[Cite as *State v. Bruce*, 2009-Ohio-6214.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92016

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARRELL BRUCE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART,
REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-503337

BEFORE: Blackmon, J., Cooney, A.J., and McMonagle, J.

RELEASED: November 25, 2009
JOURNALIZED:

ATTORNEY FOR APPELLANT

Paul Mancino, Jr.
75 Public Square
Suite 1016
Cleveland, Ohio 44113-2098

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Patrick Thomas
Assistant County Prosecutor
9th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Darrell Bruce appeals his convictions and sentence following a jury trial. Bruce assigns 23 errors for our review.[1] Having reviewed the record and pertinent law, we affirm in part and reverse in part Bruce's conviction and sentences. We reverse the sexually violent predator specification convictions attendant to Counts 1 through 6 and remand to the trial court for the limited purpose of deleting said convictions from its journal entry. The apposite facts follow.

{¶ 2} On November 15, 2007, a Cuyahoga County Grand Jury indicted Bruce on three counts of rape and three counts of gross sexual imposition. A sexually violent predator specification was attached to each count. The grand jury also indicted Bruce for failure to provide notice of a change of address. On March 20, 2008, a trial commenced, but the jury was unable to reach a unanimous verdict. On July 23, 2008, a second trial commenced.

Second Jury Trial

{¶ 3} During the trial, the state proved that Bruce, an admitted sex offender, raped the nine-and seven-year-old daughters of his then wife E.B.[2] He

[1]See appendix.

[2]Throughout this opinion, we will refer to the victims' mother and the victims by their initials to protect the identity of the children.

raped them separately over a period of four years according to their respective testimony. One victim, N.W., was fourteen years old at the time of trial and nine years old when the rapes began. She testified that shortly after her mother began dating Bruce in 2001, she and her sister D.W., 13 years old at the time of trial, would stay at Bruce's house after school, until their mother came to pick them up after work. D.W. was 7 years old at the time.

{¶ 4} Bruce would rape N.W. approximately two out of five school days. The incidents generally occurred when D.W. was taking a nap or was in the front room. Bruce continued to rape N.W. after they began living with him, and continued after his marriage to her mother.

{¶ 5} N.W. further testified that the rapes occurred at every place the family resided. N.W. always resisted, but Bruce would eventually overpower her because of his size. When the rapes began, N.W. told her mother that Bruce was "pulling" on her, but the rapes continued. Later, she told a friend at school, and eventually a police officer came to her school and asked her about the rapes, but she denied the incidents. N.W. was afraid to disclose the rapes because she did not want others to know, and because Bruce was a minister, she feared no one would believe her.

{¶ 6} In 2007, after Bruce was no longer living with the family, N.W. and her mother were at Golden Corral restaurant when she decided to talk about the

rapes. N.W. told her mother that Bruce had been molesting and raping her for a number of years.

{¶ 7} D.W. testified that at first, Bruce began touching her on her buttocks. D.W. was unaware this was inappropriate behavior. Later, when her mother and sister were away, Bruce would rape her. Bruce would rape her on an ongoing basis at each place where the family resided.

{¶ 8} At trial, D.W. related several instances of rape, including one occasion when Bruce instructed her to take off her clothes as if she was going to take a shower. D.W. proceeded to the bathroom, took off her clothes and was about to enter the shower, when Bruce summoned her to his room. On that day, he raped her.

{¶ 9} D.W. told her mother that Bruce was touching her inappropriately, and her mother indicated that she would deal with it. The incidents would stop for a short while and then resume. Bruce continued to rape D.W. until he moved out of the family residence.

{¶ 10} It was after Bruce moved out that D.W. and N.W. disclosed more about the incidents to their mother. D.W. had not previously disclosed the attacks because Bruce had instructed her not to tell her mother.

{¶ 11} The mother, E.B., testified that she was divorced from her daughters' father and living with her father when she met Bruce in May 2001. E.B. testified about the dating and courtship following their meeting. A few months

after their meeting, Bruce disclosed to E.B. that he had been previously convicted of sexually assaulting his biological daughter, that he had been imprisoned, and had been labeled a sexual offender. E.B. said Bruce assured her that the incident with his daughter occurred once in a moment of weakness as result of drug abuse.

{¶ 12} E.B. subsequently introduced Bruce to her daughters and later allowed him to pick up the children from school and keep them at his apartment until she finished work. One day in June 2002, E.B. arrived unexpectedly early at his apartment. When she entered the apartment, she discovered Bruce on the living room couch with D.W. laying on top of him. D.W. was unclothed below her waist and her underpants were lying on the floor.

{¶ 13} E.B. testified as follows about the ensuing events:

"Q. What did you do when you saw that scene?

A. * * * I sent her out of the room. I began to fuss at Mr. Bruce, he started - - what I call suicidal in the sense that he went to the kitchen and got a knife and gave it to me. He said, 'You can kill me. I'm sorry.' I was telling him that it's over, just forget everything. He was like, 'Don't tell my mom. If you tell her, that will kill her. I am so sorry.' And went through that."[3]

{¶ 14} After this incident, E.B. decided to end the relationship, but Bruce was remorseful and persistent, which led her to stay in the relationship.

[3]Tr. 125B.

Subsequently, in March 2003, E.B. married Bruce. She later gave birth to their son, D.B. They changed residences many times during which the relationship soured. They separated in 2005.

{¶ 15} After Bruce left the family residence, E.B.'s daughters disclosed that Bruce had been sexually assaulting them. Her daughters did not disclose the extent or details of the assaults, but indicated that they were ready to get help in addressing the situation. E.B. was conflicted about how to proceed because the family was active in the community and Bruce was a church minister, but she eventually sought help for the children and reported it to the authorities.

{¶ 16} At trial, Bruce's biological daughter, D.J.D., age 28, testified that she lived with Bruce from birth until age two, when her biological mother died giving birth. D.J.D. later lived with Bruce in New York and Ohio from age 5 until age 10. D.J.D. testified that Bruce began raping her when she was about six years old and continued to rape her repeatedly for the next four years.

{¶ 17} D.J.D. stated Bruce would rape her while her stepmother was at work. He would awaken her at night and rape her while her younger brother was sleeping. D.J.D. always resisted, to no avail. D.J.D. testified about one incident as follows:

> **"We lived in Aurora, and we had a split-level house in Aurora, and one time he raped me in the family room. It wasn't in the basement part because there was another family room. It was in the living room/family room area. It was early in the morning before he went to work because he was a garbage man for the**

> **city, and he had one of those zip-up — you know, the zip-up suits they wear. He took it off a little bit so he could, you know, so he could — I was going upstairs to tell. He stopped me when I was going up the stairs and he was on his knees. He said, 'I'll go to jail.' I didn't want him to go to jail. He was my dad. It was my dad. I didn't want him to."**[4]

{¶ 18} D.J.D. eventually told the pastor of the church about the ongoing rapes. Criminal charges were brought against Bruce, who ultimately served a ten-year prison term following a plea agreement with the state.

{¶ 19} On July 31, 2008, the jury returned guilty verdicts on two counts of rape and three counts of gross sexual imposition with a sexually violent predator specification attached to each count. The jury also found Bruce guilty of failing to provide notice of a change of address. On August 5, 2008, the trial court sentenced Bruce to consecutive terms of life for the two counts of rape, two years to life on the three counts of gross sexual imposition, and five years for failing to provide notice of change of address.

Request for Transcript

{¶ 20} Where appropriate, we will address Bruce's assigned errors out of order.

{¶ 21} In the first assigned error, Bruce argues the trial court erred in denying his request for a transcript of his prior trial. This assigned error lacks merit.

---

[4]Tr. 1393.

{¶ 22} The law is clear that the state must provide an indigent defendant with a transcript of a prior proceeding when it is needed for an effective defense or appeal.[5]

{¶ 23} In this instance, however, Bruce was not entitled to a transcript at the state's expense because he has failed to establish his indigency for purposes of obtaining the transcript.[6] The record indicates that on April 21, 2008, the trial court conducted a hearing for purposes of determining indigency in order to decide whether to provide a transcript at the state's expense. The hearing revealed that Bruce had received approximately $92,192.69 immediately prior to his incarceration on the instant charges. When given an opportunity to explain if said funds were depleted, Bruce was not forthcoming. In denying his request, the trial court stated in pertinent part as follows:

> **"* * * Your client has sizeable income. Your client is not indigent. As I indicated to you previously, certainly if you wanted a transcript of the proceedings, you were entitled to it. You simply had to pay for it. Now, he has been incarcerated so, therefore, he has no other reason to use any of the monies that he has received other than to obtain this transcript if he wanted it. Certainly if he wants a transcript, he is entitled to it. But he is not entitled to indigent qualifications."**[7]

---

[5] *State v. Walton*, Cuyahoga App. No. 90140, 2008-Ohio-3550, citing *State v. Arrington* (1975), 42 Ohio St.2d 114, at paragraph one of the syllabus.

[6] Id.

[7] Tr. 1382-1383.

{¶ 24} Moreover, the record indicates that Bruce retained his own counsel to represent him in the first trial and the same counsel was representing him in the second trial. Thus, Bruce was not entitled to a transcript at the state's expense because he was not indigent. Accordingly, we overrule the first assigned error.

Recorded Interviews

{¶ 25} In the second assigned error, Bruce argues he was denied a fair trial because the trial court allowed the prosecutor to play the recorded interviews of

{¶ 26} N.W. and D.W. during their direct examinations.

{¶ 27} Both N.W. and D.W. were present in court and subject to cross-examination. In addition, a third witness, Stacey Spicer, who was present during the recording, testified and was subject to cross-examination.

{¶ 28} Consequently, since the victims testified at trial and were subject to cross-examination, the Confrontation Clause was not implicated.[8] Accordingly, we overrule the second assigned error.

Spousal Competency Rule

{¶ 29} In the third assigned error, Bruce argues the court erred by allowing his wife, E.B., to testify without his consent; however, in support of this argument, he cites a portion of R.C. 2945.42, which was superseded by Ohio Evid.R. 601(B).

{¶ 30} In *Akron v. Hockman*,[9] the court noted "that the portion of R.C. 2945.42 relating to spousal competence has been superseded by Evid.R. 601 since its inception in 1980. *State v. Mowery* (1982), 1 Ohio St.3d 192, 194, 899. Evid.R. 601 provides that '[e]very person is competent to be a witness except: * * * A spouse testifying against the other spouse charged with a crime except when * * * a crime against the testifying spouse or a child of either spouse is charged[.]'"[10]

{¶ 31} Since the alleged crimes were committed against E.B.'s children and E.B. elected to testify, her testimony does not violate Evid.R. 601(B). Accordingly, we overrule the third assigned error.

Recorded Phone Conversations

{¶ 32} In the fourth assigned error, Bruce argues the trial court erred in admitting recorded telephone conversation between himself and E.B. This assigned error lacks merit.

{¶ 33} Directly relevant to the recorded telephone conversation at issue is R.C. 2933.52(B)(3), which allows:

> **"* * * A law enforcement officer [to] intercept a wire, oral, or electronic communication, if the officer is a party to the**

---

[8]See *State v. Djuric*, Cuyahoga App. No. 87745, 2007-Ohio-413.

[9](2001), 144 Ohio App.3d 262.

[10]Id.; Evid.R. 601(B)(1).

communication or if one of the parties to the communication has given prior consent to the interception by the officer.* * *"

{¶ 34} In the instant case, the recorded telephone conversation was properly admitted because E.B., one of the parties to the conversation, gave permission for the recording. As gleaned from the following excerpt, defense counsel conceded that E.B. gave permission for the recording:

"The Court: Now, do you question whether or not she in fact authorized law enforcement or gave them authorization to listen? * * * are you admitting that, you know, she gave permission and therefore they are still illegal; or are you questioning whether or not she in fact gave them permission?

Mr. Mancino: Well, I suppose she gave them permission. * * *"

{¶ 35} Since E.B. gave her permission, the recorded conversations were properly admitted. Accordingly, we overrule the fourth assigned error.

Dismissing Various Counts of the Indictment

{¶ 36} In the sixth assigned error, Bruce argues the trial court should have dismissed Counts 1 through 6 because of the vague dates and date range. This assigned error lacks merit.

{¶ 37} Initially, we note the indictment recited the language for the definition of rape and gross sexual imposition as defined in the relevant statutes; therefore, the indictment properly apprised Bruce of the charged offenses.[11] We

[11]*State v. Murphy* (1992), 65 Ohio St.3d 554, 583; *State v. Landrum* (1990), 53 Ohio St.3d 107, 119; Crim.R. 7(B).

conclude the indictment was not invalid for failure to state the exact date that the offenses were committed. Specificity as to the time and date of an offense is not required in an indictment.[12]

{¶ 38} Further, under R.C. 2941.03, "an indictment or information is sufficient if it can be understood therefrom: * * * (E) That the offense was committed at some time prior to the time of filing of the indictment * * *." Consequently, an indictment is not invalid for failing to state the time of an alleged offense or doing so imperfectly.[13] The state's only responsibility is to present proof of offenses alleged in the indictment, reasonably within the time frame alleged.[14]

{¶ 39} Here, both victims were under ten years of age when the rapes began. Both victims testified that Bruce raped them at each and every address where the parties resided. E.B. testified that she and her daughters lived with Bruce at two locations in Cuyahoga County and two locations in Lorain County. E.B. testified as to the dates that the parties resided at the respective addresses.

{¶ 40} Thus, Bruce had ample information regarding the date range of the offenses and could adequately prepare a defense. Accordingly, we overrule the sixth assigned error.

---

[12]*State v. Shafer*, Cuyahoga App. No. 79758, 2002-Ohio-6632.

[13]*State v. Bogan*, Cuyahoga App. No. 84468, 2005-Ohio-3412.

[14]Id.

Motion for Acquittal

{¶ 41} In the twenty-second assigned error, Bruce argues he was denied due process of law when the trial court overruled his motion for judgment of acquittal. This assigned error lacks merit.

{¶ 42} Crim.R. 29(A), which governs motions for acquittal, states:

> **"The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."**

{¶ 43} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman*:[15]

> **"Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."**[16]

{¶ 44} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks*,[17] in which the Ohio Supreme Court held:

> **"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal**

---

[15](1978), 55 Ohio St.2d 261, syllabus.

[16]See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23; *State v. Davis* (1988), 49 Ohio App.3d 109, 113.

[17](1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

> **conviction is to examine the evidence submitted 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"**

{¶ 45} After reviewing the evidence in a light most favorable to the state, we find that the evidence, if believed, could convince a rational trier of fact that the state had proven beyond a reasonable doubt each element of the charge of rape, gross sexual imposition, and failure to provide notice of change of address.

{¶ 46} In this case, Bruce was charged with three counts of rape, in violation of R.C. 2907.02. Subsection (A)(1) of this statute provides that "no person shall engage in sexual conduct with another who is not the spouse of the offender * * * when * * * the other person is less than thirteen years of age * * *." Subsection (A)(2) provides that "no person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶ 47} Bruce was also charged with three counts of gross sexual imposition, in violation of R.C. 2907.05, which provides that "no person shall have sexual contact with another, not the spouse of the offender * * * when * * * the offender purposely compels the other person to submit by force or threat of force * * * [or] the other person * * * is less than thirteen years of age * * * ."

{¶ 48} At trial, both minor victims testified that shortly after their mother began dating Bruce, he commenced touching them inappropriately and such behavior progressed into his repeatedly raping them over a period of four years. Both victims testified that the rapes began at his Bedford Heights apartment and continued at each and every location where the family resided. Both victims testified that Bruce raped them when their mother was not at home, and one victim testified that he raped her while she was sleeping.

{¶ 49} Both victims testified about the efforts they undertook to resist the sexual assaults Bruce inflicted. Each victim testified that Bruce would overpower them to carry out his sexual assault. In addition, it was established that both victims were under the age of 13 at the time of these offenses. Certainly, this testimony, if believed, would convince a rational trier of fact as to Bruce's guilt for these offenses beyond a reasonable doubt.

{¶ 50} As it pertains to the offense of failure to provide notice of change of address, the record indicates that at trial, Detective Paul Soprek, the lead investigator in the case, stated that Bruce had a prior conviction for gross sexual

imposition. Detective Soprek said that as a result of said conviction, Bruce was classified a habitual sexual offender and was required to register with the county sheriff once a year.

{¶ 51} Detective Soprek stated that in 2007, Bruce registered his address in Cuyahoga County as 10709 Sprague Road, but in an unrelated civil case, he filed and affidavit claiming that his address was 6725 West Central Avenue, Lucas County, Ohio. According to Detective Soprek, Bruce failed to provide notice of this change of address.

{¶ 52} Based on this testimony, there was sufficient evidence to sustain convictions for failure to provide notice of change of address. Thus, the trial court properly denied Bruce's Crim.R. 29 motion for acquittal. Accordingly, we overrule the twenty-second assigned error.

Other Bad Acts

{¶ 53} In the seventh assigned error, Bruce argues the trial court erred in allowing his biological daughter, D.J.D. to testify about other bad acts. This error lacks merit.

{¶ 54} A trial court generally has broad discretion in admitting evidence.[18] That said, evidence of a criminal defendant's prior criminal acts is generally inadmissible.[19] R.C. 2945.59 identifies exceptions to this rule:

---

[18]*State v. Maurer* (1984), 15 Ohio St.3d 239, 265.

[19]*State v. Thompson* (1981), 66 Ohio St.2d 496, 497.

> **"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 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, 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."**

{¶ 55} Further, Under Evid.R. 404(B),

> **"evidence of other crimes, wrongs, or acts is not admissible to prove a defendant's character as to criminal propensity. It may, however, be admissible * * * [to show] motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."**[20]

{¶ 56} The trial court allowed the testimony of D.J.D., Bruce's biological daughter, who testified that he had raped her repeatedly between ages six and ten. A review of the testimony of "other acts" evidence to which Bruce objects established a pattern, and was fully admissible under Evid.R. 404(B).

{¶ 57} The pattern that emerged from the testimony of D.J.D. and the present victims indicated that Bruce committed the acts against very young girls, who lacked the ability to comprehend the acts, the power to resist, and the emotional strength to tell their mothers or other authority figure.

---

[20] *State v. Cochran*, 11 Dist. No. 2006-G-2697, 2007-Ohio-345, quoting *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, at ¶44.

{¶ 58} In addition, Bruce had a pattern of committing these rapes when the mothers were working, when other siblings were away from home, in another part of the home, or sleeping, and often at night. Further, Bruce committed his sexual assaults multiple times per week and for years at a time.

{¶ 59} A review of the complained-of testimony reveals that it is practically identical to the testimony of N.W. and D.W. We conclude that D.J.D.'s testimony was properly admitted to show the pattern in which Bruce inflicted the sexual assaults upon these victims. Accordingly, we overrule the seventh assigned error.

Bifurcating Charges

{¶ 60} In the fifth assigned error, Bruce argues the trial court erred when it refused to bifurcate the specification charging him as a sexually violent predator.

{¶ 61} This assigned error lacks merit.

{¶ 62} The procedure for determining if an individual is a sexually violent predator is set forth in R.C. 2971.02:

> **"In any case in which a sexually violent predator specification is included in the indictment, count in the indictment, or information charging a sexually violent offense and in which the defendant is tried by a jury, the defendant may elect to have the court instead of the jury determine the specification. If the defendant does not elect to have the court determine the specification, the defendant shall be tried before the jury on the charge of the offense, and, following a verdict of guilty on the charge of the offense, the defendant shall be tried before the jury on the sexually violent predator specification."**

{¶ 63} A review of the record before us indicates that prior to the first trial, Bruce filed a motion to bifurcate the sexually violent predator specification and also filed a motion for a separate trial on Count 7, which dealt with his failure to provide his new address to the sheriff's department. When the trial court entertained the motion, the following exchange took place:

"The Court: Did you want to bifurcate this to try it to the Court, or did you want to try it on a different trial?

Mr. Mancino: Well, a different trial at the moment.

The Court: Not with the Court?

Mr. Mancino: Not immediately, no.

Mr. Thomas: Under those circumstances, I would object. It seems to me, your Honor, that the only reason that this would be bifurcated is so that the jury would not hear about the prior conviction. Under those circumstances, the State could not object as of the prejudicial nature. If for any reason defense counsel seeks to try this matter in front of another jury, that would be duplicative action and that would not be required in my opinion. And I would submit that they both should be denied.

Mr. Mancino: I think we're talking about different things. I am talking about Count 7 only right now.

The Court: That's what we're all talking about. You see, I thought when you said that you didn't want the jury to hear about it, that you wanted to try it to the Court. But you're saying that you wanted to pick 12 different people to hear Count 7?

Mr. Mancino: Yes.

The Court: Okay. And he had initially said that he had no objection.

Mr. Mancino: Right.

*** * ***

The Court: Sure. Well, Mr. Mancino, this is what we can do. We're going to try on these cases. If you want to keep it from the jury the Court is prepared to hear the case and not read it, not inform the jury that the Court is hearing the case at the same time that they are hearing Count 1 through 6. If you don't want to do that, then the Court will inform the jury because there is no reason for us to pick another jury to try this case.

*** * ***

Mr. Mancino: The Prosecutor could, in front of the jury, still bring this evidence out about a prior conviction saying, well, the Court is hearing part of it.

The Court: Not if it's being tried to the Court. He initially agreed that it could be tried to the Court and — but you're saying, no, you don't want it to the Court you want another jury. So you actually want this to be divided so that there are two juries hearing the same case.

Mr. Mancino: No, not two juries. It will be just a jury and a separate — you know, on a separate occasion. That's all.

The Court: That's two.

Mr. Mancino: Yeah. But I mean you won't have 24 people here.

The Court: No. We'll have 12 this time and 12 the next time.

Mr. Mancino: Right.

The Court: That will be denied. But you certainly have the option open to you to bifurcate the case if you choose.

Mr. Mancino: I guess with those choices we'd have to bifurcate it under those circumstances."[21]

{¶ 64} Following the above exchange, the trial court read all seven counts to the jury along with the specifications attached to Counts 1 through 6. As previously noted, the first trial ended in a hung jury. Before the second trial commenced, defense counsel motioned the trial court to incorporate all the prior rulings. The trial court granted the motion, and the record indicates that the trial court read all seven counts to the jury along with the specifications attached to Counts 1 through 6.

{¶ 65} Bruce now argues that he was prejudiced by the trial court's failure to bifurcate the sexually violent predator specification. We disagree.

{¶ 66} Initially, we note this is a classic case of invited error. Defense counsel made the unusual request to have two separate juries, which the trial court denied. However, after the trial court offered to hear the specifications and Count 7 separately, the record indicates that defense counsel was unclear in his desires.

{¶ 67} It is disingenuous for defense counsel to now complain of error that he induced.[22] The invited error doctrine prohibits a party who induces error in

[21]Tr. 18-24.

the trial court from taking advantage of such error on appeal.[23] The invited error doctrine is applied when counsel is "actively responsible" for the trial court's error.[24]

{¶ 68} The record indicates that defense counsel proceeded through the first trial without objecting to all the charges being in front of the jury. He then proceeded to have the trial court incorporate all the prior rulings from the first trial. In the second trial, defense counsel failed to object to all charges being before the jury. Accordingly, this court can only review this assignment for plain error.[25] Reversal for plain error is warranted only when the outcome of the trial would have been different without the error.[26] Further, plain error is only found in exceptional circumstances to prevent a miscarriage of justice.[27]

{¶ 69} The trial court erred in failing to bifurcate the sexually violent predator determination from the underlying offenses. The statute clearly requires

---

[22]See *State v. Bialec*, Cuyahoga App. No. 86564 , 2006-Ohio-1585, citing *State v. Smith*, 148 Ohio App.3d 274, 2002-Ohio3114.

[23]*State v. Felder*, Cuyahoga App. No. 87453, 2006-Ohio-5332.

[24]Id., citing *State v. Campbell*, 90 Ohio St.3d 320, 324, 2000-Ohio-183.

[25]*State v. Grubb* (1986), 28 Ohio St.3d 199, 201-202.

[26]*State v. Mitts*, 81 Ohio St.3d 223, 1998-Ohio-635, reconsideration denied 82 Ohio St.3d 1444.

[27]*State v. Lundgren*, 73 Ohio St.3d 474, 1995-Ohio-227, reconsideration denied 74 Ohio St.3d 1422.

bifurcation.[28] However, Bruce failed to object and based on the evidence in support of the jury's verdict, the error was harmless in this case.[29] Accordingly, we overrule the fifth assigned error.

Motion for Continuance

{¶ 70} In the eighth assigned error, Bruce argues the trial court erred in denying his motion for a one-week continuance to review the potential testimony of his biological daughter. This assigned error lacks merit.

{¶ 71} A trial court has broad discretion in deciding whether to grant a continuance of trial proceedings.[30] A reviewing court will not reverse the denial of a continuance absent an abuse of discretion.[31] Abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.[32] The Supreme Court of Ohio has explained this standard as follows:

> **"An abuse of discretion involves far more than a difference in * * *opinion* * *. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made**

---

[28]*State v. Clark*, 7th Dist. No. 04 MA 246, 2006-Ohio-1155.

[29]Crim.R. 52(B).

[30]*State v. Unger* (1981), 67 Ohio St.2d 65, syllabus.

[31]Id.

[32]*Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

> **between competing considerations. In order to have an 'abuse' in reaching such a determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias."**[33]

{¶ 72} The Ohio Supreme Court set forth a balancing test to determine whether a motion for continuance should be granted.[34] When evaluating a motion for continuance, a court should consider the length of delay; whether other continuances have been granted; the inconvenience to litigants, witnesses, opposing counsel, and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the moving party contributed to the circumstances that give rise to the request for a continuance; and any other relevant factors, depending on the unique facts of each case.[35]

{¶ 73} Here, the record indicates that on March 13, 2008, the state provided Bruce with a copy of his prior conviction from Portage County Common Pleas Court, which specifically related to the charge of failing to provide notice of a new

---

[33]*Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87.

[34]*Unger*, supra.

[35]Id.

address. Thus, Bruce had sufficient time to ascertain that the victim was his biological daughter. In addition, during the first trial, E.B. testified that Bruce told her that he was convicted of gross sexual imposition relating to his oldest daughter and that his daughter would routinely fend off his potential girlfriends.

{¶ 74} Further, the state indicated on July 24, 2008, that it intended to call Bruce's biological daughter as a witness and did not actually call her as a witness until July 28, 2008. Thus, defense counsel had four days to prepare for D.J.D.'s court appearance. Accordingly, we overrule the eighth assigned error.

Truth and Veracity

{¶ 75} In the tenth assigned error, Bruce argues he was denied a fair trial by reason of testimony regarding the victims' truth and veracity. This assigned error lacks merit.

{¶ 76} First, Bruce argues various witnesses, including Anita Moreno, were allowed to testify about the victims' truth and veracity. However, the record indicates that defense counsel first elicited this testimony. The following exchange took place between defense counsel and Moreno:

> **"Q. You have no corroboration by physical examination of any of these complaints, correct?**
>
> **A. Correct.**
>
> **Q. You have, at least with N, she appears to be a liar, stealer, threatener and fighting; is that right?**
>
> *** * ***

Q. Not very trustworthy person with all those traits?

A. I think that depends on who you are talking to. I would trust her."[36]

{¶ 77} Defense counsel also opened the door when he cross-examined Betty Parson, the victims' grandmother, as follows:

"Q. Do you feel that you have the knowledge of them to form an opinion, as to their truth and honesty?
A. Yes."[37]

{¶ 78} A review of the above exchanges indicates that defense counsel opened the door to elicit the testimony regarding the victims' truth and veracity. Consequently, it is disingenuous to now take issue with the errors he invited. Accordingly, we overrule the tenth assigned error.

Improper Prosecutorial Closing Argument

{¶ 79} In the eleventh assigned error, Bruce argues the prosecutor committed prosecutorial misconduct by making improper comments during closing argument. This assigned error lacks merit.

{¶ 80} In addressing a claim for prosecutorial misconduct, we must determine (1) whether the prosecutor's conduct was improper and (2) if so, whether it prejudicially affected the defendant's substantial rights.[38] The

[36]Tr. 1376-1377.

[37]Tr. 1467.

[38]*State v. Smith* (1984), 14 Ohio St.3d 13, 14.

touchstone of this analysis "is the fairness of the trial, not the culpability of the prosecutor."[39] A trial is not unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments.[40]

{¶ 81} Appellate courts ordinarily decline to reverse a trial court's judgment because of counsel's misconduct in argument unless (a) the argument injects non-record evidence or encourages irrational inferences, such as appeals to prejudice or juror self-interest or emotion, (b) the argument was likely to have a significant effect on jury deliberations, and (c) the trial court failed to sustain an objection or take another requested curative action when the argument was in process.[41] Generally, the prosecution is entitled to a certain degree of latitude in making its closing remarks.[42]

{¶ 82} In the instant matter, the appellant claims the prosecutor erred by making the following statements in his closing arguments: (1) "He did it to his wife's children"; (2) "Bruce told E.B. 'One time in the past, one time, I had a weak

---

[39]*Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78.

[40]*State v. Treesh*, 90 Ohio St.3d 460, 464, 2001-Ohio-4.

[41]*State v. Maddox* (Nov. 4, 1982), Cuyahoga App. Nos. 44600 and 44608, ¶9-10.

[42] *State v. Perry*, Cuyahoga App. No. 84397, 2005-Ohio-27, citing *State v. Woodards* (1966), 6 Ohio St.2d 14.

moment and I touched my daughter.' The daughter comes in and tells you it was for four years all the time"; and finally, (3) "Darrell Bruce is guilty of rape."

{¶ 83} After reviewing the entire trial record, we find the prosecutor's conduct was not improper as to affect Bruce's right to a fair trial. The prosecutor was commenting on the evidence he presented at trial. The prosecutor was simply reiterating the testimony of the victims, E.B., and his biological daughter D.J.D. "Darrell Bruce is guilty of rape," although it may be an inartful comment, it was taken out of context by Bruce and did not amount to sufficient prejudice to deny him a fair trial. Accordingly, we overrule the eleventh assigned error.

Cumulative Errors

{¶ 84} In the ninth assigned error, Bruce argues he was denied a fair trial by virtue of cumulative errors throughout the trial. Although Bruce alleges several prejudicial errors, we have addressed the majority of them in other assigned errors, and will limit our discussion to his claim of improper opinion testimony. Bruce complains that social workers Amy Houk and Anita Moreno were allowed to provide opinion testimony.

{¶ 85} Houk testified generally about the procedure her agency utilizes to determine whether counseling, police investigation, or medical treatment is necessary. Houk testified that she is qualified to render a disposition of a case, as to "substantiated," to find "unsubstantiated," or "indicate the validity of facts."

{¶ 86} Moreno, who holds a masters degree in social work and teaches at Case Western Reserve University, has worked in the field of mental health for more than 20 years. Moreno is qualified to make a mental health diagnosis and testified that both victims suffer from post traumatic stress disorder.

{¶ 87} Our review of the record reveals that neither Houk nor Moreno offered improper opinion testimony. Consequently, we must reject the premise of Bruce's argument. Accordingly, we overrule the ninth assigned error.

Culpable Mental State

{¶ 88} In the twelfth assigned error, Bruce argues he was denied due process of law when he was convicted and sentenced on indictments that failed to allege any culpable mental states. This assigned error lacks merit.

{¶ 89} Bruce contends that no culpable mental state was alleged in his indictment nor proven by the state, in violation of *State v. Colon.*[43] However, this court, and others, have repeatedly held that R.C. 2907.05, gross sexual imposition involving a victim under the age of 13, is a strict liability offense and requires no precise culpable state of mind. All that is required is a showing of the proscribed sexual contact.[44]

---

[43]118 Ohio St.3d 26, 2008-Ohio-1624.

[44]*State v. Aiken* (June 10, 1993), Cuyahoga App. No. 64627; *State v. Laws* (Dec. 22, 1998), 10th Dist. No. 98AP-306.

{¶ 90} The same applies to the sexual conduct element of raping a child under 13 years of age.[45] Here, an offender commits rape under R.C. 2907.02(A)(1)(b) when the victim is less than 13 years old "whether or not the offender knows the age of the other person." This provision plainly indicates that strict liability applies to the age element of rape.[46] Therefore, the indictment against Bruce was not defective for failing to specify a mens rea element. Accordingly, we overrule the twelfth assigned error.

Sexually Violent Predator Specification

{¶ 91} In the thirteenth assigned error, Bruce argues he was denied due process because the sexually violent predator specification failed to allege any elements. This assigned error lacks merit.

{¶ 92} According to R.C. 2941.148, the specification that the offender is a sexually violent predator shall be stated in substantially the following form:

> **"Specification * * *. The grand jury * * * further find and specify that the offender is a sexual violent predator."**

{¶ 93} Since the specification that alleged that Bruce was a sexually violent predator mirrored the statutory language, we do not find that his due process rights were abridged. Moreover, it was uncontroverted that Bruce was previously

---

[45] See *State v. Ferguson*, 10th Dist. No. 07AP-999, 2008-Ohio-6677; R.C. 2907.02(A)(1)(b).

[46] See *State v. Haywood* (June 7, 2001), Cuyahoga App. No. 78276; *State v. Gillingham*, 2nd Dist. No. 20671, 2006-Ohio-5758, ¶91.

convicted of a sexually oriented offense. Because Bruce was previously convicted of a sexually violent offense, we find no error with the present convictions. Accordingly, we overrule the thirteenth assigned error.

Curative Jury Instructions

{¶ 94} In the fourteenth assigned error, Bruce argues the trial court failed to give the proper curative jury instruction regarding other acts evidence. This assigned error lacks merit.

{¶ 95} In the instant case, the following discussion took place regarding the jury instructions on the other acts evidence:

"The Court: * * * Counselors, are there any corrections, deletions, or objections to the instructions?

Mr. Mancino: Just one, your Honor.

The Court: I will see you at sidebar, please.

*** * ***

Mr. Mancino: Is there a better instruction on other acts?

The Court: That is it.

Mr. Mancino: That is the statute?

The Court: That is the statute.

Mr. Mancino: That is the rule?

The Court: Yes.

Mr. Mancino: I thought there was a better instruction.

The Court: Okay. Anything else?

Mr. Mancino: That's it."[47]

{¶ 96} Here, defense counsel acknowledged that the trial court's jury instruction was according to the statute. Accordingly, we overrule the fourteenth assigned error.

Address and Residence

{¶ 97} In the fifteenth assigned error, Bruce argues the trial court erred in responding to a jury's question regarding the legal definition of address and residence. This assigned error lacks merit.

{¶ 98} In response to the jury's question, the trial court stated:

> **"Ladies and gentlemen, in this case, the state of Ohio legislature saw fit to mandate that those individuals in this state, having been classified as sexual offenders, must indicate where they are residing. That has been labeled as their address. Residence has nothing to do with it. It is not an issue of concern to this jury. You must notify the sheriff where you are. The sheriff must be able to contact you by the information you provide as your address."**[48]

{¶ 99} Here, the trial court simply explained that the sheriff must be able to find the registrant at the address provided. Consequently, we find no error in the trial court's explanation. Accordingly, we overrule the fifteenth assigned error.

---

[47]Tr. 1592-1593.

[48]Tr. 1601.

Jury Instructions

{¶ 100} We will address Bruce's sixteenth, seventeenth, and eighteenth assigned errors together because they involve the same application of law and facts. Bruce argues the trial court either failed to fully instruct the jury or erred in instructing the jury.

{¶ 101} A charge to the jury should be a plain, distinct, and unambiguous statement of the law as applicable to the case made before the jury by the proof adduced.[49] It is well established that a trial court should confine its instructions to the issues raised by the pleadings and the evidence.[50]

{¶ 102} In Ohio, it is well established that the trial court will not instruct the jury where there is no evidence to support an issue.[51] However, requested instructions should ordinarily be given if they are correct statements of law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the specific instruction.[52] However, the trial court is not required to give a proposed jury instruction in the exact language requested by its

---

[49]*Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12.

[50]*Becker v. Lake Cty. Mem. Hosp. West* (1990), 53 Ohio St.3d 202, 208.

[51]*Riley v. Cincinnati* (1976), 46 Ohio St.2d 287.

[52]*Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591.

proponent, even if it properly states an applicable rule of law. The court retains discretion to use its own language to communicate the same legal principles.[53]

{¶ 103} When reviewing such an assignment of error, a single challenged jury instruction may not be reviewed in isolation but must be reviewed within the context of the entire charge.[54] Accordingly, the proper standard of review for an appellate court is whether the trial court's refusal to give a defendant's requested instruction constituted an abuse of discretion under the facts and circumstances of the case.[55] As previously noted, the term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable.[56]

{¶ 104} First, Bruce claims that the trial court failed to fully instruct the jury on the statutory definition of a sexually violent predator.

{¶ 105} R.C. 2971.01(H)(1) defines sexually violent predator as a person who, on or after January 1, 1997, commits a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses. Our review of the record indicates that the trial court provided the above definition and

---

[53]*Youssef v. Parr, Inc.* (1990), 69 Ohio App.3d 679, 690.

[54]*State v. Hardy* (1971), 28 Ohio St.2d 89; *State v. Price* (1979), 60 Ohio St.2d 136; *State v. Wise* (Jan. 29, 1993), 6th Dist. No. 91 WC 113.

[55]*State v. Wolons* (1989), 44 Ohio St.3d 64.

[56]*State v. Adams* (1980), 62 Ohio St.2d 151, 157; *Blakemore,* supra.

then proceeded to instruct the jury on the essential and applicable elements of the charged offense.[57] Consequently, this claim lacks merit.

{¶ 106} Second, Bruce claims the trial court blurred the definition of address and residence in response to a jury question. We have addressed this claim in Bruce's fifteenth assigned error and found no merit to it.

{¶ 107} Third, Bruce claims the trial court incorrectly instructed the jury that it could convict for offenses committed outside of Cuyahoga County.

{¶ 108} R.C. 2901.12(H) provides in pertinent part as follows:

> **"(H) When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, the offender may be tried for all of those offenses in any jurisdiction in which one of those occurred. Without limitation on the evidence that may be used to establish the course of criminal conduct, any of the following is prima-facie evidence of a course of criminal conduct:**
>
> **(1) The offenses involved the same victim, or victims of the same type or from the same group.**
>
> **(2) The offenses were committed by the offender in the offender's same employment, or capacity, or relationship to another.**
>
> **(3) The offenses were committed as part of the same transaction or chain of events, or in furtherance of the same purpose or objective."**

{¶ 109} The record supports the conclusion that venue was proper in Cuyahoga County. First, the chain of events commenced in Cuyahoga County

[57]Tr. 1578 -1580.

at Bruce's Bedford Heights apartment and continued at the parties' residence in North Olmsted. The offenses were part of a course of criminal conduct spanning four years. The offenses were against the same victims and were committed in a similar manner whether in Cuyahoga or Lorain County.

{¶ 110} Based on the statute, Bruce was properly tried in Cuyahoga County even though some of the offenses occurred in Lorain County. Thus, the trial court gave the proper jury instruction regarding venue. Accordingly, we overrule the sixteenth, seventeenth, and eighteenth assigned errors.

Date and Location of Offenses

{¶ 111} In the nineteenth assigned error, Bruce argues the jury should have been required to make a finding as to the dates and location of the offenses. This error lacks merit.

{¶ 112} Specificity as to the time and date of an offense is not required in an indictment.[58] Where such crimes constitute sexual offenses against children, indictments need not state with specificity the dates of alleged abuse, so long as the prosecution establishes that the offense was committed within the

[58]*State v. Coles*, Cuyahoga App. No. 90330, 2008-Ohio-5129.

time frame alleged.[59] This is partly due to the fact that the specific date and time of the offense are not elements of the crimes charged.[60]

{¶ 113} Moreover, many child victims are unable to remember exact dates and times, particularly where the crimes involved a repeated course of conduct over an extended period of time.[61] The problem is compounded where the accused and the victim are related or reside in the same household, situations that often facilitate an extended period of abuse.[62] Thus, an allowance for reasonableness and inexactitude must be made for such cases considering the circumstances.[63]

{¶ 114} Here, the victims were of tender years, the crimes involved a repeated course of conduct over four years, Bruce was the victims' stepfather, and he resided in the same household. In addition, the minor victims testified that Bruce sexually assaulted them at each and every location where they resided. Thus, Bruce had sufficient information to fairly defend himself. Accordingly, we overrule the nineteenth assigned error.

---

[59]*State v. Yaacov*, Cuyahoga App. No. 86674, 2006-Ohio-5321, ¶17; see, also, *State v. Gus*, Cuyahoga App. No. 85591, 2005-Ohio-6717.

[60]*Gus* at ¶6.

[61]*State v. Mundy* (1994), 99 Ohio App.3d 275, 296; see *State v. Robinette* (Feb. 27, 1987), 5th Dist. No. CA-652.

[62]*Robinette*, supra.

[63] Id.

Sexually Violent Predator Specification

{¶ 115} In the twentieth assigned error, Bruce argues he was denied due process of law when he was convicted of the sexually violent predator specification where the court used the present conviction as a basis for the conviction. We agree.

{¶ 116} R.C. 2971.01(H)(1) defines sexually violent predator as follows: "* * * a person who, on or after January 1, 1997, commits a sexually violent offense and is likely to engage in the future of one or more sexually violent offenses."

{¶ 117} In this matter, it is undisputed that in 1991, Bruce was convicted of gross sexual imposition. However, because Bruce's prior conviction was in 1991, six years before 1997, it was improperly the basis of the prior conviction for the sexually violent predator specifications. Further, the Supreme Court of Ohio has held that the underlying sexually violent offenses in a case cannot be used to support a sexually violent predator specification in that same case.[64] Consequently, Bruce's 1991 gross sexual imposition conviction was improperly used as the basis for the sexually violent predator specifications attendant to Counts 1 through 6.

[64]*State v. Robinson*, Cuyahoga App. No. 85207, 2005-Ohio-5132, citing *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238.

{¶ 118} Accordingly, we sustain the twentieth assigned error, reverse and remand in part, with instructions to the trial court to amend its journal entry to find Bruce not guilty of the sexually violent predator specifications attendant to Counts 1 through 6.

Failure to Provide Notice of Address

{¶ 119} In the twenty-first assigned error, Bruce argues the trial court made no findings that his prior conviction was a third degree felony. This assigned error lacks merit.

{¶ 120} A review of the record indicates that it was established that Bruce had previously been convicted of gross sexual imposition in Portage County. It was also established that it was a felony of the third degree.[65] Thus, the instant charge of failing to register was a third degree felony.

{¶ 121} After the enactment of S.B. 2, the sentencing scheme for third degree felonies changed to a range of one-to-five years in prison.[66] Therefore, the sentence imposed was within the range for third degree felonies. Accordingly, we overrule the twenty-first assigned error.

Consecutive Sentences

[65]Tr. 1412.

[66] See R.C. 2929.14; *State v. Lawwill*, Cuyahoga App. No. 91032, 2009-Ohio-484.

{¶ 122} In the twenty-third assigned error, Bruce argues the trial court erred in imposing consecutive sentences. This assigned error lacks merit.

{¶ 123} In *State v. Foster*,[67] the Ohio Supreme Court held that judicial fact-finding to impose a maximum sentence is unconstitutional in light of *Blakely v. Washington*.[68] The *Foster* court severed and excised, among other statutory provisions, R.C. 2929.14(C), because imposing maximum sentences requires judicial fact-finding.[69]

{¶ 124} "After the severance, judicial fact-finding is not required before a prison term may be imposed within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant."[70] As a result, "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings and give reasons for imposing maximum, consecutive, or more than the minimum sentence."[71]

---

[67]109 Ohio St.3d 1, 2006-Ohio-856.

[68](2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403.

[69]Id., applying *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, *Blakely*, and *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435.

[70]Id. at ¶99.

[71]*Foster* at paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at paragraph three of the syllabus.

{¶ 125} Thus, post-*Foster*, we now apply an abuse of discretion standard in reviewing a sentence that is within the statutory range.[72]

{¶ 126} An abuse of discretion is more than an error in judgment or law; it implies attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable.[73] Furthermore, when applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court.[74]

{¶ 127} In *Foster*,[75] the Ohio Supreme Court held that R.C. 2929.11 must still be followed by trial courts when sentencing offenders. The Ohio Supreme Court held that R.C. 2929.11 does not mandate judicial fact-finding; rather, the trial court is merely to "consider" the statutory factors set forth in this section prior to sentencing.[76]

{¶ 128} R.C. 2929.11(A) provides that a trial court that sentences an offender for a felony conviction must be guided by the "overriding purposes of

---

[72] *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. See, also, *State v. Lindsay*, 5th Dist. No. 06CA0057, 2007-Ohio-2211; *State v. Parish*, 6th Dist. No. OT-07-049, 2008-Ohio-5036; *State v. Bunch*, 9th Dist. No. 06 MA 106, 2007-Ohio-7211; and, *State v. Haney*, 11th Dist. No. 2006-L-253, 2007-Ohio-3712.

[73] *Blakemore*, supra.

[74] *State v. Murray*, 11th Dist No. 2007-L-098, 2007-Ohio-6733, citing *Pons v. Ohio State Med. Bd.,* 66 Ohio St.3d 619, 621, 1993-Ohio-122.

[75] 109 Ohio St.3d 1, 2006-Ohio-856.

[76] Id.

felony sentencing."[77] Those purposes are "to protect the public from future crime by the offender and others and to punish the offender."[78] R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.[79]

{¶ 129} We have previously held that judicial fact-finding is not required under R.C. 2929.11.[80] Thus, the trial court must merely "consider" the statutory factors before imposing sentence.[81] Further, a comparison of similar cases was not mandated under R.C. 2929.11(B), noting that "[e]ach case is necessarily, by its nature, different from every other case just as every person is, by nature, not the same."[82]

{¶ 130} In the instant matter, we find that the trial court complied with all applicable rules and statutes in imposing Bruce's sentence, and thus, the

---

[77]*State v. McCarroll*, Cuyahoga App. No. 89280, 2007-Ohio-6322.

[78]Id.

[79]Id.

[80]See *State v. Georgakopoulos*, Cuyahoga App. No. 81934, 2003-Ohio-4341.

[81]See *Foster*.

[82]*State v. Wheeler*, 6th Dist. No. L-06-1125, 2007-Ohio-6375. See, also, *State v. Donahue*, 6th Dist. No. WD-03-083, 2004-Ohio-7161.

sentence was not contrary to law. Here, the trial court sentenced Bruce within the statutory ranges provided by R.C. 2929.14. A review of the record demonstrates that the trial court considered the principles and purposes of sentencing as required by R.C. 2929.11 and 2929.12 prior to imposing Bruce's sentence.

{¶ 131} The trial court examined Bruce's criminal conduct and discussed the pertinent factors related to the seriousness of the conduct and the likelihood of recidivism. We conclude the trial court expressly provided that it considered the purposes and principles of R.C. 2929.11 and 2929.12. Consequently, we find no abuse of discretion in the sentence the trial court imposed.

{¶ 132} Nonetheless, immediately prior to oral argument, Bruce filed a notice of intention to cite *Oregon v. Ice*.[83] After oral argument, we asked both parties to brief *Oregon v. Ice,* and both parties responded. Bruce argues that *Oregon v. Ice* abrogates *Foster's* finding the consecutive sentencing section of Senate Bill 2 unconstitutional. The state contends Bruce's argument to this court is misplaced.

{¶ 133} *Oregon v. Ice* acknowledges that trial judges historically have decided when to impose consecutive sentences; consequently, it upheld Oregon's law on consecutive sentencing. The implication of Bruce's argument is

---

[83](2009), ___ U.S. ___, 129 S.Ct. 711, 716, 172 L.Ed.2d 517.

that the Senate Bill 2 provision on consecutive sentences is constitutional, and thus the trial court must make findings before it can impose a consecutive sentence.

{¶ 134} We have responded to *Oregon v. Ice* in several recent decisions and concluded that we decline to depart from the pronouncements in *Foster*, until the Ohio Supreme Court orders otherwise.[84]

{¶ 135} Moreover, we have concluded that the trial court expressly provided that it considered the purposes and principles of R.C. 2929.11 and 2929.12 prior to sentencing Bruce within the statutory ranges provided by R.C. 2929.14. Accordingly, we overrule the twenty-third assigned error.

Judgment affirmed in part, reversed in part, and remanded.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. Case remanded to the trial court for further proceedings consistent with this opinion.

---

[84] See *State v. Reed*, Cuyahoga App. No. 91767, 2009-Ohio-2264; *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379; and *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564

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

PATRICIA ANN BLACKMON, JUDGE

COLLEEN CONWAY COONEY, A.J., and
CHRISTINE T. McMONAGLE, J., CONCUR

APPENDIX

Assignments of Error

"I. Defendant was denied due process of law and equal protection of the law when the court refused to grant defendant's request for a transcript of his prior trial."

"II. Defendant was denied due process of law and equal protection of the law when the court permitted the prosecutor, during direct examination of N.W. and D.W., to play their recorded interviews with a social worker."

"III. Defendant was denied due process of law when the court ruled that his wife, E.B., could testify over defendant's objection."

"IV. Defendant was denied due process of law when the court overruled defendant's motion to suppress concerning a recorded phone conversation made by E.B. at the request of the deputy sheriff."

"V. Defendant was denied due process of law and a fair trial when the court refused to bifurcate a specification charging defendant as a sexually violent predator."

"VI. Defendant was denied due process of law when the court overruled his motion to dismiss various counts of the indictment."

"VII. Defendant was denied due process of law when the court allowed D.J.D. to testify concerning other bad acts."

"VIII. Defendant was denied due process of law when the court refused to grant a continuance when the prosecutor amended discovery during the course of the trial."

"IX. Defendant was denied a fair trial by reason of cumulative errors committed during the course of the trial."

"X. Defendant was denied due process of law and a fair trial when the the witnesses were allowed to testify as to the truth and veracity of the claims made against defendant and to defendant's guilt."

“XI. Defendant was denied a fair trial by reason of improper prosecutorial argument.”

“XII. Defendant was denied due process of law when he was convicted of offenses which required no culpable mental state.”

“XIII. Defendant was denied due process of law when he was convicted of a sexually violent predator specification which specification failed to allege any elements of the specification.”

“XIV. Defendant was denied due process of law when the court failed to give a proper curative instruction regarding other acts evidence.”

“XV. Defendant was denied due process of law when the court improperly answered a question concerning elements of the failure to register.”

“XVI. Defendant was denied due process of law when the court failed to instruct fully as to the definition of a sexually violent predator.”

“XVII. Defendant was denied due process of law and a fair trial when the court failed to include the entirety of its jury instructions in written form to the jury and orally modified the instructions.”

“XVIII. Defendant was denied due process of law when the court amended the venue statute and indictment by instructing the jury it could convict for offenses committed in other than Cuyahoga County.”

“XIX. Defendant was denied due process of law when the court would not require the jury to determine the date of the offense and location of the offense.”

“XX. Defendant was denied due process of law when he was convicted and sentenced as a sexually violent predator.”

“XXI. Defendant was denied due process of law when he was sentenced to five (5) years for a felony of the third degree for failure to register.”

“XXII. Defendant was denied due process of law when the court overruled defendant’s motion for judgment of acquittal.”

“XXIII. Defendant was denied his Sixth Amendments Rights when the court sentenced defendant to consecutive terms of imprisonment on all offenses based on judicial fact finding.”

KEYWORDS:
Case No. 92016