number 2001 CR 143.⁶

Trial Court Case Number 2001 CR 462

{¶17} On September 6, 2001, the State filed an indictment in case number 2001 CR 462. This indictment, under which Sinclair ultimately went to trial, alleged five counts of rape involving J.S. (Doc. #1). On September 7, 2001, Sinclair was served with a summons on this indictment, but he was not arrested. (Summons and return, Doc. #7). On September 14, 2001, he moved for a continuance and waived

indictment in case number 2001 CR 143. Although we are inclined to believe that the triple-count provision did apply, given that he was being held on a single indictment with one trial date, we need not resolve this issue. Even if the triple-count provision did apply, the trial court did not violate Sinclair's statutory speedy trial right.

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Parenthetically, we note that we would find no statutory speedy trial violation even if speedy trial time were not tolled while the motion in limine remained pending from April 10, 2001, to April 24, 2001. Given that Sinclair was in jail during that time, he presumably would be entitled to triple counting of those 14 days, resulting in an additional 42 speedy trial days expiring. As explained more fully below, at most only 217 speedy trial days expired in the present case. Even adding 42 additional days to that total would not result in a speedy trial violation.

speedy trial time through October 22, 2001. (Doc. #28). Thereafter, on October 17, 2001, Sinclair moved for another continuance and waived speedy trial time through November 13, 2001, the date that his trial commenced. (Doc. #58).

{¶18} The foregoing facts reveal that **seven days** of speedy trial time ran from September 7, 2001, through September 14, 2001. Although Sinclair waived speedy trial time from September 14, 2001, through his November 13, 2001, trial date, he contends that the waiver should not toll the running of the speedy trial clock. In support of this claim, Sinclair notes that following his September 6, 2001, indictment in this case, the trial court on September 10, 2001, set a trial date of September 17, 2001. (Doc. #8). Given that the trial court set the case for trial only ten days after service of the summons, Sinclair argues that his speedy trial waiver of September 14, 2001, was not voluntary, as he had no choice but to seek a continuance. Even if we accept this argument, however, the record does not reveal a speedy trial violation. Assuming, arguendo, that speedy trial time continued to run from September 14, 2001, through October 17, 2001, then only another **33 speedy trial days** elapsed. As noted above, on October 17, 2001, Sinclair filed another motion for a continuance through his November 13, 2001, trial date, and he does not suggest that the speedy trial clock ran during this time.

{¶19} As the foregoing analysis demonstrates, even giving Sinclair the benefit of all possible arguments, he has failed to demonstrate a speedy trial violation. At most, **144 days** of speedy trial time passed in case number 2000 CR 710. The indictment in case number 2001 CR 104 had no impact on the speedy trial time in the present case because that indictment was wholly unrelated to the sexual

abuse of J.S. At most, **33 days** of speedy trial time passed in case number 2001 CR 143. Finally, no more than **40 days** of speedy trial time passed in case number 2001 CR 462. As a result, even construing the record charitably in favor of Sinclair and resolving all possible issues against the State, no more than **217 speedy trial days** passed from the time of his initial arrest on November 7, 2000, until he was brought to trial on November 13, 2001. Accordingly, we find no speedy trial violation, and we overrule his first assignment of error.

{¶20} In his second assignment of error, Sinclair contends the trial court erred in allowing the State to introduce evidence of uncharged sexual activity that allegedly occurred outside the jurisdiction of the court but during the time period covered by the indictment. This argument concerns the admission at trial of evidence about sexual conduct between Sinclair and J.S. at a cabin in Kentucky and in a van on the way to the cabin. Over defense counsel's objection, J.S. testified about this sexual activity. In particular, J.S. explained that he and Sinclair went on approximately a dozen weekend trips to the Kentucky cabin during the time period covered by the indictment in this case. (Tr. Transcript at 216). J.S. also testified that he slept in a bed with Sinclair at the cabin and participated in sexual activities with him there. (Id. at 216-217). In addition, J.S. testified that he and Sinclair had sex in a van on the way to the cabin while Sinclair's companion, Sol Valentine, drove. (Id. at 217).

{¶21} The foregoing issue first came to the trial court's attention on October 30, 2001, when Sinclair filed a motion in limine, seeking to prohibit the State from referring to or introducing evidence of unindicted sexual offenses. (Doc. # 61). In

support, he argued that such evidence was inadmissible under R.C. §2907.02(D), R.C. §2945.59, and Evid.R. 404. The trial court overruled the motion in a November 13, 2001, judgment entry, reasoning:

{¶22} “. . . [T]he proposed evidence of Defendant’s alleged, but uncharged, sexual activity with this victim is both proper and relevant under O.R.C. §2907.02(D).

{¶23} “The court further finds that said evidence would indeed be probative as to the Defendant’s motive, opportunity, intent, preparation, plans, or knowledge.

{¶24} “It is obvious to the Court from the arguments presented that Defendant will assert that this victim is untruthful. Evidence of alleged, but uncharged, sexual activity between the Defendant and the victim would definitely be relevant and probative.” (Doc. #77 at 2).

{¶25} The trial court subsequently addressed this issue again in a November 19, 2001, judgment entry filed after the presentation of all evidence and during jury deliberations. (Doc. #83). In its November 19, 2001, entry, the trial court noted that it had convened a hearing on the motion on November 8, 2001. At that time, however, the parties had elected to submit the matter upon their written filings. The trial court also noted that it had re-opened the matter during trial on November 14, 2001, prior to the presentation of testimony about unindicted sexual activity occurring in Kentucky. On that date, the parties again had elected to submit no new evidence, but made brief arguments.⁷ (Trial Transcript at 125-131). After

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In the argument in court on November 14, 2001, the prosecutor proposed that,

considering those arguments, the trial court adhered to its prior decision, finding the evidence to be admissible. (Id. at 131). In support, the trial court filed its November 19, 2001, written decision, reasoning that the “proposed evidence of other alleged un-indicted sexually related offenses by the Defendant is material and probative and that said proposed evidence is more probative than unfairly prejudicial.” (Doc. #83 at 2-3).

{¶26} On appeal, the parties reiterate their earlier arguments. For its part, the State first argues that it could have indicted Sinclair on dozens, if not hundreds, of counts of rape. Given that it instead elected to indict him on only five “representative counts,” the State argues that it should not be limited “to allegations of only one instance of conduct regarding each representative count.” According to the State, “[t]o rule otherwise would require the State to indict defendants such as this Defendant for hundreds of counts, resulting in convictions which could result in

as a result of an oral agreement with the State of Kentucky, double jeopardy would preclude Sinclair from being tried in Kentucky for any sexual activity there if the State of Ohio offered such evidence in the present case. (Trial Transcript at 128). In fact, the prosecutor told the trial court : “I speak for the Commonwealth of Kentucky and we sat and discussed this because we discussed what the consequences might be so if you look at the venue statute, it is clear to me as representative of the State what occurred in Kentucky is not only inextricable, but for purpose of argument in fact even though they are in another Commonwealth under the venue statute are part and parcel of these acts. We have chosen rather than use 225 counts and go that route, from an overall standpoint to treat this as a course of continuing conduct with representative counts[.]” (Id. at 128-129). Insofar as the State of Ohio appears to have been suggesting that sexual activity in Kentucky may be tried in Ohio under some unidentified venue provision, we are aware of nothing to support such a proposition. In addition, regardless of any agreement between the two, the State of Ohio and the Commonwealth of Kentucky cannot confer jurisdiction on an Ohio court to try criminal activity occurring in another jurisdiction. As a result, any sexual activity in Kentucky was not only *uncharged* but also *unchargeable* in this

over a thousand years of incarceration.” (Appellee’s brief at 14).

{¶27} Upon review, we are unpersuaded by this argument for at least two reasons. First, the State could not have indicted Sinclair for any sexual activity that occurred in Kentucky. Regardless of how many other acts of sexual abuse occurred in Ohio, criminal sexual activity in Kentucky is beyond the jurisdiction of the Greene County Prosecutor’s office. Given that the State of Ohio could not have indicted Sinclair for any out-of-state activity, its stated rationale for admitting the evidence is flawed. Second, the State certainly is free to indict a defendant on any number of counts that it chooses, but it must live with the consequences of its decision. Neither the Ohio Revised Code nor the Ohio Rules of Evidence contains a provision authorizing the admission of “other acts” evidence solely on the basis that such acts could have been charged but were not. Therefore, if testimony about uncharged sexual activity is to be admissible, the State must do more than assert that it could have charged a defendant for the activity. In other words, the evidence still must fit within some provision of the Ohio Revised Code or the Ohio Rules of Evidence that makes it admissible.

{¶28} In the present case, one possible provision cited by both parties is R.C. §2907.02(D), which provides that evidence of “past” sexual activity between an offender and a victim is admissible “only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.” As noted above, the trial court found that evidence about sexual activity in Kentucky was “material and

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probative and . . . more probative than unfairly prejudicial.” (Doc. #83 at 2-3). Having reviewed the record, however, we cannot agree that evidence about this uncharged sexual activity was admissible under R.C. §2907.02(D).

{¶29} As an initial matter, it is questionable whether anything that occurred at, or on the way to, the Kentucky cabin was “past” sexual activity within the meaning of §2907.02(D). On appeal, the State insists that “past” means anytime prior to trial. In our view, this interpretation is absurd, as it would preclude only evidence of still-to-come sexual activity that had not yet taken place at the time of trial. A more reasonable interpretation is that the word “past” in R.C. §2907.02(D) means prior to the time frame set forth in the indictment. In the present case, however, the Kentucky sex allegedly occurred during the same time period that Sinclair was molesting J.S. at his home in Fairborn, Ohio.

{¶30} Even setting aside the foregoing issue, we face a more difficult problem in attempting to apply R.C. §2907.02(D) to the evidence at hand. In particular, we note that neither the trial court nor the State identified precisely what “fact” such evidence was “material to” in this case. In its first written opinion on the matter, the trial court suggested that the evidence was material to the victim’s truthfulness. (Doc. #77 at 2). In other words, the trial court appears to have believed that because “past” rapes occurred in Kentucky, the victim was more likely to be telling the truth about being raped at Sinclair’s home in Ohio. This is precisely the type of inference that Ohio law prohibits, and it is also the type of inference that the trial court prohibited the jury from drawing when it gave an “other acts” instruction at the close of trial. (Tr. Transcript at 662).

{¶31} As the parties and the trial court recognized, however, another possibility is that the evidence at issue was admissible under Evid.R. 404(B) or R.C. §2945.59, which codifies the evidence rule. Under Rule 404(B), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted 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.” Likewise, R.C. §2945.59 provides: “In 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 tends 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, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.”

{¶32} In the present case, the trial court found that evidence about sexual activity at the Kentucky cabin “would indeed be probative as to the Defendant’s motive, opportunity, intent, preparation, plans, or knowledge.” After considering this issue at length, we disagree and find that the trial court abused its discretion in admitting the evidence. In reaching this conclusion, we note that because “R.C. 2945.59 and Evid.R. 404(B) codify an exception to the common law with respect to evidence of other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict.” *State v.*

Broom (1988), 40 Ohio St.3d 277, 282. We note too that a plea of not guilty does not automatically place at issue any of the factors necessary to allow the admission of “other acts” evidence, such as motive, opportunity, intent, etc. As the First District Court of Appeals recently recognized, “if such were the case, there would be no reason for [Evid.R. 404(B)].” *State v. Griffin* (2001), 142 Ohio App.3d 65, 72. Thus, the determination of what truly is “at issue” in a given case for purposes of R.C. §2945.59 and Evid.R. 404(B) “must instead be made upon the theory of the case as presented by the prosecution and the defense.” *Id.* As we observed in *State v. Smith* (1992), 84 Ohio App.3d 647, “Evid.R. 404(B) creates an exception for [other-acts] evidence when it is . . . probative of certain matters identified in the rule. However, the matter concerned must genuinely be in issue.”

{¶33} With the foregoing requirements in mind, we conclude that the evidence of sexual activity in or on the way to Kentucky was not admissible on the basis that it was material to Sinclair’s motive, opportunity, intent, preparation, plans, or knowledge. The only real disputed issue in the present case was whether Sinclair had engaged in oral or anal sex with J.S., as described in his testimony, and resolution of this issue turned entirely on witness credibility. There was no question that if J.S. was telling the truth, Sinclair acted with the requisite knowledge and intent, as the charged rapes could not be construed as accidental or mistaken. *State v. Schaim* (1992), 65 Ohio St.3d 51, 61, 1992-Ohio-31. Likewise, the motive for Sinclair’s conduct was not a disputed issue in this case. *State v. Curry* (1975), 43 Ohio St.2d 66, 70-71 (recognizing that the “obvious motive” for sex crimes such as statutory rape is sexual gratification). Similarly, opportunity was not genuinely at

issue, as it was undisputed that J.S. regularly spent time at Sinclair's house. Finally, evidence about sexual activity occurring at or on the way to a cabin in Kentucky had nothing to do with any preparation or plan for the sexual activity that occurred at Sinclair's home in Fairborn, Ohio.

{¶34} On appeal, the State insists that evidence about the sexual acts at the Kentucky cabin was admissible because those acts were "inextricably intertwined" with the crimes charged in the present case. This argument is without merit. In *State v. Curry* (1975), 43 Ohio St.2d 66, 73, the Ohio Supreme Court recognized that "other acts" evidence may be admissible under the "scheme, plan, or system" exception of R.C. §2945.59 in two situations: (1) when the "other acts" form "part of the immediate background of the crime charged in the indictment"; or (2) when the identity of the perpetrator of the crime is at issue. In order to be admissible under the former situation, evidence must concern events that are "inextricably intertwined" with the crime charged. *Id.*

{¶35} In the present case, there was no dispute that if J.S.'s testimony was truthful, Sinclair was the perpetrator of the crimes alleged in the indictment. Therefore, identity was not at issue. *State v. Villa* (June 14, 2002), Montgomery App. No. 18868, 2002-Ohio-2939; *State v. Schaim* (1992), 65 Ohio St.3d 51, 61. Despite the State's protestations to the contrary, the charged crimes also were not inextricably intertwined with any sexual activity that may have occurred at, or on the way to, the Kentucky cabin. As the State properly notes, other acts are inextricably intertwined with a charged crime when they are so blended or connected with the charged crime that proof of one incidentally involves the other, explains the

circumstances thereof, or tends logically to prove any element of the crime charged. *State v. Wilkinson* (1980), 64 Ohio St.2d 308, 317. Stated differently, the Ohio Supreme Court has determined that “other acts” evidence is inextricably intertwined with charged conduct when testimony about the other acts is “necessary to give the complete picture of what occurred.” *Id.* at 318.

{¶36} Although the State cites *Wilkinson*, it fails to explain how the requirements imposed by that case were met herein. Proof of sexual activity on certain weekends in Kentucky does not in any way “incidentally involve” sexual activity occurring on different days in Fairborn, Ohio. Likewise, evidence that Sinclair and J.S. engaged in sexual conduct at a cabin in Kentucky does not in any way “explain the circumstances” of their sexual conduct at Sinclair’s home. Nor does evidence about sexual conduct in Kentucky tend logically to prove any element of the crimes charged. In short, any uncharged sexual activity between Sinclair and J.S. in, or on the way to, Kentucky simply does not “form part of the *immediate* background” of the crimes charged in the indictment. *Curry*, *supra*, at 73 (Emphasis added). Accordingly, the trial court abused its discretion in admitting evidence about sexual conduct occurring in a van on the way to Kentucky and at a cabin in that state.

{¶37} Despite the trial court’s erroneous evidentiary ruling, we agree with the State’s alternative argument that the error did not prejudice Sinclair and was harmless beyond a reasonable doubt. At trial, J.S. testified that he and Sinclair “constantly” engaged in oral and anal sex over a twelve-month period. (Tr. Transcript at 220-222). When pressed about what he meant, J.S. replied that the

oral and anal sex “was so much it was constantly.” (Id. at 246). In light of this testimony about repeated sexual conduct over a twelve-month period, we fail to see how Sinclair was particularly prejudiced by evidence that a portion of the “constant” abuse occurred on weekend trips to Kentucky rather than in Fairborn, Ohio.

{¶38} The jury verdicts in this case also persuade us that the trial court’s erroneous evidentiary ruling constituted harmless error. The jury’s passions plainly were not inflamed by the testimony about sexual activity in Kentucky, as evidenced by the fact that Sinclair was acquitted on three of the five charges. Indeed, the jurors seem to have received J.S.’s testimony with a large degree of skepticism. It appears that the jury may have convicted Sinclair on the two counts of rape for engaging in oral sex with J.S., an allegation that was corroborated by eyewitness testimony from J.S.’s sister. With regard to these two instances of oral sex, the record persuades us that the properly admitted evidence against Sinclair was overwhelming. In addition to the testimony of J.S.’s sister, the State also presented testimony from Brian Woodring, who stated that Sinclair admitted engaging in oral sex with J.S. Finally, James Vincent testified that Sinclair admitted having a sexual relationship with a boy. Having reviewed this testimony and all the other evidence at trial, we are convinced that the admission of evidence about sexual conduct in, or on the way to, Kentucky did not affect Sinclair’s substantial rights and was harmless beyond a reasonable doubt. *State v. Brown* (1992), 65 Ohio St.3d 483, 1992-Ohio-61. Accordingly, we overrule his second assignment of error.

{¶39} In his third assignment of error, Sinclair argues that the trial court erred in overruling his motion for a new trial as a result of juror misconduct. This

issue concerns statements allegedly made by juror number six. During a break at trial, Sinclair's father reported having overheard juror number six tell juror number five, "I think they ought to put him away." (Tr. Transcript at 317, 526). The trial court privately questioned both jurors, but neither could recall any such statement. While being questioned by the trial court, however, juror number five did recall a different statement made to her by juror number six. In particular, juror number five explained that upon entering the building someone had observed that arraignments were scheduled to be held in the courtroom. Someone then remarked that "maybe [the trial] will be over today." In response, juror number six allegedly said, "I thought maybe he pled guilty." (Id. at 529-531). When questioned by the trial court, however, juror number six did not recall having made any statement about the case. (Id. at 532-533). Juror number five and juror number six also both reaffirmed that they would not form an opinion about the case until the conclusion of trial. (Id. at 529, 533).

{¶40} After the trial court concluded its inquiry, Sinclair moved to excuse juror number six. The trial court took the matter under advisement until after closing arguments. At that point, the trial court sustained Sinclair's motion and excused juror number six out of an abundance of caution. (Id. at 655-657). On appeal, Sinclair argues that the trial court was obligated to remove juror number six immediately rather than waiting until after closing arguments.

{¶41} We find no merit in the foregoing argument. Juror number six did not participate in deliberations, and juror number five reaffirmed, under oath, that she would remain fair and impartial, regardless of what juror number six may have said.

In addition, the record is devoid of evidence to suggest that juror number six spoke inappropriately to anyone other than juror number five. On the record before us, we simply see no prejudice to Sinclair flowing from the trial court's decision to take the matter under advisement before excusing juror number six. Accordingly, we overrule his third assignment of error.

{¶42} In his fourth assignment of error, Sinclair asserts that the trial court erred in permitting hearsay testimony from a doctor who examined the victim. This argument concerns the trial testimony of physician Kevin Sharrett, who performed the rectal examination on J.S. Sharrett testified that the purpose of the examination was to rule out any type of rectal pathology and to recommend treatment if needed. At the outset of the examination, Sharrett inquired about J.S.'s particular complaints. J.S. responded that he had experienced pain and bleeding upon defecation, but added that this was occurring less frequently than it had in the past. (Tr. Transcript at 279-280). According to Sharrett, J.S. also stated that he had participated in "anal and oral intercourse with a man over a one-year period of time." (Id. at 281). The trial court allowed the jury to hear this last statement over the objection of defense counsel, who cited Evid.R. 803 as a basis for excluding the testimony.

{¶43} Upon review, we find no abuse of discretion in the trial court's admission of Sharrett's testimony about J.S. having anal intercourse with a man. Evid.R. 803(4) provides an exception to the hearsay rule for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of

the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” Based on Sharrett’s testimony, the trial court reasonably could have concluded that J.S. made the remark about anal sex for purposes of obtaining a medical diagnosis and, if necessary, treatment from Sharrett.⁸ In addition, J.S.’s statement about anal sex plainly described “the cause or external source” of his symptoms. Therefore, the trial court did not abuse its discretion in finding the statement to be admissible under Evid.R. 803(4).

{¶44} In opposition to this conclusion, Sinclair contends that the purpose of J.S.’s visit to Sharrett was for the State to obtain evidence. While we do not dispute that the State hoped to obtain evidence, the record nevertheless supports a finding that J.S. made his statement about anal sex for the purpose of obtaining a medical diagnosis from Sharrett. Therefore, based on the analysis set forth above, the statement was admissible under Evid.R. 803(4).

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In *State v. Dever* (1992), 64 Ohio St.3d 401, 1992-Ohio-41, the Ohio Supreme Court adopted a somewhat relaxed “motivational requirement” in cases involving statements made by children to examining physicians. Although the hearsay exception provided by Evid.R. 803(4) rests on the belief that a declarant’s subjective motive to obtain proper diagnosis and treatment generally guarantees the statement’s trustworthiness, the *Dever* court noted that young children often are not personally motivated to seek treatment. Nevertheless, the *Dever* court reasoned that “[o]nce the child is at the doctor’s office, the probability of understanding the significance of the visit is heightened and the motivation for diagnosis and treatment normally will be present. That is to say, the initial desire to seek treatment may be absent, but the motivation certainly can arise once the child has been taken to the doctor. Absent extraordinary circumstances, the child has no more motivation to lie than an adult would in similar circumstances.” *Id.* at 409-410. Unless the circumstances surrounding the making of the child’s statement indicate that it was inappropriately influenced by others, the child’s statement should be admitted under Evid.R. 803(4). Of course, the credibility of the statement remains something for the jury to evaluate in its role as fact-finder.

{¶45} We reach a different conclusion, however, with regard to J.S.'s statement about engaging in oral sex. As Sinclair properly notes, a statement about *oral* sex has nothing to do with a *rectal* examination. Indeed, oral intercourse would be irrelevant to the diagnosis or treatment of rectal pain and bleeding. As a result, the statement about oral sex does not fit within the hearsay exception provided by Evid.R. 803(4). Having reviewed the record, however, we find, beyond a reasonable doubt, that the trial court's admission of this statement did not prejudice Sinclair. In reaching this conclusion, we note that J.S.'s sister testified that she twice saw Sinclair and J.S. engaged in oral sex. Additionally, jail inmate Brian Woodring testified that Sinclair admitted having engaged in oral sex with J.S., and James Vincent testified that Sinclair admitted having a sexual relationship with a boy. Finally, we note that the victim himself testified at trial about engaging in oral sex with Sinclair on numerous occasions. In light of the foregoing testimony, we find, beyond a reasonable doubt, that Sharrett's isolated hearsay statement about J.S. engaging in oral sex with an unidentified individual did not prejudice Sinclair. As a result, the error in admitting the statement was harmless. *State v. Brown* (1992), 65 Ohio St.3d 483, 1992-Ohio-61. Sinclair's fourth assignment of error is overruled.

{¶46} In his fifth assignment of error, Sinclair contends that prosecutorial misconduct and ineffective assistance of counsel deprived him of his right to a fair trial.⁹ The prosecutorial misconduct argument concerns the prosecutor's cross-

Id. at 410.

In his fifth assignment of error, Sinclair also suggests, without any argument on the point, that the trial court should have made a sealed transcript of certain

examination of Sol Valentine, who shared the Fairborn, Ohio, residence with Sinclair. The prosecutor asked Valentine a number of questions concerning his employment as a male escort, his advertising on the internet as a “companion” to other men, his hourly rate as a male escort, his income from that profession, his appearance in a pornographic movie, and why he and Sinclair advertised on the internet to others if they loved each other. (Tr. Transcript at 457-459, 466-468, 480-483, 497-499, 508-509). The trial court overruled objections to some of these questions and sustained others. On appeal, Sinclair contends that the questions were improper under Evid.R. 608(B) as they are not clearly probative of Valentine’s truthfulness. In response, the State asserts, without citation to any authority, that the questions were proper because prostitution is illegal and Valentine’s engagement in that activity affected his credibility.

{¶47} Upon review, we conclude that most of the disputed questions asked by the prosecutor were inappropriate.¹⁰ In *State v. Skatzes*, Montgomery App. No. 15848, 2003-Ohio-516, we recognized that “[c]riminal activities not resulting in conviction cannot ordinarily form the basis for an attack upon a witness’s credibility.”

grand jury testimony a part of the record for appeal in this case. Given Sinclair’s failure to brief and argue this issue properly, we cannot address it. We note too that Sinclair does not appear to have filed a motion in the trial court or in this court asking to have the grand jury transcript made a part of the record for appeal.

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On direct examination, Valentine testified about various jobs that he performed to earn a living, but he neglected to mention the fact that he worked as a male escort. In light of this testimony, it may have been appropriate for the State to ask a *question* to bring out the fact that Valentine also earned money as a male escort. Beyond this, however, we believe that the questions at issue were improper.

We also noted that “[t]he Ohio Rules of Evidence clearly delineate the methods by which a party may impeach a witness. Credibility may be attacked by evidence that the witness has been convicted of a crime (Evid.R.609), or by evidence of the witness's character for untruthfulness (Evid.R.608).” *Id.*

{¶48} Contrary to the State’s belief, evidence about engaging in prostitution has not been found to be particularly probative of truthfulness. See, e.g., *State v. Irizarry-Romero* (July 12, 1996), Licking App. No. 95-CA-121 (“[T]he evidence appellant sought to introduce concerning . . . Nedra Pritchett’s conduct of engaging in prostitution does not have a high degree of probative value concerning truthfulness.”); *State v. Thomas* (Nov. 21, 1985), Cuyahoga App. No. 49749 (“The trial court properly concluded that questioning [the witness] as to how many acts of prostitution she had performed over the last year was not ‘clearly probative’ of her truthfulness or the lack thereof.”); *State v. Goins* (March 8, 1984), Cuyahoga App. No. 47238 (reasoning that questions about appellant’s involvement in prostitution did not bear on his veracity for purposes of Evid.R. 608(B)). In any event, we note that some of the questions at issue had absolutely nothing to do with prostitution or other illegal activity.

{¶49} Although the State’s questions did not constitute proper attempts at impeachment, we note that the trial court sustained objections to a number of them. With regard to the others, we do not believe that the improper questioning of Valentine deprived Sinclair of a fair trial. Viewing the record as a whole and considering the evidence against Sinclair, we are convinced, beyond a reasonable doubt, that the prosecutor’s questions did not prejudice his substantial rights or

deprive him of a fair trial. As a result, the trial court's allowance of some improper questions constituted harmless error.

{¶50} Finally, we find no merit in Sinclair's argument regarding ineffective assistance of trial counsel. This argument is based on defense counsel's failure to object to the prosecutor's closing argument, portions of which Sinclair believes were improper. In particular, he contends that the prosecutor improperly commented on or vouched for the truth of J.S.'s allegations and made excessively emotional arguments. Having reviewed the prosecutor's closing argument, we find that it was within the permissible range of latitude afforded to counsel in closing argument. The prosecutor's opinions were based on the evidence and reasonable inferences drawn therefrom, and his argument was not so emotional as to deny Sinclair a fair trial. Given that the prosecutor's closing argument was unobjectionable, defense counsel's failure to object did not constitute ineffective assistance of counsel. Accordingly, we overrule Sinclair's fifth assignment of error.

{¶51} In his sixth assignment of error, Sinclair challenges the legal sufficiency and manifest weight of the evidence to support his convictions and also argues that the State's failure to file a bill of particulars deprived him of his right to a fair trial. With regard to the sufficiency and weight of the evidence, Sinclair suggests that the jury must have reached an improper "compromise verdict." In support, he notes that the jury acquitted him of counts three, four, and five, while convicting him of counts one and two. Sinclair reasons that the jury plainly did not find J.S. to be credible; otherwise, it would have convicted him of all five counts. According to Sinclair, the only way to reconcile the "inconsistent" verdicts is to conclude that the

jury lost its way.

{¶52} Upon review, we find no merit in Sinclair's argument. When a defendant challenges the sufficiency of the evidence, he is arguing that the State presented inadequate evidence on each element of the offense to sustain the verdict as a matter of law. *State v. Hawn* (2000), 138 Ohio App.3d 449, 471. "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, at paragraph two of the syllabus.

{¶53} When a conviction is challenged on appeal as being against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. A judgment should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶54} In the present case, Sinclair's conviction on the charge of rape in

counts one and two of his indictment is supported by legally sufficient evidence. The record contains ample evidence in addition to J.S.'s testimony that would convince the average mind of Sinclair's guilt beyond a reasonable doubt. In particular, we note that J.S.'s sister testified that she twice saw Sinclair and J.S. engaged in oral sex. Additionally, jail inmate Brian Woodring testified that Sinclair admitted having engaged in oral sex with J.S., and James Vincent testified that Sinclair admitted having a sexual relationship with a boy. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact certainly could have found the essential elements of rape, as alleged in count one and two, proven beyond a reasonable doubt.

{¶55} We also conclude that Sinclair's conviction on counts one and two is not against the manifest weight of the evidence. In reaching this conclusion, we reject his argument that the jury necessarily reached an improper and inconsistent "compromise verdict." Although we do not know why the jury convicted Sinclair on the first two counts and acquitted him of the others, it is well established that the several counts of an indictment containing more than one count are not interdependent; and an inconsistency in a verdict does not arise out of inconsistent responses to different counts. *Dunn v. United States* (1932), 284 U.S. 390; *Browning v. State* (1929), 120 Ohio St. 62. It very well may be that the jury was comfortable convicting Sinclair on two counts of rape for engaging in oral sex with J.S., as this allegation was corroborated by eyewitness testimony from J.S.'s sister, who stated that she saw the oral sex. For present purposes, however, we need not speculate as to why the jury acquitted Sinclair on three counts out of five. The issue

before us is whether his conviction on count one and two is against the manifest weight of the evidence. After conducting the proper review, we conclude that it is not. The evidence simply does not weigh heavily against his conviction on two counts of rape.

{¶56} Finally, we find no merit in Sinclair’s argument regarding a bill of particulars. Although he did request a bill of particulars in this case, he subsequently waived “any claim of error concerning his failure to receive a bill of particulars by proceeding to trial without said bill of particulars or a request for a continuance.” *State v. Houser* (May 30, 1996), Cuyahoga App. No. 69639; see also *State v. DePaulo* (1971), 25 Ohio App.2d 39; *State v. Haffey* (Sept. 2, 1993), Cuyahoga App. No. 63576; *State v. Sims* (Oct. 19, 1994), Lorain App. No. 94CA005797. In any event, Sinclair has not shown that he was prejudiced by his failure to receive a bill of particulars in this case. Notably, while the other indictments discussed above were pending against him, Sinclair sought and received more than one bill of particulars. For example, in case number 2000 CR 710 he moved for a bill of particulars as to the charges of rape involving J.S., and the State filed a bill of particulars. (Doc. #30, 40). Thereafter, in case number 2001 CR 143, Sinclair again sought and received a bill of particulars as to the rape charges involving J.S. (Doc. #16, 39). In light of these prior filings, which addressed the same rape charges at issue in the present case, Sinclair could not have been prejudiced by the absence of yet another bill of particulars, which likely is why his attorney proceeded to trial without raising the issue. Accordingly, we overrule Sinclair’s sixth assignment of error and affirm the judgment of the Greene County Common Pleas Court.

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FAIN, P.J., and WOLFF, J., concur.

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