Child Sexual Abuse
Evidence & Trial Court Procedure Issues

Judge Robert P. Ringland

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PREFACE

Child sexual abuse cases are one of the most challenging types of cases to deal with as an attorney or judge. This guide is designed to assist the bench and bar in addressing those evidentiary issues common to those cases. While most of the cases herein involve children I have occasionally mentioned cases involving adult victims where the holdings may pertain to child sexual abuse. I have, with rare exceptions, avoided reporting holdings involving prior acts under Evidence Rules 403-404 in as much as these cases are generally fact specific and are decided on a case by case basis. This bench book is hopefully designed to be a starting guide in research and certainly not as a final source. It is not designed to provide legal advice. I wish to acknowledge the following who have helped me compile these cases over the past 26 years: Sasha Blaine, Esq., Aaron Susmarski, Carolyn Besl, Esq., Joshua Vineyard, Esq., Daniel Linneman, Esq., Andrew Thaler, Esq., Laura Johnson, Esq., Kate Bedinghaus, Esq., Becky Carroll Hudson, Esq., Melissa Whalen, Esq., Terrance McQuown, Esq., Sally Moore, Esq. and Diana Thomas, Esq. and Ethan Miller.

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I. CHILD ABUSE: REPORTING & REPORT CONFIDENTIALITY

A. Duty to Report: The Role of R.C. § 2151.421 & § 5153.16

1. R.C. § 2151.421(A)(1) establishes on those acting in a professional or official capacity a mandatory duty to report known or suspected child abuse.

    a) Those who are required to report are given immunity against suits, regardless of whether their report was made in good faith.[1]

    b) Those who are required to report are immune from suits even where the misdiagnosis was not reasonable.[2]

    c) If a government employee or official is under a duty to report, but fails to do so, he or she may incur civil or criminal liability for such an omission under R.C. 2151.421.[3]

2. Those individuals not specified in R.C. § 2151.421(A)(1) as required to report may do so under R.C. § 2151.421(B).

    a) To encourage persons to report, under R.C. § 2151.421(B), their information to proper authorities, R.C. § 2151.421(G)(1)(a) confers immunity on those who report in good faith,[4] while R.C. § 2151.421(H)(3) makes it a crime to knowingly make or cause another person to make a false report.

    b) The enactment of R.C. § 2151.421(g) represents a policy decision by the legislature that the "societal benefits arising from encouraging the reporting and prosecution of child abuse by granting immunity outweigh any individual harm which might arise from false reports."[5]

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[1] Surdel v. Metrohealth Medical Center, 135 Ohio App.3d 141 (8th Dist. 1999).

[2] Id.

[3] Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities, 102 Ohio St.3d 230, 2004-Ohio-2629.

[4] Formerly, courts said that the statutory immunity applied even in the absence of good faith. *See, e.g.*, Cudlin v. Cudlin, 64 Ohio App.3d 249 (8th Dist. 1990); Hartley v. Hartley, 42 Ohio App.3d 160 (6th Dist. 1988). Subsequent amendments to the statute, however, indicate that good faith is necessary.

[5] Criswell v. Brentwood Hospital, 49 Ohio App.3d 163 (1989) (*quoting* Bishop v. Ezzone, 6th Dist. Wood No. WD-80-63) (June 26, 1981). *See also* Cudlin v. Cudlin, 64

3. Anyone who participates in a mandatory or good faith voluntary reporting is immune under R.C. § 2151.421(G)(1)(a), whether the information provided is considered the initial report or merely corroborative of an earlier report.[6]

4. R.C. 5153.16 places a statutory duty upon any public children services agency to make investigation concerning any child alleged to be an abused, neglected, or dependent child and report all known or suspected child abuse to law enforcement.[7]

    a) In interviewing suspected child abusers, children services investigators are not considered law enforcement and therefore are not required to advise those suspects of their *Miranda* rights prior to questioning.[8]

        (1) Where a child's sexual behavior at school was reported to children services, which interviewed the defendant father and received an incriminating written statement from him, the court found that the defendant's compliance with the investigation was voluntary despite children services' temporary custody of the child pending resolution of the complaint. Children services' statutory duty to report the suspected abuse to authorities did not make it an agent of law enforcement for *Miranda* purposes. [9]

B. Confidentiality of Child Abuse Reports

1. An apparent conflict exists regarding counsel's entitlement to information involving allegations of child abuse and reports by child service agencies.

    a) Certain law and procedural rules support disclosure.

Ohio App.3d 249 (8th Dist. 1990); Surdel v. Metrohealth Medical Center, 135 Ohio App.3d 141 (8th Dist. 1999).

[6] Surdel v. Metrohealth Medical Center, *supra*.

[7] R.C. 5153.16(A).

[8] State v. Kessler, 12th Dist. Fayette No. CA 2005-12-037, 2007-Ohio-1225, citing State v. Jones, 8th Dist. No. 83481, 2004-Ohio-5205 and State v. Thoman, 10th Dist. No. 04AP-787, 2005-Ohio-898.

[9] State v. Kessler, *supra*.

(1) Ohio's Public Records Act, R.C. 149.43, requires that most public agency reports be open for public inspection.

(2) R.C. 1347.08 et seq. requires disclosure of personal information contained in public records to members of the general public.

(3) Crim.R. 16 and Juv.R. 24 each provide for discovery of evidence favorable to the requesting party.

(4) Disclosure of such information is arguably necessary under the guidelines of *Brady v. Maryland*, 373 U.S. 83 (1963).

b) Other law supports the confidentiality of such information.

(1) R.C. 5153.17 requires public children services agencies to keep the written records of their investigations confidential under most circumstances.

(2) R.C. 2151.421 provides for the confidentiality of reports.

(A) Reports may not be used as evidence against the reporting individual in civil actions.

(B) Reports are admissible in criminal proceedings and are subject to discovery in accordance with the Rules of Evidence and the Rules of Criminal Procedure.

2. *Pennsylvania v. Ritchie* and *in camera* review of child abuse reports[10]

a) Defendant, charged with various sexual offenses against his minor daughter, subpoenaed state agency responsible for investigating cases of child mistreatment during discovery.

b) The agency refused to comply with the subpoena, citing privilege under a Pennsylvania statute.

c) The Supreme Court held that, under the Due Process Clause of the 14th Amendment, confidentiality of the records not absolute. Relevant information could be disclosed upon trial court finding that the information was material to the defense of the accused.

[10] Pennsylvania v. Ritchie, 480 U.S. 39, 107 Sup. Ct. 989, 94 L.Ed.2d 40 (1987).

d) The Supreme Court struck balance between state's interest in confidentiality and defendant's interest in information by requiring submission of materials to trial court for *in camera* review.

3. Ohio's position on the confidentiality of child abuse reports

a) The Ohio Supreme Court has not officially adopted *Pennsylvania v. Ritchie*, but has followed *Ritchie* regarding the disclosure of *Brady* material.[11]

b) However, it is nonetheless clear that Ohio courts have adopted the reasoning behind *Ritchie*, in that courts must weigh the state's compelling interest in protecting child abuse information against a defendant's right of access by way of *in camera* review.

c) Ohio courts of appeals have addressed the confidentiality issues raised by *Ritchie* in context of applicable state statutes and criminal rules.

(1) R.C. § 5153.17 specifically excludes records of county children services from R.C. § 149.43. Not error for juvenile court to refuse to disclose records.[12]

(2) No conflict between R.C. §§ 1347.01 et seq. and 5153.01 et seq. Reasonable access should be provided to an "involved" party.[13]

(3) In a juvenile custody/dependency case, Juv.R. 24 requires the court to inspect file. Court cannot refuse carte blanche inspection.[14] The fact that certain records may not be accessible under Chapter 1347 does not prevent their discovery and use, if appropriate, in a judicial proceeding.

(4) In charge of gross sexual imposition, defendant filed motion to produce records of children's services board regarding child

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[11] *See* State v. Johnston, 39 Ohio St.3d 48 (1988); State v. Lawson, 64 Ohio St.3d 336 (1992); State v. Wickline, 50 Ohio St.3d 114 (1990); State v. Sanders, 92 Ohio St.3d 245, 2001-Ohio-189.

[12] In re Phipps, 4th Dist. Adams No. 445, 1987 WL 12240 (June 2, 1987).

[13] In re Trumbull County Children Services Board, 32 Ohio Misc.2d 11 (Trumbull Cty. Ct. Com. Pls. 1986).

[14] In re David B. Evans, 2d Dist. Miami No. 87 CA 12, 1987 WL 26739 (Nov. 23, 1987).

victim. The trial court reviewed the file and determined no "exculpatory" material was found and also made files available to defense counsel for "perusal." Defendant argued that neither he nor counsel had the opportunity to review the file. The Court held that per R.C. § 5153.17, R.C. § 2151.421, Crim.R. 16 and *Pennsylvania v. Ritchie* (1987), 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, these records not subject to discovery.[15]

(5) Failure of Court to permit defense to call school psychologist who had talked to victim per mother's request was prejudicial error; R.C. § 2317.02(G) was not applicable. However court rejected defendant's request for independent psychological evaluations. Court should have conducted in camera inspection of tapes of interview of victim by social workers per Crim.R. 16 (B)(1)(g).[16]

(6) Where R.C. § 5153 does not apply, R.C. § 149.43 may supersede Crim.R. 16(B)(1)(c).[17]

(7) In civil suit trial judge's order requiring disclosure of Children Services file which were subject of suit (definition) not neglect to writ of prohibition.[18]

(8) Confidential information drawn from reports made to children-services agencies pursuant to R.C. 2151.421 is exempt from disclosure by police under Public Records Act.[19]

(9) Grant of protective order quashing subpoena *duces tecum* for child victim's children's services records not abuse of discretion where *in camera* review found confidentiality consideration to outweigh disclosure. The court distinguished

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[15] State v. Hart, 57 Ohio App.3d 4 (6th Dist. 1988).

[16] State v. Bunch, 62 Ohio App.3d 801 (9th Dist. 1989).

[17] State ex rel. Sanford v. Kelly, 44 Ohio App.3d 30 (2d Dist. 1989); State v. Simmons, 12th Dist. Butler No. CA91-05-078 (Feb. 10, 1992); City of Chillicothe v. Knight, 75 Ohio App.3d 544 (4th Dist. 1992).

[18] State ex rel. Butler Cty. Children Services Bd. v. Sage, 95 Ohio St.3d 23, 2002-Ohio-1494.

[19] State ex rel. Beacon Journal Publishing Co. v. Akron, 104 Ohio St.3d 399, 2004-Ohio-6557.

"reports" from "records" in refusing to expand the limited confidentiality exception for reports under R.C. 2151.421 to all children's services board files connected to victim.[20]

(10) Crim.R. 16(B)(1)(g) required *in camera* inspection of taped interviews of victims by social workers to determine allegations of coaching by social workers and inconsistent statements by victims.[21]

(11) Records of Department of Children & Family Services are not absolutely privileged and confidentiality is not absolute; access to records may be warranted if records are necessary and relevant to the proceeding and good cause for disclosure is shown.[22]

4. The presence and participation of counsel during *in camera* inspection depends upon the proper classification of the material being inspected.

a) Statements actually written or recorded by the victim

(1) Where actual written or recorded statements of the victim are contained in the children's services report, counsel should be present and should participate in the review. Such statements are treated as witness statements.

(A) Crim.R. 16(B)(1)(g) requires both defense and prosecuting attorneys to be present and participate in inspection of witness statements; counsel should see the material during the *in camera* inspection under this rule.[23]

b) Summaries by investigators

(1) Where the child victim's statements are not written out or recorded by the child victim, but are merely summaries made by the investigator, the review should be conducted outside the presence of counsel.

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[20] State v. Dixon, 5th Dist. Richland No. 03 CA 75, 2004-Ohio-3940.

[21] State v. Bunch, 62 Ohio App.3d 801 (9th Dist. 1989).

[22] State v. Sahady, 8th Dist. No. 83247, 2004-Ohio-3481.

[23] State v. Daniels, 1 Ohio St.3d 69 (1982).

(A) These are not actual victim statements, and they are not subject to impeachment under Evid.R. 613.[24]

(B) Where a statement falls under an apparent privilege or statutory protection, the court should review it outside the presence of counsel.[25]

(C) The trial court should preserve the issues by sealing and filing with the record all materials it reviews during *in camera* inspection so appellate courts may review its decision on exclusion.[26]

[24] *See* State v. Mittman, 8th Dist. No. 80629, 2002-Ohio-6810.

[25] State v. Geis, 2 Ohio App.3d 258 (10th Dist. 1982); State v. Black, 85 Ohio App.3d 771 (1st Dist. 1993).

[26] State v. Lawson, 64 Ohio St.3d 336, 1992-Ohio-47.

II. THE INDICTMENT

A. Jurisdiction

1. There was sufficient evidence that the defendant's offense occurred within the county that was the jurisdiction of the court as required to support his conviction for GSI.

    a) The defendant's four year-old niece claimed the defendant touched her inappropriately during a car ride. On the day of the incident, the defendant drove with his niece to pick up her mother and dropped them off at their home. The evidence established that the defendant lived with his mother and provided childcare for his niece during the day while her mother worked, and that her mother's work was located in the same county as the defendant's residence. This evidence was sufficient to establish that the beginning and ending points of the automobile's travel occurring in the same county, giving the court jurisdiction.

2. Where rapes occur periodically over 5 year period beginning in Medina County and then in Summit County, charges can be brought in Summit County.[27]

B. Charges Occurring Over a Period of Time

1. Nature of the Problem

    a) Many indictments in child abuse cases will involve charges occurring over a period of time, *e.g.*, between March 1, 1984 to June 15, 1984. Fairly large time windows in the context of child abuse prosecutions are not in conflict with constitutional notice requirements.[28]

    b) Young children remember event times, e.g., the time of a birthday, Christmas, etc., better than clock or calendar times.[29]

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[27] State v. Lydicowens, 9th Dist. Summit No. 14054, 1989 WL 140617 (Nov. 22, 1989), per R.C. § 2901.12 (H).

[28] State v. Schwarzman, 8th Dist. No. 100337, 2014-Ohio-2393, citing *Valentine v. Konteh,* 395 F.3d 626 (6th Cir. 2005).

[29] Suzanne M. Sgroi, M.D., HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE (1982), at 323; Debra Whitcomb, et al., *When the Victim is a Child*, ISSUES AND PRACTICES IN CRIMINAL JUSTICE, August 1985 (NIJ); 1 William O'Donohue & James H. Geer, THE SEXUAL ABUSE OF CHILDREN: THEORY AND RESEARCH (1992).

2. Defense Counsel's Remedies

a) File a request for a bill of particulars, and if the prosecutor cannot respond, file a pre-trial motion to dismiss or make a Crim.R. 19 motion during trial.

b) Crim.R. 7(B) states: "The indictment or information…shall contain a statement that the accused has committed some public offense therein specified. Such statements may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the applicable section of the statute as long as the words of that statute charge an offense, or in any words sufficient to give the accused notice of all the elements of the offense with which he is charged."

3. The Courts' Response

a) Time Frame Accepted

(1) Generally speaking, "the failure to provide dates and times in an indictment will not alone provide a basis for dismissal of the charges."[30] Therefore, the trial court did not err in denying a defendant's motion to dismiss where the dates and times of the offenses in question were not elements of the offenses, and where the defendant could not show that his defense that the alleged conduct never actually occurred was prejudiced by the absence of specific dates and times.[31]

(2) *State v. Gingell*: Where indictment states that the offense in count one occurred from December 1, 1979 to May 31, 1980, that the offense in count two occurred from May 31, 1980 to September 30, 1980 and that the offense in count three occurred from October 1, 1980 to February 8, 1981 and the prosecutor cannot determine the exact times due to the age of child, there is no reason to dismiss unless the times are necessary to:

(A) Permit the accused to prepare an adequate defense, *e.g.*, alibi, or

[30] State v. Rogers, 12th Dist. Butler No. CA2006-03-055, *citing* State v. Sellards, 17 Ohio St.3d 169 (1985).

[31] Id.

(B) Put the accused on notice of an offense, i.e., where the age of the victim at the time of the offense is an element.[32]

(3) *State v. Sellards*: Adopted *Gingell* rationale: seven counts, 30 day to two month periods.[33]

(4) State's failure to narrow time frame for count in which defendant was alleged to have engaged in anal intercourse with minor despite state's possession of more specific information was harmless error; during trial minor victim stated that first act of anal intercourse occurred shortly after he received athletic club membership, a date which could be determined, and defendant failed to show more specific date was material to presentation of his defense in light of his admitted having frequent one-on-one contact with minor during that time frame.[34]

(5) Trial court did not err by allowing prosecution to amend the indictment regarding the alleged dates of the offense after jury was impaneled and declaring a mistrial. Defendant argued that he should not have been forced into a decision between proceeding with trial under an amended indictment or requesting time to locate witnesses necessitated by the "thirteenth hour" amendment of the indictment. The court held that pursuant to Crim.R. 7 amending the indictment changed neither the name nor the identity of the crime with which defendant was charged.[35]

(6) Where three Bill of Particulars specified between August 15 and September 15 and victim testifies sometime before school starting, Bill of Particulars specific enough.[36]

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[32] State v. Gingell, 7 Ohio App.3d 364 (1st Dist. 1982).

[33] State v. Sellards, 17 Ohio St.3d 169 (1985).

[34] State v. Fulton, 12th Dist. Clermont No. CA2002-10-085, 2003-Ohio-5432; State v. Daniel, 97 Ohio App.3d 548 (1994).

[35] State v. Fulton, *supra*; *see also,* State v. Collinsworth, 12th Dist. Brown No. CA2003-10-012, 2004-Ohio-5902.

[36] State v. Bell, 5th Dist. Perry No. CA-96-027 (Aug. 21, 1997); *see also* State v. Geboy, 145 Ohio App.3d 706, 2001-Ohio-2214 (3rd Dist.).

(7) Prosecution's failure to provide defense with more particular information about dates on which minor was alleged to have been sexually penetrated by defendant's boyfriend, despite having such information, did not prejudice the defendant in prosecution for aiding and abetting felonious sexual penetration.[37]

(8) Prosecution's failure to provide defense with more specific dates as to when the criminal conduct allegedly occurred did not prejudice the defendant in a prosecution for rape.[38]

(9) Where the Bill of Particulars stated that the alleged offense took place "on or about a Sunday in the middle to late July, 2002", the state's inability to provide a more specific date did not violate the accused's due process rights, nor materially prejudice his ability to present an adequate defense.[39]

(10) Where victim identified specific date of offense for the first time at trial, Bill of Particulars not defective for failure to include specific date; documentary evidence obtained by defendant after trial tending to contradict victim's identification of the specific date not grounds for new trial.[40]

(11) Where the dates of the crimes alleged in the indictment are not essential elements of any of the offenses at issue, the defendant is not deprived of any constitutional rights by the prosecution's use of general time frames.[41]

(12) Where the defendant does not present an alibi defense, but rather simply denies that alleged offenses ever occurred,

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[37] State v. Stepp, 117 Ohio App.3d 561 (4th Dist. 1997).

[38] State v. Meador, 12th Dist. Warren No. CA200803042.

[39] State v. Brewer, 12th Dist. Warren No. CA2003-01-008, 2003-Ohio-5880.

[40] State v. Stepp, 117 Ohio App.3d 561 (4th Dist. 1997).

[41] State v. Ali, 8th Dist. No. 88147, 2007-Ohio-3776.

the inexactitude of the dates in the indictment is not prejudicial error.[42]

(13) Evidence sufficiently established that appellant raped victim during the time frame of the indictment when a video-recorded interview with a social worker was dated with a time within the period of the indictment and the victim stated on the video that he was still suffering from pain from the anal rape.[43]

b) Time Frame Not Accepted

(1) State, per bill of particulars, indicated it could not provide anything more specific than from Jan. 1, 1985 to Jan. 31, 1985. However, victim's mother "pinpointed date in her testimony and also disclosed she gave statement to prosecutor pinpointing date." Held to be error. State must provide more specific dates when it has ability to do so.[44]

c) Discussion of *Gingell* and *Sellard*s

(1) *State v. Springfield*, 9th Dist. Summit No. C.A. 10546, 1982 WL 2700 (Aug. 11, 1982) (failure to dismiss indictment for failure to state specific dates not unconstitutional.)

(2) *State v. Hiltabidel*, 9th Dist. Summit No. C.A.11971, 1985 WL 10801 (May 1, 1985) (1 day; state proved offense occurred "close to Labor Day."); *see also State v. Lydicowens*, 9th Dist. Summit No. 14054, 1989 WL 140617 (Nov. 22, 1989); *State v. Foster*, 9th Dist. Summit No. 14277, 1990 WL 72345 (May 23, 1990); *State v. Sharier*, 9th Dist. Summit No. 14795, 1991 WL 65125 (Apr. 24, 1991); *State v. Russell*, 9th Dist. Summit No. 14714, 1991 WL 57331 (Apr. 10, 1991).

(3) Six month period: State v. Barnes, 12th Dist. Clermont No. CA84-05-041, 1985 WL 7980 (April 18, 1985); State v. Marshall, 12th Dist. Clinton No. CA90-04-010, 1991 WL 69356 (Apr. 29, 1991); *State v. Humfleet*, 12th Dist.

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[42] State v. Bell, 176 Ohio App.3d 378, 2008-Ohio-2578 (2d Dist.).

[43] State v. Gilfillan, 10th Dist. No. 08AP-317, 2009-Ohio-1104.

[44] State v. Lawrinson, 11th Dist. Lake No. 2005-L-003, 1988 WL 95380 (Sept. 9, 1988).

Clermont Nos. CA84-04-031, CA84-05-036, 1985 WL 7728 (Sept. 9, 1985); *State v. Madden*, 15 Ohio App.3d 130 (12th Dist. 1984).

(4) Other amounts of time: *State v. Gorman*, 1st Dist. No. C-840707, 1985 WL 11511 (Oct. 23, 1985) (twelve month period); *State v. White*, 2d Dist. Greene No. 85 CA 38, 1986 WL 4613 (approx. 2 month period); *State v. Robinette,* 5th Dist. Morrow No. CA-652, 1987 WL 7153 (Feb. 27, 1987) ("2-3 months before April 18th" not detriment to defense where alibi in Columbus Feb. 18th); *State v. Berezoski*, 2d Dist. Montgomery No. 9568, 1986 WL 14770 (Dec. 17, 1986) (18 mo. period); State v. Bennett, 9th Dist. Lorain Nos. 4033, 4034, 1986 WL 13702 (Dec. 3, 1986) ("latter part of 1984"); *State v. Carey*, 5th Dist. Licking No. 2008-CA-20, 2009-Ohio-103 (five month period).

(5) *State v. Alexander*, 8th Dist. No. 51565, 1987 WL 6800 (Feb. 19, 1987) follows *Gingell*, *supra*, with little discussion. *See also State v. Sinica*, 3rd Dist. Allen No. 1-86-47, 1989 WL 29867 (Mar. 29, 1989); *State v. Ratliff*, 8th No. 56620, 1990 WL 28825 (Mar. 15, 1990).

(6) *State v. Barnecut*, 44 Ohio App.3d 149 (5th Dist. 1988) (numerous counts during calendar year violative of due process where defendant does not rely on alibi defense, creates bright line requiring dismissal not amendment. No longer "good law" per *State v. Morgan*, 6th Dist. Lucas No. L-00-1114 (May 11, 2001).

(7) *State v. Albrecht*, 10th Dist. No. 85AP-949, 1986 WL 5974 (May 22, 1986). Unless nature of defense is such that exactness of time is an essential element, proof of the exact date and time is not required.

(8) State v. Myers, 12th Dist. Preble No. 88-01-003, 1988 WL 89625 (Aug. 29, 1988) (not violative of due process); State v. Murrell, 72 Ohio App.3d 668 (12th Dist. 1991).

(9) *State v. Reece*, 1st Dist. Nos. C-930257, C-930279, 1994 WL 201826 (May 25, 1994) (an undetermined day in 1988 or 1989); *State v. Jones,* 12th Dist. Clermont No. CA92-12-117, 1993 WL 369243 (Sept. 20, 1993).

(10) *State v. Cottrell*, 8th No. 51576, 1987 WL 6799 (Feb. 19, 1987) (Jan. 1, 1983 - Dec. 31, 1983): "an examination of the

relevant decisions does not suggest there is a bright line such that an indictment alleging an offense over a certain period of time is *per se* invalid."

(11) *State v. Campbell,* 12th Dist. Butler Nos. 87-07-089, 87-09-116, 1988 WL 94042 (Sept. 12, 1988). "As it is readily apparent that appellant did not vigorously pursue an alibi defense, we fail to see how lack of specificity as to dates truly prejudiced appellant's ability to fairly defend himself." Defendant did not indicate he was out of town on specific dates in indictment, he just generally asserted that he was out of state often. *See also State v. Price*, 12th Dist. Butler No. CA90-08-158, 1991 WL 149553 (Aug. 5, 1991) (where indictment not specific, failure of state to prove specific date is not grounds for Rule 29 or reversal.)

(12) *Cf.*, *State v. Allen*, 1st Dist. No. C-840479, 1985 WL 6781 (May 8, 1985) (indictment charging events in summer of 1983 flawed where time of events crucial to determine type of sentencing). *See also State v. Kinney*, 35 Ohio App.3d 84 (1st Dist. 1987), where case focuses on one specific date and the defendant alleges alibi on that specific date, it is error to charge jury "on or about," *but cf.*, *State v. Brown*, 6th Dist. Lucas No. L-87-241, 1988 WL 86913 (Aug. 19, 1988) (distinguishing *Kinney* on facts, i.e., neither State nor defendant focused on one date nor was there an alibi.) *See also State v. Garrett*, 12th Dist. Clermont No. CA89-08-070, 1990 WL 98222 (July 16, 1990); *State v. Steckel*, 8th No. 52594, 1989 WL 112358 (Sept. 21, 1989), distinguishing *Kinney* where charge was "on or about Sept.1 through Sept.10, 1985"; *Kinney* was single incident by defendant who neither lived with, nor was related to victim and who had timely presented an alibi defense. Court also cited *Robinette* on theory of access. Where total denial, *Kinney* not applicable. *State v. Love,* 1st Dist. No. C-960498, 1997 WL 292349 (June 4, 1997).

(13) State v. Nelson, 8th Dist. No. 54905, 1989 WL 4146 (Jan. 19, 1989). Discrepancy between time in bill of particulars (Nov. 19, 4:00 p.m. - 9:00 p.m.) and trial testimony (Nov. 19, 12:30 p.m.), not grounds for dismissal or reversal when defense given chance for continuance during trial.

(14) *State v. Ambrosia,* 67 Ohio App.3d 552 (6th Dist. 1990). Court rejected argument that lack of specific date made a unanimous jury verdict impossible.

(15) *State v. Stamm*, 6th Dist. Erie No. E-90-72, 1992 WL 32025 (Feb. 21, 1992). There was sufficient evidence to convict defendant of failing to send her daughters to school, where the complaint charged her with failing to do so "on and after 8-29-89 through 5-9-90," and there was evidence presented to show that the daughters missed a substantial amount of school in the school year which began in September 1990. Although defendant contended that the language in the complaint required proof of a violation between the two dates specified, and although the language was confusing in this respect, it was properly read as only requiring proof of the offense on or after either of the two dates.

(16) *State v. Price*, 80 Ohio App.3d 35 (3rd Dist. 1992), on or about "Aug.21, 1990" with "Easter Sunday" interlineated sufficient.

C. Use of Victim's Initials

1. Nature of the Problem

a) Often the victim's name may only be listed as initials or not listed at all.

b) Purpose of using only initials, or nothing, is to protect victims from unwanted publicity

c) R.C.2907.11 - effective Sept.3, 1996 provides " Upon the request of the victim or offender in a prosecution under any provision of sections 2907.02 to 2907.07 of the Revised Code, the judge before whom any person is brought on a charge of having committed an offense under a provision of one of those sections shall order that the names of the victim and offender and the details of the alleged offense as obtained by any law enforcement officer be suppressed until the preliminary hearing, the accused is arraigned in the court of common pleas, the charge is dismissed, or the case is otherwise concluded, whichever occurs first. Nothing in this section shall be construed to deny to either party in the case the name and address of the other party or the details of the alleged offense."[45]

2. Defense Counsel's Remedies

[45] *See* Haushwout, 23 U. Toledo Law Review 735 (Summer 1992) "Prohibiting Rape Victim Identification in Media, is it Constitutional?"

a) File a request for a bill of particulars, and if the prosecutor cannot respond, file a pre-trial motion to dismiss or make a Crim.R.19 motion during trial.

b) Crim.R. 7(B) states: "The indictment or information...shall contain a statement that the accused has committed some public offense therein specified. Such statements may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the applicable section of the statute as long as the words of that statute charge an offense, or in any words sufficient to give the accused notice of all the elements of the offense with which he is charged."

3. The Courts' Response

a) Defense is entitled to a victim's name unless the prosecutor, under Crim.R. 16 (B) (1) (e), certifies that disclosure may "subject the witness or others to physical or substantial economic harm or coercion."[46] The prosecutor cannot merely state conclusions; he or she must give reasons.[47]

(1) Hearing permitted to determine reason for certification.[48]

(2) Victim's name not required under Crim.R. 7.[49]

b) Publication of indictment and "media trials" cause more "damage" than original abuse.[50]

(1) Defense must show prejudice in court's refusal to release name and address.[51]

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[46] State v. Howard, 56 Ohio St.2d 328 (1978).

[47] State v. Daniels, 92 Ohio App.3d 473 (1993).

[48] State v. Owens, 51 Ohio App.2d 132 (1975).

[49] State v. Hopkins, 1st Dist. No. C-840852, 1985 WL 4678 (Dec. 24, 1985).

[50] A. Tyler & M. Brassard, *Abuse in the Investigation and Treatment of Intrafamilial Child Sexual Abuse*, CHILD ABUSE AND NEGLECT 47-53 (1984).

[51] State v. Martin, 1st Dist. No. C-890427, 1990 WL 151709 (Oct. 10, 1990).

c) Judge who rules on Crim.R. 16 (B)(1)(e) motion may not be same judge who conducts trial.[52] Where judge does preside, not constitutional error under *Arizona v. Fulminate*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), but rather case by case analysis to determine if harmless error.[53]

4. Possible Results

a) Disclosure of the victim's name by way of amending the indictment changes neither the substance nor the identity of the crime charged. Furthermore, where the defendant is aware of the alleged victim's identity prior to being indicted, there is no prejudice to his defense.[54]

D. Use of Photographs

1. The use of photographs of the victims depicting them at the ages at which the crime allegedly occurred is left to the sound discretion of the trial court.[55]

2. Admission of a photograph of victim and defendant where defendant is wearing red athletic shorts and has his hands down his pants "clowning around" is harmless error as there was overwhelming evidence of guilt and there was evidence that it was the only non-staged picture of the victim of defendant available.[56]

E. Length of Time from Perpetration of Crime to Indictment

1. Nature of the Problem

a) Often events occur more than six years before charge when the child was too young or afraid to report.

b) R.C. § 2901.13 provides in pertinent part:

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[52] State v. Gillard, 40 Ohio St.3d 660 (1988).

[53] State v. Esparza, 74 Ohio St.3d 660 (1996).

[54] State v. Valenzona, 8th Dist. No. 89099, 2007-Ohio-6892, *citing* State v. Owens, 51 Ohio App.2d 132 (9th Dist. 1975).

[55] State v. Carey, 5th Dist. Licking No. 2008-CA-20, 2009-Ohio-103.

[56] State v. Southall, 5th Dist. Stark No. 2008 CA 00105, 2009-Ohio-768.

"(A)(1) Except as provided in division (A)(2) or (3) of this section... a prosecution shall be barred unless it is commenced within the following periods after an offense is committed:

(a) For a felony, six years;

(3) Except as otherwise provided in divisions (B) to (H) of this section, a prosecution of any of the following offenses shall be barred unless it is commenced within twenty years after the offense is committed:

(a) A violation of section 2903.03, 2903.04, 2905.01, 2907.02, 2907.03, 2907.04, 2907.05, 2907.21, 2909.02, 2911.01, 2911.02, 2911.11, 2911.12, or 2917.02 of the Revised Code, a violation of 2903.11 or 2903.12 of the Revised Code if the victim is a peace officer, a violation of section 2903.13 of the Revised Code that is a felony, or a violation of former 2907.12 of the Revised Code[.]"

c) 1998 H 49, § 3, eff. 3-9-99, reads:

"Section 2901.13 of the Revised Code, as amended by this act, applies to an offense committed on and after the effective date of this act and applies to an offense committed prior to the effective date of this act if prosecution for that offense was not barred under section 2901.13 of the Revised Code as it existed on the day prior to the effective date of this act."

2. Statute of Limitations Issues[57]

a) Corpus delicti "discovered" when reported to anyone listed under R.C. § 2151.421, not just prosecutor. Child victim's understanding that act was inappropriate does not constitute "discovery."[58]

(1) Probation officer: Not error to fail to dismiss *sua sponte* a charge of gross sexual imposition against a minor on the

[57] For a general discussion of civil statute of limitations problems in child sex abuse cases *see generally* Wendy J. Murphy, *Debunking "False Memory" Myths in Sexual Abuse Cases*, TRIAL, Nov. 1997, at 54; Kathy A. Tatone, *Sexual Abuse Litigation: Opportunities and Obstacles*, TRIAL, Feb. 1995, at 66; James Wilson Harshaw, III, *Not Enough Time?: The Constitutionality of Short Statutes of Limitations for Civil Child Sexual Abuse Litigations*, 50 OHIO ST. L.J. 753 (1989).

[58] State v. Hensley, 59 Ohio St.3d 136 (1991).

ground that the prosecution had been commenced outside the time provided by the statute of limitations, when the record contained evidence to show that the defendant was charged within six years of the time that the corpus delicti of the crime was discovered by a responsible adult (i.e., when the minor first made a report of the incident to a probation officer).[59]

(2) Children's services[60]

(3) Prosecutor.[61]

b) However, discovery by spouse of defendant does not start "clock ticking" because spouse not required to report. Under R.C. § 2151.421(A)(1), a parent is not a responsible adult.[62]

c) Statute of limitations does not start to run merely because the victim is interviewed by police and had the opportunity to disclose the abuse, if the victim does not in fact disclose abuse.[63]

d) Per R.C. § 2901.13(F) where corpus delicti undiscovered, statute is tolled. In case of child abuse of six year-old, victim is unaware that the act is wrong and therefore the corpus is undiscovered. Statute begins to run when child victim comprehends acts committed against her were wrong.[64]

e) Six year statute of limitations for rape and sexual battery begins when the alleged victim reaches the age of majority. The Court of Appeals would not consider whether victim's inability to recall incidents of abuse at time he or she turned 18 would continue tolling statute of limitations, where the State neither made this argument to trial court, nor presented any evidence that the victim was, in fact, unable to recall alleged abuse at the time she turned 18.[65] Where 14 year-old child at

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[59] State v. Bailey, 83 Ohio App.3d 749 (1st Dist. 1992).

[60] State v. Ritchie, 95 Ohio App.3d 569 (12th Dist. 1994).

[61] State v. Buhl, 1st Dist. No. C-830049, 1983 WL 5337 (Nov. 30, 1983).

[62] State v. Canton, 6th Dist. Lucas No. L-90-256, 1991 WL 163497 (Aug. 23, 1991).

[63] State v. Talani, 8th Dist. No. 68750, 1996 WL 11319 (Jan. 11, 1996).

[64] State v. Alexander, 58 Ohio App.3d 28 (9th Dist. 1989).

[65] State v. Webber, 101 Ohio App.3d 78 (9th Dist. 1995).

time of sexual imposition did not report misdemeanor sex crime (two yr. statute of limitation) until 21 years old, the tolling of statute of limitation stops at 18 years and warrants a dismissal.[66] Where crime not reported by victim until victim was 24-½ yrs old (over six yrs) and beyond statute of limitations.[67]

f) In *State v. Weiss*, the court rejected the argument that a presumption of knowledge and understanding of the defendant's act and its criminal nature exist as to child abuse victims who attain the age of majority. Testimony of victim that he "knew it was wrong for a person to take advantage of someone else under the laws of Ohio" was sufficient to indicate that the victim upon reaching majority understood the criminal nature of the act perpetrated against him, although it was "debatable whether [victim] was aware of the exact nature of the crime."[68]

g) Rape offenses occurring within family for five year period are continuing course of conduct, and oldest incident not outside statute of limitations per R.C. § 2901.13. [69]

h) Former altar boy discovered his injuries from allegedly being sodomized by priest no later than year in which he sought counseling in college, during which counselor attributed his psychological difficulties to sexual abuse, and, therefore, claims pursued against priest seven years later were barred by statute of limitations applicable to claims for sexual battery, breach of fiduciary duty, clergy malpractice, negligent and intentional infliction of emotional distress, negligence, vicarious liability, conspiracy, and state constitutional violation. R.C. §§ 2305.09, 2305.09(C) & (D), 2305.10, 2305.11(A).[70]

i) Where student/plaintiff knew by the time he reached the age of majority he had been sexually abused by teacher and choir director, became preoccupied with his sexual identity, and sought psychological

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[66] *See* State v. Pfouts, 62 Ohio Misc.2d 587 (Wood Cty. Ct. Com. Pls. 1992), *citing* State v. Sutter, 9th Dist. Summit No. 13749 (Nov. 15, 1989), as narrowly construing statute of limitation in favor of accused.

[67] State v. Hughes, 92 Ohio App.3d 26 (12th Dist. 1994).

[68] State v. Weiss, 96 Ohio App.3d 379 (5th Dist. 1994).

[69] State v. Lydicowens, 9th Dist. Summit No. 14054, 1989 WL 140617 (Nov. 22, 1989).

[70] Kotyk v. Rebovich, 87 Ohio App.3d 116 (8th Dist. 1993), abrogated by *Sutton v. Mt. Sinai Med. Ctr.*, 102 Ohio App.3d 641 (8th Dist. 1995).

help, the discovery rule did not toll his claim against his former teacher and derivative claims against the school district and the church after the student's eighteenth birthday.[71]

j) Discovery Rule applies in Ohio to toll statute of limitations where victims of childhood sexual abuse repress memories of that abuse until later time.[72] Court held that the discovery rule applied and then remanded for determination of whether the statute of limitations for intentional tort or negligence applied as to one defendant.[73] Where Plaintiff's uncle abused Plaintiff from the time she was three until she was sixteen, but Plaintiff repressed the memory until approximately fifteen years after the last incident, discovery rule applied to toll the statute of limitations.[74]

k) Cases reversed and remanded by the Supreme Court in the wake of *Ault*:

(1) *Smith v. Rudler*, 11th Dist. Ashtabula No. 92-A-1753, 1993 WL 318797 (Aug. 13, 1993), *rev'd and rem'd.* 70 Ohio St.3d 397 (1994) (incest victim was aware of abuse that occurred from 1976 through 1980, but claimed that she did not realize she was suffering emotional disturbances due to abuse until she first sought counseling in October 1990. Trial court granted summary judgment and appeals court affirmed, noting that "it is the discovery of the facts, not their legal significance, that activates the statute of limitations.")

(2) *Stewart v. Kennedy*, 1st Dist. No. C-920152, 1993 WL 368967 (Sept. 22, 1993), *rev'd and rem'd.* 70 Ohio St.3d 536 (1994) (Plaintiff claimed that abuse occurred from 1968 through 1980, but that she did not discover the causal connection between the defendant's acts and her injuries until August of 1990, when Plaintiff underwent psychotherapy. Trial court granted defendant's motion to dismiss, and the appeals court affirmed.).

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[71] Doe v. United Methodist Church, 68 Ohio St.3d 531, 1994-Ohio-531.

[72] Ault v. Jasko, 70 Ohio St.3d. 114, 1994-Ohio-376.

[73] Steiner v. Steiner, 10th Dist. No. 93APE10-1368, 1994 WL 85625 (Mar. 15, 1994).

[74] Herald v. Hood, 9th Dist. Summit No. 15986, 1993 WL 277541 (July 21, 1993), *appeal dismissed as improvidently granted pursuant to* Ault, 70 Ohio St.3d 1210 (1994).

(3) *Doe v. Doe*, 1st Dist. No. C-920809, 1994 WL 79555 (March 16, 1994), *rev'd and rem'd*. 70 Ohio St.3d 469 (1994)(38 year-old Plaintiff repressed memories of abuse that occurred when she was 16 years old, and discovered abuse through psychotherapy. Trial court refused to apply discovery rule.).

(4) *Pratte v. Stewart*, 2d Dist. Greene No. 08-CA-95, 2009-Ohio-1768 (Plaintiff repressed memories of abuse for 24 years. Trial court refused to hold that R.C. 2305.111(C) did not retroactively apply to plaintiff).

l) But, in a civil suit for child sexual abuse, depression of the plaintiff alone is not sufficient to toll the statute of limitations.[75]

m) Where memories merely suppressed and not repressed, summary judgment granted on statute of limitations grounds. Court rejected suggestion that *Ault* should be interpreted as tolling the statute of limitations until the victims "verified" their memories, and that the injuries were not discovered until the victims reported the abuse.[76]

n) Statute of limitations for sexual assault was tolled during entire period defendant was voluntarily resident in another country lacking extradition treaty with United States, despite his occasional trips to United States embassy in another country with which United States did have extradition treaty, in absence of any evidence that state knew, or should have known, enough about defendant's trips to effectuate extradition.[77]

o) Although the statute of limitations for the rape was 6 years at the time of commission of the rape, the extending of R.C. 2901.13(A)(3)(a) to a 20 year statute of limitations three years after the rape allowed for prosecution, as the extension applied retroactively.[78]

F. Evidence Establishing Individual Distinguishable Incidents Required For Multiple Charges

[75] Casey v. Casey, 109 Ohio App.3d 830 (8th Dist. 1996).

[76] Livingston v. Diocese of Cleveland, 126 Ohio App.3d 299 (8th Dist. 1998).

[77] State v. West, 134 Ohio App.3d 45 (1st Dist. 1999).

[78] State v. Herron, 8th Dist. No. 91362, 2009-Ohio-2128.

1. When a defendant's conduct results in two or more offenses of the same kind committed separately, he may be convicted of them all.[79]

2. *Valentine v. Konteh*[80]

   a) Cuyahoga County prosecutors charged a defendant with twenty identical counts of child rape and twenty identical counts of felonious sexual penetration. The factual bases of the charges were not distinguished in the indictment or the bill of particulars.[81]

   b) At trial, the only evidence as to the number of offenses was provided by the testimony of the child victim, who described typical abuse scenarios and estimated that the abusive offenses occurred "about 20," "about 15," or "about 10" times.[82]

   c) The defendant was convicted on all forty counts, but the Sixth Circuit upheld the district court's issuance of a writ of habeas corpus as to all but one count of each crime. The court found that the language of the indictment violated the defendant's rights to notice and protection against double jeopardy. While the defendant had notice that he was charged with two separate crimes during the period specified in the indictment, he had no way of identifying what he was to defend against in the repetitive counts and no way to determine what charges of a similar nature could be brought against him in the future if he were re-indicted.[83]

3. Ohio Cases Applying and Interpreting *Valentine*

   a) Identical language used in indictment as to each of five counts of rape was not impermissibly vague where prosecution differentiated each count at trial so as to allow the court and jury to tell one count from another.[84]

   b) Testimony providing numerical estimate of number of inappropriate sexual incidents and victim's statements that her stepfather touched

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[79] State v. Chojnacki, 8th Dist. No. 88213, 2007-Ohio-4016, *citing* R.C. 2941.25(B).

[80] Valentine v. Konteh, 395 F.3d 626 (6th Cir. 2005).

[81] Id.

[82] Id.

[83] Id.

[84] State v. Rice, 8th Dist. No. 82547, 2005-Ohio-3393.

her "any chance he got" were unconnected to individual, distinguishable incidents. While demonstrative of a general pattern of abuse, evidence provided an insufficient basis to convict defendant for twenty counts of rape, twenty-one counts of felonious sexual penetration, or twenty-nine counts of kidnapping.[85]

c) Where record reflected that defendant did not object to form of indictment before trial or request an amended bill of particulars or additional specific information, testimonial evidence that defendant engaged in specific course of conduct toward victim deemed sufficient to uphold all convictions.[86]

d) Child victim's testimony that defendant inserted his penis into her vagina "eight, nine times" and that he inserted his finger into her vagina "a good 11 or 12 times" insufficient to support defendant's convictions of additional charges of rape and GSI; numerical estimate was unconnected to individual, distinguishable incidents.[87]

e) Child victim's placement of separate instances of abuse in time frame detailing where the abuse occurred, which house the family lived in at the time, and who employed defendant at the various times victim was molested was sufficient to establish separate occurrences and distinguishable from mere numerical estimate; victim's testimony also corroborated by testimony of younger sister.[88]

f) Defendant placed on sufficient notice of six pending rape offenses where indictment alleged that each offense occurred in a different month during 2003.[89]

g) Victim's descriptions of differentiated instances of abuse at trial were sufficient to support defendant's convictions on certain identically worded counts, but testimony that similar incidents occurred "ten or more" times, or "at least four [other] times" was insufficient to support convictions on remaining charges.[90]

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[85] State v. Hemphill, 8th Dist. No. 85431, 2005-Ohio-3726.

[86] State v. Carnes, 12th Dist. Brown No. CA2005-01-001, 2006-Ohio-2134.

[87] State v. Warren, 168 Ohio App.3d 288, 2006-Ohio-4104 (8th Dist.).

[88] State v. Yaacov, 8th Dist. No. 86674, 2006-Ohio-5321.

[89] State v. Parks, 7th Dist. Carroll No. 04-CA-803, 2006-Ohio-7269.

[90] State v. Tobin, 2d Dist. Greene No. 2005-CA-150, 2007-Ohio-1345.

h) Where defendant was acquitted of two carbon-copy rape charges and the state dismissed a third without prejudice, failure to differentiate between three counts in bill of particulars, jury instructions, verdict forms, or evidence at trial rendered it impossible to determine whether retrial on dismissed third count would implicate facts upon which defendant was acquitted. Retrial would violate principles of double jeopardy.[91]

i) No error in alleging multiple offenses where victim was a minor, visited defendant frequently, and testified that abuse occurred "mostly every time" she visited, and where not guilty verdicts on several counts indicated jury's separate consideration of each count of indictment.[92]

j) Where child victim was able to recall when, where, and how abuse occurred and put it in a time frame based upon the home she was living in and her grade in school, multiple count indictment for rape not improper.[93]

G. Post-Trial Amendment of the Indictment

1. Crim.R. 7(D) permits post-trial amendments to criminal indictments.

a) While a trial court cannot permit an amendment that changes the name or identity of the offense charged, regardless of whether the defendant is prejudiced, post-trial amendments which change neither the name nor identity of the offense are subject only to abuse of discretion review.

(1) No error where defendant's rape charges were amended after his trial to reflect digital penetration rather than vaginal intercourse.[94]

(2) A trial court's decision to permit the amendment of an indictment is reviewed under an abuse of discretion standard. To demonstrate error, Appellant must show not

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[91] State v. Ogle, 8th Dist. 8th Dist. No. 87695, 2007-Ohio-5066.

[92] State v. Palmer, 12th Dist. Fayette No. CA2007-04-012, 2008-Ohio-2412.

[93] State v. Coles, 8th Dist. 8th Dist. No. 90330, 2008-Ohio-5129.

[94] State v. Abdullah, 10th Dist. No. 07AP-427, 2007-Ohio-7010.

only that the trial court abused its discretion, but that the amendment prejudiced his defense.[95]

(3) A trial court did not err by allowing the State to amend the indictment after resting its case-in-chief to include the full text of the gross sexual imposition statute, which the State had argued was omitted due to "scrivener's error", because the defendant was not prejudiced. Defendant's defense that the contact with the victim was not sexual was not affected by the amendment.[96]

[95] State v. Dicks, 5th Dist. Muskingum No. CT2012-0051, 2013-Ohio-2585, ¶ 41, citing State v. Beach, 148 Ohio App.3d 181, 2002–Ohio–2759, appeal not allowed, 96 Ohio St.3d 1516, 2002–Ohio–4950.

[96] State v. Dicks, 5th Dist. Muskingum No. CT2012-0051, 2013-Ohio-2585, ¶ 46-47.

III. PREPARATION FOR TRIAL

A. Allowing a Defendant to Review Grand Jury Testimony

1. A defendant is not entitled to see grand jury transcripts unless the ends of justice require it and the defendant demonstrates a "particularized need" for disclosure which outweighs the need for secrecy of grand jury proceedings. "Particularized need" will be found where the circumstances reveal a probability that the failure to provide the grand jury testimony will deny the defendant a fair trial.

2. Defendant failed to show particularized need when he sought the transcripts in an attempt to determine whether there were inconsistencies with the victim's testimony. This request was based upon the state's amendment of some dates included in the indictment. However, the state's motion explicitly stated that the amendments were to correct internal inconsistencies due to a clerical error. Thus, the inconsistencies were not due to the victim's testimony before the grand jury.[97]

3. When a defendant speculates that the grand jury testimony might have contained material evidence or might have aided his cross-examination by revealing contradictions, the trial court does not abuse its discretion by finding that the defendant had not shown a particularized need.[98]

B. Criminal Rule 16(B)(1)(g): Examination of Witness' Statement

1. Crim.R. 16(B)(1)(g) states that a party is entitled to an in camera inspection of a witness' written or recorded statement to determine inconsistencies and is entitled to the statement for cross-examination purposes if inconsistencies are found.

2. Pursuant to Crim.R. 16(B)(2), documents not provided for in subsections (B)(1)(a), (b), (d), (f) and (g), and are made by the prosecution in connection with the case or statements of witnesses are generally not available for discovery or inspection.

3. The proper procedure in determining the availability of confidential records is for the trial court to conduct an in camera inspection to determine relevancy and necessity, and whether the admission of the records outweighs the

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[97] State v. Baker, 12th Dist. Clermont No. CA98-11-108, 1999 WL 636479 (Aug. 23, 1999); State v. Leach, 12th Dist. Clermont No. CA2000-05-033, 2001-Ohio-4203.

[98] State v. Fulton, 12th Dist. Clermont No. CA2002-10-085, 2003-Ohio-5423; State v. Mack, 73 Ohio St.3d 502, 1995-Ohio-273; State v. Tillman, 12th Dist. Butler No. CA2003-08-185, 2004-Ohio-1030.

confidentiality considerations of R.C. § 5153.17 [re: keeping foster care records confidential].[99]

4. In civil case, writ of prohibition or mandamus is not appropriate method to stop trial judge from ordering disclosure of child abuse records.[100]

C. Closure of Courtroom

1. Nature of the Problem

   a) Many child abuse cases create local interest; members of the community, press and relatives pack the courtroom to view the case and listen to the young victim.

   b) Some children are humiliated or embarrassed by the public exposure of their victimization.[101] Relatives of incest victims may be unsupportive or even hostile to victim.[102] "Media trials cause as much damage as the actual abuse."[103]

   c) Prosecutors prepare witness through visits to the courtroom and mock trials and ask for closure of the courtroom.

2. Defense attorney's remedy

   a) Objection to denial of right to public trial.

3. Court response

   a) Closure Generally

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[99] State v. Fuson, 5th Dist. Knox No. 97 CA 000023, 1998 WL 518259 (Aug. 11, 1998).

[100] State ex rel. Butler Cty. Children Services Board v. Sage, 95 Ohio St.3d 23, 2002-Ohio-1494.

[101] Debra Whitcomb, et al., *When the Victim is a Child*, ISSUES AND PRACTICES IN CRIMINAL JUSTICE, August 1985 (National Institute of Justice), at 46.

[102] Suzanne M. Sgroi, M.D., HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE (1982), at 93.

[103] A. Tyler & M. Brassard, *Abuse in the Investigation and Treatment of Intrafamilial Child Sexual Abuse*, CHILD ABUSE AND NEGLECT 47-53 (1984). *See also* Debra Whitcomb and G. Goodman, *The Emotional Effects of Testifying on Sexually Abused Children*, NIJ, April 1994.

(1) Closure of courtroom is discretionary with the court as long as the trial judge considers on a case by case basis the criteria in Globe Newspaper Co. v. Superior Court for County of Norfolk, 457 U.S. 596, 102 S.Ct. 2613 (1982):

(A) victim's age
(B) victim's psychological maturity
(C) victim's understanding
(D) victim's wishes as to closure
(E) the nature of the crime (i.e., the nature of the facts), and
(F) interest of parents and relatives.[104]

(2) Necessary vs. Unnecessary (Ohio)

(A) Only "unnecessary" persons should be excluded[105]: few Ohio cases addressing who is "necessary" or "unnecessary."

(B) Where 11 year-old victim indicates presence of relatives of victim (aunt-grandmother) who are also relatives of defendant (wife-mother) is intimidating to her, exclusion order not too broad to violate right of public trial.[106]

(C) Chief caseworker of Children's Services not excluded per Evid.R. 615.[107]

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[104] "We emphasize that our holding is a narrow one: that a rule of mandatory closure respecting the testimony of minor sex victims is constitutionally infirm. In individual cases, and under appropriate circumstances, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public during the testimony of minor sex-offense victims. But a mandatory rule, requiring no particularized determination in individual cases, is unconstitutional." Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 102 S.Ct. 2613 (1982), fn. 27.

[105] State v. Workman, 14 Ohio App.3d 385 (8th Dist. 1984).

[106] State v. Cockshutt, 59 Ohio App.3d 87 (1st Dist. 1989), *overruled on other grounds*, 74 Ohio App.3d 352 (1991), *citing* State v. Bayless, 48 Ohio St.2d 73 (1976). *But cf.*, State v. Hensley, 75 Ohio St. 255 (1906) (exclusion order too general violates public trial).

[107] State v. Collins, 4th Dist. Lawrence No. 1763 (May 28, 1986).

(D) Not error to allow two support personnel (counselors) to remain during deposition taken under former R.C. § 2907.41 (A)(2), even though the support counselors testify at trial.[108]

(E) Mother of victim present during voir dire of child not error, particularly where nothing on record to show presence had an effect on child.[109]

(F) The court's "request" to voluntarily exclude onlookers not violative of public trial rights.[110]

(3) Necessary vs. Unnecessary (Other Jurisdictions)

(A) Family of victim, media and members of rape crisis agencies permitted to stay.[111]

(B) Victims' fathers and psychologist allowed to stay in courtroom.[112]

(C) Stepchildren of defendant can be excluded where hostile or disruptive.[113]

(D) There was a "sufficiently compelling reason" for exclusion where one of spectators, defendant's brother, had threatened witness.[114]

(E) Excused prospective juror could be ejected from courtroom.[115]

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[108] State v. Lipp, 6th Dist. Erie No. E-86-74, 1988 WL 10961 (Jan. 29, 1988).

[109] State v. Harrison, 8th Dist. No. 53758, 1988 WL 47409 (May 12, 1988).

[110] State v. Payne, 2d Dist. Montgomery No. 11106, 1989 WL 94548(Aug. 16, 1989).

[111] People v. Mountain, 481 N.Y.S.2d 449 (N.Y.A.D.3rd 1984).

[112] People v. Holveck, 565 N.E.2d 919 (Ill. 1990).

[113] State v. Raymond, 447 So.2d 51 (La.App.1984).

[114] People v. Bumpus, 558 N.Y.S.2d 587 (N.Y.A.D.2nd Dept.1990); People v. Woods, 549 N.Y.S.2d 116 (N.Y.A.D.2nd Dept.1989).

[115] State v. Porter, 391 S.E.2d 144 (N.C. 1990).

(F) When victim requests exclusion, all excluded except media.[116]

(G) May exclude parents from child dependency hearing if attorney is present.[117]

(H) Where 14 year-old victim undergoing counseling wishes no public court, not abuse of discretion in clearing courtroom of "all but a few individuals."[118]

(4) Proximity

(A) Aunt may have child sit on lap per Evid.R. 611.[119]

(B) Grandmother can sit next to child (here no objection at trial).[120]

(C) Permissible to allow victim services coordinator to stand next to blind child witness while testifying.[121]

(D) Allowing adult to sit next to 13 year-old victim during her testimony not error.[122]

b) Exclusion of the Press

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[116] Rodriguez v. State, 424 So.2d 892 (Fla.App.1982).

[117] In re Spears, 4th Dist. Athens No. 1200, 1984 WL 5682 (Dec. 10, 1984).

[118] State v. Doles, 4th Dist. Ross No. 1660, 1991 WL 179582 (Sept. 16, 1991).

[119] State v. Johnson, 38 Ohio App.3d 152 (5th Dist. 1986).

[120] State v. Dunn, 3rd Dist. Marion No. 9-86-8, 1987 WL 16264 (Aug. 27, 1987).

[121] State v. Henry, 9th Dist. Summit No. 13965, 1989 WL 86325 (Aug. 2, 1989).

[122] State v. Walton, 12th Dist. Clermont No. CA91-03-022, 1991 WL 228916 (Nov. 4, 1991).

(1) Court must give advance notice to press for closure and must make specific findings on record as to reason for closure and must weigh alternatives to closure on the record.[123]

(2) Right of newspaper to be present in courtroom derives from newspaper status as member of public and does not occupy or rise higher than the right of the general public. Public and press can be barred from criminal proceedings only in limited circumstances.[124]

(3) A newspaper may bring an action for writ of prohibition to challenge a Court's order barring public from a trial or proceeding even after the case is concluded as well as the order sealing pre-trial motions.[125] However, a newspaper does not have standing in criminal case to file a motion to revoke Court's order.[126]

(4) Juvenile Court may restrict public and press to juvenile proceedings per Juv.R.27 and R.C. § 2151.35 if the Court finds after hearing evidence and argument on the issue:[127]

(A) that there exists a reasonable and substantial basis for believing that public access could harm the child or endanger the fairness of the adjudication, and

(B) the potential harm outweighs the benefits of public access.[128]

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[123] State ex rel. The Cincinnati Enquirer v. Court of Common Pleas, 12th Dist. Clermont No. CA1988-04-033, 1988 WL 41541 (May 2, 1988), *on remand sub nom*. State v. Court of Common Pleas, 42 Ohio St.3d 82 (1989).

[124] State ex rel. The Repository, Div. of Thompson Newspapers, Inc. v. Unger, 28 Ohio St.3d 418 (1986).

[125] Id.

[126] State v. Schmidt 123 Ohio Misc.2d 30, 2002-Ohio-7462 (Medina Cty. Ct. Com. Pls.).

[127] The closure hearing itself may be closed to public if the court conducts an in camera inspection and determines that closure of the closure hearing is appropriate. *See* State ex rel. Dispatch Printing Co. v. Lias, 68 Ohio St.3d 497, 1994-Ohio-335.

[128] In re T.R., 52 Ohio St.3d 6 (1990), *cert. denied* 498 U.S. 958.

D. Videotaping and Closed Circuit Trial

1. Generally

   a) R.C. § 2945.481 effective Oct. 14, 1997 and formerly 2907.41, states that when a child under 13 years old is the victim of a sex crime, his or her testimony may be taken by deposition, which can be videotaped; the rights to examine and cross-examine the child are preserved.

      (1) Taking of video deposition must comply with the civil rules per § 2945.481(A)(2) and must be separately recorded or have court reporter transcribe what was played to jury to make adequate record.[129]

      Under R.C. § 2945.481(A)(3), the defendant may see and hear the child victim by a monitor, but he or she shall be removed from where the child is testifying; the child shall be given a monitor by which the child can, during testimony, observe the defendant. The Ohio Supreme Court has held that R.C. 2907.41 does not violate State or U.S. Constitution.[130] State complies with R.C.2907.41 where psychologist testified with reasonable degree of medical certainty that child would suffer serious emotional trauma if required to testify at trial.[131]

      (2) The refusal of the court to permit pre-trial discovery of a video deposition of the child victim, under Rule 16(B)(1)(c) or 16 (B)(1)(d), is not plain error.[132]

2. Constitutional Challenges to R.C. § 2945.481

   a) While not an exhaustive list, the constitutional challenges include:[133]

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[129] State v. Butts, 10th Dist. No. 88AP-764, 1989 WL 71662 (June 29, 1989).

[130] State v. Self, 56 Ohio St.3d 73 (1990).

[131] State v. Gotham, 11th Dist. Trumbull No.96-T-5485, 1997 WL 837550 (Dec. 31, 1997).

[132] State v. Sherman, 6th Dist. Sandusky No. S-88-6, 1989 WL 47238 (May 5, 1989) (here, waived by no objection).

[133] J. Stone, *O.A.C.D.L. Members Win a Rare Unanimous Reversal by Supreme Court in Child Rape Case*, VINDICATOR, Winter 1989, at 28.

(1) The presumption of innocence is violated;[134]

(2) The right to confrontation is violated;[135]

(A) "While we make no judgment on the constitutionality of [procedure required under former R.C. § 2907.41] today, we do recognize that it is somewhat less intrusive on the defendant's right of confrontation than the procedure employed in the cause sub judice."[136]

(B) Iowa's closed circuit testimony statute permits child to testify outside courtroom; defendant objected and court required child to testify in courtroom but with screen between child and defendant. The U.S. Supreme Court held that eye-to-eye contact between victim and defendant is required by the confrontation clause, at trial before jury.[137]

(C) Maryland statute permits testimony by child abuse victims via one-way closed-circuit television if trial court determines that physically confronting their alleged abuser would cause "serious emotional distress;" the trial judge allowed closed-circuit testimony by four children after hearing expert testimony from the children's therapists. The U.S. Supreme Court held that where expert testimony has established that a child witness could suffer serious emotional distress, face to face confrontation is not

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[134] Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394 (1895); Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691 (1976).

[135] Ohio Constitution, Art. I, § 10; U.S. Constitution, 6th and 14th Amends.

[136] State v. Eastham, 39 Ohio St.3d 307 (1988).

[137] Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798 (1988), *rev'g*, 397 N.W.2d 730 (1986) (note, however, that the majority felt that there may be exceptions to face-to-face requirement, and the concurring opinion concluded that there are exceptions to face-to-face requirements). *See also*, Tafoya v. New Mexico, 729 P.2d 1371 (1986), *vacated*, 108 S.Ct. 2890 (1988), per *Coy*, *supra* and *reaff'd*, 765 P.2d 1183 (1988) (videotaped testimony of child taken outside presence of defendant but with his attorney present); Robert H. King, Jr., *The Molested Child Witness and The Constitution: Should the Bill of Rights be Transformed into the Bill of Preferences?*, 53 OHIO ST. L.J. 49 (1992) (contending that the Supreme Court has changed a constitutional right to a balancing of preferences).

required.[138] In fact, the U.S. Supreme Court denied cert. in a Texas case where a child victim/witness was allowed to testify by closed-circuit television even though she was not the subject of that particular prosecution nor was she testifying about her own abuse by the defendant, but rather abuse by the defendant of another victim. In that case, there was little to no evidence that her testimony would cause her emotional distress.[139]

(D) Where there is a two-way monitor, as required under R.C. § 2945.481(A)(3), and court determines that child would experience serious emotional trauma if he or she testified in open court, neither the Ohio nor the U.S. confrontation clauses are violated.[140]

(3) The right to confrontation is placed in an "undeniable tension" with the right to compulsory process, the right to require the state to prove its case beyond a reasonable doubt, the right to be present at all significant stages of the proceeding, and the right to self-representation;[141] and

(4) the right of the Ohio Supreme Court to prescribe practice and procedure in all courts of this state is violated.[142]

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[138] Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157 (1990), *citing* Coy v. Iowa, *supra*. *See also* State v. Short, 12th Dist. Butler No. CA91-04-066, 1992 WL 158413 (July 6, 1992) (following Craig).

[139] Marx v. Texas, 528 U.S. 1034, 120 S. Ct. 574 (1999) (dissent of Justices Scalia and Thomas from the denial of certiorari).

[140] The Ohio Supreme Court in State v. Self, 56 Ohio St.3d 73 (1990), stated that Ohio's requirement of "face-to-face" should not be construed literally. A trial court does not have to find the victim's trauma would be permanent. The Court in *Self* distinguished *Coy* and *Eastham* in that here the judge made a specific finding of necessity.

[141] Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968); Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975); Rose v. State, 20 Ohio 31 (1851).

[142] Ohio Constitution, Art. IV, § 5. *But see* State v. Butts, 10th Dist. No. 88AP-764 1989 WL 71662 (June 29, 1989) (*citing* Gates v. Brewer, 2 Ohio App.3d 347 (10th Dist. 1981)) (stating that the Modern Courts Amendment does not exclude the legislature from making new laws pertaining to procedure which were not in existence at the time of the effective date of the specific procedural rule involved).

b) Challenges to "Face to Face" Confrontation:

(1) Error to not enter findings related to determination that children under eleven could testify via closed-circuit television, but error harmless as record contained sufficient evidence to support decision. Also, witness to sexual abuse of another may testify via closed-circuit television if trauma and significant emotional stress involved.[143]

(2) Where child victims were found to be unavailable to testify, admission of their videotaped depositions did not violate appellant's confrontation right where the children were subject to cross-examination, the judge was present to rule on any objections, the prosecutor and appellant's attorney were present, the children and appellant could see each other on TV monitors, appellant had a telephone connection with his attorney and the judge, and attorneys and appellant were able to view the videotaped depositions after they were taken.[144]

(3) In State v. Sibert the victims testified from the court's chambers adjacent to the courtroom. A camera in the court's chambers filmed the witness, who was seen in the courtroom on three monitors, one in front of the jury, one in front of appellant, and one in front of the court. A second camera filmed appellant, displayed to the child witness on a monitor set up in the court's chambers. Appellant could communicate privately with his attorney through a headset and microphone system. The setup complied with the statutory requirements of former R.C. § 2907.41(C). Appellant could adequately communicate privately with his attorney. "Appellant contends that having a video camera focused on him overemphasized the claimed trauma of the children and his possible involvement. However, we cannot see how that would be true. During every trial, the defendant sits in front of the jury throughout the proceeding and the witnesses are given the opportunity to observe and identify him. Accordingly, we find no prejudicial error."[145]

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[143] In re Howard, 119 Ohio App.3d 33 (12th Dist. 1997), *dismissed*, 79 Ohio St.3d 1482 (1997).

[144] In the Matter of Graves, 12th Dist. Clinton CA94-07-018, 1995 WL 155367 (April 10, 1995).

[145] State v. Sibert, 98 Ohio App.3d 412 (4th Dist. 1994).

(4) Where witness refuses to have eye-to-eye contact with defendant, not violative of 6th Amendment.[146]

(A) A child forced to watch his sister be sexually assaulted is a "victim" under 2151.3511(E), and can testify through closed circuit TV.[147]

(5) Testimony of child with monitor is permitted under 2945.481(C). Not required where obvious that child is aware that defendant is in the courtroom.[148] May be implicitly overruled by Coy v. Iowa and State v. Eastham, supra.

(A) But cf, Supreme Court of Connecticut has held that the state may not videotape victim's testimony in lieu of live testimony unless the state can show that testifying live would intimidate or inhibit the child's testimony.[149]

(6) Where court did not hold former R.C. § 2907.41 violative per the Sixth Amendment of the U.S. Constitution but held that Section 10 Art.1 of the Ohio Constitution requires the taking of a criminal deposition and examination of witnesses face-to-face as fully and in the same manner as if in court. Here the court found that the trial court had insufficient evidence before it to find per former § 2907.41(B)(1) that the child was unavailable and would experience severe emotional trauma other than mother's opinion that child "might be traumatized."[150]

(A) Testimony that child would have "difficult" time not sufficient.[151]

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[146] State v. Payne, 2d Dist. Montgomery No. 11106 (Aug. 16, 1989).

[147] In re Tindle, 12th Dist. Butler No. CA96-08-151 (Feb. 10, 1997).

[148] State v. Lipp, 6th Dist. Erie No. E-86-74, 1988 WL 10961 (Jan. 29, 1988).

[149] Connecticut v. Jarzbek, 519 A.2d 1245 (Conn. 1987), *cert. denied*, 484 U.S. 1061, 108 S.Ct. 1017 (1988).

[150] State v. Butts, 10th Dist. No. 88AP-764 1989 WL 71662 (June 29, 1989).

[151] State v. Kreitzer, 2d Dist. Clark No. 2492, 1989 WL 130815 (Nov. 3, 1989).

(7) Court held that defendant must be able to see victim witness, and that denial of face-to-face confrontation with 11 year-old victim/witness on basis of affidavit showing that defendant and witness had briefly seen each other since the alleged incident, and without making particularized finding concerning emotional well-being of witness and necessity for seating arrangement that blocked defendant's view of witness, denied defendant his constitutional right to confrontation.[152]

(8) Videotaping of dependency hearing does not violate Sixth Amendment because civil in nature; R.C. 2151.3511(C) permitting testimony via two-way closed circuit television not applicable since both victim and charged child not under 11 years; court should look to determine if procedural due process followed (here the court determined it was). [153] However, per R.C. 2151.35(G), the civil counterpart to § 2945.481, the court may make finding of trauma after deposition of victim taken.[154]

E. Determining Competency of Child Witnesses

1. In General

a) Children under 10 years of age are not presumed competent as indicated in Evid.R.601:

"Every person is competent to be a witness except those of unsound mind and children under 10 years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined or of relating them truly. . . ."

(1) Rationale

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[152] State v. Bean, 62 Ohio App.3d 881 (6th Dist. 1990); *see also*, M. Hennebert, *Deposition Testimony and the Alleged Child Sex Offense Victim*, VINDICATOR, Spring 1992, at 27; Debra Whitcomb and G. Goodman, *The Emotional Effects of Testifying on Sexually Abused Children*, NIJ, April 1994.

[153] In re Burchfield, 51 Ohio App.3d 148 (4th Dist. 1988).

[154] In re Collier, 12th Dist. Butler Nos. CA91-07-124 and CA91-07-125, 1992 WL 236834 (Sept. 21 1992).

(A) Some experts believe that young children tend to confuse fact and fantasy.[155]

(B) Because children lack substantial general knowledge of the world and language skills they are less likely to admit they don't understand a question, to correct an adult who misinterprets the child's answer, or to admit they don't know the answer to a question.[156]

b) Other experts believe that young children are unable to fabricate explicit sexual stories unless they have actually experienced the event.[157]

c) Defense attorneys' remedy: Object to competency of child and request voir dire.

2. Criteria for Determining Competency

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[155] Debra Whitcomb and G. Goodman, *The Emotional Effects of Testifying on Sexually Abused Children*, NIJ, April 1994. *See also* Hollida Wakefield & Ralph Underwager, ACCUSATION OF CHILD SEXUAL ABUSE 67-97 (1988). *But cf.,* A. Salter, ACCURACY OF EXPERT TESTIMONY IN CHILD ABUSE CASES: A CASE STUDY OF RALPH UNDERWAGER. *See also* Elizabeth F. Loftus & Laura A. Rosenwald, *Buried Memories Shattered Lives*, ABA JOURNAL, Nov. 1993, at 70; Kathleen A. Kendall-Tackett, et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, PSYCHOLOGICAL BULLETIN, 1993, Vol. 113, No. 1, 164-180; Stephen J. Ceci & Maggie Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, PSYCHOLOGICAL BULLETIN, 1993, Vol. 113, No. 3, 403-439; Terence W. Campbell, *False Allegations of Sexual Abuse and Their Apparent Credibility*, AM. J. FORENSIC PSYCHOLOGY, Vol. 10, No. 4 (1992); Jeannette M. DeVaris, *Getting to the Truth: Child Testimony in Sex Abuse Cases*, COURT REVIEW, Vol. 31, No. 2, Summer 1994. Cynthia Crosson-Tower "False Allegation Movement" Child Abuse and Neglect, 5th Ed. 2002 at 130.

[156] David B. Battin & Stephen J. Ceci, *Children as Witnesses: What We Hear Them Say May Not Be What They Mean*, COURT REVIEW, Spring 2003, 4-5.

[157] Debra Whitcomb and G. Goodman, *The Emotional Effects of Testifying on Sexually Abused Children*, NIJ, April 1994. *See also* Katherine Hunt Federle, *Putting Children on The Stand*, TRIAL, Aug. 1989; Jeannette M. DeVaris, *Child Testimony: A Developmental and Contextual Perspective*, COURT REVIEW, Vol. 30, No. 1, Spring 1993; Z. Hale, *Do Kids Lie*, OHIO L., May 1991; Pamela Freyd, *False Memory Syndrome Phenomenon: Weighing the Evidence*, COURT REVIEW, Spring 1995; Cynthia Grant Bowman & Elizabeth Mertz, *What Should Courts Do About Memories of Sexual Abuse? Toward a Balanced Approach*, ABA JUDGES JOURNAL, Fall 1996. *See also* A. Walker, Handbook on Questioning Children; A Linquistic Perspective ABA 1994.

a) Generally

(1) According to *State v. Frazier*, in determining whether a child under ten is competent to testify, the trial court must consider:

(A) the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify,

(B) the child's ability to recollect those impressions or observations,

(C) the child's ability to communicate what was observed,

(D) the child's understanding of truth and falsity, and

(E) the child's appreciation of his or her responsibility to be truthful.[158]

b) Children under ten are presumed incompetent,[159] but whether such a child is ruled incompetent is a matter of discretion for the judge who is unfettered by evidentiary presumptions.[160]

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[158] State v. Frazier, 61 Ohio St.3d 247 (1991), *cert. denied* 503 U.S. 941 (murder case), State v. Allard, 75 Ohio St.3d 481, 1996-Ohio-150; *see also* State v. Ward, 86 Ohio App.3d 4 (9th Dist. 1992) (*citing* Frazier, *supra*), State v. Allan (May 13, 1994), 6th Dist. Lucas No. L-93-165, 1994 WL 193759; Ann Marie Tracey, *Competency, Confrontation and the Child Witness*, OHIO TRIAL, Winter 1993. For *pre-Frazier* cases, *see* Barnett v. State, 104 Ohio St. 298 (1922); State v. Workman, 14 Ohio App.3d 385 (8th Dist. 1984); State v. Bowling, 6th Dist. Sandusky No. S-84-29, 1985 WL 7521 (June 28, 1985); State v. Myers, 9th Dist. Summit No. 12018, 1985 WL 11020 (July 24, 1985); State v. Floyd, 8th Dist. No. 49737, 1985 WL 8597 (Aug. 22, 1985); In re Newsome, 2d Dist. Montgomery No. 9031, 1985 WL 7914 (May 16, 1985); State v. Campbell, 12th Dist. Butler Nos. 87-07-089, 87-09-116, 1988 WL 94042 (Sept. 12, 1988); State v. Toda, 6th Dist. Wood No. WD-86-69, 1987 WL 16513 (Sept. 4, 1987); State v. Jells, 8th Dist. No. 54733, 1989 WL 43401 (Apr. 20, 1989); State v. Kirk, 42 Ohio App.3d 93 (5th Dist. 1987); State v. Fleck, 6th Dist. Lucas No. L-98-1249, 1999 WL 682583 (Sept. 3, 1999); State v. Swartsell, 12th Dist. Butler No. CA2002-06-151, 2003-Ohio-4450.

[159] State v. Lee, 9 Ohio App.3d 282 (9th Dist. 1983).

[160] State v. Kirk, 42 Ohio App.3d 93 (5th Dist. 1987); State v. Duke, 8th Dist. No. 52604, 1988 WL 88862 (Aug. 25, 1988).

(1) Trial court did not abuse its discretion in determining that a five year-old victim was competent to testify since the trial court had the opportunity to view the child's demeanor. Though the child became confused when answering certain questions, he could relate basic information, and he indicated he could tell the truth about what had happened to him.[161]

(2) A party that wishes to present testimony from a child under the age of ten must be given an opportunity to establish the child's competency to testify.[162]

(3) Trial court committed error during competency hearing when it did not ask the child questions regarding the time period in which the alleged rape occurred. However plain error did not occur because child's subsequent trial testimony demonstrated child's competence as a witness.[163]

c) According to *Frazier*, reluctance to discuss events of rape does not preclude finding that child is competent to testify.[164]

d) *Frazier* applies to civil cases and trial court not required to make express findings on factors to support conclusion on record.[165]

e) Court may consider child's appearance and general demeanor.[166]

f) Defendant cannot play tape of victim to jury to show child is incompetent.[167]

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[161] State v. Blanton, 12th Dist. Warren No. CA94-04-047, 1994 WL 594184 (Oct. 31, 1994). *See also* State v. Sprauer, 12th Dist. Warren No. CA2005-02-022, 2006-Ohio-1146 and State v. Alvarado, 3rd Dist. Putnam No. 12-07-14, 2008-Ohio-4411. See also, State v. Fry, 125 Ohio St.3d 163, 2010-Ohio-1017.

[162] Arnold v. Arnold, 135 Ohio App.3d 465, 734 N.E.2d 837 (12th Dist. 1999).

[163] State v. Molen, 2d Dist. Montgomery No. 21941, 2008-Ohio-6237.

[164] State v. Allan, 6th Dist. Lucas No. L-93-165, 1994 WL 193759 (May 13, 1994).

[165] Schulte v. Schulte, 71 Ohio St.3d 41, 1994-Ohio-459.

[166] State v. Duke, 8th Dist. No. 52604, 1988 WL 88862 (Aug. 25, 1988), *citing* State v. Wilson, 156 Ohio St. 525 (1952).

[167] State v. Willard, 7th Dist. Columbiana Nos. 88-C-57, 89-C-59, 1991 WL 1568 (Jan. 10, 1991).

g) Intellectual capacity for observation, recollection and communication.[168]

(1) Child must be able to demonstrate that he can, in fact, remember and relate facts from the period in question.[169]

(2) Child's inability to remember how many times she went to psychologist, how long beatings took place and on dates they occurred, does not *per se* disqualify her.[170]

(3) Child's inability to recount dates not *per se* incompetency; while experiencing "some confusion" a 7 year-old girl knew date of birth, name of teacher and therefore competent.[171]

(4) Trial court did not abuse its discretion in determining, after personally questioning defendant's four year-old and six year-old daughters, that daughters were competent to testify in prosecution of defendant for raping them; both girls explained to the court the ramifications of telling a lie and punishment for lying, and responded to trial court's inquiries about where they lived, what type of home they lived in, who lived with them now, type of grade or class they were in, and who their teachers were.[172]

(5) There is no corroboration requirement regarding the truth or accuracy of a child's recollection of past events.[173]

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[168] State v. Reger, 9th Dist. Summit Nos. 12378, 12384, 1986 WL 5699 (May 14, 1986); State v. Floyd, 8th Dist. No. 49737, 1985 WL 8597 (Aug. 22, 1985); State v. Workman, 14 Ohio App.3d 385 (8th Dist. 1984), and State v. Venia, 6th Dist. Wood No. WD-85-42, 1986 WL 2958 (Mar. 7, 1986).

[169] State v. Mangen, 8th Dist. Nos. 59079, 59080, 1991 WL 199520 (Oct. 3, 1991).

[170] State v. Alford, 9th Dist. Summit No. 13845, 1989 WL 41628 (Apr. 26, 1989); State v. Allen, 69 Ohio App.3d 366 (1st Dist. 1990).

[171] State v. Mongold, 12th Dist. Fayette No. CA92-02-004, 1992 WL 210652 (Aug. 31, 1992); *see also,* State v. Goins, 12th Dist. Butler No. CA 2000-09-190, 2001-Ohio-8647 (seven year-old gave wrong dates); State v. Manning, 8th Dist. No. 90326, 2008-Ohio-3801 (seven year-old child's recollection with respect to dates was vague).

[172] State v. Kelly, 93 Ohio App.3d 257 (5th Dist. 1994).

[173] State v. Markland, 2d Dist. Miami No. 07-CA-05, 2008-Ohio-992, *citing* State v. Glass, 8th Dist. No. 81607, 2003-Ohio-879.

h) Appreciation For Obligation To Tell Truth

(1) Answer of child, articulating what a lie is and acknowledging that you will be in trouble if you lie, shows appreciation of oath. [174] However, where child consistently answered "I don't know" to questions of whether he thought anything would happen, good or bad, if he were to lie, and where child answered "Nothing" when asked what he thought would happen if he lied, child deemed incompetent.[175]

(2) Where judge voir dires child and child understands she will get in trouble and where in response to prosecution's question answers question about her family, alphabet and counting, not error to allow five year-old to testify because she cannot answer defense voir dire consisting of questions such as "who God is," "what heaven is," what "whole truth" means.[176]

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[174] State v. Allard, 75 Ohio St.3d 482, 1996-Ohio-208.

[175] State v. Wright, 10th Dist. No. 85AP-79, 1985 WL 10339 (June 20, 1985); State v. Brown, 6th Dist. Lucas No. L-82-297, 1983 WL 6945 (Sept. 16, 1983), *aff'd*, 74 Ohio St.3d 630 (1996) (good voir dire copy); State v. Moyer, 8th Dist. No. 43748, 1982 WL 5207 (Mar. 4, 1982) ("If I lie I will get paddled" sufficient); State v. Street (1997), 122 Ohio App.3d 79. *See also*, Anne Walker, HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE, ABA Center on Children and the Law, 2nd Ed. 1999, at 57-58 (getting children to articulate difference between the truth and a lie is difficult): "The solution, however, does not lie in asking children, "Do you know the difference between the truth and a lie?" Not only does that question have little predictive value as to whether or not a child will report an event accurately, it is, in essence, a waste of breath, because no matter what the response is, it cannot lead to a reliable decision as to competency. A "No" answer may lead to a false determination that the child is not competent to testify, when it more likely reflects a lack of ability to explain in words a very abstract concept. A "Yes" answer requires a follow-on invitation either to define truth ("What is truth?") or to explain the difference ("What is the difference?"). Each of these questions requires a child 1) to know what it means for one thing to be different from another; 2) to have the cognitive capacity to compare, contrast, and abstract differences; and finally, 3) to apply linguistic skill to articulate those capacities in the form of offline acceptable definitions or explanations. That is an unrealistic task to set for a young child." *See also* Mitnick Mindy *"Children's Testimony: Helping Them Reveal What They Know"* For The Record Ohio Judicial Conference, 4th Quarter 2001.-p.27.

[176] In the Matter of Smalley, 4th Dist. Washington No. 84X24, 1986 WL 2989 (Feb. 25, 1986).

(3) Witness need not state textbook definitions of truth.[177]

(4) Child's inability to see punishment for lying coming from a higher Being not basis for incompetence where child understands if she lies, will be whipped or mouth washed out with soap.[178]

(5) Where child asked if she knew meaning of oath, what it means to tell truth and she answers "no" but her trial testimony is "straightforward," child is competent.[179]

(6) Question from defense attorney, "Would it be o.k. to lie to keep from starving" improper.[180]

(7) Failure to formally swear in child does not affect competency since apparently child understood purpose of oath.[181]

(8) However where child never asked - nor answers that it is wrong to lie, insufficient evidence exists for the judge to make a determination of competency.[182]

3. Mentally Handicapped Victims

a) "Those persons classified as mentally retarded are presumed incompetent as witnesses and must have their competency to testify determined by the court."[183]

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[177] State v. Self, 12th Dist. Clermont No. CA88-07-051, 1989 WL 72504 (June 30, 1989), *rev'd*, 56 Ohio St.3d 73 (1990).

[178] State v. Sherman, 6th Dist. Sandusky No. S-88-6, 1989 WL 47238 (May 5, 1989).

[179] State v. Pierce, 3rd Dist. Seneca No.13-87-27, 1989 WL 86258 (Aug. 3, 1989); State v. Higgins, 5th Dist. Muskingum No. CA-90-33, 1991 WL 11623 (Jan. 23, 1991).

[180] State v. Mayhew, 71 Ohio App.3d 622 (4th Dist. 1991).

[181] State v. Short, 12th Dist. Butler No. CA91-04-066, 1992 WL 158413 (July 6, 1992).

[182] State v. Higgins, *supra*.

[183] State v. Oritz, 8th Dist. No. 69958, 1996 WL 661043 (Nov. 14, 1996).

(1) However, "a person who is able to correctly state matters which have come within his perception with respect to the issues involved and appreciates and understands the nature and obligation of an oath, is competent witness notwithstanding some unsoundness of mind."[184]

(2) Although physician was apprehensive about mildly retarded victim's ability to recall the past accurately and to tell the truth, the court did not abuse its discretion by determining, after questioning the victim, that she was competent to testify.[185]

4. Conduct of Voir Dire

a) When

(1) Duty upon court to hold hearing to determine competency of child under 10, regardless of whether requested by defense attorney.[186] "The qualification upon competency of children under 10 years of age requires a preliminary examination by the trial judge..."[187] In fact, it has been held that a trial court commits reversible error by excluding the testimony of a child under ten without first conducting a voir dire examination.[188]

(2) But where no hearing, no objections, no request there is no error. [189] Appellate Court need not address issue of competency if not raised at trial.[190]

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[184] State v. Wildman, 145 Ohio St. 379 (1945), paragraph three of syllabus.

[185] State v. Alkire, 12th Dist. Madison No. CA2008-09-023, 2009-Ohio-2813.

[186] City of Berea v. Petcher, 119 Ohio App. 165 (8th Dist. 1963).

[187] State v. Johnson, 38 Ohio App.3d 152 (5th Dist. 1986), *citing* State v. Workman, 14 Ohio App.3d 385 (8th Dist. 1984); State v. Hunter, 1st Dist. No. C-961142, 1997 WL 793094 (Dec. 26, 1997), *citing* State v. Clark, 71 Ohio St.3d 466, 1994 Ohio-43 and State v. Frazier, 61 Ohio St.3d 247 (1991).

[188] Baird v. Gillispie, 2d Dist. Miami No. 99-CA-12, 2000 WL 43493 (Jan. 21, 2000).

[189] State v. Morgan, 31 Ohio App.3d 152 (1st Dist. 1986).

[190] State v. McCoy, 12th Dist. Butler No. CA87-02-012, 1987 WL 18283 (Oct. 12, 1987), *citing* Sakian v. Taylor, 18 Ohio App.3d 62 (8th Dist. 1984); State v. Rhodes, 2d Dist. Montgomery No. 10955, 1989 WL 38226 (Apr. 19, 1989).

(3) Where competency clearly called into question but there is no objection and no voir dire, it is plain error (witness ten years old at the time of trial but mentally retarded should have been voir dired).[191]

(4) Where six year-old is not voir dired and defendant objects, not error if questioning of witness during case provides sufficient record for reviewing court to determine that the child meets the test of competency from his testimony at trial.[192]

(5) Must object after voir dire to preserve error and appeal.[193] Where not clearly indicated before voir dire that witness incompetent, not plain error for defense counsel to fail to object.[194]

(6) Spousal competency: court has affirmative duty to inquire of and "voir dire" spouse even if no request or objection.[195]

b) Who

(1) Court may conduct voir dire without attorneys participating.[196] Counsel may participate in the voir dire if the court permits.[197] The trial judge has a duty to determine the competency of a child under age ten to testify without the interference or participation of counsel. But, while the trial

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[191] State v. Kinney, 35 Ohio App.3d 84 (1st Dist. 1987).

[192] State v. Montgomery, 2d Dist. Montgomery No. 10495, 1988 WL 63009 (June 13, 1988).

[193] State v. Johnson, 3rd Dist. Union Nos. 14-87-20, 14-87-21, 1989 WL 17294 (Mar. 6, 1989).

[194] State v. Miller, 44 Ohio App.3d 42 (6th Dist. 1988), at 45, *distinguishing* Kinney.

[195] State v. Adamson, 72 Ohio St.3d 431, 1995-Ohio-199.

[196] State v. Self, 56 Ohio St.3d 73 (1990); State v. Workman, 14 Ohio App.3d 385 (8th Dist. 1984); *See* Mitnick, M., *Childrens Testimony: Helping Them Reveal What They Know*, FOR THE RECORD, 4th Quarter 2001, Ohio Judicial Conference, at 27-31.

[197] State v. York, 1st Dist. No. C-830944, 1984 WL 7002 (Oct. 10, 1984).

court's procedure of allowing counsel to question the child was technically erroneous, appellant did not object. The child was thoroughly questioned and the error does not rise to the level of plain error.[198]

(2) However, not error for attorney to conduct without court.[199] It is preferable that the inquiry be conducted solely by the trial judge, but as long as the court retains "primary responsibility" to determine competency, it is discretionary.[200] While court "did not necessarily approve" of allowing prosecutor to voir dire after court, no objection and not plain error.[201]

c) How

(1) Hearing to determine competency of child witness should be conducted outside of the presence of the jury.[202] It is not a violation of due process rights to exclude the defendant from the competency hearing.[203]

(2) A hearing to determine the competency of a potential child witness under Evid.R. 601 must be recorded pursuant to Crim.R. 22; failure to do so constitutes reversible error. Also discussed that Evid.R. 807 requires determination that child "competent" before admitting.[204]

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[198] State v. Blanton, 12th Dist. Warren No. CA94-04-047, 1994 WL 594184 (Oct. 31, 1994), *citing* State v. Workman, 14 Ohio App.3d 385 (8th Dist. 1984).

[199] State v. Nicholson, 1st Dist. No. C-810933, 1982 WL 4846 (Nov. 24, 1982).

[200] State v. Harris, 8th Dist. No. 55147, 1989 WL 27753 (Mar. 23, 1989), *citing* State v. Evans, 8th Dist. No. 49449, 1985 WL 8428 (Nov. 14, 1985); State v. Bunch, 62 Ohio App.3d 801 (9th Dist. 1989); State v. Sherman, 6th Dist. Sandusky No. S-88-6, 1989 WL 47238 (May 5, 1989).

[201] State v. Phillips, 2d Dist. Montgomery No. 11576, 1990 WL 42316 (April 10, 1990).

[202] State v. Wilson, 156 Ohio St. 525 (1952); State v. Bowling, 6th Dist. Sandusky No. S-84-29, 1985 WL 7521 (June 28, 1985); State v. Molen, 1st Dist. No. C-830946 (June 19, 1985).

[203] State v. Wynn, 8th Dist. No. 75281, 1999 WL 1087497 (Dec. 2, 1999).

[204] State v. Said, 71 Ohio St.3d 473, 1994-Ohio-402.

(3) Court or counsel allowed to use leading questions in voir dire of child.[205]

(4) Judge calling victim-witness on voir dire "honey," "angel" not error where did so only once in front of jury.[206]

(5) Court not required to make express finding or record that all criteria of Frazier were followed.[207]

5. Determining Time of Competency

a) A trial court's failure to conduct a voir dire examination of a child witness, who was sixteen years old at the time of the trial but nine years old at the time that the abuse occurred, did not constitute reversible error in the absence of any reason to question the child's competency. "[U]nder the plain meaning of Evid.R. 601(A), a child witness who is ten years of age or older at the time of the trial, but who was under the age of ten at the time an incident in question occurred, is presumed competent to testify about the event."[208]

b) If statement made by declarant under 10 Judge must determine if child competent when statement made before admitting statement under Evid.R. 807.[209]

c) Pre-Clark case law:

(1) Civil case law applicable to criminal cases under Evid.R. 601(A), staff notes to Evid.R. 601(A); see also R.C. 2945.41: The rules of evidence in civil cases where applicable govern in all criminal cases.

(2) Age of child at time of occurrence is controlling, not age at time of testimony.[210]

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[205] State v. Hartman, 11th Dist. Lake No. 11-254, 1986 WL 14583 (Dec. 19, 1986); State v. Norwood, 11th Dist. Lake No. 11-065, 1987 WL 10763 (May 1, 1987).

[206] State v. Dunn, 3rd Dist. Marion No. 9-86-8, 1987 WL 16264 (Aug. 27, 1987).

[207] Logsdon v. Nichols, 72 Ohio St.3d 124, 1995-Ohio-225.

[208] State v. Clark, 71 Ohio St.3d 466, 471, 1994-Ohio-43; State v. Vaughn, 106 Ohio App.3d 775 (12th Dist. 1995).

[209] State v. Said, 71 Ohio St.3d 473, 1994-Ohio-402.

[210] Huprich v. Paul W. Varga & Sons, Inc., 3 Ohio St.2d 87 (1965).

(A) Trial court voir dire upheld in questioning 13 year-old about incident which occurred when she was 9 years old and made finding that (1) understood obligations of truthfulness, (2) had ability to recollect and communicate events which occurred at age nine.[211]

(B) The Supreme Court, in discussing the admissibility of excited utterance of an otherwise incompetent child, has opined that the issue of a child's competency should be determined at the time of the event.[212]

(3) Judge has no obligation to voir dire child 10 years old, because evidentiary exclusion pertains to time of testimony, not time of offense.[213] "The law requires the trial judge to determine the child's ability to perceive, remember, and relate truthfully, those events about which the child is to testify. We find no case law requiring the judge to inquire into the specific testimony to be elicited from the child at trial. In most cases the child will be a competent witness if the child has the intellectual capacity to accurately and truthfully recount events occurring during the same time period as the events about which he is to testify at trial."[214] Evid.R.601 pertains to age of child at time of trial, not age of child at time of crime.[215]

(4) Developmentally disabled child who was 8 years old at time of alleged sexual molestation by taxi driver and 13 at time of trial is competent to testify when shown that she is capable of

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[211] State v. Fenton, 68 Ohio App.3d 412 (6th Dist. 1990).

[212] State v. Wallace, 37 Ohio St.3d 87 at 94 (1988), *citing* Huprich v. Paul W. Varga & Sons, Inc., 3 Ohio St.2d 87 (1965). Court has used time of occurrence to determine if statement admissible under Evid. Rule 807. State v. Said, 71 Ohio St.3d 473, 1994-Ohio-402. *But cf*. State v. Lewis, 4 Ohio App.3d 275 (3rd Dist. 1982); State v. Dowers, 1st Dist. No. C-860135, 1986 WL 14884 (Dec. 24, 1986) (adopting Lewis).

[213] State v. Smith, 12th Dist. Butler No. CA91-06-104, 1991 WL 278241 (Dec. 30, 1991), *citing* State v. Self, 12th Dist. Clermont No. CA90-10-099, 1991 WL 144313 (July 29, 1991).

[214] State v. Cobb, 81 Ohio App.3d 179 (9th Dist. 1991).

[215] State v. Uhler, 80 Ohio App.3d 113 (9th Dist. 1992).

receiving just impressions of the facts and can understand the importance of being truthful.[216]

(5) Failure of court to allow voir dire on subject, i.e., circumstances of rape per Huprich (supra) harmless error where record showed voir dire answers established competency.[217] Error for court in paternity suit to exclude ten year-old child from testifying. Court required to voir dire child.[218] The trial judge has discretion in determining whether a child under 10 is competent to testify.[219]

6. Other Issues Regarding Competency

a) Standard of review:

(1) Reviewing court will not reverse unless abuse of discretion.[220]

(2) Trial court in better position to judge whether witness competent.[221]

b) Length of hearing:

(1) Not significant if criteria established.[222]

c) Jury instructions:

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[216] Tinkham v. Groveport-Madison Local School District, 77 Ohio App.3d 242 (10th Dist. 1991).

[217] State v. Steed, 2d Dist. Greene No. 83-CA-73, 1984 WL 3819 (Aug. 13, 1984). *See also*, State v. Barror, 6th Dist. Fulton No. F-96-033, 1997 WL 614983 (Sept. 30, 1997).

[218] Philpot v. Williams, 8 Ohio App.3d 241 (1st Dist. 1983), *citing* Huprich v. Paul W. Varga & Sons, Inc., 3 Ohio St.2d 87 (1965) (possible conflict with *Dowers*, *supra*).

[219] State v. McCadney, 6th Dist. Lucas No. L-95-123, 1996 WL 38786 (Feb. 2, 1996).

[220] State v. Holt, 17 Ohio St.2d 81, 83 (1969); State v. Allard, 75 Ohio St.3d 482, 1996-Ohio-208.

[221] State v. Sturgill, 12th Dist. Warren No. CA90-12-085, 1991 WL 238256 (Nov. 12, 1991).

[222] State v. Reger, 9th Dist. Summit Nos. 12378, 12384, 1986 WL 5699 (May 14, 1986).

(1) No special instruction as to child credibility required. A determination that a child witness is competent does not establish credibility, which remains for trier of fact.[223]

d) Need for Interpreter:

(1) Where a witness cannot testify without the aid of an interpreter, absent the case where the witness spoke a foreign language, it cannot be said that the witness is competent to testify.[224]

7. Scope of Voir Dire

a) General

(1) Defense inquiry in voir dire must relate to other than actual count.[225] However, just showing ability to recall name of school and street not enough to establish competency.[226]

(2) But c.f., name of street, teacher, grade in school sufficient to establish competency.[227]

(3) Inquiry of child as to events occurring the same time as event not required where child is able to generally relate accurately and truthfully.[228]

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[223] Darcy v. Bender, 68 Ohio App.2d 190 (9th Dist. 1980); State v. Berezoski, 2d Dist. Montgomery No. 9568 (Dec. 17, 1986); State v. Evans, 1st Dist. Nos. C-860583, C-860590, 1987 WL 17269 (Sept. 23, 1987) (while witness answered few of questions asked by attorneys she did appreciate consequences of lying and accurately answered questions on voir dire); State v. Gladding, 66 Ohio App.3d 502 (11th Dist. 1990).

[224] State v. Dunning, 12th Dist. Brown No. CA2000-03-004, 2000 WL 1818559 (Dec. 11, 2000).

[225] State v. Anderson, 8th Dist. No. 66544, 1994 WL 663494 (Nov. 23, 1994); State v. Barror, 6th Dist. Fulton No. F-96-033, 1997 WL 614983 (Sept. 30, 1997). Court has discretion to prohibit attorney from voir dire about specific event which child would testify at trial if other questions show ability to receive and relate information and appreciate truth.

[226] State v. Mangen, 8th Dist. Nos. 59079, 59080, 1991 WL 199520 (Oct. 3, 1991).

[227] State v. Franklin, 8th Dist. No. 70211, 1997 WL 37744 (Jan. 30, 1997).

[228] State v. Cobb, 81 Ohio App.3d 179 (9th Dist. 1991).

b) Evidence Deemed Sufficient:

(1) The victim's (nine yr.) competency testimony confirmed that she knew she was going to have to testify about what happened between her and defendant in front of the jury, that she remembered that defendant touched her, and that she was able to communicate the incident to others. The nine year-old said she knew the difference between telling the truth and telling a lie and was able to explain the difference when given examples by the judge. Finally, the nine year-old agreed that she had to tell the truth when she testified in court. From that evidence, the court found no plain error.[229]

(2) The trial court properly determined that eight year-old child was competent to testify based on her knowledge of her full name and age, as well as the names of her parents, stepbrothers, and friends, her mother's age, the grade she was in, the name of her school, and her testimony that to tell the truth means to not lie and to speak honestly and that she knew that she would get in trouble if she did not tell the truth.[230]

(3) Voir dire met Frazier test where judge elicited child's grade in school, teacher's name, place and individuals with whom he lived, and that child understood difference between truth and a lie. Note: concurring judge found voir dire by itself did not meet Frazier test, but did so when combined with complete record.[231]

(4) Five year-old child competent as he indicated he knew the difference between the truth and a lie, was able to relay name, age and names of school, friends and teacher, and trial testimony was consistent with other evidence produced at trial concerning crime. Also, facts that were uncorroborated were immaterial.[232]

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[229] State v. Edwards, 9th Dist. Lorain No. 93CA005651, 1994 WL 68145 (Mar. 9, 1994).

[230] State v. Pershin, 62 Ohio App.3d 405 (9th Dist. 1988).

[231] State v. Franklin, *supra*.

[232] State v. Allard, 75 Ohio St.3d 482, 1996-Ohio-208.

(5) Child competent where told court he could spell, was in second grade, able to relate facts about kindergarten and first grade, told court where he lived, knew why he was in court, knew difference between truth and lie and told court he gets in trouble when he tells lie.[233]

(6) No abuse of discretion in determining nine year-old victim to be competent where he was able to tell the court where he lived, the name and location of his school, the classes he took, the grades he received, that he understood the difference between truth and lie and understood duty to answer truthfully.[234]

(7) Despite fact that 16 year-old victim-witness had been diagnosed with adjustment disorder, cerebral palsy, and borderline intellectual functioning, believed herself to be an angel, and could not give her present address, trial court did not abuse its discretion in finding her competent to testify where she could remember the schools she attended and homes she had previously lived in, understood the distinctions between truth and falsity, and the purpose of the oath.[235]

c) Evidence Deemed Insufficient:

(1) Voir dire inadequate because no demonstration that victim knew difference between truth and lie and unable to identify defendant as "Zack" at hearing. Trial court erred in adopting magistrate's report even though it found voir dire inadequate; should have made its own determination of competency.[236]

(2) Not abuse of discretion to determine four year-old child incompetent where child consistently responded with "I don't know" to questions regarding whether anything good or bad would happen if he lied, and responded "nothing" when asked what would happen if he lied.[237]

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[233] People v. Goble, 354 N.E.2d 108 (Ill.App.1976).

[234] State v. Langston, 8th Dist. No. 71578, 1998 WL 57152 (Feb.12, 1998).

[235] State v. Hudgins, 5th Dist. Stark No. 2006CA000093, 2007-Ohio-3361.

[236] In the Matter of Gibbs, 11th Dist. Trumbull No. 97-L-067, 1998 WL 257315 (Mar. 13, 1998).

[237] State v. Street, 122 Ohio App.3d 79 (9th Dist. 1997).

d) Burden of Proof:

(1) If child under ten, burden on proponent to prove child competent.[238] If child 10 or over, burden on party challenging competency.[239]

e) Competency vs. Credibility:

(1) The issue of competency, which is a question of law for the court, is separate from the issue of credibility of the witness, which is a question of fact for the jury.[240]

(A) Proper for court to disallow questions on voir dire as to child's bias since those type of questions would focus on credibility, not competency.[241]

(B) However, it is improper to deny cross examination during trial concerning child's understanding of truth and falsity since this may go to credibility, a jury issue.[242]

(C) Where child answers defense question that it might be alright to lie to keep from starving, such answers do not show lack of appreciation of truth, and involve credibility, not competency.[243]

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[238] State v. Clark, 71 Ohio St.3d 466, 1994-Ohio-43; Schulte v. Schulte, 71 Ohio St.3d 41, 1994-Ohio-459.

[239] State v. McCoy, 12th Dist. Butler No. CA87-02-012, 1987 WL 18283 (Oct. 12, 1987); In the Matter of Gibbs, 11th Dist. Trumbull No. 97-L-067, 1998 WL 257315 (Mar. 13, 1998); State v. Hertlein, 12th Dist. Brown No. 401, 1983 WL 4291 (Feb. 16, 1983); State v. Jones, 12th Dist. Brown App. CA2000-11-032, 2001 WL 1402638 (Nov. 13, 2001).

[240] State v. Johnson, 12th Dist. Clermont No. CA 85-12-105, 1986 WL 15289 (Dec. 31, 1986), *reversed on other grounds*, 36 Ohio St.3d 224 (1988); State v. Norwood, 11th Dist. Lake No. 11-065, 1987 WL 10763 (May 1, 1987).

[241] State v. Bunch, 62 Ohio App.3d 801 (9th Dist. 1989).

[242] State v. Higgins, 5th Dist. Muskingum No. CA-90-33, 1991 WL 11623 (Jan. 23, 1991).

[243] State v. Mayhew, 71 Ohio App.3d 622 (4th Dist. 1991).

(2) In *State v. Moreland*, before child testified, defense counsel requested an opportunity to examine the witness and also to present other witnesses regarding the child's ability to testify truthfully. The trial court denied this request. The court also denied defense counsel's request for an independent psychiatric examination to determine the child's competency. After conducting a brief interview with the child eyewitness, the Court concluded the child was competent to testify.

On appeal defendant contended that the trial court erroneously failed to hold a full evidentiary hearing on the child's competency to testify. Defendant argued that the child was incompetent to testify because he was subject to repeated pretrial questioning by police and the prosecution, and also because the child was affected by "improper influences" of family members.

The Supreme Court concluded that "all the evidence that appellant wishes to introduce in a competency hearing relates to whether the child is to be believed. Therefore, appellant's evidence goes to the credibility of the child as a witness rather than to the admissibility of the child's testimony."[244] The fact that child may incorrectly answer questions during voir dire goes to credibility not competency. [245]

8. Competency vs. Availability:

a) Court did not abuse discretion in refusing to voir dire traumatized upset child; court declared her unavailable under Evid.R. 804(A) and allowed in out-of-court statements.[246]

b) Where child refuses to answer court's competency voir dire, finding of incompetency actually finding of unavailability under Evid.R. 804(A).[247]

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[244] State v. Moreland, 50 Ohio St.3d 58 (1990).

[245] State v. Leach, 12th Dist. Clermont No. CA2000-05-033, 2001-Ohio-4203.

[246] State v. Robison, 4th Dist. Pickaway No. 85 CA 12, 1986 WL 11935 (Oct. 22, 1986).

[247] State v. Boston, 46 Ohio St.3d 108 (1989).

c) Trial court erred in ruling the child witness to be available in spite of the fact that it had found the child to be incompetent to testify.[248]

d) Five and a half year-old girl who cannot remember incident occurring two years before is "unavailable" and her out of court statement admissible due to other "indicia of reliability."[249]

e) If the trial court finds a child incompetent to testify, it must also exclude evidence of the child's prior statements, regardless of hearsay exceptions.[250]

9. Miscellaneous:

a) Excluding defendant but not attorneys from voir dire is not a violation of confrontation clause where the defendant will be present during testimony and cross-examination of child at trial.[251] Not error nor violation of Sixth Amendment to exclude defendant and his attorney.[252]

(1) But cf., due process clause requires presence of defendant.[253]

b) Where a 12 year-old witness who had been committed to psychiatric hospital, no competency inquiry by court required since child did not exhibit unusual behavior.[254]

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[248] State v. Rogers, 8th Dist. No. 63979, 1993 WL 515635 (Dec. 9, 1993).

[249] State v. Dever, 1st Dist. No. C-880712, 1990 WL 6405 (Jan. 31, 1990) (vacated by Dever v. Ohio, 498 U.S. 1009), *interpreting* State v. Boston, *supra*.

[250] State v. Ungerer, 5th Dist. Ashland No. 95COA1125, 1996 WL 362804 (June 5, 1996).

[251] Kentucky v. Stincer, 482 U.S. 730, 107 S.Ct. 2658 (1987); State v. Butts, 10th Dist. No. 88AP-764, 1989 WL 71662 (June 29, 1989).

[252] State v. McMillan, 62 Ohio App.3d 565 (9th Dist. 1989); State v. Phillips, 2d Dist. Montgomery No. 11576, 1990 WL 42316 (April 10, 1990); State v. Short, 12th Dist. Butler No. CA91-04-066, 1992 WL 158413 (July 6, 1992).

[253] State v. Howard, 57 Ohio App.2d 1 (1st Dist.1978), *citing* Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330 (1934).

[254] State v. Cooper, 139 Ohio App.3d 149 (12th Dist. 2000).

c) Excluding defendant from voir dire of child at grand jury not error; rules of evidence not applicable to grand jury. If, however, child is "voir dired" by court prior to grand jury, finding of judge is not conclusive for later hearings at trial. Issue of competency is subject to de novo determination at trial.[255]

10. Reform of *Per se* Competency Rule:

a) Rationale

(1) Research shows that children lie no more than adults.[256] Studies indicate no relationship between how children answered certain competency questions and whether they were able to be accurate and truthful.

b) Competency of young child should be issue for trier of fact.[257]

(1) At least 23 states have eliminated competency qualifications for children by statute or by changing evidence rules.

(2) Ohio Supreme Court recommended amendment of Evid.R. 601 to be issue for trier of fact, but Rules Committee has not suggested amendment.[258]

c) "Competency Panel" consisting of attorney, psychiatrist, clinical psychologist and two lay members would "voir dire" child early in case and assess competency and advise judge.[259]

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[255] State v. Montgomery, 2d Dist. Montgomery No. 10495, 1988 WL 63009 (June 13, 1988).

[256] Debra Whitcomb and G. Goodman, *The Emotional Effects of Testifying on Sexually Abused Children*, NIJ, April 1994. Goodman & Michelli, *Would You Believe A Child Witness*, PSYCHOLOGY TODAY (Nov. 1981), (cited in Whitcomb and Goodman, supra.) *But cf.* Gail S. Goodman, et al., *Child Sexual and Physical Abuse: Children's Testimony*, CHILDREN'S EYE WITNESS MEMORY, p. 1 (Stephen J. Ceci, et al. eds., 1987).

[257] Attorney General Task Force on Family Violence, Final Report (Sept. 1984), 38-39. Debra Whitcomb and G. Goodman, *The Emotional Effects of Testifying on Sexually Abused Children*, NIJ, April 1994.

[258] State v. Boston, 46 Ohio St.3d 108 (1989).

[259] Hollida Wakefield & Ralph Underwager, ACCUSATION OF CHILD SEXUAL ABUSE 67-97 (1988).

F. Leading Questions

1. When a witness is young child, prosecutor may attempt to ask leading questions.

    a) Children are less able to use total recall.[260]

    b) Children are no more susceptible to suggestion than adults.[261]

    c) But cf. Hollida Wakefield & Ralph Underwager, ACCUSATION OF CHILD SEXUAL ABUSE 67-97 (1988).

2. Defense Attorney's Remedy:

    a) Objection under Evid.R. 611(C), which states:

        (1) "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony."

        (2) Defendant argued that he was entitled to a mistrial because the state had been permitted to ask the victim-witnesses leading questions. In most of the instances the defendant objected and the court sustained the defendant's objections so that defendant was not prejudice. Moreover, the state clarified that the sole leading question was asked because of the witness's young age. [262]

3. Court Response:

    a) Evid.R. 611(A) still permits discretion of court.[263]

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[260] Debra Whitcomb and G. Goodman, *The Emotional Effects of Testifying on Sexually Abused Children*, NIJ, April 1994.

[261] Id., *citing* Moren, *The Potential of Children as Eyewitnesses*, 3 LAW AND HUMAN BEHAVIOR (1979), at 304; John Doren, Ed., *The Suggestibility of Children's Recollections: Implications for Eyewitness Testimony*, AM. PSYCHOLOGICAL ASSOC. 193.

[262] State v. Brooks, 7th Dist. Mahoning No. 07-MA-79, 2008-Ohio-6600.

[263] State v. Madden, 15 Ohio App.3d 130 (12th Dist. 1984); State v. Sturgill, 12th Dist. Warren No. CA90-12-085, 1991 WL 238256 (Nov. 12, 1991); State v. Cantrall, 8th Dist. No. 50307, 1986 WL 4666 (April 17, 1986); State v. Harris, 8th Dist. No. 55147, 1989 WL 27753 (Mar. 23, 1989); State v. Skaggs, 10th Dist. No. 84AP-463, 1985 WL 10069 (July 11, 1985); State v. Venia, 6th Dist. Wood No. WD-85-42, 1986 WL 2958 (Mar. 7, 1986); State v. Figueroa, 8th Dist. No. 51587, 1987 WL 11097 (May 14, 1987).

b) Where witness is of tender years and questions concern embarrassing subject matter, the court does not abuse its discretion by permitting leading questions.[264]

c) Trial court's use of leading questions during competency examination of four year-old not error.[265]

d) Error to prohibit defense attorney from leading four year-old child on competency voir dire; questions designed to refresh memory.[266]

e) Not abuse of discretion to allow leading questions of child where no showing that leading questions caused child to change her testimony.[267] Leading questions are sometimes necessary with child victims, if child upset and having difficulty testifying.[268] Allowing use of leading questions with a child is within trial court's discretion.[269]

f) Court may allow prosecution some leeway in asking leading questions to child victim of sexual abuse.[270]

g) Leading questions of witness to murder permitted where used to facilitate testimony of five year-old child; prosecutor forewarned defendant and trial court of potential use of leading questions, kept questions to minimum and used them only where necessary.[271]

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[264] State v. Butterfield, 1st Dist. No. C-840353, 1985 WL 6699 (Mar. 13, 1985).

[265] State v. Hartman, 11th Dist. Lake No. 11-254, 1986 WL 14583 (Dec. 19, 1986).

[266] State v. Norwood, 11th Dist. Lake No. 11-065, 1987 WL 10763 (May 1, 1987).

[267] Id.

[268] State v. Barker, 10th Dist. No. 95APA09-1209, 1996 WL 239640 (May 9, 1996).

[269] State v. Butler, 9th Dist. Lorain No. 96CA006343, 1997 WL 66217 (Jan. 29, 1997).

[270] State v. Eberle, 12th Dist. Clermont No. CA97-03-019, 1997 WL 795662 (Dec. 29, 1997); *see also,* State v. Mader, 8th Dist. No. 78200, 2001 WL 1002365 (Aug. 30, 2001) (13 year-old victim).

[271] State v. Brown, 112 Ohio App.3d 583 (12th Dist. 1996).

G. Use of Sexually Anatomically Correct Dolls

1. SAC Dolls Generally

   a) In recounting to child abuse investigators or when testifying in court, children may be reluctant, embarrassed or unable to recite the correct sexual nomenclature or describe the correct sexual activity.[272]

   b) Prosecutors and child abuse team investigators want to use the nonverbal, assertive conduct of child victims playing with sexually anatomically correct (SAC) dolls as evidence.

   c) During trial, prosecutors will ask child victim questions and use the dolls as aids or have the child victim demonstrate what occurred using the dolls.

   d) The use of dolls by children elicits two types of testimony: verbal and nonverbal assertive conduct.

      (1) Verbal testimony occurs when a child makes verbal responses while playing with the SAC dolls, describing the events or identifying the participants.

      (2) Nonverbal assertive conduct occurs when the child, in response to questions asking what happened to him or her, postures the SAC dolls.[273]

2. Defense Attorney's Remedy:

   a) Objection under theory of hearsay and violation of right of confrontation; statements to third parties are inherently unreliable.[274]

3. Court Response:

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[272] Suzanne M. Sgroi, M.D., HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE (1982), at 322.

[273] State v. Wagner, 30 Ohio App.3d 261 (8th Dist. 1986).

[274] Ralph Underwager and Hollida Wakefield, THE REAL WORLD OF CHILD INTERROGATIONS (1990), and Hollida Wakefield & Ralph Underwager, ACCUSATION OF CHILD SEXUAL ABUSE 67-97 (1988); *but cf.*, A. Salter, ACCURACY OF EXPERT TESTIMONY IN CHILD ABUSE CASES: A CASE STUDY OF RALPH UNDERWAGER; Barbara Walling Boat, Ph.D. & Mark D. Everson, Ph.D., *Using Anatomical Dolls: Guidelines for Interviewing Young Children in Sexual Abuse Investigations*, (1986), available from the University of North Carolina, Chapel Hill, Department of Psychiatry.

a) Use of dolls in courtroom to illustrate victim's testimony is not an abuse of discretion.[275]

b) "We recognize that many professionals criticize the use of SAC dolls in the diagnosis of sexual abuse. They assert that there is no consistent interview format associated with the use of SAC dolls. Also, they claim that there is little or no comparison data describing the response of non-abused children to SAC dolls as compared to the response of abused children. In this case, since Dr. Lord had other evidence of the alleged abuse, we need not decide whether an expert opinion based only the child's manipulation of SAC dolls is reliable."[276]

c) Argument that child could not use dolls in court unless State established that victim unable to testify without dolls discounted.[277]

d) Numerous studies criticize use of dolls for diagnosis (not necessarily use of dolls in courtroom testimony).[278]

e) Nonverbal assertive conduct with dolls obtained by rape team physician for purposes of diagnosis and treatment is an exception to

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[275] State v. Lee, 9 Ohio App.3d 282 (9th Dist. 1983); State v. Ringer, 9th Dist. Summit No. 12451, 1986 WL 15276 (Dec. 31, 1986); State v. Hart, 57 Ohio App.3d 4 (6th Dist. 1988).

[276] State v. Boston, 46 Ohio St.3d 108 at 120 (1989), fn.8.

[277] State v. Dubose, 8th Dist. No. 56174, 1989 WL 142916 (Nov. 22, 1989).

[278] Myrna S. Raeder, *Navigating Between Scylla and Charybdis: Ohio's Efforts to Protect Children Without Eviscerating The Rights of Criminal Defendants*, 25 UNIV. OF TOLEDO L.R. 43, 138 (1994); V.M. Friedemann & M.K. Morgan, INTERVIEWING SEXUAL ABUSE VICTIMS USING ANATOMICAL DOLLS: THE PROFESSIONALS' GUIDEBOOK, Eugene, Oregon, Migima Designs, Inc. (1985); R.M. Gabriel, *Anatomically Correct Dolls in the Diagnosis of Sexual Abuse of Children*, THE JOURNAL OF MELANIE KLEIN SOCIETY, pp. 32, 40-51 (1985); L. Jampole & M.K. Weeber (1987), *An Assessment of the Behavior of Sexually Abused and Non-abused Children with Anatomically Correct Dolls*, CHILD ABUSE AND NEGLECT, pp.11, 187-194; S. White, G.S. Strom & G. Santilli, *Interviewing Young Sexual Abuse Victims with Anatomically Correct Dolls* (1985 October), paper presented at the 32nd Annual Meeting of the American Academy of Child Psychiatry, San Antonio, Texas.

the hearsay rule under Evid.R. 803(4).[279] Medical treatment hearsay exception firmly rooted hearsay exception may be inherently trustworthy.[280] But cf. State v. Boston, where Ohio Supreme Court had "serious reservations" about the use of 803(4) where the child is of "tender years."[281]

f) Statements using dolls by three year-old to administrative head of children's services not within the hearsay exception since her administrative skills were not sufficient to qualify her as a child abuse team expert in child sexual abuse.[282]

H. Evidence of Defendant's Character

1. Generally:

a) Under Evid.R. 404(A)(1) evidence of an accused's character trait is admissible when the character trait to be proven is pertinent to the issues of the case.

b) A trial court's decision regarding the admission of a defendant's other acts will be reviewed for abuse of discretion.[283]

c) If admissible, proof of the character trait may be made by testimony as to reputation in the community or by lay opinion. Evid.R. 405(A).

(1) With lay opinion, it must concern the personal opinion of the witness and be based upon a personal acquaintance with the defendant.[284]

2. Evidence Held Admissible:

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[279] State v. Barnes, 12th Dist. Clermont No. CA84-05-041, 1985 WL 7980 (April 18, 1985); State v. Humfleet, 12th Dist. Clermont Nos. CA84-04-031, CA84-05-036, 1985 WL 7728 (Sept. 9, 1985); United States v. Iron Shell, 633 F.2d 77 (8th Cir.1980).

[280] Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139 (1990).

[281] State v. Boston, 46 Ohio St.3d 108 (1989).

[282] In re Reeder v Reeder, 12th Dist. Madison Nos. CA84-10-034, CA85-03-009, 1986 WL 2179 (Feb. 18, 1986).

[283] State v. Kirby, 9th Dist. Summit No. 27060, 2014-Ohio-5643.

[284] State v. Ambrosia, 67 Ohio App.3d 552 (6th Dist. 1990).

a) Where defendant spoke with separate twelve year-old victims on computer prior to abusing them and then touched the victims' breasts in a similar fashion, testimony regarding the similarity of the acts admissible under Evid.R. 404(B) for purposes of showing defendant's plan, motive and scheme.[285]

b) "The evidence clearly shows preparation, plan, and knowledge. The defendant used child pornography movies in the process of grooming plaintiff for further sexual abuse. Showing these movies was an effort on defendant's part to make her believe that there was nothing wrong with the abuse which was occurring." When they were watching the movies defendant pointed out different things that were going on in the movies. Evid.R. 404(B) permits the introduction into evidence of statements that tend to prove, inter alia, preparation or motive.[286]

c) Evidence of the defendant's other acts were admissible to prove the identity of the defendant as the attacker because defendant claimed that one of the victim's other customers could have been responsible.[287]

3. Evidence Held Inadmissible:

a) Videotape of defendant playing with his own children, to show that he acted appropriately with children, was inadmissible: (1) although the defendant's actions with children were at issue, the videotape was not relevant because the charges did not concern his interactions with his own children, and (2) there was no guarantee the videotape was unbiased or trustworthy as the defendant failed to show when the videotape was made or for what purpose.[288]

I. Expert Witnesses

1. In General:

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[285] State v. Travis, 9th Dist. Medina No. 06CA0075-M, 2007-Ohio-6683.

[286] State v. Poling, 11th Dist. Ashtabula No. 2008-A-0071, 2010-Ohio-1155. *See also* State v. Broom, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988) and State v. Crotts, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302.

[287] State v. Kirby, 9th Dist. Summit No. 27060, 2014-Ohio-5643.

[288] State v. Baker, 12th Dist. Clermont No. CA98-11-108, 1999 WL 636479 (Aug. 23, 1999).

a) Prosecuting attorney will often ask physicians, social workers or other child abuse team members their opinions as to whether the injuries suffered by the victim/child were consistent with sexual abuse.

b) Defense Attorney's Remedy:

(1) Objection under Evid.R. 702, which reads as follows:

(A) "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by his knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

c) Court Response:

(1) The U.S. Supreme Court now has rejected the general acceptance requirement for expert testimony; the standard for admissibility is whether the testimony will aid the trier of fact.[289]

(2) The trial court must rule on admissibility and this entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether the reasoning or methodology can be properly applied to the facts in issue.

(3) In performing their function the courts may consider a number of factors:

(A) the court should determine whether the scientific theory or technique can be and has been tested. Citing scientific authorities, the Court recognized that a hallmark of science is empirical testing.

(B) whether a theory or technique has been subjected to peer review and publication is a relevant, though not dispositive, consideration in assessing scientific validity. The peer review and publication process increases the likelihood that flaws in methodology will be detected.

[289] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993).

(C) a technique's known or potential rate of error is also a relevant factor.

(D) the existence and maintenance of standards controlling the technique's operation is another indicium of trustworthiness.

(E) "general acceptance" remains an important factor.

(4) In Ohio, Evid. Rule 702 has been amended to read as follows: A witness may testify as an expert if all of the following apply:

(A) the witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons.

(B) the witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) the witness' testimony is based on reliable scientific, technical, or other specialized information, to the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

i. the theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

ii. the design of the procedure, test, or experiment reliably implements the theory;

iii. the particular procedure, test, or experiment was conducted in a way that will yield an accurate result.[290]

(5) The Court appears to have expanded this aspect of the rule. The trial court had disallowed the testimony of two

[290] *See also* Michael Lepp & Christopher B. McNeil, *The Trial Judge as Gatekeeper for Scientific Evidence: Will Ohio Rule of Evidence 102 Frustrate the Ohio Courts' Rule Under Daubert v Merrell Dow?* (1993), 27 AKRON LAW REVIEW 89.

psychiatrists because they had based their opinions of insanity on police reports, hospital records, and reports of other doctors. They had, however, also examined the defendant. The Supreme Court concluded: "[W]here an expert bases his opinion, in whole or in major part, on facts or data perceived by him, the requirements of Evid.R. 703 has been satisfied. It is important to note that Evid.R. 703 is written in the disjunctive. Opinions may be based on perceptions or facts or data admitted in evidence." Many of these records were probably admissible as business records.[291] The court reaffirmed the "major parts" rule: *Solomon* permits expert opinions under Rule 703 "despite their being partially based on medical reports not in evidence, where the doctors had personally examined the defendant."[292] In a child abuse prosecution, a physician "opined that Angel had been sexually abused. [The expert] formed her opinion after obtaining the history from Angel, examining her and hearing Angel's own statements, which were testified to at the trial by Angel."[293]

(6) Ohio Supreme Court has not adopted the "Frye Test" and the following observation concerning it in *State v. Williams*:

(A) "As stated by Professor McCormick: *** General scientific acceptance is a proper condition for taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence. Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion. Particularly, probative value may be overborne by the familiar dangers of prejudicing or misleading the jury, and undue consumption of time. If the courts used this approach, instead of repeating a supposed requirement of general acceptance not elsewhere imposed, they would arrive at a practical way of utilizing the results of scientific advances. McCormick, Evidence (2 Ed., Cleary Ed. 1972) 491, Section 203.[294]

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[291] State v. Solomon, 59 Ohio St.3d 124, 126 (1991).

[292] State v. Mack, 73 Ohio St.3d 502, 512, 1995-Ohio-273.

[293] State v. Kelly, 93 Ohio App.3d 257, 265 (5th Dist. 1994).

[294] State v. Williams, 4 Ohio St.3d 53, 57 (1983).

2. Physicians and Psychologists

a) Scope Of Opinions:

(1) Child Abuse Team psychologist, after observing child play with dolls in three sessions and interviewing child, and the Child Abuse Team pediatrician are able to render an opinion that the behavior of the child is unique to a child who has experienced sexual abuse. Opinion that penetration is probable is permissible. Also holds that reference to general credibility of child witness is permissible. One doctor, pediatrician, testified that "there was probable vagina and possible rectal penetration." According to the Supreme Court, "possible" was explained by the witness to mean more than 50% certainty - "probability" more than 90%. The expert did not have to testify in terms of "reasonable medical certainty." All that was required was that the context and phrasing of the doctor's statement made it clear that the expert was testifying that something was at least more likely than not. However, psychologist could not testify that child did not fantasize in telling history to pediatrician, this being beyond Evid.R.704.[295]

(2) Clinical psychologist or psychologist's assistant can testify that behavior of child victim is consistent with behavior observed in sexually abused children - not considered vouching.[296]

(3) Psychologist's testimony that victim suffered from posttraumatic stress disorder was admissible; victim's demeanor after incident was relevant and important to corroborate that she was raped where the defendant argued consent.[297]

(4) Mere fact that qualified psychologist does not testify about "child sexual abuse accommodation syndrome" or other

[295] State v. Boston, 46 Ohio St.3d 108 (1989); for a good discussion on the standard for admissibility, see C. Hallinan, Expert Testimony Under Ohio's Revised Evidence Rule 702, 30 OACTA QUARTERLY REVIEW, No. 2 (Spring 95).

[296] State v. Stowers, 81 Ohio St.3d 260, 1998-Ohio-632; State v. Hudgins, 5th Dist. Stark No. 2006CA00093, 2007-Ohio-3361.

[297] State v. Martens, 90 Ohio App.3d 338 (3rd Dist. 1993).

psychological conditions does not render her testimony irrelevant where she discusses the procedures and results of the Multiphasic Personality Inventory Adolescent version test administered to the child victim; such discussion required the interpretation of an expert.[298]

b) Pre-Boston And Pre-Stowers Cases:

(1) Statement to intake psychologist of children's services within Evid.R. 803(4).[299]

(2) Physicians who are members of the child abuse team who have treated the child are permitted to testify as to whether or not injuries received by the child are consistent with child sexual abuse.[300]

(3) Psychologist's testimony that victim's continual soiling of pants is consistent with anal rape is permissible. [301] Psychologist able to testify as to opinion that victim was abused but not as to truthfulness.[302]

(4) Psychologist can offer opinion that child was physically abused and comment on credibility.[303]

(5) Testimony from doctor that victim suffered from rape trauma syndrome relevant to corroborate victim's testimony that she was raped and its probative value outweighs prejudice.[304]

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[298] State v. Cripps, 12th Dist. Preble No. CA 97-12-031, 1998 WL 568683 (Sept. 8, 1998).

[299] State v. McCollum, 6th Dist. Sandusky No. S-88-15, 1989 WL 35502 (Apr. 14, 1989), *citing* State v. Wilson, 8th Dist. No. 52031, 1987 WL 10042 (April 23, 1987).

[300] State v. Robinette, 5th Dist. Morrow No. CA-652, 1987 WL 7153 (Feb. 27, 1987).

[301] State v. Barnes, 12th Dist. Clermont No. CA84-05-041, 1985 WL 7980 (April 8, 1985).

[302] State v. Grewell, 5th Dist. Coshocton No. 87-CA-18, 1988 WL 59443 (June 1, 1988), *aff'd*, 45 Ohio St.3d 4 (1989).

[303] In re Spears, 4th Dist. Athens No. 1200, 1984 WL 5682 (Dec. 10, 1984).

[304] State v. Whitman, 16 Ohio App.3d 246 (11th Dist. 1984).

c) Post Boston - Pre Stowers Cases:

(1) Expert testimony was admissible in the following cases:

(A) Doctor's testimony that his findings "compatible" with victim's story of abuse not vouching for witness and is permitted under Boston.[305]

(B) Doctor can testify that victim's statements are consistent with her injuries; such testimony is not vouching.[306]

(C) Testimony that victim displayed characteristics of a child who had been abused not error.[307]

(D) Testimony from doctor that she "discovered no inconsistencies" and general testimony about what factors to use in determining credibility of victims in general not error.[308]

(E) Allowing statement to doctor from Children's Hospital of 3-1/2 year-old girl as to her rape by her father not error.[309]

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[305] State v. Moore, 9th Dist. Medina No. 1736, 1989 WL 21233 (Mar. 8, 1989); State v. Dawson, 9th Summit No. 15054, 1991 WL 259531 (Dec. 4, 1991).

[306] State v. Proffitt, 72 Ohio App.3d. 807 (12th Dist. 1991); State v. Lewis, 9th Dist. Summit No. 14632, 1991 WL 156559 (Aug. 14, 1991).

[307] State v. Short, 12th Dist. Butler No. CA91-04-066, 1992 WL 158413 (July 6, 1992); *See* Horner, T., Prediction, Prevention and Clinical Expertise in Child Custody Cases in which Allegations of Child Sexual Abuse Have Been Made, Family Law Quarterly, Vol. XXVI, No.2 (1992), p.141.

[308] State v. Alderman, 4th Dist. Athens No. CA 1433, 1990 WL 253034 (Dec. 11, 1990); State v. Ames, 12th Dist. Butler No. CA2000-02-024, 2001 WL 649734 (June 11, 2001) (where Defense council raises issue on cross of psychologist as to victim's credibility, the State is permitted to follow up with questions whether victim was consistent during her interview with the psychologist.)

[309] State v. Dever, 1st Dist. No. C-880712, 1990 WL 6405 (Jan. 31, 1990), *citing* State v. Boston, 46 Ohio St.3d 108 (1989).

(F) Testimony of witness qualified as expert in child psychology and sexual abuse concerning typical sexual reactions of young people did not violate Boston.[310]

(G) Psychologist's testimony that reaction of child victims in tests were consistent with allegations of sexual abuse not error.[311]

(H) Psychologist permitted to offer opinion that child was victim of incest.[312] Expert may offer her opinion as to whether child is victim of sexual abuse.[313]

(I) Doctor can testify that he believed victim was sexually abused.[314]

(J) "We find that the trial court did not abuse its discretion in allowing Det. Riley to testify concerning the outward appearance of children who have been sexually abused in order to combat the inference that David's testimony was not credible."[315]

(K) Psychologist testimony concerning interview protocol to determine if child's report is consistent with children her age admissible.[316]

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[310] State v. Daniel, 97 Ohio App.3d 548 (10th Dist. 1994).

[311] State v. Sibert, 98 Ohio App.3d 412 (4th Dist. 1994).

[312] State v. Lewis, 9th Dist. Summit No. 14632, 1991 WL 156559 (Aug. 14, 1991); State v. Battista, 5th Dist. Stark No. CA-8612, 1992 WL 29225 (Feb. 10, 1992).

[313] In the Matter of Dooley, 12th Dist. Butler No. CA93-09-178, 1994 WL 233155 (May 31, 1994), *citing* State v. Boston, 46 Ohio St.3d 108 (1989); State v. Vaughn, 106 Ohio App.3d 775 (12th Dist. 1995); State v. Adams, 4th Dist. Washington No. 90CA5, 1991 WL 62184 (Apr. 16, 1991); State v. France, 9th Dist. Summit No. 15198, 1992 WL 41285 (Mar. 4, 1992); State v. Fuentes, 8th Dist. No. 56799, 1990 WL 66469 (May 17, 1990).

[314] State v. Wilcher, 9th Dist. Summit No. 14236, 1990 WL 28111 (Mar. 14, 1990).

[315] State v. McMillan, 69 Ohio App.3d 36 (9th Dist. 1990).

[316] State v. Lacy, 12th Dist. Butler No. CA95-12-221, 1996 WL 688789 (Dec. 2, 1996).

(L) Testimony of detective regarding investigation protocols did not improperly bolster the victim's credibility and is, therefore, admissible. [317]

(M) Testimony by nine year-old victim's treating psychologist that, in his opinion, alleged victim was sexually abused was admissible, and was not improper testimony as to veracity of statements by alleged victim. Psychotherapist's testimony that alleged sex offense victim had been sexually abused was not rendered inadmissible by fact that psychotherapist had used "galvanic skin machine" which is used as portion of polygraph test, on alleged victim; psychotherapist did not give opinion on alleged victim's veracity since machine used to help victim learn to relax, not as means of evaluation.[318]

(N) Psychologist who treated defendant's four year-old and six year-old daughters was qualified to testify as expert that daughters had been sexually abused, even though psychologist did not have a medical degree; psychologist testified that this opinion was based on her personal observation of one daughter's sexual acting out during counseling sessions, on fact that other daughter acted out in similar fashion, and on children's accounts of the attacks.[319]

(O) Examining pediatrician can testify as to opinion whether or not victim had been sexually molested and explain that lack of physical evidence in examination not inconsistent with child abuse.[320]

(P) Expert testimony as to posttraumatic stress disorder in children was properly admitted.[321]

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[317] State v. McGlown, 6th Dist. Lucas No. L-07-1163, 2009-Ohio-2160.

[318] State v. Eben, 81 Ohio App.3d 341 (4th Dist. 1992); State v. Wolfe, 81 Ohio App.3d 624 (11th Dist. 1992).

[319] State v. Kelly, 93 Ohio App.3d 257 (5th Dist. 1994); Evid.R. 703.

[320] State v. Burrell, 89 Ohio App.3d 737 (9th Dist. 1993).

[321] State v. Bidinost, 71 Ohio St.3d 449, 1994-Ohio-465. For more discussion on posttraumatic stress disorder, *see* Kathy A. Tatone, *Sexual Abuse Litigation: Opportunities and Obstacles*, TRIAL, Feb. 1995, at 66.

(Q) Nurse practitioner who has examined over 900 children for sexual abuse qualifies as expert.[322]

(R) Question of psychologist "Do you have opinion whether or not victim exhibited evidence of a child that has been sexually abused?" without objections not plain error where court later gives instruction that only the jury can determine credibility.[323]

(S) While testimony by doctor that victim was not fabricating did not rise to the level of plain error, failure of defense counsel to object held to be ineffective assistance of counsel.[324]

(T) Not plain error for doctor to testify regarding basis for opinion even though basis included child's demeanor and responses to questions; he did not testify as to his opinion regarding child's veracity.[325]

(U) Testimony of medical doctor and social worker was permissible where they testified after the children and did not render opinions as to the veracity of the children's statements, but only as to their findings and general attributes of child abuse.[326]

(V) Expert testimony is admissible where psychologist never vouched for the credibility of the victim or indicated that her testimony was truthful, she only

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[322] State v. Pierce, 9th Dist. Summit No. 17684, 1997 WL 72098 (Feb. 12, 1997).

[323] State v. Black, 12th Dist. Butler No. CA95-06-102, 1996 WL 189031 (Apr. 22, 1996).

[324] State v. Jones, 114 Ohio App.3d 306 (2d Dist. 1996).

[325] State v. Cardosi, 122 Ohio App.3d 70 (9th Dist. 1997).

[326] State v. Fuson, 5th Dist. Knox No. 97 CA 000023, 1998 WL 518259 (Aug. 11, 1998) (stating also that "*Boston* does not apply when the child victim actually testifies and is subjected to cross-examination.").

testified about the victim's symptoms as revealed through psychological testing.[327]

(W) Testimony of sexual assault nurse examiner ("SANE nurse") was not plain error where SANE nurse testified about her experience, specialized training, case reviews, and prior expert witness testimony. Trial counsel was not ineffective for failing to object to the SANE nurse's testimony. [328]

(2) Expert testimony was inadmissible in the following cases:[329]

(A) Expert may testify about general characteristics of child abuse phenomenon and the symptoms generally exhibited by victims and may also relate pertinent observations as to demeanor and conduct of specific victim, but may not express opinion that child was sexually abused. The court found the following admitted testimony error (albeit waived): "I can say that there's nothing in my history or physical examination inconsistent with the diagnosis of sexual abuse. It's an extremely strong conclusion I can reach because of the time I spent with the child and her mother."[330]

(B) Doctor's opinion whether or not victim was "malingering" (lying) improper.[331]

(C) Doctor's (Ph.D, child development specialist) testimony that child victim fulfilled certain

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[327] State v. Cripps, 12th Dist. Preble No. CA 97-12-031, 1998 WL 568683 (Sept. 8, 1998).

[328] State v. Gamble, 2d Dist. Montgomery No. 25639, 2014-Ohio-1277, ¶ 40.

[329] *See* State v. Phillips, 2d Dist. Montgomery No. 11576, 1990 WL 42316 (April 10, 1990) (for a good discussion of when witness impermissibly vouches for truthfulness of victim).

[330] State v. Duke, 8th Dist. No. 52604, 1988 WL 88862 (Aug. 25, 1988).

[331] State v. Edwards, 123 Ohio App.3d 43 (6th Dist. 1997); State v. Mona, 9th Dist. Summit No. 14818, 1991 WL 116306 (June 19, 1991); State v. Burns, 8th Dist. Nos. 58202, 58212, 1991 WL 34725 (Mar. 14, 1991), *citing* State v. Moreland, 50 Ohio St.3d 58 (1990).

"checkpoints of credibility," her account was consistent with her verbalization and demonstrations, held to be error.[332]

(D) Clinical psychologist cannot testify that based on testing, defendant did not have characteristics of a pedophile per rape shield.[333]

(E) Psychologist cannot offer opinion of child's credibility where he has not conducted examination of victim.[334] Psychologist and member of child abuse hospital team could not testify as to credibility.[335]

(F) Pediatrician cannot testify as to opinion that child was sexually abused; pediatrician's testimony that children of victim's age were unlikely to fabricate story was prejudicial.[336]

(G) Where court admits psychologist as expert, testimony that 15 year-old girl was suffering from "posttraumatic stress disorder" impermissible and was in fact vouching for credibility.[337]

(H) General testimony concerning patterns found in child sexual abuse inadmissible because used solely to bolster children's credibility; expert did not reach any conclusion in her testimony.[338]

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[332] State v. Hamilton (1991), 77 Ohio App.3d 293, *citing* State v. Boston, 46 Ohio St.3d 108 (1989) and distinguishing State v. Phillips, *supra*.

[333] State v. Ambrosia, 67 Ohio App.3d 552 (6th Dist. 1990).

[334] State v. Whitt, 68 Ohio App.3d 752 (8th Dist.1991).

[335] State v. Duff, 10th Dist. No. 89AP-760, 1990 WL 34761 (March 29, 1990).

[336] State v. Cantlebarry, 69 Ohio App.3d 216 (10th Dist. 1990).

[337] State v. Hollon, 12th Dist. Clermont No. CA90-03-029, 1991 WL 7938 (Jan. 28, 1991), *citing* State v. Davis, 64 Ohio App.3d 334 (12th Dist. 1989), and distinguishing State v. Boston, 46 Ohio St.3d 108 (1989).

[338] State v. Price, 80 Ohio App.3d 35 (3rd Dist. 1992); State v. Macias, 6th Dist. Lucas No. L-99-1363, 2001 WL 640893 (June 8, 2001); State v. Hruby, 8th Dist. No. 81303, 2003-Ohio-746; State v. Draughon, 10th Dist. No. 02AP-895, 2004-Ohio-320.

(I) Expert witness's testimony that behavior of alleged child victim of sexual abuse is consistent with behavior observed in sexually abused children is admissible, even if it conveys expert's belief that child was actually abused, as expert testimony on this ultimate issue is permissible as aid to jurors. [339]

(J) Testimony from psychologist as to whether child's statements were product of child's imagination improperly admitted; defendant did not "invite error" through opening statement which inferred child had been coached.[340]

(K) While psychologist was qualified to testify as to general behavior of pedophiles, here the testimony tended to trait of defendant's character. Inadmissible under Evid.R. 404, in that it linked other acts of defendant with other children and classified them as pedophile acts.[341]

(L) Counselor testimony of "I can tell you... reasons why I believe... victim" plain error.[342]

(M) Trial court's instructions to jury to strike statement of psychologist opinion of credibility sufficient to prevent reversal.[343]

d) Post Boston- Post Stowers Cases:

(1) Expert may testify that a child has been sexually abused, but not as to whom the perpetrator was.[344]

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[339] State v. Stowers, 81 Ohio St.3d 260, 1998-Ohio-632, abrogating State v. Givens, 12th Dist. Warren No. CA92-02-015, 1992 WL 329453.

[340] State v. McWhite, 73 Ohio App.3d 323 (6th Dist. 1991).

[341] State v. Smith, 84 Ohio App.3d 647 (2d Dist. 1992).

[342] State v. Yarber, 102 Ohio App.3d 185 (12th Dist. 1995).

[343] State v. Fenton, 68 Ohio App.3d 412 (6th Dist. 1990).

[344] State v. Freistuhler, 3rd Dist. Shelby No. 17-97-19, 1998 WL 229782 (Apr. 3, 1998).

(2) Trial court erred by allowing a social worker to testify that she believed the complaining witness was a victim of sexual abuse, even though Defendant failed to object to the testimony when it was given.[345]

(3) Expert psychologist, when directly asked whether or not the victim was telling the truth, attempted to phrase the answer as admissible testimony by responding that the victim had given a genuine report of an experience she had. Despite the wording of the expert's response, the question was designed to, and did, elicit a response concerning the veracity of the victim, and therefore defendant was deprived fair representation during the testimony of the State's expert witness by his counsel's failure to object to the testimony.[346]

(4) An expert does not need physical findings to reach a diagnosis regarding abuse. If the expert relies on other facts in addition to the child's statements, then the expert's opinion is not an improper statement on the child's veracity.[347]

(A) No error in admitting testimony of social worker qualified as an expert on child abuse where he relied upon information received from physicians, corroboration of childrens' physical description of the defendant's anatomy, the demeanor of the children, and his past experience in dealing with sexually abused children in addition to the statements of abused children.[348]

(5) No error in admission of social worker's testimony that the allegations against the defendant were "indicated" where term was defined as the existence of "some evidence, be they statements, consistent statements, physical evidence, [or] corroboration with statements that suggests the alleged incident could have occurred." According to the Eighth District, such a determination is not considered testimony regarding veracity, but rather a reflection of the social work

[345] State v. Pizzillo, 7th Dist. Carroll No. 746, 2002-Ohio-446.

[346] In re Wesley Rooney, 8th Dist. No. 77212, 2000 WL 1513776 (Oct. 12, 2000).

[347] State v. Jordan, 7th Dist. Harrison No. 06 HA 586, 2007-Ohio-3333.

[348] Id.

agency's policy regarding child abuse case classification, in that the incident "could have occurred."[349]

(6) *State v. Winterich*, 8th Dist. No. 89581, 2008-Ohio-1813 provides several examples of infirmities within such expert testimony.

(A) While social workers may testify as to their disposition in an alleged sexual abuse case, they cannot testify as to the truthfulness or credibility of the alleged victim. Testimony of social worker that child victim "seemed believable" improper; social worker had seen "thousands" of child abuse cases, making it likely that jury would defer to her opinion as to credibility.[350]

(B) Doctor's diagnosis of "presumed" sexual abuse improperly considered because it stemmed only from victim's statements and redness around vagina which admittedly could have stemmed from any number of causes.[351]

(C) Nurse's diagnosis of alleged sexual abuse as "very possible" improperly considered because it stemmed only from victim's statements and inconclusive medical exam.[352]

(7) Social worker could not testify as to victims' veracity, but, if children testified, could lend additional support for the truth of the facts testified to by the children or assist the fact-finder in assessing their veracity.[353]

(8) A trial court did not commit plain error by allowing a SANE nurse to testify that she suffered nightmares from hearing the victim's account of the rape. The State used the SANE nurse's

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[349] State v. Whitfield, 8th Dist. No. 89570, 2008-Ohio-1090, *citing* State v. Smelcer, 89 Ohio App.3d 115 (8th Dist. 1993).

[350] State v. Winterich, 8th Dist. No. 89581, 2008-Ohio-1813.

[351] Id.

[352] Id.

[353] State v. Barnes, 12th Dist. Clermont Nos. 2007 CR 0327, 2007 CR 0417, 2008-Ohio-5609.

testimony to show that the SANE nurse specifically remembered the victim's account despite having treated over 150 sexual assault victims, not to impermissibly bolster the victim's credibility.[354]

e) Rape Trauma Syndrome:

(1) Testimony that child victim suffering from rape trauma syndrome (that child was reluctant to mention the event to authority figure) was permitted to counter defense suggestion that lateness in reporting was indicia of fabrication. [355] Opinion that child's actions consistent with rape trauma syndrome allowed.[356]

(2) Testimony regarding severity of rape victim's injuries and her prognosis for "severe psychological, emotional, social, and sexual problems" to develop over months and years was not evidence of rape trauma syndrome (RTS) and, thus, defendant was not entitled to rebut that evidence by showing that victim was not exhibiting symptoms of RTS; there was no mention of RTS in state's testimony, no description of its symptoms, and no indication that victim was suffering from RTS, and purpose of the testimony was to establish "serious physical harm" element of felonious assault.[357]

(3) Witness who had worked in psychology although not licensed, employed as therapist and who had read over 50 books on sexual abuse of children is an expert under Evid.R. 702 to testify as to general symptoms of child sexual abuse.[358]

(4) While the highest courts of other states have split on the admissibility of testimony regarding rape trauma syndrome, the majority find it inadmissible to prove that a rape in fact occurred.

(A) Admissible

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[354] State v. Dye, 10th Dist. No. 13AP-420, 2014-Ohio-1067.

[355] State v. Ziruolo, 9th Dist. Summit No. 11960, 1985 WL 10834 (June 26, 1985).

[356] State v. Moore, 9th Dist. Medina No. 1736, 1989 WL 21233 (Mar. 8, 1989).

[357] State v. Jones, 83 Ohio App.3d 723 (2d Dist. 1992).

[358] State v. Gordon, 11th Dist. Geauga No. 1410, 1989 WL 260228 (Mar. 31, 1989).

i. Psychiatrist's testimony that victim had suffered from rape trauma syndrome was relevant in rape prosecution in which defense raised defense of consent and did not invade province of jury.[359]

(B) Inadmissible

i. Addressing defense of consent, expert's conclusion that rape victim suffered from rape trauma syndrome inadmissible, as it served to bolster credibility of victim; probative value of testimony outweighed by prejudice.[360]

ii. Addressing defense of consent, expert testimony regarding rape trauma syndrome not viewed as fact-finding tool, but rather as therapeutic tool useful in counseling; because evidence regarding the reactions of other people does not assist jury in role as fact-finder, testimony inadmissible.[361]

iii. Expert testimony regarding rape trauma syndrome inadmissible to prove that rape in fact occurred; rape trauma syndrome developed as therapeutic tool for counselors rather than to determine "truth" or "accuracy" of particular past event.[362]

(5) Testimony by doctor who "is clearly well versed in all aspect of child abuse, including psychological and behavioral…did not abuse trial court discretion in declaring the doctor an expert in the area of child abuse." The doctor's testimony demonstrates that his opinion is based on the behavior of

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[359] State v. Marks, 231 Kan. 645, 647 P.2d 1292 (Kan. 1982).

[360] State v. Taylor, 663 S.W.2d 235 (Mo. 1984) (rejecting Kansas Supreme Court's State v. Marks decision; agreeing with Minnesota Supreme Court's State v. Saldana decision and California Supreme Court's People v. Bledsoe decision).

[361] State v. Saldana, 324 N.W.2d 227 (Minn. 1982).

[362] People v. Bledsoe, 681 P.2d 291 (Cal. 1984) (reviewing State v. Marks, State v. Taylor, and State v. Saldana decisions).

other children in similar situations." Furthermore, the doctors training and experiences have exposed him to the mental processes of adults and children and the behavioral aspects of child abuse victims.[363]

f) Child Abuse Syndrome:

(1) Doctor can testify about child abuse syndrome and whether symptoms experienced by victim were consistent with child abuse syndrome.[364] But defense attorney not permitted to cross-examine expert who testified that child suffered from child abuse syndrome as to possible causation from prior sexual activity for reason that Rape Shield prohibits such testimony. [365] Answer of doctor, "could be," was permissible.[366] "Therapist" at children services able to testify as to percentage of children who do not recount full story first time.[367]

(2) One of the more common errors involves misunderstanding the Child Sexual Abuse Accommodation Syndrome (CSAAS) described by Dr. Roland Summit (Summit 1983). Dr. Summit did not intend the syndrome as a diagnostic device:

(A) CSAAS is not the sexual abuse analogue of battered child syndrome, which is diagnostic of physical abuse. Unfortunately, attorneys sometimes overlook this limitation and seek to prove sexual abuse with evidence that a child fits the requirements of CSAAS. Surprisingly, a number of mental health professionals aid and abet the error by supplying such testimony. Little wonder judges become confused and suspicious

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[363] State v. Poling, 11th Dist. Ashtabula No. 2008-A-0071, 2010-Ohio-1155.

[364] State v. Garfield, 34 Ohio App.3d 300 (11th Dist. 1986); State v. Reger, 9th Dist. Summit Nos. 12378, 12384, 1986 WL 5699 (May 14, 1986); State v. Little, 5th Dist. Richland No. CA-2176, 1984 WL 4438 (Feb. 1, 1984); State v. Rowe, 5th Dist. Holmes No. 98-CA-6, 1999 WL 668573 (Aug. 3, 1999).

[365] State v. Myers, 12th Dist. Preble No. 88-01-003, 1988 WL 89625 (Aug. 29, 1988).

[366] State v. Humfleet, 12th Dist. Clermont Nos. CA84-04-031, CA84-05-036, 1985 WL 7728 (Sept. 9, 1985).

[367] State v. McMillan, 62 Ohio App.3d 565 (9th Dist. 1989).

about CSAAS in particular, and expert psychological testimony in general.[368] Counselor's testimony that in her opinion victim suffered from CSAAS to explain child's symptom is error. CSAAS does not diagnose or detect abuse but assures the presence of abuse and seeks to explain it. It is a therapeutic aid, not a truth seeking procedure. The jury was not permitted to rely on an improper scientific technique to bolster uncorroborated child testimony contra to due process and Evid.R. 702.[369]

(3) In a rape prosecution involving a child victim, the trial court does not err in allowing a police detective and a representative from the county's victim witness program to testify that in their experience in dealing with child victims of sexual abuse it was not unusual for children to recant their accusations of abuse. The testimony was general and not directed to the specific issue of the victim's credibility. The court also held that the trial court does not err in allowing a medical doctor who examined the child victim to explain the term Child Sexual Abuse Accommodation Syndrome (CSAAS). The witness gave only a brief, general explanation of CSAAS and did not specifically relate it to the issue of the child's credibility nor express her opinion as to the child's credibility. Moreover, the test for admission of scientific or expert testimony is no longer a matter of whether the concept at issue has been generally accepted in the scientific community. The admissibility of such evidence is within the trial court's discretion as to whether it will assist the trier of fact. The trial court does not err in allowing a medical doctor whose primary practice involves adolescent and childhood gynecology to testify that, based on her examination of the child victim in the case, the child had been sexually abused. The doctor explained the specific physical factors which formed the basis of her opinion and was fully qualified to render such an opinion. Moreover, defendant had a chance to and did attempt to discredit the doctor's opinion on cross-examination. Psychologist's assistant allowed to testify with

[368] J. Meyers, THE ADVISOR, Vol.2, No.1 (1989), reprinted in NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE UPDATE Vol.2, No.7, (July 1989); State v. Thompson (Dec. 29, 1989), Montgomery No. CA-11262.

[369] State v. Davis, 64 Ohio App.3d 334 (12th Dist. 1989); State v. Shaffer, 12th Dist. Preble No. CA88-12-023, 1989 WL 157199 (Dec. 29, 1989).

reasonable psychological certainty of opinion child was sexually abused.[370]

(4) A trial court did not impermissibly allow lay witness opinion testimony by allowing a police officer to testify that he found no evidence of consent. Rather than rendering an opinion, the police officer's testimony recounted his evidence collection and therefore did not impermissibly elevate him to an expert on consent.[371]

3. Social Workers

a) Social Workers can testify based upon experience, training and knowledge of victim, as to whether or not victim had experienced child sexual abuse.

(1) Allowed:[372]

(A) Children services caseworker can testify that not unusual for lapse of time in reporting child abuse; determining that defense counsel never challenged witness's qualifications as expert.[373]

(B) Counselor at Human Services for 25 years presently obtaining certification as counselor allowed to testify as to "opinions" regarding abuse of 3 year-old to whom she showed anatomically correct dolls and from whom she took statements.[374]

(C) "In child abuse cases experts properly qualified might include a priest, a social worker or a teacher, any of whom might have specialized knowledge, experience

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[370] State v. Hunter, 2d Dist. Montgomery No. 11853, 1991 WL 19402 (Feb. 12, 1991).

[371] State v. Brown, 8th Dist. No. 98540, 2013-Ohio-1982.

[372] State v. Jackson, 1st Dist. Nos. C830331, 830343, 1984 WL 6853 (April 11, 1984); State v. Humfleet, 12th Dist. Clermont Nos. CA84-04-031, CA84-05-036, 1985 WL 7728 (Sept. 9, 1985).

[373] State v. Glover, 12th Dist. Clermont No. 85-12-106, 1988 WL 85899 (Aug. 15, 1988), *citing* State v. Garfield, 34 Ohio App.3d 300 (11th Dist. 1986).

[374] State v. Quimby, 7th Dist. Columbiana No. 86-C-7, 1987 WL 15612 (Aug. 13, 1987).

and training in recognizing occurrences of child abuse."[375]

(D) "Consistent with child abuse" - ok[376], but cf., allowing social worker to give opinion that the victim telling truth inadmissible.[377]

(E) Evid.R. 803(4) permits statements to social workers, not just physicians - good discussion of why social worker's testimony falls under Evid.R.803(4).[378]

(F) Proper for social worker to describe protocol and to testify about history taken from child, but not to testify about the findings of the medical examination.[379]

(G) Counselor of Juvenile Court can testify based on 22 "sessions" and training as to her opinion that victim was sexually abused.[380]

(H) Social worker allowed to testify as to credibility of juvenile victim not prejudicial.[381]

(I) Testimony of social worker that (1) children often recant when they are returned to their home environment and (2) if she knew then what she knew now she would not have returned child to home,

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[375] State v. Boston, 46 Ohio St.3d 108, 119 (1989).

[376] State v. Garrett, 12th Dist. Clermont No. CA89-08-070, 1990 WL 98222 (July 16, 1990).

[377] State v. Brown, 7th Dist. Columbiana No. 87-C-64, 1990 WL 167528 (Nov. 1, 1990).

[378] Presley v. Presley, 71 Ohio App.3d 34 (8th Dist. 1990), *citing* State v. Barnes, 12th Dist. Clermont No. CA84-05-041, 1985 WL 7980 (April 8, 1985).

[379] State v. Austin, 131 Ohio App.3d 329 (1st Dist. 1998).

[380] State v. Bugh, 7th Dist. Carroll No. 594, 1991 WL 38013 (Mar. 14, 1991), *citing* Boston, *supra*.

[381] State v. Buhrts, 5th Dist. Licking No. CA-3147, 1987 WL 7160 (Feb. 23, 1987); State v. Garfield, 34 Ohio App.3d 300 (11th Dist. 1986); *but cf.* State v. Cottrell, 8th Dist. No. 51576, 1987 WL 6799 (Feb. 19, 1987) (error, but harmless error).

upheld. Also where defense attorney asks questions on cross-examination of social worker that girls who are not molested could possibly pick up information from other girls, proper for State to ask on redirect that it is possible that a person could not make up story unless abused.[382]

(J) Testimony that social worker believed victim admissible because issue opened up by defense questioning regarding her statement to defendant that she always believes children.[383]

(K) Where no objection, opinion from supervisor of Children Services that child sexually abused apparently not plain error.[384]

(2) Disallowed: [385]

(A) "Our decision today should not be construed as setting any hard and fast guidelines for determining when a social worker is qualified to testify as an expert in the area."[386]

(B) Social worker who has never made diagnosis on rape trauma syndrome not an expert and not qualified to testify that victims suffer from rape trauma syndrome.[387]

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[382] State v. Holland, 9th Dist. Lorain No. 4193, 1987 WL 18680 (Oct. 14, 1987).

[383] State v. Netherland, 132 Ohio App.3d 252 (1st Dist. 1999).

[384] State v. Gotham, 11th Dist. Trumbull No.96-T-5485, 1997 WL 837550 (Dec.31, 1997).

[385] State v. Harris, 12th Dist. Clermont No. CA84-10-073, 1985 WL 8695 (June 17, 1985). *See also*, Palmer, OHIO EVIDENCE REVIEW, (Aug. 1984), at 831, criticizing rationale of Harris under Evid. R. 702. *See also* Harris, discussed in State v. Grewell, 5th Dist. Coshocton No. 87-CA-18, 1998 WL 59443 (June 1, 1988) as inconsistent with State v. Humfleet, 12th Dist. Clermont Nos. CA84-04-031, CA84-05-036, 1985 WL 7728 (Sept. 9, 1985).

[386] In re Reeder v. Reeder, 12th Dist. Madison Nos. CA84-10-034, CA85-03-009, 1986 WL 2179 (Feb. 18, 1986).

[387] State v. Whitman, 16 Ohio App.3d 246 (11th Dist. 1984); State v. Hurst, 10th Dist. No. 98AP-1549, 2000 WL 249110 (Mar. 7, 2000).

(C) Case manager's testimony regarding victim's veracity inadmissible.[388]

4. Other "Experts":

a) The trial court must be vested with a substantial degree of discretion in determining whether to permit expert testimony.[389]

b) Psychologists:

(1) School psychologist can testify that 19 year-old victim had IQ of 46 and mental age of 6, and that victim's ability to appraise nature of conduct was substantially impaired; i.e., not ultimate issue for trier of fact and not contra to Evid. Rule 704.[390]

(2) Psychologist's testimony as to credibility of identification testimony of witness inadmissible under Evid.R. 702 absent showing that eyewitness suffers from mental or physical impairment.[391]

(3) Fact that otherwise qualified psychologist was not licensed when took tests of children which he testified about goes to weight, not admissibility.[392]

(4) Pre-Boston court's refusal to allow defense psychologist to testify as to his opinion of whether victim's allegations were

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[388] State v. Edwards, 123 Ohio App.3d 43 (6th Dist. 1997).

[389] Weissenberger, OHIO EVIDENCE (1992), Section 702.3. *But cf.* Donald E. Murray, *Expert Testimony in Sexual Abuse Litigation*, 30 FOR THE DEFENSE 14 (1988), which contains discussions of holdings throughout the U.S. on scope of expert testifying in child sex abuse cases. *See also*, Hollida Wakefield & Ralph Underwager, ACCUSATION OF CHILD SEXUAL ABUSE 67-97 (1988), which critically examines the theories commonly accepted by "experts."

[390] State v. Bennett, 9th Dist. Lorain Nos. 4033, 4034, 1986 WL 13702 (Dec. 3, 1986).

[391] State v. Buell, 22 Ohio St.3d 124 (1986) (murder case).

[392] In re Webb, 64 Ohio App.3d 280 (1st Dist. 1989); State v. Adams, 4th Dist. Washington No. 90CA5, 1991 WL 42774 (Apr. 16, 1991).

reliable not abuse of discretion. Seems to indicate that, if error, harmless error, although admits court has wide discretion.[393]

(A) But cf., trial court erred in denying defense expert's testimony that interview used did not follow appropriate pediatric or psychological protocol which insure that child witnesses are not misled or caused to lie.[394]

(5) Defense psychologist may testify to appropriate protocol to interview child witness to support position that child not interviewed properly.[395]

(6) Defendant must state with particularity that there was a reasonable probability that a medical expert would aid his defense of that the denial of a medical expert would result in an unfair trial in order for an appellate court to overturn a conviction for rape.[396]

(7) Defense psychologist testimony that it was common for child victims of sexual abuse to delay disclosure of the abuse and that it was not common for anal penetration to result in permanent scars was admissible in prosecution for rape, gross sexual imposition, and felonious sexual penetration of children. Expert testimony that bolstered victims' credibility was permissible, and testimony could be believed or disbelieved by the finder of fact.[397]

c) Detectives and Police Officers:

(1) In post-conviction hearing, expert testimony that detective's investigation was improper, that children's memories may have been "created" and that mass hysteria could have spread easily through apartment complex admissible as it was

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[393] State v. Collins, 4th Dist. Lawrence No. 1763, 1986 WL 6044 (May 28, 1986).

[394] State v. Gersin, 76 Ohio St.3d 491, 1996-Ohio-114.

[395] State v. Wyckhouse, 3rd Dist. Henry No. 7-96-07, 1997 WL 282404 (May 21, 1997).

[396] State v. Simmons, 9th Dist. Summit No. 24218, 2009-Ohio-1495.

[397] State v. Kaufman, 7th Dist. Mahoning No. 08 MA 57, 2010-Ohio-1536.

relevant to claims that victim's testimony was perjured and that defense counsel was ineffective.[398]

(2) Police officer's opinion of guilt of defendant error, but in this case harmless error in light of overwhelming evidence.[399]

(A) But cf., police officer may testify as expert that in his experience working in a sex crime unit for 21 months it's not unusual for child to report crimes after a delay in time.[400]

(B) But detective not able to testify that 90% of child abusers were abused based on profile.[401]

(3) Police detective cannot testify as to belief in child's reliability.[402]

(4) Error to allow police officer to testify regarding experience in other cases with respect to children lying because this improperly bolsters child's credibility.[403]

(5) Error to allow a police detective to testify about kinesic interview conducted with victim because the science of kinesic interviewing has not established by the State based and the detective improperly testified regarding his conclusions about the victim's truthfulness.[404]

(6) Abuse of discretion to allow taped interview between police officer and defendant where officer opines that victim is credible.[405]

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[398] State v. Aldridge, 120 Ohio App.3d 122 (2d Dist. 1997).

[399] State v. Tucker, 10th Dist. Nos. 87AP-598, 87AP-600, 1988 WL 66251 (June 23, 1988).

[400] State v. Haynes, 8th Dist. No. 55538, 1989 WL 65662 (June 15, 1989).

[401] State v. McMillan, 69 Ohio App.3d 36 (9th Dist. 1990).

[402] State v. Whitt, 68 Ohio App.3d 752 (8th Dist.1991).

[403] State v. Coffman, 130 Ohio App.3d 467 (3rd Dist. 1998).

[404] In re K.S., 5th Dist. Fairfield No.13-CA-21, 2014-Ohio-188.

[405] State v. Rogers, 6th Dist. Erie No. E-93-20, 1994 WL 175003 (May 6, 1994).

d) Parents / Guardians:

(1) Mother allowed to testify as to credibility of child where credibility attacked per Evid.R. 608.[406]

(2) Trial court did not abuse its discretion in permitting mother to give lay witness opinion testimony that she noticed very radical changes in her three sons after defendant was arrested for forcibly raping them, where mother testified that all three boys lived with her, gave specific examples of what she had noticed about their emotional condition and personality, and her testimony was helpful to jury in determining credibility of victims' testimony that they had been raped by defendant.[407] However, permitting victim's mother to express her opinion that victim was being truthful in her accusation was not harmless beyond a reasonable doubt in prosecution for forcible rape of a child under 13 years of age; there was no significant medical or physical evidence to corroborate charged offense, and victim waited three years to tell any adult about the crime.[408]

(3) In THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEX ABUSE (1987), Dr. Richard Gardner proposed a "Sex Abuse Legitimacy Scale" to differentiate between bona fide and fabricated sex abuse allegations of children. The instrument includes a series of yes/no questions with points assigned to "yes" answers. Points are totaled for a score used to determine whether an allegation is genuine. Gardner acknowledges that he chose "to recommend a cut off point [score] at a level that might indeed exonerate bona fide perpetrators in order to protect innocents who might be falsely considered guilty." He did this because "it is better to let 100 guilty men go free than to convict one innocent man" and because "many perpetrators are so shaken and sobered by the investigations into their sexual activities that they 'cease and desist' from further molestation of children, even though exonerated." p.176. Despite the lack of any published research

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[406] State v. Nelson, 8th Dist. No. 54905, 1989 WL 4146 (Jan. 19, 1989).

[407] State v. Sibert, 98 Ohio App.3d 412 (4th Dist. 1994).

[408] State v. Kovac, 150 Ohio App.3d 676 (2d Dist. 2002).

to validate this system or Gardner's justifications, the "Scale" has been the subject of testimony proffered by accused child molesters on numerous occasions. According to Jon Conte, Ph.D., editor of the Journal of Interpersonal Violence and Violence Update, the SAL Scale is "probably the most unscientific piece of garbage I've seen in the field in all my time." (ABA Journal, December 1988).

5. Other Issues:

   a) DNA evidence may be relevant to assist trier of fact, rejecting Frye test.[409]

   b) False memory syndrome/recovered-repressed memory.[410]

   c) "Profilist" examining crime scene, reporting, and photographing cannot offer opinion that scene fell into patterns of criminal behavior that he had studied and that any sexual activity which occurred there was non-consensual.[411]

6. Psychological Exam of Victim/Witness:

   a) Prosecutor may intend to call child to testify; may allude to mental trauma of child.

   b) Defense Attorney's Response:

      (1) Defense attorney may move to have child examined by psychiatrist or psychologist and have the expert testify as to "stability" of witness, or to support incompetency of witness.

   c) Court Response:

      (1) No provision in the Revised Code authorizes the court to require a witness to undergo a psychiatric examination to

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[409] State v. Pierce, 64 Ohio St.3d 490, 1992-Ohio-53; Frye v. United States, 293 F. 1013 (D.C.Cir.1923).

[410] *See* Pamela Freyd, *False Memory Syndrome Phenomenon: Weighing the Evidence*, COURT REVIEW, Spring 1995; Wendy J. Murphy, *Debunking "False Memory" Myths in Sexual Abuse Cases*, TRIAL, Nov. 1997, at 54 (discussing the defensive use of Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993), 509 U.S. 579, 113 S.Ct. 2786).

[411] State v. Roquemore, 85 Ohio App.3d 448 (10th Dist. 1993).

determine competency to testify.[412] Crim.R. 16 does not authorize psychological examination of victim.[413]

(2) Requiring victims to undergo psychiatric examination violates the spirit of the rape shield statute, R.C. 2907.02(D) and is an abuse of discretion in most factual situations.[414]

(3) Motion for psychiatric examination does not require a hearing.[415]

(4) Denial of psychiatric examination to prove defendant's theory of "programming" not abuse of discretion.[416] The opinion of an experimental psychologist is not admissible regarding the credibility of a particular witness unless there is some special identifiable need for the testimony such as a physical or mental impairment which would affect the witness's ability to observe or recall details.[417] Where victim alleges she was

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[412] State v. Moreland, 50 Ohio St.3d 58 (1990); State v. Moyer, 8th Dist. No. 43748, 1982 WL 5207 (Mar. 4, 1982); State v. Kingsley, 12th Dist. Warren Nos. CA83-07-046, CA83-09-065, 1984 WL 3376 (June 29, 1984); In re Johnson, 61 Ohio App.3d 544 (8th Dist. 1989); State v. Bunch, 62 Ohio App.3d 801 (9th Dist. 1989); State v. Showalter, 5th Dist. Stark No. CA 9349, 1994 WL 115954 (Mar. 14, 1994); State v. Gersin, 11th Dist. Lake No. 93-L-025, 1994 WL 652622 (Nov. 10, 1994) (appealed to Supreme Court on other issues); State v. Ramirez, 98 Ohio App.3d 388 (3rd Dist. 1994)(psychological examination of victims not required before sentencing). Note however that on July 1, 1998, Evid. R. 616 was amended as follows:

> "(B) Sensory or mental defect
> A defect of capacity, ability, or opportunity to observe, remember or relate may be shown to impeach the witness either by examination of the witness or by extrinsic evidence."

[413] State v. Neiderhelman, 12th Dist. Clermont No. CA94-10-081, 1995 WL 550030 (Sept. 18, 1995).

[414] State v. Duff, 12th Dist. Warren No. CA84-02-013, 1984 WL 3679 (Dec. 31, 1984); State v. Stutts, 9th Dist. Lorain No. 90CA004879, 1991 WL 1964 (Jan. 2, 1991).

[415] State v. Tomlinson, 33 Ohio App.3d 278 (12th Dist. 1986); State v. Garrett, 8th Dist. No. 74759, 1999 WL 685648 (Sept. 2, 1999).

[416] State v. Johnson, 12th Dist. Clermont No. CA 85-12-105, 1986 WL 15289 (Dec. 31, 1986), *reversed on other grounds*, 36 Ohio St.3d 224 (1988).

[417] State v. Broom, 40 Ohio St.3d 277 (1988)(rape/murder of 12 year-old).

raped twice and had drug problem not enough to warrant psychiatric examination. Defendant must overcome the strong presumption of competency of adult witness and demonstrate compelling need for examination. If only purpose is to help jury determine credibility, would usurp jury's function.[418]

(5) Where mental condition of child victim/witness is essential element of crime [R.C.2907.03 sexual battery where defendant was alleged to know that the victim's ability to appraise the nature of his conduct was substantially impaired] the State may be barred from utilizing evidence of such mental condition obtained in clinical interview with witness unless witness voluntarily agrees to court appointed independent exam with results made available to State and defense.[419]

(6) Recommending that any female complainant, especially a girl who accuses her father of sexually abusing her, should be examined by a psychiatrist to determine her credibility.[420]

(7) For independent medical exam of victim, defendant must show good cause per Civ.R.35(A).[421]

(8) R. C. 2945.50 permits taking deposition of victim at discretion of court.[422]

(9) No error where court refuse to appoint defendant a psychological expert in order to evaluate whether the victim displayed symptoms of child abuse accommodation syndrome; such a request is an extraordinary order that should not be granted lightly; court must consider the danger

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[418] State v. Yockey, 9th Dist. Wayne No. 2257, 1987 WL 16914 (Sept. 9, 1987); State v. Craver, 2d Dist. Montgomery No. 11101, 1989 WL 43079 (Apr. 24, 1989); State v. Bunch, 62 Ohio App.3d 801 (9th Dist. 1989).

[419] State v. Zeh, 31 Ohio St.3d 99 (1987).

[420] 3A Wigmore, EVIDENCE, § 924a (Chadbourn rev. 1970); concurring opinion of Justices Brown, Moyer and Holmes in State v. Boston, 46 Ohio St.3d 108 (1989) at 130 - 131.

[421] State v. Craver, 2d Dist. Montgomery No. 11101, 1989 WL 43079 (Apr. 24, 1989); State v. White, 9th Dist. Lorain No. 96CA006501, 1997 WL 177678 (April 9, 1997).

[422] State v. Daniel, 97 Ohio App.3d 548 (10th Dist. 1994).

that defendants might request psychiatric evaluations solely to harass the victim and violate the spirit of the rape shield law; here, the prosecution's experts did not testify that the victim exhibited the symptoms of child abuse accommodation syndrome and the defendant could have shown the victim was fabricating her story by other means, such as cross-examination.[423]

7. Appointment of Defense Expert Witness:

a) Due process by the state, as guaranteed by the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution require an indigent criminal defendant be provided funds to obtain expert assistance at state expense only where the trial court finds, in the exercise of sound discretion, that defendant has made a particularized showing

(1) of a reasonable probability that the requested expert would aid in his defense, and;

(2) that denial of the requested expert assistance would result in an unfair trial.[424]

An indigent defendant who seeks state funded assistance bears the burden of establishing reasonable necessity for such assistance.[425]

b) Burden is upon defendant to show particularized need for expert assistance, i.e., for court to approve expert in indigent case.[426] Appointment of expert witness for indigent lies within discretion of

[423] State v. Garrett, 8th Dist. No. 74759, 1999 WL 685648 (Sept. 2, 1999).

[424] State v. Mason, 82 Ohio St.3d 144, 1998-Ohio-370; State v. Wright, 7th Dist. Columbiana No. 97 CO 35, 2001-Ohio-3423.

[425] State v. Gumm, 73 Ohio St.3d 413, 1995-Ohio-24; State v. Wright, *supra*.

[426] State v. Weeks, 64 Ohio App.3d 595 (12th Dist. 1989) (shaken baby syndrome); *see* Edward Monohan, *Obtaining Funds for Experts in Indigent Cases Ake v Oklahoma (470 U.S 68, 105 S.Ct. 1087 (1985))*, OHIO PUBLIC DEFENDER VINDICATOR, p.11 (1990).

court.[427] State v. Boston is not to be interpreted as requiring appointment of expert for defense.[428]

c) Examples:

(1) Not error to exclude expert witness for defendant who would testify that based on clinical tests defendant not a pedophile. Error waived where no objection to excluding penal plethysmograph test.[429]

(2) In criminal rape charge, where victim testifies child conceived as a result of rape, error for court to deny blood test per R. C. 2317.47.[430]

(3) Defendant not entitled to independent psychological and physical examination of alleged child victim even though state utilized psychologist and doctor to examine child and to render opinions on sexual abuse.[431]

(4) Denial of defendant's motion for permission to designate impartial person to conduct visual examination to determine whether defendant's penis had physical characteristics described by alleged victim of kidnapping and rape was abuse of discretion; possibility that what victim described as resembling surgical scar was sufficiently temporary to become indiscernible at time of trial was matter for consideration by jury.[432]

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[427] State v. Broom, 40 Ohio St.3d 277 (1988); State v. Prater, 3rd Dist. Marion No. 9-85-2, 1986 WL 7115 (June 19, 1986); State v. Sherman, 6th Dist. Sandusky No. S-88-6, 1989 WL 47238 (May 5, 1989) (concerning sexual dysfunctions of defendant); State v. McLaughlin, 55 Ohio App.3d 141 (6th Dist. 1988); State v. Perry, 6th Dist. Lucas No. L-90-260, 1991 WL 253902 (Sept. 13, 1991).

[428] State v. Murrell, 72 Ohio App.3d 668 (12th Dist. 1991); State v. Lacy, 12th Dist. Butler No. CA95-12-221 (Dec. 2, 1996).

[429] State v. Ambrosia, 67 Ohio App.3d 552 (6th Dist. 1990).

[430] State v. Hill, 59 Ohio App.3d 31 (1st Dist. 1989).

[431] State v. Wolfe, 81 Ohio App.3d 624 (11th Dist. 1992).

[432] State v. Minkner, 93 Ohio App.3d 127 (2d Dist. 1994).

d) "A request for a psychological examination of an alleged sex abuse victim, especially a minor, presents several critical considerations of its own. Judges must remain cognizant that such motions may be employed as a means of intimidating and harassing a prosecuting witness. Furthermore, evaluating the victim's credibility through expert testimony is clearly impermissible. Finally, both the letter and the spirit of Ohio's Rape Shield Law, R.C. 2907.02(D), present limits upon the scope of a permissible examination of a rape victim. Unless one of the specific exceptions is met, there can be no probe into past sexual activity or reputation since such evidence is statutorily deemed irrelevant.*** A psychological examination of an alleged sex abuse victim (again emphasizing that a minor is involved in this case) by the accused presents a number of intrinsic dangers and must be carefully controlled, if allowed at all."[433]

e) No error where trial court denied defendant's request for the state to provide him an expert where the defendant failed to show that a psychiatrist's testimony (concerning the proper techniques for interviewing abused children) would have aided his defense; also, there was no showing that the techniques actually used were contrary to proper protocol.[434] However, other courts have ruled such denial prejudicial error without such showing.[435]

f) Not abuse of discretion to deny request for state-paid medical expert where defendant failed to establish reasonable probability that expert would aid his defense or that lack of expert would result in unfair trial; also, state did not call any expert witnesses who were not also fact witnesses.[436]

g) Trial court erred when it denied Defendant's motion for an appointed expert to testify as to the proper protocol for interviewing child victims regarding their abuse.[437]

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[433] State v. Stutts, 9th Dist. Lorain No. 90CA004879, 1991 WL 1964 (Jan. 2, 1991) (citations omitted.)

[434] State v. Garrett, 8th Dist. No. 74759, 1999 WL 685648 (Sept. 2, 1999).

[435] State v. Barror, 6th Dist. Fulton No. F-96-033, 1997 WL 614983 (Sept. 30, 1997).

[436] State v. Lawrence, 9th Lorain No. 98CA007118, 1999 WL 1140881 (Dec. 1, 1999).

[437] State v. Wright, 7th Dist. Columbiana No. 96 CR 64, 2001-Ohio-3423.

h) Trial court abused its discretion in overruling defendant's motion for expert assistance as the failure to appoint an expert severely curtailed defendant's ability to contest State's expert's conclusion that the alleged victim would suffer severe emotional trauma if she were required to testify in defendant's presence.[438]

J. Victim's/Defendant's Sexual Activity (Rape Shield)

1. In General

a) Counsel seeks to adduce testimony of activity or opinion of victim's or defendant's sexual activity.

b) Opposing counsel urges 2907.02(E) & (F) (rape) or 2907.05(E) & (F) (gross sexual imposition):

"(E) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and 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.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under § 2945.59 of the Revised Code, and 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.

(F) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial."

[438] State v. Gotham, 11th Dist. Trumbull No. 96-T-5485, 1997 WL 837550 (Dec. 31, 1997).

c) Prevalence of non-material sexual activity in today's society renders such evidence useless as a predictor of human behavior.[439]

d) Trial court is within its discretion to determine the relevancy of evidence that a defendant seeks to enter in a rape prosecution and to determine the manner in which the rape shield law is to be applied.[440]

2. Specific issues regarding the in camera hearing of R.C. 2907.02(F) and 2907.05(F)

a) The Court is required to hold an in camera hearing at least three days before trial to address the admissibility of sexual activity evidence.[441] However, some courts have determined that this provision is not intended to be absolute.[442]

(1) Statutory exception: for good cause shown, the issue may be addressed and resolved at trial.[443]

(2) Waiver as exception: if a hearing is not requested, it is deemed waived.[444]

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[439] Abraham P. Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character For Chastity*, 63 CORNELL L. REV. 90 (1977), *but cf.* J. Wigmore, EVIDENCE IN TRIAL AT COMMON LAW (3d Ed. 1940), at 683 (warning of "evil of putting an innocent man's liberty at the mercy of an unscrupulous and revengeful mistress"); and cf. Morris Ploscowe, *Sex Offenses: The American Legal Context*, 25 L. CONTEMPT PROB. 217, at 223 (1960), prosecutors must be on guard for "spurned females filing unwarranted charges."

[440] State v. Ashcraft, 12th Dist. Butler No. CA97-11-217, 1998 WL 667657 (Sept. 28, 1998).

[441] *See*, e.g., State v. Acre, 6 Ohio St.3d 140 (1983).

[442] State v. Liddle, 9th Dist. Summit No. 23287, 2007-Ohio-1820; State v. Napier, 1st Dist. No. C980999, 1999 WL 1263929 (Dec. 30, 1999). ("It is clear that the three-days-before-trial requirement was not intended to be absolute, since the statute contemplates that 'for good cause shown' the hearing may be held even during trial.").

[443] *See id., see also* R.C. 2905.02(F) and 2905.07(F).

[444] *See* Acre, *supra*, at ¶ 4 of the syllabus, for the general proposition regarding waiver. *See also* State v. Montaz-Pagan, 11th Dist. Trumbull No. 91-T-4635, 1994 WL 321598 (June 30, 1994); State v. Fritsch, 1st Dist. No. C-850746, 1986 WL 13162 (Nov. 19, 1986); and State v. Kearns, 7th Dist. Mahoning No. 90 CA 123, 1992 WL 52535 (Mar. 17, 1992).

b) The purpose of the in camera hearing is "to insure an in camera hearing before presentation of any evidence of sexual activity takes place, as opposed to a mere discussion at the bench."[445] A side bench discussion does not fulfill the law's requirements.[446]

c) The statute specifies that the hearing be held in the judge's chambers.[447]

(1) The rationale behind this requirement is privacy, given the nature of the proposed evidence.

(2) The requirement that the hearing be held in chambers may be waived.[448]

d) The statute does not specify that the actual evidence to be adduced at trial be presented during the hearing.[449] The person to provide the testimony need not be present.[450]

(1) However, the court must review the testimony of all witnesses planning to testify to the sexual activities of the defendant or victim during the hearing.[451] Failure to do so is error, although it may be non-prejudicial where the unreviewed evidence is merely corroborative or cumulative.[452]

e) During the hearing, the court must determine whether the proffered evidence fits an enumerated exception to the general ban on sexual activity evidence.

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[445] Acre, *supra,* at 143.

[446] Id. at ¶ 3 of the syllabus; *see also* State v. Cotton, 113 Ohio App.3d 125, 680 N.E.2d 657 (1st Dist. 1996).

[447] R.C. 2907.02(F) and 2907.05(F).

[448] State v. Fletcher, 5th Dist. Licking No. CA 2720, 1981 WL 6343 (June 26, 1981).

[449] *See* R.C. 2907.02(F) and 2907.05(F).

[450] *See* Fletcher, *supra*; State v. Ditzler, 9th Dist. Lorain No. 00CA007604, 2001 WL 298233 (Mar. 28, 2001).

[451] Acre. at ¶ 2 of the syllabus.

[452] Id.

(1) Generally, evidence regarding specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity is inadmissible.[453]

(2) However, such evidence may be admissible if:

(A) It involves evidence of the origin of semen, pregnancy, or disease;[454]

(B) It involves evidence of the defendant's past sexual activity with the victim;[455] or

(C) The evidence is admissible against the defendant under R.C. 2945.59.[456]

(3) If the proffered evidence fits one of these exceptions, its admissibility remains conditioned upon:

(A) Its materiality to a fact at issue in the case,[457] and;

(B) Its analysis under Evid.R. 403.[458]

f) Court's Response:

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[453] *See* R.C. 2907.02(E) and 2907.05(E).

[454] Id.

[455] Id. Note that—at least where offered by the defendant—the Ohio Supreme Court has held that the prior sexual activity between the victim and defendant is not a material issue of fact unless the defense of consent is raised. *See* State v. Yenser, 176 Ohio App. 3d 1, 2008-Ohio-1145 (3rd Dist.), *citing* State v. Graham, 58 Ohio St.2d 350, 390 N.E.2d 805 (1979).

[456] Id.

[457] Id.

[458] Id. However, note that unlike Evid.R. 403, the statutes do not require that the prejudicial effect of the evidence "*substantially* outweigh" its probative value. Do the statutes provide a lesser standard for exclusion?

(1) Victim had previously testified on preliminary matter that she had sexual intercourse with third party no earlier than ten days before alleged rape. Trial court disallowed defense witness's testimony that victim had sexual intercourse with third party two days before alleged rape. In weighing victim's sexual privacy against appellant's right to confront his accusers, the court stated at 165: "Further, the key fact at issue at trial was whether the victim consented to sexual activity with appellee, not whether she had sexual intercourse two or ten days earlier. Hence, we hold that R. C. 2907.02(D) will render inadmissible evidence of the rape victim's activity with one other than the accused where the evidence: does not involve the semen, pregnancy, or disease, or the victim's past sexual activity with the offender; is offered simply to impeach the credibility of the victim; and is not material to a fact at issue in the case."[459]

(A) But cf, doctor examined rape victim and testified that victim had lacerations on vagina. Attempts to introduce evidence of prior sexual experience with two men not permitted by the trial court and upheld by appellate court. The appellate court, however, stated that evidence of victim's prior sexual activity may be admissible not only if it falls within the four stated exceptions, but that there may be other exceptions available. [460] Where state's witness testified that dilation of hymen was evidence of sexual abuse, the defendant should have been allowed to present evidence of child victim's sexual encounter with third persons; failure was harmless error however, since defendant was able to show through other evidence that victim had been sexually abused by father. [461] Defense can introduce prior sexual activity of child

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[459] State v. Ferguson, 5 Ohio St.3d 160 (1983)(adult rape); State v. Beatty (Dec. 1, 1988), 8th Dist. No. 54431, 1988 WL 128247; State v. Roberson, 1st Dist. No. C-870148, 1988 WL 14040 (Feb. 10, 1988); Edward Kraus, *Admissibility of Evidence Under Rape Shield Laws*, CRIMINAL LAW JOURNAL OF OHIO, Vol. 4, Issue 2 (Feb. 1992).

[460] State v. Whisonant, 11th Dist. Trumbull No. 3596 (no WL citation) (Sept. 12, 1986); Barbara Child, *Ohio's New Rape Law; Does It Protect Complainant At The Expense of The Rights of The Accused*, (1975), 9 AKRON L. REV. 337.

[461] State v. Pulley, 9th Dist. Lorain No. 92CA005418, 1993 WL 20989 (Jan. 27, 1993).

victim to explain behavior described by expert witness as indicative of sexual abuse.[462]

(2) State was not permitted to introduce evidence of defendant's homosexuality to show that he acted in conformity therewith in the raping of two mentally handicapped men.[463]

g) Confrontation Clause:

(1) Rape Shield not violative of right to confrontation where testimony is not relevant other than to discredit witness.[464]

(A) Cf., shield law denying right to cross-exam witness about his status as probationer violative of confrontation where court would not permit accused to show witness's testimony.[465]

(B) Court's refusal to permit cross-examination of victim in regard to cohabitation with boyfriend (under Kentucky Rape Shield) violates Sixth Amendment confrontation clause where consent in issue and defense theory is that victim concocted story of rape to allay boyfriend's suspicions in seeing victim and alleged defendant leave bar together.[466]

(C) But cf., Michigan's rape shield statute generally prohibits a criminal defendant from introducing at trial evidence of an alleged rape victim's past sexual conduct. However, a statutory exception permits a defendant to introduce evidence of his own past sexual conduct with the victim, provided that he files a written motion and an offer of proof within 10 days after he is arraigned, whereupon the trial court may hold an in camera hearing to determine whether the proposed evidence is admissible. Because respondent Lucas

[462] State v. Ungerer, 5th Dist. Ashland No. 95COA1125, 1996 WL 362804 (June 5, 1996); In the Matter of Michael, 119 Ohio App.3d 112 (2d Dist. 1997).

[463] State v. Swartsell, 12th Dist. Butler No. CA2002-06-151, 2003-Ohio-4450.

[464] State v. Gardner, 59 Ohio St.2d 14 (1979); In re Michael, 119 Ohio App.3d 112 (2d Dist. 1997); State v. Hart, 112 Ohio App.3d 327 (12th Dist. 1996).

[465] Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974).

[466] Olden v. Kentucky, 488 U.S. 227, 109 S.Ct. 480 (1988).

failed to give the statutorily required notice and, therefore, no admissibility hearing was held, a state court refused to let him introduce, at his bench trial on charges of criminal sexual assault, evidence of prior sexual relationship with the victim, his ex-girlfriend. He was convicted and sentenced to prison, but the State Court of Appeals reversed, adopting a *per se* rule that the statutory notice and hearing requirement violates the Sixth Amendment in all cases where it is used to preclude evidence of a past sexual relationship between a rape victim and a criminal defendant. The U.S. Supreme Court held: (1) assuming, *arguendo*, that the Michigan rape shield statute authorizes preclusion of the evidence as a remedy for a defendant's failure to comply with the notice and hearing requirement, the State Court of Appeals erred in adopting a *per se* rule that such preclusion is unconstitutional in all cases. The Sixth Amendment is not so rigid. The notice and hearing requirement serves legitimate state interests: protecting rape victims against surprise, harassment, and unnecessary invasions of privacy and protecting against surprise to the prosecution. This Court's decisions demonstrate that such interest may justify even the severe sanction of preclusion in an appropriate case.[467] A trial court's refusal to allow defense counsel to examine an eight year-old victim about her alleged admission to sexual relations with some unidentified boys, which does not hinder the ability of the defense to establish an alternative cause for the victim's physical condition, will be affirmed.[468]

h) Relevancy of Certain Material:

(1) Past sexual acts with victim not relevant to issue of alibi.[469]

(2) Hospital records that victim was on birth control pills not relevant.[470]

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[467] Michigan v. Lucas, 500 U.S. 145, 111 S.Ct. 1743 (1991).

[468] State v. Pulley, 9th Dist. Lorain No. 92CA005418, 1993 WL 20989 (Jan. 27, 1993).

[469] State v. Graham, 58 Ohio St.2d 350 (1979).

[470] State v. Robinson, 9th Dist. Summit No. 14821, 1991 WL 95256 (May 29, 1991).

(3) Evidence that defendant married fourteen year-old and conceived a child with her, violation of rape shield.[471]

(4) Evidence of defendant's "problem" with masturbation not admissible under rape shield.[472]

(5) Testimony regarding defendant's sexual relations with another stepdaughter inadmissible.[473]

(6) Not error to prevent testimony that victim thought she was pregnant prior to rape and therefore could not have been a virgin; no bearing on material fact that the victim had sexual intercourse with someone the night of the alleged rape.[474] Even if defendant were to show victim had prior consensual sex, it would not demonstrate that defendant's actions in this case were in any way welcome.[475]

(7) R.C. 2907.05(D) not intended to set forth criteria for joinder of cases; Crim.R. 8 (A) controls.[476]

3. Issues of Origin of Semen:

a) Where State presents evidence of semen in victim's vagina per hospital vaginal swab, the court's ruling excluding testimony of victim's boyfriend #2 that within twenty-four hours of attempted rape by boyfriend #1, boyfriend #2 had intercourse with the victim and that victim confided the she had recent intercourse with boyfriend #3, was error. The trial court had determined that the in camera disputed testimony of boyfriend #2 was not credible. The appellate court ruled that the sole purpose of the evidence was not to impeach but also to produce evidence of semen. There was no evidence of the age of the semen found in the victim as there was in State v. Ferguson, 5 Ohio

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[471] State v. Hurst, 12th Dist. Clermont No. CA91-08-064, 1992 WL 176470 (July 27, 1992).

[472] State v. Clemons, 94 Ohio App.3d 701 (12th Dist. 1994).

[473] State v. Price, 80 Ohio App.3d 35 (3rd Dist. 1992).

[474] State v. Oyler, 6th Dist. Lucas No. L-87-003, 1987 WL 27583 (Dec. 11, 1987).

[475] State v. Jenkins, 6th Dist. Erie App. E-97-057 (May 11, 2001).

[476] State v. Alderman, 4th Dist. Athens No. CA 1433, 1990 WL 253034 (Dec. 11, 1990).

St.3d 160 (1983), thus Ferguson was distinguished.[477] When state offers evidence in child rape case of semen stained underwear of victim and defendant, error for court to deny evidence of victim's and defendant's temporally proximate prior sexual activity to explain origin of semen on underwear. This evidence more than mere collateral impeachment.[478]

b) Evidence that semen found on victim's underwear came from someone other than rape defendant was inadmissible under Rape Shield Statute, even though victim denied having sex with anyone other than defendant at time of rape; there was no evidence of origin of semen in question, there was no fact at issue relative to semen in question, and proffered evidence was to be presented simply to impeach credibility of victim.[479] Where the defense is alibi, evidence in the State's case in chief of a non-conclusive vaginal smear does not open the door to sexual activity of the victim under the origin of semen exception.[480] Questions regarding sex with another not relevant where defense is consent.[481] Where victim refused medical examination no issue of origin of semen created; there must be semen available for comparison.[482]

4. Victim's Activity with Offender:

a) Inadmissible

(1) Evidence that 15 year-old sat on defendant stepfather's lap and hugged him properly excluded where issue is consent since this is "common form of affection."[483]

(2) Defendant wanted to introduce "sex diary" of his victim/daughter's to show that his name was not in it with the names of other sexual partners, therefore relevant to show

[477] State v. Smith, 34 Ohio App.3d 180 (5th Dist. 1986).

[478] State v. Brewster, 10th Dist. No. 88-AP-974, 1990 WL 56919 (May 1, 1990).

[479] State v. Trummer, 114 Ohio App.3d 456 (7th Dist. 1996).

[480] State v. Wright, 5th Dist. Stark No. CA-6877, 1986 WL 10309 (Sept. 15, 1986).

[481] State v. Alvis, 4th Dist. Athens No. 1380, 1988 WL 85098 (July 28, 1988).

[482] State v. Huntley, 10th Dist. No. 88AP-502, 1988 WL 142111 (Dec. 27, 1988).

[483] State v. Zemerick, 8th Dist. Nos. 51607, 51705, 1987 WL 10615 (Apr. 30, 1987).

daughter falsified charge against him; also show motive of false accusation because defendant discovered diary. The trial court denied admission and was affirmed by the Court of Appeals. Here oral testimony that father's name was not in diary because victim took them out. Court admits it would be relevant, but denies error (cumulative evidence?).[484]

(3) Acts of prior anal non-consensual sex between defendant and victim 4 years prior to charge of anal rape not temporally relevant and should have been excluded.[485]

b) Admissible

(1) Victim's testimony regarding other sexual encounters with the defendant admissible, and the lack of hearing on materiality or prejudice was not error where defendant used victim's testimony and did not request hearing.[486]

5. Issues of Disease:

a) Testimony that victim had herpes not permitted by trial court and upheld by majority of appellate court which stated: "We have grave doubts about the aptness here of 2907.02 (D)." The court's decision was based upon the fact that the record failed to show why the information could reasonably be held to be substantive evidence about whether the victim had herpes and if so what were its contagious potentialities or propensities. Apparently insufficient expert testimony existed on the record to show that the fact that the victim had herpes would create a probability that anyone who had intercourse would contract the herpes, or to put it another way, assuming defendant had no herpes that would not necessarily establish the probability that he did not have intercourse with the victim based upon the evidence before the trial court. See the strong dissent of Judge Black.[487] Herpes of victim not relevant.[488]

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[484] State v. Lumadue, 5th Dist. Richland No. CA-2449, 1987 WL 14042 (July 6, 1987).

[485] State v. Lewis, 66 Ohio App.3d 37 (2d Dist. 1990).

[486] State v. Netherland, 132 Ohio App.3d 252 (1st Dist. 1999).

[487] State v. Coleman, 1st Dist. No. C-820067, 1982 WL 9259 (Dec. 22, 1982).

[488] State v. Shipley, 5th Dist. Stark No. CA-8062, 1990 WL 187075 (Nov. 26, 1990).

b) Where defense fails to establish foundation that origin of victim's vaginal mutilations is from disease, evidence of such not admissible under this exception to rape shield.[489]

c) Probative Value

(1) Evidence the victim had STD and defendant did not is excluded under rape shield. Little probative value because disease could have been cured between period of alleged offense and exam - also disease could have been contracted non-sexually.[490]

(2) Evidence the victim had Gonorrhea (and the argument that defendant did not contract it, therefore no rape) properly excluded because probative value (80% chance of not getting infected with intercourse) outweighed by prejudice.[491]

(3) Probative value that victim has Chlamydia not great, where one incident of penetration and defendant wore condom.[492]

d) Where defendant produces no evidence that asymmetry of the hymen and/or a notch on the hymen may be the result of a disease, there is no reversible error if the trial judge disallows the facts at trial.[493]

e) Evidence that victim had venereal disease which she transmitted to defendant not relevant to issue of consent.[494] Evidence that victim was on medication for treatment of herpes refers to sexual activity under 2907.02(D) and not relevant to show consent.[495]

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[489] State v. Pierson, 9th Dist. Lorain No. 4197, 1987 WL 16991 (Sept. 16, 1987).

[490] State v. Garrett, 12th Dist. Clermont No. CA89-08-070, 1990 WL 98222 (July 16, 1990).

[491] State v. Ridgeway, 66 Ohio App.3d 270 (8th Dist. 1990), *citing* State v. Logan, 9th Dist. Summit No. 11203, 1983 WL 3912 (Nov. 9, 1983).

[492] State v. Sharier, 9th Dist. Summit No. No. 14795, 1991 WL 65125 (Apr. 24, 1991).

[493] State v. Ashcraft, 12th Dist. Butler No. CA97-11-217, 1998 WL 667657 (Sept. 28, 1998).

[494] State v. Clemons, 3rd Dist. Allen No.1-85-9, 1987 WL 5575 (Jan. 20, 1987).

[495] State v. Leslie, 14 Ohio App.3d 343 (2d Dist. 1984).

6. Pregnancy Exception:[496]

   a) Out of wedlock pregnancy with third party not relevant.[497]

7. Issues of Consent:

   a) Where contested issue is consent which directly relates to crime of rape the application of rape shield violates Sixth Amendment right of confrontation.[498]

   b) Where issue is consent, "mere rumors" are not reputation evidence, therefore not error to exclude testimony from witnesses who had been told by third parties that victim was prostitute.[499]

   c) Whether or not victim was a lesbian not relevant to issue of consent in rape by a male defendant.[500]

   d) Testimony of unique living arrangements and prior sexual activity with third party was not relevant to issue of consent to sex with defendant and did not relate to past sexual activity with defendant.[501]

8. Issues of Prior False Accusation by Victim/Motive of Victim:

   a) Procedure

      (1) Where an alleged rape victim admits on cross-examination that she has made a prior false rape accusation, the trial judge shall conduct an in camera hearing to ascertain whether sexual activity was involved and, as a result, cross-

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[496] *See* State v. Haney, 10th Dist. No. 87AP-561, 1987 WL 26308 (Dec. 3, 1987); State v. Oyler, 6th Dist. Lucas No. L-87-003, 1987 WL 27583 (Dec. 11, 1987).

[497] State v. Ingle, 8th Dist. No. 54483, 1989 WL 43396 (Apr. 20, 1989).

[498] State v. Williams, 16 Ohio App.3d 484 (1st Dist. 1984) and 21 Ohio St.3d 33(1986).

[499] State v. Collins, 12th Dist. Butler Nos. CA 86-04-048, CA 86-04-058, 1987 WL 14579 (July 27, 1987).

[500] State v. Cruz, 6th Wood No. WD-86-72, 1987 WL 17116 (Sept. 18, 1987).

[501] State v. Core, 2d Dist. Montgomery No. 9976, 1987 WL 12968 (June 17, 1987).

examination on the accusation would be prohibited by R.C. 2907.01(D), or whether the accusation was totally unfounded and therefore could be inquired into pursuant to Evid.R. 608(B). When the defense seeks to cross-examine on prior false accusations of rape, the burden is upon the defense to demonstrate that the accusations were totally false and unfounded. Hence the initial inquiry must be whether the accusations were actually made. Moreover, the trial court must also be satisfied that the prior allegations of sexual misconduct were actually false or fabricated, i.e., the trial court must ascertain whether any sexual activity took place, (an actual rape or consensual sex). If it is established that either type of activity took place, the rape shield statute prohibits any further inquiry into this area. Only if it is determined that the prior accusations were false because no sexual activity took place would the rape shield law not bar further cross- examination.[502] Court cannot rely on the mere denial of victim of prior accusation, but must allow (1) cross-examination and (2) extrinsic evidence in the in camera hearing.[503] Where evidence indicates that prior accusations against third parties were true, evidence excluded.[504] Rule 608(B) applies: only victim may be cross-examined regarding false accusations and no extrinsic evidence is permitted.[505]

b) Admissible

(1) Victim's prior unsubstantiated allegations of sexual abuse did not constitute sexual activity of victim for purposes of rape-shield doctrine and therefore was admissible.[506]

(2) Prior false accusations against third parties are admissible because goes to credibility, not conduct.[507]

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[502] State v. Boggs, 63 Ohio St.3d 418 (1992).

[503] State v. Boggs, 89 Ohio App.3d 206 (4th Dist. 1993) (on remand).

[504] State v. Burton, 12th Dist. Clermont No. CA92-05-053, 1992 WL 341283 (Nov. 23, 1992), *citing* Boggs; *see* however, the two concurring opinions which do not agree with the rape shield analysis but affirm on grounds of harmless error.

[505] State v. Netherland, 132 Ohio App.3d 252 (1st Dist. 1999).

[506] State v. Black, 85 Ohio App.3d 771 (1st Dist. 1993).

[507] State v. Chaney, 169 Ohio App.3d 246, 2006-Ohio-5288, *citing* Boggs, *supra*.

(3) Victim's "involvement" with third party who was disliked by parents and prohibited from seeing also relevant to show motive for a rape charge and origin of semen.[508]

(4) False accusations against other men goes to credibility, not sexual activity, but judge should first be satisfied that the prior accusations were, in fact, false.[509]

(5) Error for court not to permit defendant to show pattern of false accusations by retarded ten year-old girl against defendant in past. Facts show a prior false report two years previous and one seven days subsequent to the alleged rape. The court held that this was not a rape shield issue but fell under Evidence Rule 608; specific instances of conduct which were clearly probative of truthfulness and not extrinsic because it went to the bias of the witness.[510]

(6) Evidence of who else had had sexual relation with victim relevant, more than impeachment and outweighed interest of State because: 1) near time of alleged rape; 2) victim had stated to witness she thought she was pregnant by defendant; 3) showed why she waited so long to tell her mother; and 4) had bearing on motive, why she singled out defendant.[511]

(7) Motive of victim is subject to cross-examination.[512]

c) Inadmissible

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[508] State v. Besco, 4th Dist. Lawrence No. 1585, 1983 WL 3237 (July 29, 1983); *see also* State v. Dean, 8th Dist. No. 53068, 1987 WL 25717 (Dec. 3, 1987), *agreeing with* Besco but requiring trial court to make determination whether prior rape charges were fabricated first.

[509] State v. McMeans, 10th Dist. No. 89AP-1037, 1990 WL 122571 (Aug. 23, 1990).

[510] State v. Bailey, 5th Dist. Stark No. 7410, 1988 WL 59529 (May 31, 1988).

[511] State v. Haney, 10th Dist. No. 87AP-561, 1987 WL 26308 (Dec. 3, 1987).

[512] Olden v. Kentucky, 488 U.S. 227, 109 S.Ct. 480 (1988).

(1) Alleged fabricated charges against third party barred by rape shield where offered solely to impeach credibility and not material to case.[513]

(2) Proper to limit cross-examination of victim regarding evidence relative to a prior rape charge against defendant involving the same victim; defendant merely wanted to impeach victim with evidence.[514]

(3) Report of prior accusation not covered by rape shield because not "sexual activity" but excluded on issue of materiality.[515]

(4) Evid.R.608 does not permit extrinsic evidence of other accusations against third parties; even if entire case turns on child's credibility, it is not an element of the crime.[516]

(5) No violation of 6th Amendment where court denies defense's attempt to cross-examine victim about alleged confrontation between defendant and victim concerning his distress about her sexual behavior to show her motivation and bias against him.[517]

(6) Previous rape charges filed against third persons which resulted in convictions were correctly disallowed; the court found that defendant failed to request a hearing under subsection (E), and because the previous accusations resulted in convictions they were not false, and therefore not probative

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[513] State v. Miller, 63 Ohio App.3d 479 (12th Dist. 1989); State v. Guthrie, 86 Ohio App.3d 465 (12th Dist. 1993); State v. Hurt, 3rd Dist. Hancock No. 5-87-24, 1989 WL 22049 (Mar. 16, 1989).

[514] State v. Banks, 117 Ohio App.3d 592 (7th Dist. 1997).

[515] State v. Burkhart, 12th Dist. Clermont No. CA90-04-040, 1991 WL 57104 (April 15, 1991), *citing* State v. Besco, *supra,* and State v. Watson, 10th Dist. No. 80AP-880, 1981 WL 3435 (Aug. 27, 1981).

[516] State v. Lemmon, 9th Dist. Wayne No. 2531, 1990 WL 72357 (May 23, 1990), *citing* State v. Strobel, 51 Ohio App.3d 31, 35 (3rd Dist. 1988) (court also indicated that counsel must first ask the predicate question of witness about her previous accusations against third parties).

[517] State v. Pennington, 10th Dist. No. 91AP-13, 1991 WL 476699 (July 30, 1991) (good discussion of rape shield).

to impeaching victim, but rather enhanced victim's credibility.[518]

(7) Evidence of prior accusation by victim against third party correctly excluded when third party confessed.[519]

(8) Victim's past history of falsely accusing defendant of infecting her with herpes is collateral to whether or not defendant raped victim. Even if true, the evidence was not sufficiently probative of a history of false sexual charges to outweigh the State's legitimate interest in excluding the testimony. Further, the evidence that the victim had this disease would unnecessarily inflame and prejudice the jury by drawing the attention away from the central issue, i.e., the rape. (The court also held that allowing defendant's statement to police that he had no reticence in having sexual relations during menses was not prejudicial error, since issue not consent but whether intercourse took place).[520]

(9) Conversation between mother and daughter/victim concerning her virginity excluded, although defendant contended would show fabrication, was not clear how.[521]

(10) "Although R.C. 2907.02(D) precludes the admissibility of evidence regarding any prior sexual activity with anyone other than the accused, any cross-examination beyond this scope of preclusion may be permitted"; however, failure to allow defense to cross-examine victim on her past occasion of filing false charge on her third party boyfriend after argument not abuse of discretion nor violative of confrontation right.[522]

(11) Issue of fabrication not covered by rape shield, but defendant failed to preserve error.[523]

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[518] State v. Webb, 3rd Dist. Allen No. 1-85-47, 1987 WL 32135 (Dec. 30, 1987).

[519] State v. Pierce, 9th Dist. Summit No. 17684, 1997 WL 72098 (Feb. 12, 1997).

[520] State v. Holcomb, 9th Dist. Summit No. 10941, 1983 WL 4079 (April 27, 1983).

[521] State v. Hatfield, 3rd Dist. Henry No. 7-86-13, 1988 WL 139118 (Dec. 20, 1988).

[522] State v. Tucker, 10th Dist. Nos. 87AP-598, 87AP-600, 1988 WL 66251 (June 23, 1988).

[523] State v. Reeves, 1st Dist. No. C-900062, 1990 WL 210853 (Dec. 26, 1990).

(12) Evidence that stepson victims had engaged in a previous incident of homosexual activity with each other and that the defendant severely punished them for it as motive for victim to make complaint against defendant precluded.[524]

(13) Evidence of "victim's" having made similar sexual abuse allegations against her half-sister's father were not admissible because defendant did not prove that the girl's allegations were clearly false.[525]

(14) Court refused to allow the inquiry of whether the victim's sexual contact with the father of her second child was consensual. Whether the victim consented to sexual relations with another person at another time had no relevant to the question whether the victim consented to sexual relations with appellant.[526]

(15) Trial court properly precluded evidence of defendant's alleged abuse of victims in two different states because defendant did not cross-examine the victims about those allegations but instead tried to question their mother about the allegations, which was improper under Evid.R. 613.[527]

9. Issues of Knowledge of Victim/Witness:

a) Where court prohibited questions regarding prior rape without prior sidebar when victim's knowledge of sexual practices was an issue, ruling was not error where defense counsel failed to request sidebar or cross-examine on this issue. (Waiver?) [528]

b) Admissible

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[524] State v. Hart, 112 Ohio App.3d 327 (12th Dist. 1996).

[525] State v. Garrett, 8th Dist. No. 74759, 1999 WL 685648 (Sept. 2, 1999).

[526] State v. Foster, 8th Dist. No. 90870, 2009-Ohio-31.

[527] State v. Setty, 12th Dist. Clermont Nos. CA2013-06-049, CA2013-06-050, 2014-Ohio-2340.

[528] State v. Dinwiddie, 9th Dist. Summit No. 12876, 1987 WL 16994 (Sept. 16, 1987).

(1) Cross-examination of defendant's girlfriend as to her sleeping with defendant on night of alleged rape of third party not error where it was foundation for question as to whether or not girlfriend saw scratches on neck of defendant corroborating victim's testimony that she scratched defendant.[529]

c) Inadmissible

(1) Where defense was that victim performed fellatio on defendant while defendant was asleep, evidence of six year-old victim's prior sexual activity showing that she had undressed a five year-old boy to "teach him about sex," that she would follow adults into the bathroom to satisfy curiosity, and permitted a neighborhood dog to explore her genitals was properly excluded because the prejudice outweighed any probative value under 2907.02(D).[530]

(2) Where victim's knowledge of sexual matters adequately explored on cross-examination, prior sexual acts of victim would serve only to impeach, and not error to exclude.[531]

(3) Evidence of 9 year-old victim's prior sexual activity four years prior to explain victim's unusually detailed knowledge of male sex organs denied as too remote in time and too tenuous (with 5 year-old boy) to be probative. Victim testified got her knowledge from watching "Divorce Court."[532]

(4) On direct for sexual battery, victim testifies couldn't tell if defendant's penis erect: defense can't produce letters after act by victim bragging about oral sex with third person - not relevant.[533]

(5) Not error for trial court to disallow evidence of prior unsubstantiated allegations of sexual abuse brought by victim against her father. Evidence was offered for the limited purpose of establishing alternate source of knowledge of

[529] State v. Green, 5th Dist. Delaware No. 85-CA-7, 1986 WL 799 (Jan. 3, 1986).

[530] State v. Toda, 6th Dist. Wood No. WD-86-69, 1987 WL 16513 (Sept. 4, 1987).
[531] State v. Hendricks, 10th Dist. No. 85AP-1066, 1987 WL 16795 (Sept. 8, 1987).

[532] State v. Frazier, 12th Dist. Butler No. 88-04-051, 1989 WL 8474 (Feb. 6, 1989).

[533] State v. Rooker, 4th Dist. Pike No. 483, 1993 WL 120580 (Apr. 15, 1993).

sexual function or possible ulterior motive for bringing charge, but the court found the evidence immaterial.[534]

(6) While the argument could be made that the victim's prior sexual activities would tend to show knowledge sufficient to fabricate a story, the court would not allow victim's credibility to be attacked pursuant to R. C. 2907.02(D) or Evid.R. 608.[535]

(7) Defendant sought to introduce evidence that the three victims had been sexually abused by another in order to establish an alternative explanation for the children's sexual knowledge. The court ruled that such evidence was not material to a fact at issue.[536]

(8) Where defendant sought to show victim's enhanced sexual awareness could have resulted from an earlier assault, evidence was inadmissible since it was not being offered to show origin of semen, pregnancy, or disease.[537]

(9) Application of rape shield not error even though evidence that victim had been abused in past essential to defense; application did not prevent evidence in record from establishing an alternate explanation for victim's enhanced sexual knowledge.[538]

(10) Evidence that victim sexually active inadmissible to show she learned the details of sexual experience elsewhere and was lying about abuse.[539]

(11) Rape shield barred introduction of evidence in medical exhibit that victim had "never had sex before except with her brother when she was younger" because this information did not

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[534] State v. Miller, 63 Ohio App.3d 479 (12th Dist. 1989).

[535] State v. Clark, 4th Dist. Pike No. 408, 1988 WL 50506 (May 17, 1988).

[536] State v. Guthrie, 86 Ohio App.3d 465 (12th Dist. 1993), *citing* State v. Miller, 63 Ohio App.3d 479 (12th Dist. 1989).

[537] State v. Smelcer, 89 Ohio App.3d 115 (8th Dist. 1993), *contra* State v. Ungerer, 5th Dist. Ashland No. 95COA1125, 1996 WL 362804 (June 5, 1996).

[538] In re Michael, 119 Ohio App.3d 112 (2d Dist. 1997).

[539] State v. Freistuhler, 3rd Dist. Shelby No. 17-97-19, 1998 WL 229782 (Apr. 3, 1998).

relate to the origin of semen, pregnancy, disease, victim's past sexual activity with defendant or prior false accusations of rape; nor did victim's mother open the door to such evidence by testifying in general about her daughter's grasp of the concept of sex where she did not testify that her daughter had never had sex or had no knowledge of what would constitute sex.[540]

(12) Evidence inadmissible of prior sexual abuse to prove child-victim's sexual knowledge came from elsewhere when child did not remember other incident and mother was not aware of other individual touching her daughter in her vaginal area.[541]

(13) Evidence of two minor victims' prior sexual abuse was not admitted to show that the victims' sexual knowledge came from a source other than the defendant. The defendant failed to show what the prior abuse was and thus could not show that the prior abuse was sufficiently similar to the knowledge each victim displayed, and thus the evidence had insufficient probative value.[542]

10. Issues Regarding Rape Shield's Effect On Joinder:

a) Trial court did not err in denying defendant's motion to sever trial involving sexual conduct with three underage victims; despite the fact that the testimony of one victim would be inadmissible to prove charges against the others, the court found no prejudice because both the evidence and the crimes were simple and distinct from one another.[543]

11. Scope of Rape Shield:

a) Rape shield statute applies only to rape and GSI. Rape shield not applicable to sexual battery under 2907.03.[544]

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[540] State v. Malin, 9th Dist. Lorain No. 97CA006898, 1999 WL 1775 (Dec. 30, 1998).

[541] State v. Ashcraft, 12th Dist. Butler No. CA97-11-217, 1998 WL 667657 (Sept. 28, 1998).

[542] In re M.C., 10th Dist. No. 12AP-618, 2013-Ohio-2109.

[543] State v. Campbell, 11th Dist. Lake No. 2004-L-126, 2005-Ohio-6147.

[544] State v. Holland, 9th Dist. Lorain No. 4193, 1987 WL 18680 (Oct. 14, 1987).

b) Rape shield not applicable to interference with custody.[545]

c) Rape shield not applicable to sexual imposition, 2907.06.[546]

d) Rape shield not applicable to unlawful sexual conduct with a minor.[547]

(1) However, where sexual battery tried with rape and GSI, rape shield applies.[548]

e) Rape shield does not apply to felonious sexual penetration or unlawful sexual conduct with a minor, although under Evid.R. 403 uses same analysis.[549]

f) Rape shield not applied to felonious sexual penetration, but Evid. Rule 403 used to determine that probative value of evidence that victim had consensual sex with another was substantially outweighed by danger of unfair prejudice. The court noted that "substantial" is not a requirement for rape shield, but is for Rule 403. Here, additional charges of rape permitted rape shield, but sexual penetration did not; however, the trial court could use Rule 403 analysis on non-rape shield charges even where combined with rape shield charges.[550]

(1) Rape shield applies to children as well as adult; child's privacy is a compelling interest.[551] Evidence of juvenile actions also prohibited by Evid.R. 609(D) and R.C. 2151.358 (H).[552]

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[545] State v. Light, 5th Dist. Stark No. CA-7297, 1988 WL 38644 (April 18, 1988).

[546] State v. Birkman, 86 Ohio App.3d 784 (12th Dist. 1993).

[547] State v. Smiddy, 2d Dist. Clark No. 06CA0028, 2007-Ohio-1342. *See also* State v. Gresham, 2d Dist. Montgomery No. 22766, 2009-Ohio-3305.

[548] State v. Blankenship, 5th Dist. Delaware No. 93-CA-A-06-023, 1994 WL 198725 (May 11, 1994).

[549] State v. Johnson, 9th Dist. Medina No. 2174, 1993 WL 145836 (May 5, 1993); State v. Smiddy, 2d Dist. Clark No. 06CA0028, 2007-Ohio-1342.

[550] State v. Lopez, 12th Dist. Clermont No. CA95-02-012, 1995 WL 645552 (Nov. 6, 1995).

[551] State v. Oder, 5th Dist. Licking No. CA-3618, 1991 WL 184548 (Aug. 23, 1991).

[552] State v. Reyes-Cairo, 6th Dist. Lucas No. L-96-137, 1997 WL 256670 (May 16, 1997).

(2) Phrase "does not outweigh its probative value" means judge must assume testimony is true in making the determination.[553]

g) Inadmissible

(1) Although defendant was permitted to inquire that victim was under indictment, he was properly prohibited from inquiring into the specific nature of the offense; rape shield prohibited defendant from questioning victim about the charge that he had engaged in sexual conduct with his minor niece and nephew.[554]

(2) Not error to prohibit evidence that fourteen year-old female victim had sex with her sixteen year-old brother and admitted it, and that defendant told both that he would kill them if they continued their sexual relationship; the appellate court was not persuaded by the argument that it was relevant to show threats to kill the victim were directed to the incident related to sexual conduct between the victim and her brother rather than the acts between the defendant and the victim.[555]

(3) Appellant argued that evidence of 9 year-old victim's past conduct of fondling herself, pulling up her dress in front of boys and behavior around males is not technically "sexual conduct" or "sexual contact" under the rape shield provisions and that the statute should be liberally construed in favor of the defendant and strictly construed against the State: the appellate court refused to construe the statute so liberally.[556]

h) Admissible

(1) Cross-examination on prior felony sexual convictions not barred by rape shield, goes to issue of credibility, not conduct.[557]

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[553] State v. Smith, 34 Ohio App.3d 180, 187 (5th Dist. 1986).
[554] State v. Williams, 9th Summit No. 10945, 1983 WL 4114 (May 25, 1983).

[555] State v. Ward, 9th Dist. Summit No. 12346, 1986 WL 8551 (July 30, 1986).

[556] State v. Tomlinson, 33 Ohio App.3d 278 (12th Dist. 1986).

[557] State v. Roberts, 10th Dist. No. 81AP-18, 1981 WL 3253 (June 11, 1981).

(2) Evidence that night after alleged rape victim joking about incident and wearing sign on her back identifying herself as a "rape victim" does not constitute sexual activity and is relevant, therefore error to exclude.[558]

(3) In rape trial, error to exclude evidence that victim made statement concerning her desire to have sexual relations with defendant; rape shield pertains to sexual activity, not statements of desire. [559] However, letter about desires concerning third party not relevant and excluded—outside of rape shield.[560]

i) Court has discretion to limit cross-examination beyond preclusion of rape shield.[561] Defendant attempted vaginal penetration; failed, but successfully committed anal rape of 10 year-old. Doctor testified that vaginal area reddened and irritated and that sphincter muscles had been stretched beyond normal limits to point where anus would not close, although opinion not clear if trauma recent. Defendant wanted to introduce following evidence:

(1) victim had seen sex film 6 years ago

(2) victim had abused her rectum with enema bottle and douche instruments 1 ½ years ago

(3) two years before trial (unclear how close to rape) victim had rectal intercourse with 13 year-old black youth

(4) several years before victim had sexual intercourse with third party. Court indicated all four not relevant.[562]

12. In Camera Hearing:

a) When Required

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[558] State v. Patterson, 1st Dist. No. C-860445, 1987 WL 10034 (April 22, 1987).

[559] In re Johnson, 61 Ohio App.3d 544 (8th Dist. 1989); State v. New, 11th Dist. Lake No. 90-L-15-112, 1992 WL 25278 (Jan. 24, 1992).

[560] State v. Jones, 83 Ohio App.3d 723 (2d Dist. 1992).

[561] State v. Tucker, 10th Dist. Nos. 87AP-598, 87AP-600, 1988 WL 66251 (June 23, 1988).

[562] State v. Clark, 4th Dist. Pike No. 408, 1988 WL 50506 (May 17, 1988).

(1) Prior to taking testimony or receiving evidence of any "collateral acts" of a sexual nature of the victim or the defendant, the court in a rape trial (R.C. § 2907.02(E)) or the court in a GSI trial (R.C. § 2907.05(E)) must conduct an in camera hearing to resolve the materiality and admissibility of the evidence and to determine whether the probative value of the evidence is greater than its prejudicial effect. This hearing must be held at or before the preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

The testimony of all witnesses who shall testify to any collateral sexual activities of the victim or the defendant shall be reviewed by the trial court in such in camera hearing. However, where the witnesses' testimony is merely corroborative or cumulative to that which has been given by other witnesses, a failure to conduct an in camera hearing upon such evidence may in certain instances be found to be non-prejudicial.

A side bench conference between the trial court and counsel for the State and for the defendant does not satisfy the requirements of an in camera hearing where hearing sought by the defendant or victim.

The requirement of an in camera hearing, as provided by R.C. 2907.02(E), may be waived if not asserted prior to trial, or during trial with good cause being shown.[563]

(2) Court not required to give defendant three days to prepare after an in camera hearing where hearing held during trial, especially where defendant cannot show how the additional time would have altered his defense.[564]

b) When Not Required

(1) Where issue is victim's bias and motivation for bringing charges against defendant, in camera hearing not required.[565]

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[563] State v. Acre, 6 Ohio St.3d 140 (1983); State v. Graham, 58 Ohio St.2d 350 (1979), requirement for in camera hearing discussed.

[564] State v. Napier, 1st Dist. No. C-980999, 1999 WL 1263929 (Dec. 30, 1999).

[565] State v. Magruder, 11th Dist. Geauga No. 1228, 1985 WL 10039 (Sept. 27, 1985).

(2) In camera hearing not required where State on direct raises issue of victim's lack of prior sexual activity and is not grounds for a mistrial; harmless error.[566]

c) Procedure

(1) A formal hearing is not required. Must be of such nature to allow judge to make required determination of the admissibility of the evidence. Where counsel on the record informally discussed proffered testimony in chambers, this will suffice.[567]

d) Court of Appeals held that, in murder trial, if no hearing requested under rape shield statute concerning exclusion of deceased victim's statement of virginity, it was not error for judge to fail to strike testimony of deceased victim's statement. The Supreme Court held that decedent's statement was (1) hearsay; (2) not relevant; and (3) harmless error. Supreme Court did not discuss rape shield.[568]

e) Where the court allows evidence of victim's past sexual activity offered by the State without a hearing, is not abuse of discretion. Here both parties were aware of the evidence long before trial since it had come out in a preliminary hearing. Trial judge indicated that his rulings on admissibility would have been no different had an evidentiary hearing been held earlier. There was nothing to indicate that considering admissibility of the victim's testimony about prior sexual activity would violate the purpose of the shield law and the victim, not the accused, was offering the testimony.[569]

f) Examination of notice requirement of rape shield.[570]

13. Waiver by State:

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[566] State v. Summers, 12th Dist. Preble No. 87-12-030, 1988 WL 62948 (June 13, 1988).

[567] State v. Coleman, 1st Dist. No. C-820067, 1982 WL 9259 (Dec. 22, 1982).

[568] State v. Steffen, 31 Ohio St.3d 111 (1987), also, State v. Pearson, 1st Dist. No. C-830455, 1985 WL 8872 (Dec. 11, 1985) (rape/murder).

[569] State v. Williams, 10th Dist. No. 80AP-594, 1981 WL 3131 (April 16, 1981).

[570] Michigan v. Lucas, 500 U.S. 145, 111 S.Ct. 1743 (1991).

a) Direct examination of victim by prosecuting attorney concerning her sexual activity did not constitute waiver so as to permit defendant to cross-examine her as to any aspect of her past sexual activity. Direct examination was within limitations of rape shield statute as it only covered sexual relations with her fiancé as related to issues of the origin of semen on her blue jeans and on her incapacity to engage in vaginal sexual activity without pain thus relating to consent.[571]

b) Where the State on direct asked victim of rape if she is prostitute and she admits such, further inquiry into her specific acts as a prostitute are not relevant where consent is not an issue. The court opined that because the State did not make any inquiry into specific past sexual activity this was not a waiver of 2907.02(D).[572]

c) Evidence presented in State's case in chief of blood on underwear of twelve year-old victim and fact that she had a partially torn hymen did not open the door to victim's past sexual activity because the evidence of blood is only evidence of trauma, not necessarily loss of virginity and the defendant was allowed to adduce evidence that the victim had been a prostitute.[573]

d) Evidence presented (presumably in State's case-in-chief) by physician that 14 year-old victim's physical condition consistent with having sexual intercourse several times (absence of hymen) goes to proof of numerous rapes by father, but does not allow testimony of sexual intercourse of victim with boyfriend on one occasion.[574]

e) On cross-examination of psychologist, defense elicited testimony of child's activity with dolls showing that child had been subjected to sexual intercourse and oral sex; defendant charged with GSI (touching privates with finger). This evidence was error because intercourse not relevant where charge is GSI; however, defendant "invited error" by introducing it himself. Further cross-examination asked psychologist about child abuse syndrome. Later attempts by defense to proffer testimony that child's prior sexual history with others was the cause of

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[571] State v. Collins, 60 Ohio App.2d 116 (3rd Dist. 1977).

[572] State v. Satterwhite, 8th Dist. No. 43580, 1982 WL 2351 (Feb. 11, 1982); State v. Schaim, 1st Dist. No. C-900011, 1991 WL 73340 (May 8, 1991) (reversed on other grounds, State v. Schaim, 65 Ohio St.3d 51, 1992-Ohio-31).

[573] State v. Hall, 8th Dist. No. 45728, 1983 WL 5842 (March 10, 1983).

[574] State v. Robinette, 5th Dist. Morrow No. CA-652, 1987 WL 7153 (Feb. 27, 1987).

the manifestations of child abuse syndrome denied, since not relevant to whether defendant molested victim.[575]

f) Prosecution may introduce evidence of victim's chastity where consent is in issue.[576]

g) Argument that state waives application of rape shield law by asking victim about her sexual history rejected; victim's allegedly false statement that she was a virgin did not bear upon issue of whether she consented to contact with defendant.[577]

h) Theory of waiver by State alluded.[578]

14. Possible Double Jeopardy with Mistrial Under Rape Shield Law:

a) In cases of improperly declared mistrial involving violations of rape shield protections, double jeopardy may apply to prevent retrial of rape or GSI defendants.

(1) Where trial court abuses discretion in declaring mistrial without exploring reasonable alternatives, double jeopardy prevented subsequent retrial of rape/kidnapping defendant.[579]

[575] State v. Myers, 12th Dist. Preble No. 88-01-003, 1988 WL 89625 (Aug. 29, 1988).

[576] State v. Hodge, 12th Dist. Butler No. CA91-10-181, 1992 WL 201037 (Aug. 17, 1992).

[577] State v. Jordan, 7th Dist. Harrison No. 06 HA 586, 2007-Ohio-3333.

[578] State v. Summers, 12th Dist. Preble No. 87-12-030, 1988 WL 62948 (June 13, 1988).

[579] State v. Rodriguez, 8th Dist. No. 88913, 2007-Ohio-6302.

IV. HEARSAY

A. In General

1. Evidence Rule 102 requires narrow reading of hearsay exceptions (803(4)) in child abuse cases where child is of "tender years."[580] But c.f., Evid. Rule 102 should not be interpreted to require strict interpretation of evidence rules.[581]

2. Out of court statements of child victim are inadmissible hearsay if the child is found by the court to be incompetent to testify: limited to trustworthiness requirement of Rule 807.[582]

3. Even though prejudicial, hearsay statement should not have been excluded as it was evidence regarding defendant's motive for visual inspection he made of step-daughter which was critical aspect of defense and he was thus entitled to impeach her with it.[583]

B. Not Hearsay

1. Generally:

   a) Act of child wanting to eat after visiting defendant is non-assertive, non-hearsay evidence.[584]

   b) Child's statement as to cause of injury admissible because offered to demonstrate child had fabricated cause of injury.[585]

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[580] State v. Boston, 46 Ohio St.3d 108 (1989); State v. Johnson, 83 Ohio Misc.2d 26 (1996).

[581] State v. Dever, 64 Ohio St.3d 401, 1992-Ohio-41.

[582] State v. Wallick, 153 Ohio App.3d 748, 2003-Ohio-1252; State v. Ungerer, 5th Dist. Ashland No. 95COA1125, 1996 WL 362804 (June 5, 1996); State v. Johnson, Washington Ct. CP No. 96CR86, reported in The OACDL Vindicator, Spring 1997, at 17. *But cf*, fn. 266-273, where incompetency of declarant does not *per se* vitiate statement. *Also cf*. State v. Cardosi, 122 Ohio App.3d 70 (2d Dist. 1997).

[583] State v. Varner, 11th Dist. Trumbull No. 96-T-5581, 1998 WL 683943 (Sept. 25, 1998).

[584] In re Young, 12th Dist. Butler No. CA92-11-222, 1993 WL 358155 (Sept. 13, 1993).

[585] State v. Jones, 1st Dist. No. C-890030, 1990 WL 17325 (Feb. 28, 1990).

c) Evidence used to bolster victim's credibility is hearsay.[586] But, where defendant raises inference that victim's mother didn't believe allegations, State may cross-examine mother regarding her belief in order to rebut.[587]

d) Where mother overheard her daughter ask her cousins whether their father "ever do[es] sick, weird things to them" this was admissible because it was not hearsay; i.e., it was non-assertive.[588]

e) Testimony of minor abuse victim's father regarding victim's disclosure of the type of abuse and location where it occurred was not hearsay where used only to show how the father initially learned of the abuse and explained his subsequent investigative activities.[589]

f) In light of child victim's extensive testimony regarding her encounter with appellant, the clinical therapist's testimony was merely cumulative. Thus, even if the clinical therapist's testimony was improper, such alleged hearsay error did not affect appellant's substantial rights and therefore constitutes harmless error.[590]

C. Offered Without Reference to Truth (801(C))[591]

D. Prior Consistent Statement (801(D)(1)(B)):

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[586] State v. Yarber, 102 Ohio App.3d 185 (12th Dist. 1995).

[587] State v. Little, 8th Dist. No. 73467, 1998 WL 741932 (Oct. 22, 1998).

[588] State v. Fleck, 6th Dist. Lucas No. L-98-1249, 1999 WL 682583 (Sept. 3, 1999).

[589] State v. Mallette, 8th Dist. No. 87984, 2007-Ohio-715.

590 State v. Brandon Hensley, 12th Dist. Warren No. 2009-11-156, 2010-Ohio-3822; See, also, State v. Curren, 5th Dist. Morrow No. 04 CA 8, 2005-Ohio-4315.

[591] State v. Ames, 12th Dist. Butler No. CA2000-02-024, 2001 WL 64973 (June 11, 2001) (babysitter confronted defendant and was able to testify as to content of child's allegations to her that she relayed to defendant for limited purpose of showing defendant's reaction); *see also*, State v. Price, 80 Ohio App.3d 108 (9th Dist. 1992); State v. Leach, 12th Dist. Clermont No. CA2000-05-033, 2001-Ohio-4203 (statement offered to show defendant's attempt to provide excuse for a specific event).

1. Statements can come in where they are not hearsay, e.g., prior consistent statements per Rule 801(D)(1)(b).[592]

2. But in *State v Hamilton*, 12th Dist. conceded that because defense made charge of recent fabrication, some of victim's statements were admissible under 801(D)(1)(b) to rebut charge, but recitation of entire statement did not conform to 801(D)(1)(b).[593]

3. Trial court did not err by admitting a videotaped statement of the child as a prior consistent statement of a witness pursuant to Evid.R. 801 (D)(1)(b), where defense had suggested that the child's mother influenced the child to fabricate the charge that he was raped by his father.[594]

4. For prior consistent exception, statement must be made prior to suggested invention or motivation to fabricate.[595] Prior consistent statement not made prior to motive to fabricate and should be excluded.[596]

5. Out of court prior consistent statements are not hearsay, and may be admitted to rebut allegations of recent fabrication. (Defendant alleged that victim had been "contaminated" by police.)[597]

6. Victim's prior consistent statement admissible to inference of recent fabrication regarding whether defendant had intercourse with victim.[598]

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[592] State v. Miller, 4th Dist. Gallia No. 87 CA 6, 1988 WL 106650 (Oct. 6, 1988).

[593] State v. Hamilton, 77 Ohio App.3d 293 (12th Dist. 1991).

[594] State v. Cole, 1st Dist. C-920873, 1993 WL 465402 (Oct. 6, 1993); State v. Curry, 9th Dist. Lorain No. 90CA004862, 1991 WL 24975 (Feb. 27, 1991).

[595] State v. Woodson, 9th Dist. Lorain Nos. 91CA005120, 91CA005121, 1992 WL 31993 (Feb. 19, 1992).

[596] State v. Nichols, 85 Ohio App.3d 65 (4th Dist. 1993); Tome v. United States, 513 U.S. 150, 115 S.Ct. 696 (1995); State v. Marshall, 12th Dist. Clinton No. CA90-04-010, 1991 WL 69356 (Apr. 29, 1991).

[597] State v. Allen, 9th Dist. Lorain No. 94CA005944, 1996 WL 48550 (Feb. 7, 1996); State v. Lewis, 6th Dist. Huron No. H-95-026, 1996 WL 139510 (Mar. 1, 1996) (defendant suggested victim's earlier statements were inconsistent with the ones made in court).

[598] State v. Blevins, 12th Dist. Warren No. CA97-09-076, 1998 WL 729255 (Oct. 19, 1998).

7. Prior consistent statement to rebut defendant's theory that accusations were made under the influence of mother to fabricate sexual abuse allegations.[599]

8. Statement of victim's mother that her daughter (sister to the victim) told her that the defendant said he was having sex with the victim was inadmissible and not for impeachment of prior inconsistent testimony.[600]

9. Alleged improper influence of the victim's mother, police officers, and children's advocate did not occur until after the victim's statements to her female friend regarding a sexual relationship with defendant. As a result, the prior consistent statements met the prerequisites of R. 801(D)(1)(b) and were not hearsay.[601]

10. Where defense implied that the child fabricated allegations of sexual abuse during its opening statement, police officer's testimony regarding the victim's prior consistent statements made to him was admissible under Evid.R. 801(D)(1)(B).[602]

E. Prior identification (Rule 801(D)(1)(c)):

1. Admissible "under proper circumstances"; requires voir dire of child if child not to testify at trial to determine if circumstances under which ID was made demonstrate reliability; child must be subject to cross-examination at voir dire.[603] [In this case the child had refused to testify. Query: How does the court voir dire such a child?]

2. Where child declarant has not yet testified, but prosecutor indicates he will call her later, ID statement can be introduced.[604]

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[599] State v. Wilt, 12th Dist. Fayette No. CA95-01-002, 1995 WL 617587 (Oct. 23, 1995).

[600] State v. Fawn, 12 Ohio App.3d 25 (10th Dist. 1983).

[601] State v. Stalnaker, 11th Dist. Lake No. 2004-L-100, 2005 -Ohio- 7042.

[602]State v. Alvarado, 3rd Dist. Putnam No. 12-07-14, 2008-Ohio-4411.

[603] State v. Boston, 46 Ohio St.3d 108 (1989).

[604] State v. Turvey, 84 Ohio App.3d 724 (4th Dist. 1992) (good discussion of Rule 801 (D)(1)(c)).

3. Identification not admissible where no question existed as to identification.[605]

F. Admission of party-opponent (Rule 801(D)(2))

1. Statement of mother concerning statement of victim is not admissible under Evid.R.801(D)(2) since the victim is not a party opponent in a criminal case.[606]

2. Stories regarding defendant's violent past told to victim within minutes of rape admissible as defendant's own statements and properly used to bolster victim's claims and establish defendant's preparation, intent, plan, and scheme to rape her.[607]

G. Hearsay Exceptions Where Availability Immaterial (Rule 803)

1. Present Sense Impression:

   a) Statement "Daddy did that to me" while child is watching TV is admissible.[608]

2. Then Existing, Mental, Emotional, or Physical Condition:

   a) Court may allow statement of 3 year-old child when placed in bathtub as a statement describing her existing physical condition.[609]

   b) Statements reflecting the fact that the child was afraid, did not fall within the Rule 803(3) exception applying to a statement of "then existing state of mind."[610]

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[605] Id.

[606] State v. Browning, 12th Dist. Clermont No. CA94-04-022, 1994 WL 704903 (Dec. 19, 1994), *citing* State v. Dinwiddie, 9th Dist. Summit No. 12876, 1987 WL 16994 (Sept. 16, 1987); In re Coy, 67 Ohio St.3d 215 (1993).

[607] State v. Rupp, 7th Dist. Mahoning No. 05 MA 166, 2007-Ohio-1561.

[608] State v. Evers, 12th Dist. Clermont No. CA88-09-068, 1989 WL 47882 (May 8, 1989).

[609] State v. Dickens, 12th Dist. Clermont No. CA92-04-034, 1992 WL 333645 (Nov. 16, 1992); In re Dukes, 81 Ohio App.3d 145 (9th Dist. 1991).

[610] Arnold v. Arnold, 135 Ohio App.3d 465, 734 N.E.2d 837 (12th Dist. 1999).

3. Records Of Regularly Conducted Activity:

    a) Statements in medical records may be admitted but must be authenticated.[611]

4. Public Records And Reports:

    a) Whether records are open to public or not has no bearing on public records exception.[612]

5. Past Recollection Recorded:

    a) State failed in rape prosecution involving a child as alleged victim to satisfy foundational requirements, under hearsay exception for past recollection recorded; 803(5) for playing at trial a videotape of interview that social worker conducted with child with four days of alleged incident, where state did not show child had no memory of actual events that constituted rape, and child did not testify that videotape correctly reflected knowledge she had of events in question at the time videotape was made.[613]

H. Hearsay Exceptions Where Declarant Unavailable (Rule 804)

1. Statement where Declarant is Unavailable Due to Lack of Memory of Subject Matter (Rule 804(A)(3)):

    a) A trial court committed plain error by admitting a declarant's statements due to lack of memory without considering whether the statement met any of the exceptions under Evid.R. 804(B). Analysis of unavailability under Evid.R. 804(A) was only half of the analysis: the court was also required to review whether the statement itself met an exception to hearsay.[614]

2. Statement Against Interest (Rule 804(B)(3)):

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[611] State v. Ashby, 8th Dist. No. 59616, 1991 WL 281026 (Dec. 26, 1991).

[612] State v. Humphries, 79 Ohio App.3d 589 (12th Dist. 1992).

[613] State v. Perry, 147 Ohio App.3d 164 (6th Dist. 2002).

[614] State v. Hastings, 4th Dist. Pickaway No. 13CA16, 2014-Ohio-1418, ¶ 19-21.

a) A decision whether to admit the hearsay statement of an unavailable declarant pursuant to Evid.R. 804(B)(3) is one within the discretion of the trial court."[615]

b) Written note of unavailable declarant written six months after incident not reliable and excluded.[616]

c) Trial court properly denied defendant's request to introduce tape recorded evidence from an anonymous caller stating to be the true perpetrator of the sexual activity; while the call clearly implicated the caller, insufficient evidence of trustworthiness existed.[617]

d) Admissions made by defendant that he digitally penetrated victim, fondled her breasts, and ejaculated in her mouth were knowingly made against his penal interests where defendant was read *Miranda* warnings twice and knew he was being questioned by police in a criminal investigation.[618]

e) Under circumstances of rape and GSI trial, letters written by defendant to mother of victim asking them to recant their stories or not appear at court admissible as statements against interest upon proper authentication.[619]

f) Statements and questions made by infant victim's five year-old brother to mother regarding victim's death inadmissible as statements against interest, because record did not indicate that five year-old victim could appreciate such concepts as pecuniary or proprietary interest, or criminal liability. Argument that five year-old risked relationship with mother by making statements rejected.[620]

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[615] State v. Sumlin, 69 Ohio St.3d 105, 1994-Ohio-508; State v. Durant, 159 Ohio App.3d 208, 2004-Ohio-6224.

[616] State v. Sumlin, 69 Ohio St.3d 105, 1994-Ohio-508.

[617] State v. Wobbler, 3rd Dist. Putnam No. 12-01-01, 2001-Ohio-2308 (court specifically concerned that the anonymous caller could have been coached by the defendant).

[618] In re King, 8th Dist. Nos. 79830 and 79755, 2002-Ohio-2313.

[619] State v. Dixon, 5th Dist. Richland No. 2004-CA-90, 2005-Ohio-2846.

[620] State v. Ross, 10th Dist. No. 02AP-898, 2003-Ohio-3338.

g) Defendant's wife told the court that she did not wish to testify pursuant to the Fifth Amendment, making her "unavailable" for trial and allowing her statements regarding forced artificial insemination of defendant's stepdaughter with defendant's sperm in prosecution for rape, sexual battery, and child endangering to be admitted as statements against interest; statements subjected wife to criminal liability and were corroborated by other witnesses.[621]

h) One commentator argues that an 804(B)(3) exception can be factually supported in cases where wife makes domestic violence charge against her husband as against her economic, social interests [analogous to statement of child concerning his parent abuses?][622]

3. Former testimony (Rule 804(B)(1))

a) Introduction of grand jury testimony against defendant

(1) The state may not use Rule 804(B)(1) to introduce grand jury testimony against the accused because the defendant cannot participate in the grand jury proceeding and does not have the opportunity to develop the witness's testimony as required by the rule.[623]

b) Introduction of grand jury testimony by defendant

(1) The defendant may use Rule 804(B)(1) to introduce grand jury testimony against the state because the state has the motive and opportunity to develop the witness's testimony.[624]

c) Where defendant re-tried on rape charges testified in the first trial and exercised his Fifth Amendment rights in the second trial, admission of his testimony from the first trial proper. Defendant had same motive and opportunity to develop his testimony during the second trial as he

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[621] State v. Goff, 154 Ohio App.3d 59, 2003-Ohio-4524 (9th Dist.), vacated by Goff v. Ohio, 541 U.S. 1083, 124 S.Ct. 2819 (2004) (on Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004)).

[622] S. Ziegler, *Applying 804(B)(3) and The Battered Women Syndrome to Domestic Violence Cases*, COURT REVIEW, Vol.13, No.1 (Winter 1996) at p.15, 19.

[623] State v. Woods, 48 Ohio App.3d 1 (1st Dist. 1988).

[624] State v. Brumley, 11th Dist. Portage No. 89-P-2092, 1996 WL 210767 (Mar. 29, 1996), *citing* State v. Bowen, 3rd Dist. Hancock No. 5-90-45, 1991 WL 217664 (Aug. 16, 1991).

did during the first trial. Additionally, the court found that the testimony was not hearsay, as the statement was defendant's own.[625]

d) Where defendant's counsel was present for prior dependency hearing where defendant's daughters alleged sexual abuse, similar motive for cross-examination existed to allow for introduction of daughters' former testimony under Rule 804(B)(1).[626]

I. Availability Issues for Rule 804

1. Prior to *White* and *Storch*:[627]

a) *U.S. v. Inadi*:

(1) Unavailability not always necessary. Doctor who makes determination of unavailability due to psychological stress must be present for cross-examination and confrontation.[628]

b) *State v. Hurayt*:

(1) Court of Appeals reversed trial court's decision determining that child was unavailable under Rule 804 and allowing hearsay statements in evidence[629]; judgment reversed and remanded to trial court by Ohio Supreme Court for further proceedings in light of *Boston*.[630]

c) Issue of unavailability not raised in *Idaho v. Wright* where trial court ruled child unavailable because of inability to communicate to jury. The Supreme Court further explained *Roberts* unavailability test as the "general approach," thereafter citing exceptions to the need to find good faith unavailability, but declined to discuss whether the trial

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[625] State v. Kutzli, 5th Dist. Stark No. 1996CA00020, 1997 WL 117050 (Mar. 3, 1997).

[626] State v. Breeden, 11th Dist. Lake No. 2000-L-078, 2002-Ohio-6932.

[627] State v. Robison, 4th Dist. Pickaway No. 85 CA 12, 1986 WL 11935 (Oct. 22, 1986); State v. Lipp, 6th Dist. Erie No. E-86-74, 1988 WL 10961 (Jan. 29, 1988).

[628] United States v. Inadi, 475 U.S. 387, 106 S.Ct. 1121 (1986).

[629] State v. Hurayt, 8th Dist. No. 54662, 1988 WL 132592 (Dec. 8, 1988).

[630] State v. Hurayt, 49 Ohio St.3d 16 (1990).

court finding was also an exception to good faith unavailability. "For purposes of deciding this case, we assume without deciding that, to the extent the unavailability requirement applies in this case, the younger daughter was an unavailable witness within the meaning of the Confrontation Clause."

d) *State v. Leonard*:

(1) Court's failure to determine why child unavailable is error, albeit harmless, in admitting statements to physicians under 803(4).[631]

e) *State v. Black*:

(1) In prosecution for contributing to the unruliness of a child by engaging in sexual contact with her, the trial court erred by admitting into evidence the former testimony of the alleged unavailable victim, where the defendant did not have an adequate opportunity to cross-examine the victim in the prior proceeding because defense counsel was wrongfully denied access to relevant medical and psychiatric records concerning prior unsubstantiated allegations of sexual abuse made by the victim.[632]

2. Post *White* and *Storch*:

a) *State v. Ulis*:

(1) Under *Storch*, the Ohio Constitution requires "live testimony where reasonably possible." The court noted that: "[t]he trial court in this case improperly relied upon the earlier competency proceedings conducted by a different judge in a different case, and improperly relied upon the opinion of the clinical psychologist regarding the ability of the young boy in this case to testify. The court had an obligation to personally observe the child and to reach an unbiased decision regarding whether the child was capable of testifying."[633]

b) *State v. McWhite*:

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[631] State v. Leonard, 2d Dist. Montgomery No. 10973, 1989 WL 135306 (Nov. 6, 1989).

[632] State v. Black, 85 Ohio App.3d 771 (1st Dist. 1993).

[633] State v. Ulis, 91 Ohio App.3d 656 (6th Dist. 1993).

(1) Witness is not "unavailable" under evidence rules when previously ruled incompetent under Evid.R. 601 in a prior case three years beforehand.[634]

J. Child Statements in Abuse Cases (Rule 807)

1. A child's out-of-court statement describing any act of sexual abuse or physical violence committed against the child is not excludable as hearsay under certain circumstances.[635] The state must:

   a) establish the unavailability of the witness;

   b) provide written notice to the defense at least 10 days before trial;

   c) show a good-faith effort to obtain the child's testimony;

   d) show that the testimony is not reasonably obtainable; and

   e) demonstrate that the totality of the circumstances guarantee the trustworthiness of the statement.[636]

2. Applying Rule 807:

   a) Where defense sought to introduce five year-old's testimony regarding his concerns that his actions caused the death of his infant sister, Rule 807 inapplicable because testimony did not describe physical violence committed against the five year-old himself.[637]

   b) Trial court's hearing establishing unavailability of five year-old victim, without more, insufficient to allow admission of statements under Rule 807.[638]

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[634] State v. McWhite, 91 Ohio App.3d 508 (6th Dist. 1993).

[635] The movant must meet a "high threshold." State v. DeLeon, 6th Dist. Sandusky No. S-12-020, 2013-Ohio-2029, ¶ 24, citing State v. Silverman, 121 Ohio St.3d 581, 2009–Ohio–1576, 906 N.E.2d 427, ¶ 26.

[636] Evid.R. 807.

[637] State v. Ross, 10th Dist. No. 02AP-898, 2003-Ohio-3338.

[638] State v. Lee, 162 Ohio App. 648, 2005-Ohio-3395 (1st Dist.).

c) Rule 807 requires the Court to hold a hearing outside presence of jury to make the required findings of fact.[639] For purposes of the findings of fact, "skeletal conclusions" are inadequate.[640]

d) Child victim's hearsay statements contained sufficient indicia of reliability and particularized guarantees of trustworthiness such that statements were admissible despite lack of determination as to child's competence to testify.[641]

e) In light of child victim's extensive testimony regarding her encounter with appellant, the detective's testimony was merely cumulative. Thus, even if the detective's testimony was improper, such alleged hearsay error did not affect appellant's substantial rights and constitutes harmless error.

f) A child victim's out-of-court statements were admissible because the statements were made spontaneously a few hours after the event, the statement was internally consistent, and the child was unlikely to lie because of her prior relationship with the defendant. The child was unable to relate the content of the statement when interviewed *in camera* and there was DNA corroborating the statement admitted into evidence.[642]

K. Other Hearings

1. Strict interpretation of evidence rules of hearsay not required in juvenile temporary disposition hearings per Juv.R. 13(A).[643]

2. But "...inadmissible hearsay not admissible at the adjudicatory stage of a neglect or dependency proceeding because of the importance of the parental interests involved."[644]

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[639] Evid.R. 807(C).

[640] State v. Said, 71 Ohio St.3d 473, 1994-Ohio-402.

[641] State v. Silverman, 121 Ohio St.3d 581, 2009-Ohio-1576, *reversing* 176 Ohio App.3d 12, 2008-Ohio-618.

[642] State v. DeLeon, 6th Dist. Sandusky No. S-12-020, 2013-Ohio-2029, ¶ 27.

[643] In re Spears, 3rd Dist. Athens No. 1200, 1984 WL 5682 (Dec. 10, 1984).

[644] In re Myers Children, 12th Dist. Preble No. CA89-01-004, 1989 WL 99318 (Aug. 28, 1989); In re Vickers Children, 14 Ohio App.3d 201 (12th Dist. 1983); In the Matter of Tackett, 4th Dist. Adams No. CA 496, 1990 WL 34369 (Mar. 7, 1990).

L. The Effect of *Crawford v. Washington* on The Sixth Amendment Right Of Confrontation

1. In General:

   a) In *Crawford v. Washington*,[645] the United States Supreme Court abrogated its former Confrontation Clause jurisprudence[646] in favor of an analysis of the "testimonial" nature of a statement.

   b) Under *Crawford*, out-of-court testimonial statements are barred under the Confrontation Clause unless (1) the witness is unavailable, and (2) the defendant has had a prior opportunity to cross-examine the witness.[647]

      (1) This analysis applies regardless of whether the offered statements would be deemed "reliable" by a court under the former standard: where testimonial statements are at issue, confrontation is required to satisfy constitutional reliability demands.[648]

2. General Evidentiary Matters Remaining Unchanged By *Crawford:*

   a) Under *Crawford*, as before, a statement does not raise a confrontation concern unless it is offered to prove the truth of the matter asserted.[649]

   b) Statements fitting within certain hearsay exceptions that are not testimonial in nature are still admissible.[650]

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[645] on Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004).

[646] *See* Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980). Under Roberts and its progeny, the Confrontation Clause did not bar admission of an unavailable witness's statement against a criminal defendant so long as the statement bore "adequate indicia of reliability" by either falling within a "firmly rooted hearsay exception" or by "bear[ing]" particularized guarantees of trustworthiness."

[647] *See* Crawford, *supra*, at 53-54.

[648] *See* id.

[649] Crawford, 541 U.S. at 59, *reaffirming* Tennessee v. Street, 471 U.S. 409, 414 (1985).

[650] *See* Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2003-2004 CATO SUPREME COURT REVIEW 439 (2004), at p. 453.

(1) Under the former *Roberts* standard, the issue regarding "reliability" of business record exceptions and co-conspirator statements stemmed from their existence within "firmly rooted" hearsay exceptions.

c) Where a declarant appears for cross-examination at trial, the Confrontation Clause still places no constraints on the use of his prior out-of-court testimonial statements.[651]

(1) The Confrontation Clause still only guarantees a defendant the *opportunity* to cross-examine a witness: a defendant's failure to avail himself of the opportunity to cross-examine a witness about out-of-court statements does not violate the Confrontation Clause.[652]

(A) The case law governing the required proof of a declarant's unavailability under R. 804 apparently remains unchanged.[653]

(B) The defendant still forfeits the right to confrontation if his misconduct causes the witness's unavailability for cross-examination.[654]

(C) Child witnesses may still testify in a room separate from the accused upon a particularized showing that the child would be traumatized by testified in the presence of the accused.[655]

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[651] Crawford, *supra*, at 1369 n.9, *reaffirming* California v. Green, 399 U.S. 149 (1970).

[652] State v. Jordan, 10th Dist. No. 06AP-96, 2006-Ohio-6224, at ¶25, *citing* United States v. Owens, 484 U.S. 554, 559 (1988).

[653] Transcript of Oral Argument, on Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004).

[654] *See* Crawford, *supra*, at 62.

[655] *See* Friedman, *The Confrontation Clause Re-Rooted and Transformed*, supra, at p. 454; *see also* Maryland v. Craig, 497 U.S. 836 (1990).

(D) *Crawford* leaves intact the rule that a violation of the right to confrontation may be harmless and therefore not require reversal.[656]

(E) The State's use of a witness's prior inconsistent statement for impeachment did not violate the Confrontation Clause because the defendant was given a full and fair opportunity to cross-examine the witness after the statement was admitted.[657]

3. Changes to General Sixth Amendment Jurisprudence Resulting From *Crawford*

a) The most obvious change wrought by *Crawford* is that prosecutors may no longer use testimonial statements of persons who are not witnesses at trial and argue for their admission on the basis of reliability.

4. Judicial Interpretation Of Issues Left Open By *Crawford*

a) What is "testimonial evidence?"

(1) *Crawford* failed to establish a single definition of what constituted "testimonial" evidence, instead laying out three potential standards:

(A) Ex parte in-court testimony or its functional equivalent—that is, material, such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;

(B) Extrajudicial statements … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;

(C) Statements that were made under circumstances which would lead an objective witness reasonably to believe

[656] *See* Friedman, *supra*, at p. 455, *see also* Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986).

[657] In re A.C., 11th Dist. Ashtabula No. 2013-A-0024, 2014-Ohio-640, ¶ 56-60.

that the statement would be available for use at a later trial.[658]

(2) The Ohio Supreme Court has adopted the third *Crawford* standard, meaning that statements before Ohio courts are subject to the "objective witness" test: statements are "testimonial" and properly excluded only if made under circumstances reasonably leading an objective witness to believe that the statement would be available for use at a later trial. [659]

(3) *State v. Stahl*: The defendant to rape and kidnapping charges sought to exclude statements victim made to nurse practitioner during an emergency room examination, claiming that the admission of such statements would violate his rights under the Confrontation Clause.[660]

(A) Prior to her examination by the nurse practitioner, the victim executed a consent form authorizing the examination and allowing for the release of all evidence and information for the prosecution of her case.[661]

(B) During the physical examination, the victim identified the defendant as the offender and explained how the crime transpired. The victim thereafter died from unrelated causes prior to giving formal testimony. The defendant claimed that the prosecution's introduction of the statement was testimonial and inadmissible under Crawford.[662]

(C) The court held that in determining whether a statement is "testimonial" for Confrontation Clause purposes, Ohio courts should focus on the expectation of the declarant at the time of making the statement.[663] The

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[658] *See* Crawford, *supra*, at 51-52.

[659] State v. Stahl, 111 Ohio St.3d 186, 2006-Ohio-5482, at ¶ 36.

[660] *See* id. at ¶¶ 1-12.

[661] Id. at ¶ 3.

[662] Id. at ¶¶ 5-6.

[663] Id. at ¶ 36.

intent of the questioner is relevant only if it could affect a reasonable declarant's expectations.[664]

(D) Where hearsay statements are found to be non-testimonial, they are next examined to determine whether they fit a "firmly rooted hearsay exception."[665]

(E) Under *Stahl*, where a rape victim makes a identifying statement to police, then subsequently presents herself for a medical exam for purposes of gathering evidence of the crime and repeats the identification, the statement to medical personnel is not testimonial and may be admitted into evidence.[666]

(4) In adopting the "objective witness" test, the Ohio Supreme Court analyzed and followed the decisions of other state and federal courts.

(A) Other State Courts:

i. Nebraska: Statements made by child victim of sexual assault to emergency room physician identifying defendant as offender resulted from valid medical inquiry; no indication of a purpose to develop testimony for trial; no indication of government involvement in the examination.[667]

ii. Colorado: In case adopting and applying "objective witness" test, identifying statements made by child victim of sexual assault to doctor non-testimonial: "from the perspective of an objective witness in the child's position, it would be reasonable to assume that this examination was only for the purpose of medical diagnosis."[668]

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[664] Id.

[665] Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980).

[666] Stahl, *supra*; *see also* State v. Dorsey, 5th Dist. Licking No. 2007-CA-091, 2008-Ohio-2515.

[667] State v. Vaught, 682 N.W.2d 284 (Neb. 2004).

[668] People v. Vigil, 127 P.3d 916 (Colo. 2006).

iii. Minnesota: Adopting a broader definition of "testimonial," court held that a declarant makes a testimonial statement if the "declarant or government questioner is acting, to a substantial degree, in order to produce a statement for trial." [669] Social worker's risk-assessment interview of a child victim "represented a response to a call for assistance and preliminary determination of 'what happened' and whether there was immediate danger, rather than an effort to gather evidence for a future trial."[670]

(B) Federal courts

i. First Circuit: Declarant's statements during private conversation held as non-testimonial because the declarant "did not make the statements under circumstances in which an objective person would 'reasonably believe the that the statement would be available for use at a later trial.'"[671]

ii. Second Circuit: Statements made by defendant to undercover informant held non-testimonial despite informant's governmental function; the informant's motives did not affect the expectations of the defendant in making the statements.[672]

iii. Eighth Circuit: Child's statements to physician non-testimonial because the medical exam served to protect the child's health and the interview lacked formal questioning and substantial governmental involvement.[673]

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[669] State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006).

[670] Id.

[671] Horton v. Allen, 370 F.3d 75 (1st Cir. 2004).

[672] United States v. Saget, 377 F.3d 223 (2d Cir. 2004).

[673] United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005).

5. The Uncertain Effect Of *Crawford* On Certain Hearsay Exceptions:

a) Excited Utterances (R. 803(2))

(1) In General

(A) "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[674]

(B) Excited utterance not violative of Sixth Amendment.[675] Excited utterance a firmly rooted hearsay exception not violating confrontation.[676]

(2) Criteria for Excited Utterance[677]

(A) "To qualify as an excited utterance consideration must be given to (a) the lapse of time between the event and declaration, (b) the mental and physical condition of the declarant, (c) the nature of the statement and (d) the influence of intervening circumstances."[678]

(B) A period of unconsciousness, even an extended period, does not necessarily destroy the effect of a startling event upon the mind of the declarant for the purpose of satisfying the excited-utterance exception to the hearsay rule. The admission of a declaration as an

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[674] Evid.R. 803(2).

[675] State v. Fowler, 27 Ohio App.3d 149 (8th Dist. 1985); State v Dixon, 152 Ohio App.3d 760, 2003-Ohio-2550 (8th Dist.).

[676] Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139 (1990); State v. Estepp, 1st Dist. No. C-880052, 1989 WL 2293 (Jan. 18, 1989).

[677] State v. Brown, 6th Dist. Lucas No. L-82-297, 1983 WL 6945 (Sept. 16, 1983) *aff'd*, 74 Ohio St.3d 630 (1996); State v. Price, 1st Dist. No. C-870406, 1988 WL 83493 (Aug. 10, 1988).

[678] State v. Chappell, 97 Ohio App.3d 515 (8th Dist. 1994), which discusses staff notes to 803(2), *citing* State v. Dickerson, 51 Ohio App.2d 255 (8th Dist. 1977).

excited utterance is not precluded by questioning which: (1) is neither coercive nor leading, and (2) facilitates the declarant's expression. "(It is a) clear judicial trend, recognized in Ohio, to liberalize the requirements for an excited utterance when applied to young children victimized by sexual assaults."[679] It is unclear whether this trend will continue after *Crawford*.

(C) Since children are likely to remain in a state of nervous excitement longer than adults and are less capable of reflective thought, the time period under which 803(2) applies to children has historically been treated as longer than that applicable to adults.[680]

(D) Time element is historically not the controlling factor. The controlling factor is whether the declaration was made under circumstances as would reasonably show it resulted from reflection. Statement made by adult rape victim to witness and then one half hour later to police; both statements were made while victim was hysterical. [681] Statement made by officer to "calm down" before she related the events did not affect the admissibility of defendants statement as an excited utterance.[682] Statements made by a visibly emotionally upset nine year-old girl approximately seventeen hours after she had been sexually abused by her stepfather properly admitted under Evid.R. 803(2). [683] Statements were made very shortly after plaintiff had

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[679] State v. Wagner, 30 Ohio App.3d 261 (8th Dist. 1986); State v. Ames, 12th Dist. Butler No. CA2000-02-024, 2001 WL 64973 (June 11, 2001).

[680] State v. Ashcraft, 12th Dist. Butler No. CA97-11-217, 1998 WL 667657 (Sept. 28, 1998).

[681] State v. Smith, 34 Ohio App.3d 180 (5th Dist. 1986). *See also*, State v. Daugherty, 5th Dist. Licking No. 97-CA-99, 1998 WL 401759 (March 16, 1998).

[682] State v. Owens, 5th Dist. Stark No. 2009-CA-00223, 2010-Ohio-4240(Sept. 7, 2010).

[683] State v. Gerhart, 9th Summit Nos. 11290 and 11297, 1984 WL 4162 (Jan. 25, 1984); State v. Robison, 4th Dist. Pickaway No. 85 CA 12, 1986 WL 11935 (Oct. 22, 1986).

an ice pick driven through her head, undeniably a startling event, to say the least.[684]

(E) Trial court has (or at least had, prior to *Crawford*) broad discretion to decide whether declarant still under influence of startling event when statements made.[685] Statement of 4 ½ and 3 year-old to foster parent while bathing a "few weeks" after abuse is spontaneous and court will construe the rules liberally, citing *Boston* and *Wagner*.[686] Two weeks after incident to social worker.[687] Three hours after incident to social worker at admitting room in hospital.[688] Statement made by 9 year-old boy to mother six months after sexual assault but upon learning that defendant was moving back in the house was admissible; traumatic event was the learning of defendant's moving in.[689] Statement from two-and-a half year-old daughter to mother day after incident, upon waking up and crying was considered spontaneous. No intervening circumstances existed except sleep.[690] Four months one day later, where child had limited ability prior to communicate the events.[691] Statements to social worker one day after incident spontaneous.[692] Statements made by four

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[684] State v. Matthews, 2d Dist. Greene No. 08-CA-43, 2010-Ohio-4153 (Sept. 3, 2010). *See e.g.*, State v. Taylor, 66 Ohio St.3d 295 (1993).

[685] State v. Duke, 8th Dist. No. 52604, 1988 WL 88862 (Aug. 25, 1988).

[686] State v. Hogan, 8th Dist. No. 66956, 1995 WL 350065 (June 8, 1995).

[687] State v. Sanders, 8th Dist. No. 56977, 1990 WL 84318 (June 21, 1990); State v. Hohman, 5th Dist. Morgan No. CA-89-9, 1990 WL 35354 (March 23, 1990).

[688] State v. Barton, 71 Ohio App.3d 455 (1st Dist. 1991); State v. Shoop, 87 Ohio App.3d 462 (3rd Dist. 1993); State v. Fox, 66 Ohio App.3d 481 (6th Dist. 1990); State v. Hunt, 63 Ohio App.3d 471 (6th Dist. 1989).

[689] State v. Langston, 8th Dist. No. 71578, 1998 WL 57152 (Feb.12, 1998); State v. Humphries, 79 Ohio App.3d 589 (12th Dist. 1992).

[690] State v. Boston, 46 Ohio St.3d 108, 188 (1989).

[691] State v. Lipp, 6th Dist. Erie No. E-86-74, 1988 WL 10961 (Jan. 29, 1988).

[692] State v. Fox, *supra*.

year-old child an hour to an hour and a half after she was raped are admissible as excited utterances because she was under the stress of excitement.[693] Statements admissible even though made two weeks after alleged sexual abuse and continued for 25 minutes; court considered child's age (five) and emotional state and determined they lent reasonable indicia of trustworthiness.[694] Statement made to mother was excited utterance even though made in late November concerning events occurring "around Halloween and before Thanksgiving" and even though there was a time lapse between mother's question concerning "hickey" and daughter's statement regarding rape. Court considered fact that victim was almost in tears when she made statement, victim's age (nine) and statement that victim didn't say anything earlier because she was afraid.[695] Although five months had passed since last incident of rape, statement was still excited utterance where triggered by traumatic event related to rape (i.e., learning that defendant was again going to be living with victim.)[696] Even though unclear when abuse occurred, not error to deem statements excited utterances where there were several indicia of reliability; court found that trauma of abuse can continue until victim discloses events.[697] Six year-old victim's identification of offender minutes after being raped and dropped from a window provides a "textbook" example of an excited utterance.[698] Eight year-old's statement that her uncle had touched her on "her private area" was an excited utterance even

[693] Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050 (6th Cir.1983).

[694] In re Michael, 119 Ohio App.3d 112 (2d Dist. 1997).

[695] State v. Ashcraft, 12th Dist. Butler No. CA97-11-217, 1998 WL 667657 (Sept. 28, 1998).

[696] State v. Langston, 8th Dist. No. 71578, 1998 WL 57152 (Feb.12, 1998).

[697] State v. Lawrence, 9th Dist. Lorain No. 98CA007118, 1999 WL 1140881 (Dec. 1, 1999).

[698] State v. Brown, 11th dist. Portage No. 2007-P-0014, 2008-Ohio-832.

though it was made approximately two months after the incident occurred. [699]

(F) Three year-old child's statement to his mother that juvenile defendant "licked his weenie" admissible as excited utterance despite fact that child was calmly playing with toys on the day after the incident when making the statement. Statement was spontaneous, unsolicited, and concerned subject ordinarily foreign to three year-old child.[700]

(G) Same standard for statements made by child witnesses rather than victims. Statement by child implicating defendant made approximately one hour after witnessing death of sister deemed an excited utterance because made "within a timeframe where her 'nervous excitement' exerted domination over her reflective faculties."[701]

(H) Six-week interval not spontaneous.[702]

(I) Where statement made three years after event brought on by excitement of grandmother's death (not the sex act) which was unrelated to the event not sufficient foundation for excited utterance.[703]

(J) Statement from 25 year-old mentally disabled female 16 weeks after incident not excited utterance.[704]

(K) Statement of upset children to grandmother while crying one date after last instance of abuse sufficient as excited utterance.[705]

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[699] State v. Burkholder, 6th Dist. Lucas No. L-11-1216, 2013-Ohio-1589, ¶ 22-24.

[700] In re D.M., 158 Ohio App.3d 780, 2004-Ohio-5858 (8th Dist.).

[701] State v. Nelson, 8th Dist. No. 54905, 1989 WL 4146 (Jan. 19, 1989).

[702] Id.

[703] State v. Fenton, 68 Ohio App.3d 412 (6th Dist. 1990).

[704] State v. Hunt, 63 Ohio App.3d 471 (6th Dist. 1989).

[705] State v. Brooks, 3rd Dist. Defiance No. 4-08-09, 2008-Ohio-6188.

(L) Child victim's statements to her mother and investigating police officer were not admissible under excited utterance exception to hearsay rule, where statements were made weeks after alleged startling event, and there was no showing that statements were made when victim was under any stress which would have prevented her from reflecting on alleged rapes.[706]

(M) Statement inadmissible where after 6 year-old caught in sex act and while upset about that event recounts past event with defendant but events occurred 146 days prior.[707]

(N) An interval of seven weeks between a rape and the child rape victim's statements is too long to permit admission of the statements as excited utterances; harmless error where declarant testifies consistently and is cross-examined.[708]

(O) Out-of-court statements of alleged child victim of a sexual offense made almost a year after the first evidence of sexual abuse cannot be admitted as excited utterances.[709]

(P) Not spontaneous where there was over three months interval between incident of rape and when the child told his parents; in addition, the child had been interviewed by a case worker, police officer, shown pictures of naked individuals and directly asked if anyone had ever touched him inappropriately.[710]

(Q) While a child must generally be found competent at the time a statement is made before the statement can

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[706] In re Legg, 68 Ohio Misc.2d 1 (1993).

[707] State v. Burns, 8th Dist. Nos. 58202, 58212, 1991 WL 34725 (Mar. 14, 1991).

[708] State v. Tuttle, 8th Dist. No. 47698, 1984 WL 5080 (June 14, 1984).

[709] State v. Celestino, 6th Dist. Sandusky No. S-91-50, 1993 WL 77002 (Mar. 19, 1993).

[710] State v. Slane, 6th Dist. Fulton No. F-98-020, 1999 WL 961453 (Oct. 22, 1999).

qualify under a hearsay exception,[711] no such finding is required in the case of excited utterances.[712]

(R) Non-testimonial out-of-court statements may be admitted without the defendant having an opportunity to cross-examine the witness if the statements fall within a hearsay exception, such as an excited utterance.[713]

(3) In the aftermath of *Crawford*, state courts split regarding application of Confrontation Clause analysis to excited utterances.

(A) The courts of certain states, including Ohio, have determined that excited utterances may be categorically excluded from confrontation review because they are unrehearsed statements made without reflection or deliberation and are therefore non-testimonial by their very nature.[714]

(B) Ohio courts appear to have expanded this concept the farthest, with one court finding *Crawford* inapplicable to "common law exceptions to the hearsay rule, such as excited utterances."[715]

(C) The courts of other states, however, find that excited utterances cannot be excluded automatically from Confrontation Clause review.[716]

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[711] State v. Said, 71 Ohio St.3d 473, 1994-Ohio-402.

[712] Id.; *see also* State v. Muttart, 3rd Dist. Hancock No. 5-05-08, 2006-Ohio-2506 (affirmed in part and reversed in part by 2007-Ohio-5267).

[713] Akron v. Hutton, 9th Dist. Summit No. C.A. 22424, 2005-Ohio-3300.

[714] State v. Cannaday, 10th Dist. No. 04AP-109, 2005 WL 736583; Hammon v. State, 809 N.E.2d 945 (Ind. App. 2004); People v. Moscat, 777 N.Y.S. 875 (N.Y.C. Crim. Ct. 2004); People v. Corella, 18 Cal.Rptr.3d 770 (Cal. App. 2004); Anderson v. State, 111 P.3d 350 (Alaska App. 2005); State v. Anderson, Case No. E2004-00694-CCA-R3-CD, 2005 WL 171441 (Tenn. Crim. App. Jan. 27, 2005).

[715] Cannaday, *supra*, at 6.

[716] Commonwealth v. Gray, 867 A.2d 560 (Pa. Sup. Ct. 2004); Lopez v. 888 So.2d 693 State (Fla. App. 2005); Stancil v. United States, 866 A.2d 799 (D.C. App. 2005),

i. These courts reason that a statement does not lose its character as testimonial merely because the declarant was excited while making it.[717]

ii. The U.S. Supreme Court, by vacating a conviction from an Ohio court which rested on the excited utterance of a child and remanding for further consideration in light of *Crawford*,[718] seems to indicate that excited utterances do not categorically escape Confrontation Clause review.

(D) As a result, commentators recommend a case-by-case review of *Crawford*'s applicability to excited utterances.[719]

(4) Supreme Court interpretation of the excited utterance exception in the post-*Crawford* era:

(A) In the companion cases of *Davis v. Washington* and *Hammon v. Indiana*,[720] the United States Supreme Court provided guidance regarding the distinction between 911 calls for assistance and statements provided to police after arriving in response to a report.

i. A victim's statements in response to a 911 operator's interrogation were excited utterances and not testimonial where defendant was inside victim's home in violation of protective order.[721]

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vacated by In re Stancil, 878 A.2d 1186 (D.C. App. 2005); State v. Hembertt, 696 N.W.2d 473 (Neb. 2005); State v. Davis, 111 P.3d 844 (Wash. 2005).

[717] *See* Lopez, *supra*.

[718] Siler v. Ohio, 543 U.S. 1019, 125 S.Ct. 671 (2004).

[719] *See* Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOKLYN L.REV. 311 (2005).

[720] Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006).

[721] Id.

ii. The victim was speaking about events as they actually happened rather than describing past events, and the primary purpose of the 911 operator's interrogation was to enable police assistance to meet an ongoing emergency of physical threat to victim.[722]

iii. However, the Supreme Court noted that while a conversation may initiate as a non-testimonial interrogation regarding a need for emergency services, it may evolve into testimonial statements once that purpose has been achieved.[723] In such cases, the Supreme Court stated that the conversations must be parsed: non-testimonial portions of the statements may be admitted, while testimonial portions should be redacted or excluded through an in limine procedure.[724] This edict necessarily requires courts to examine each statement, making a blanket characterization of 911 calls as "testimonial" or "non-testimonial" impossible.[725]

iv. Victim's written statements in affidavit given to police officer responding to domestic disturbance call "testimonial" in nature, and not excited utterance.[726]

v. There was no emergency in progress when the statements were given, making the officer's interrogation for the purpose of investigating a past crime.[727]

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[722] Id.

[723] Id.

[724] Id.

[725] Prior to the Davis decision, several commentators called for such a case-by-case scrutiny of 911 calls rather than a generalization applicable to all 911 calls. To examine the rationales for such an analysis, *see, e.g.*, Friedman, *supra*, and Raeder, *supra*.

[726] Id.

[727] Id.

(5) Other Post-*Crawford* cases addressing the excited utterance exception under Ohio law:

(A) Statement "that's him, that's him. He's the one that just hit me," found to be excited utterance where officer was responding to an unrelated call and stopped after observing the victim run from an apartment, point to defendant, wave her arms and yell. Statement made in the midst of ongoing emergency to have defendant apprehended. Accusatory nature of statement not indicia of testimony: one cannot alert the police to a perpetrator without being accusatory.[728]

(B) However, statements made by victim to police officer after defendant apprehended were testimonial in nature, as defendant posed no immediate threat to victim and discussion for purpose of determining whether a crime was committed.[729]

(C) Statements by victim to police upon regaining consciousness after beating were for emergency purposes, and therefore excited utterances.[730]

(D) 911 tape admissible as excited utterance where caller placed call immediately after defendant's truck struck the home she was visiting.[731]

(E) Child victim's statement identifying defendant as attacker properly excluded as testimonial; victim only identified defendant in response to questions asked by a police officer regarding the cause of her injury.[732] Admission of identifying statement harmless error, because remainder of evidence clearly implicated defendant as guilty party.[733]

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[728] State v. McKenzie, 8th Dist. No. 87610, 2006-Ohio-5725.

[729] Id.

[730] State v. Garrison, 10th Dist. No. 05AP-603, 2006-Ohio-6142.

[731] State v. Russo, 9th Dist. Summit No. 22768, 2006-Ohio-2172.

[732] State v. Lee, 162 Ohio App. 648, 2005-Ohio-3395 (1st Dist.).

[733] Id.

b) Admissibility of 911 calls under R. 803(2)

(1) Prior to *Crawford*, courts often routinely admitted statements made in calls to 911 operators, even though the caller did not testify in court.

(2) After *Crawford*, however, such statements are inadmissible if "testimonial" in nature.

(3) In the aftermath of *Crawford*, state courts split regarding application of Confrontation Clause analysis to excited utterances.

(A) Certain courts have held that 911 calls are non-testimonial because they are victim-initiated with the intent of seeking help while an incident is in progress.

i. 911 calls have been characterized as "the electronically augmented equivalent of a loud cry for help."[734]

ii. Statement made during victim's 911 call held non-testimonial because it lacked "official and formal quality of [a testimonial] statement."[735]

iii. Statement found to be non-testimonial because it was not given in a formal setting, was not given during any type of pretrial hearing or deposition, was not contained within a formalized document.[736]

iv. 911 statements viewed as made for purpose of preventing or stopping crime as it occurred, not for purpose of proving a past event.[737]

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[734] People v. Moscat, 777 N.Y.S. 875 (N.Y.C. Crim. Ct. 2004).

[735] Fowler v. State, 809 N.E.2d 960 (Ind. App. 2004), vacated at 829 N.E.2d 459. The Fowler court found the Crawford decision limited to police "interrogation," not all police questioning.

[736] Id.

[737] Pitts v. State, 612 S.E.2d 1 (Ga. App. 2005).

v. Statements made during 911 call were non-testimonial because caller sought protection from immediate danger.[738]

(B) Other courts have determined that 911 calls are testimonial in nature.

i. Regardless of what caller believes, purpose of the information given to 911 operators is for investigation, prosecution, and potential use in judicial proceeding, making it testimonial in nature.[739]

ii. 911 calls testimonial because police prepare public to use 911 to report crimes, information is given on what to report, operators use protocols for obtaining information, and calls are recorded and preserved.[740]

iii. Where 911 call made for purpose of reporting a crime rather than requesting assistance, statement found testimonial.[741]

c) Statements Made for Purposes of Medical Diagnoses (R. 803(4)):

(1) In General

(A) "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

Statements made for the 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.[742]

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[738] State v. Wright, 686 N.W.2d 295 (Minn. App. 2004), *aff'd by* State v. Wright, 701 N.W.2d 802 (Minn. 2005).

[739] People v. Cortes, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004).

[740] Id.

[741] State v. Powers, 99 P.3d 1262 (Wash. App. 2004).

[742] Evid.R. 803(4).

(2) General issues regarding statements made for the purpose of medical diagnoses

(A) Where psychologist child abuse team member interviews child for credibility, child's statements not admissible under 803(4).[743]

(B) Drawings of child may be 803(4) material.[744]

(C) When statement made by victim to mother is excited utterance, mother's relaying of that statement to doctor is permitted under 803(4) and 805 (hearsay within hearsay). Statements, however, made by declarant victim to mother not medical diagnosis exception, since no basis to conclude that declarant had subjective belief that her statements would assist her treatment.[745] Mother's statement to doctor admissible under 803(4).[746]

(D) A sperm motility test does not constitute a statement for purposes of medical diagnosis or treatment, particularly where unable to determine when conducted.[747] Statements in hospital records made to doctor during exam for purposes of criminal analysis and not diagnosis are not admissible under 803(6) because statements are not a hearsay exception under 803(4). Good discussion of basis for medical exceptions.[748]

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[743] State v. Duff, 10th Dist. No. 89AP-760, 1990 WL 34761 (Mar. 29, 1990).

[744] State v. Burns, 8th Dist. Nos. 58202, 58212, 1991 WL 34725 (Mar. 14, 1991).

[745] State v. Duke, 8th Dist. No. 52604, 1988 WL 88862 (Aug. 25, 1988); State v. Nelson, 8th Dist. No. 54905, 1989 WL 4146 (Jan. 19, 1989).

[746] State v. McNutt, 5th Dist. Stark No. CA-8320, 1991 WL 59853 (Apr. 15, 1991).

[747] State v. Johnson, 2d Dist. Clark No. CA 2361, 1987 WL 33778 (Dec. 30, 1987).

[748] State v. Clary, 73 Ohio App.3d 42 (10th Dist. 1991).

(E) Where child victim told social worker who was treating her for depression that she had been abused, she may testify to that effect under Rule 803(4).[749]

(F) Statement or verbal conduct is not required under Evid.R. 803(4) to be made to a physician as long as it was made to a member of the child abuse team for purposes of medical diagnosis or treatment.[750]

(G) Statement made regarding the defendants' identities in emergency room to medical professionals was non-testimonial even though victim had previously said she was not hurt and a police investigator was present in the hospital to take the victim's statement. The victim signed a medical consent form to allow medical treatment but did not sign any documents related to any possible future criminal prosecution. Further, the police investigator was not in the room when the victim was examined and made the incriminating statements. Victim's prior statement that she was not hurt did not obviate the need for medical personnel to examine her for possible injury given that she had reported being raped by multiple assailants.[751]

(H) Regardless of whether a child under ten has been determined to be competent to testify pursuant to Evid.R. 601, the child's statements may be admitted under Evid.R. 803(4) if they were made for purposes of medical diagnosis or treatment.[752]

i. Where the declarant is a child, a majority of Ohio courts find statements made for the purposes of medical diagnosis or treatment

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[749] State v. Garrett, 8th Dist. No. 74759, 1999 WL 685648 (Sept. 2, 1999).

[750] State v. Barnes, 12th Dist. Clermont No. CA84-05-041, 1985 WL 7980 (April 8, 1985), *citing* Advisory Committee Notes to Fed. R. Evid. 803(4); Presley v. Presley, 71 Ohio App.3d 34 (8th Dist. 1990).

[751] State v. Bowleg, 8th Dist. Nos. 100263, 100264, 2014-Ohio-1433, ¶ 16-19.

[752] State v. Edinger, 10th Dist. No. 05AP-31, 2006-Ohio-1527; State v. Muttart, 116 Ohio St.3d 5, 2007-Ohio-5267; In re I.W. & S.W., 9th Dist. Wayne Nos. 07CA0056 & 07CA0057, 2008-Ohio-2492; State v. Alkire, 12th Dist. Madison No. CA2008-09-023, 2009-Ohio-2813.

admissible regardless of the child's competency.[753]

ii. Even where a child declarant is found to be *incompetent* to testify at trial, his or her prior statements may still be used if admissible under 803(4)—the issues of the child's testimonial competency for trial purposes and the admissibility of the child's pretrial statements under a hearsay exception require different analyses.[754]

iii. This issue often comes to light where the state wishes to present the out-of-court statements of a young victim to doctors or social workers without requiring the child to bear the emotional burden of testifying at trial. Defendants' arguments that this tactic results in an "end run" around the right of confrontation under the guise of a medical diagnosis have been rejected.[755]

(3) In the aftermath of *Crawford*, state courts split regarding application of Confrontation Clause analysis to the testimonial nature of statements made for purposes of medical diagnoses.

(A) Of key interest is whether statements regarding the identity of the perpetrator are "testimonial" in nature.

i. One state court found statements made to doctors regarding nature of alleged attack and cause of symptoms non-testimonial, but

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[753] *See* In re D.L., 8th Dist. No. 84643, 2005-Ohio-2320, *citing* State v. Brewer, 6th Dist. Erie No. E-01-053, 2003-Ohio-3423; State v. Rusnak, 8th Dist. No. 80011, 2002-Ohio-2143; State v. Ashford, 11th Dist. Trumbull No. 99-T-0015, 2001 WL 137595 (Feb. 16, 2001); State v. Wilson, 4th Dist. Adams No. 99CA672, 2000 WL 228242 (Feb. 18, 2000); State v. Ulis, 91 Ohio App.3d 656 (6th Dist. 1993); State v. Miller, 43 Ohio App.3d 44 (9th Dist. 1988); State v. McWhite, 6th Dist. Lucas No. L-95-007, 1995 WL 763898 (Dec. 29, 1995).

[754] State v. D.H., 10th Dist. No. 07AP-73, 2007-Ohio-5970.

[755] *See, e.g.*, State v. D.H., 10th Dist. No. 07AP-73, 2007-Ohio-5970; State v. Goza, 8th Dist. No. 89032, 2007-Ohio-6837.

statements of fault or identity rejected as testimonial.[756]

ii. Those post-*Crawford* cases addressing the medical diagnosis exception under Ohio law seem to generally find statements made to medical personnel *non-testimonial*.

iii. Ohio courts have developed certain factors to test the nature of statements made to medical personnel during interviews:[757] (1) To whom were the statements made;[758] (2) Did the medical personnel or social worker work for the state or a governmental agency;[759] (3) What is the age of the victim providing the statement;[760] (4) If law enforcement personnel are watching the interview, does the victim know they are present?[761]

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[756] People v. West, 823 N.E.2d 82 (Ill. App. 2005).

[757] Courts are not expressly required to consider these factors, but several have applied them in their analyses. *See, e.g.,* State v. Edinger, 10th Dist. No. 05AP-31, 2006-Ohio-1527; State v. Martin, 10th Dist. No. 05AP-818, 2006-Ohio-2749.

[758] Courts have treated medical personnel, psychological counselors, and social workers similarly in finding statements provided to them by victims to be made for the purpose of treatment. *See* id.; *see also* State v. Sheppard, 5th Dist. Stark No. 2004CA00361, 2005-Ohio-6065.

[759] *See* id.

[760] The younger the victim, the less likely courts *see*m to find them to possess a belief that the statement would be available for use at a later trial. *See* Martin, supra (ten year-old victim unlikely to realize that statements would be available for use at later trial); Edinger, *supra* (six year-old victim unlikely to realize that statements would be available for use at later trial); In re D.L., 8th Dist. No. 84643, 2005-Ohio-2320 (three year-old victim's statements to nurse practitioner during sexual assault exam non-testimonial); State v. Copley, 10th Dist. No. 04AP-1128, 2006-Ohio-2737 (statements by three year-old to mother non-testimonial); State v. Sheppard, 5th Dist. Stark No. 2004CA00361, 2005-Ohio-6065 (six year-old victim did not realize statements made to psychological counselor would be used in criminal prosecution).

[761] *See, e.g.,* Martin and Edinger, *supra*.

(B) Statements made by rape victim to hospital personnel made upon intake made for purposes of treatment and not for trial; interview process was standard hospital procedure for tailoring of treatment to patient needs, and victim informed that the interview was for medical purposes only.[762]

(C) "Statements made by child abuse victims to medical providers are normally not testimonial," as "the purpose of the interview [is] to gather information for the hospital's medical staff to treat [the victim], not to investigate acts of alleged sexual abuse."[763]

(D) Statements made by three year-old victim to nurse practitioner found to be non-testimonial; no evidence suggesting that victim or any reasonable three year-old would have believed her statements were for anything but medical treatment.[764]

(E) Statements made by seven year-old victim to Department of Family Services intake worker found to be non-testimonial; nothing indicated that victim or a typical child of her age would believe that her statements would later be used at trial.[765]

(F) Statements made by child victim to a sexual abuse investigator during an emergency room examination found to be non-testimonial; record contained no evidence that victim believed the statements would later be used at trial.[766]

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[762] State v. Jordan, 10th Dist. No. 06AP-96, 2006-Ohio-6224. The court also noted that the defendant's failure to cross-examine the victim (who testified) about the out-of-court statements at trial rendered his Confrontation Clause argument moot.

[763] Id., *citing* State v. Martin, 10th Dist. No. 05AP-818, 2006-Ohio-2749, at ¶21.

[764] In re D.L., 8th Dist. No. 84643, 2005-Ohio-2320.

[765] State v. Dyer, 8th Dist. No. 88202, 2007-Ohio-1704.

[766] State v. Walker, 1st Dist. No. C-060910, 2007-Ohio-6337. Furthermore, the victim testified at trial, making her subject to cross-examination regarding these statements.

(G) The Evid.R. 803(4) exception applies to hearsay testimony from doctors, nurses, psychologists, psychologists, therapists, and clinical social workers, so long as the hearsay statements at issue are made for the purposes of diagnosis or treatment.[767]

(H) Statements victims made to social worker were for purposes of medical diagnoses or treatment, not for use at any future court proceeding, and thus statements were nontestimonial and were not barred by the Confrontation Clause.[768]

(I) Statements made to interviewers at child-advocacy centers that are made for medical diagnosis and treatment are nontestimonial and are admissible without offending the Confrontation Clause. However, statements made to interviewers at child-advocacy centers that serve primarily a forensic or investigative purpose are testimonial and are inadmissible pursuant to the Confrontation Clause when the declarant is unavailable for cross-examination at trail. [769]

(J) The fact that plaintiff made statements to every person she encountered that she had been stabbed in the ear does not negate the fact that the information was provided in order to receive appropriate medical treatment (nontestimonial in nature). The inability of the paramedics in her home and the first medical personnel in the hospital, to see anything in her ear may have prompted plaintiff's spontaneous repetitions that she had been stabbed in the ear. Only when a CAT scan revealed the problem was medical staff able to identify and render proper medical services to the plaintiff.[770]

(K) Victim's statements to nurse regarding how she met the defendant, the defendant's statements and demeanor during the rape, and her own actions following the

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[767] State v. Brown, 5th Dist. Stark No. 2007 CA 15, 2008-Ohio-3118.

[768] State v. Barnes, 149 Ohio Misc.2d 1, 2008-Ohio-5609 (Clermont Co. Com. Pl.).

[769] State v. Arnold, 126 Ohio St.3d 290, 2010-Ohio-2742.

[770] State v. Matthews, 2d Dist. Greene No. 08-CA-43, 2010-Ohio-4153.

rape, were not for the purpose of medical treatment, but rather related primarily to the investigation. The admission of such evidence was harmless error because the victim testified at trial and the defendant had an opportunity to cross-examine her regarding the statements she made to the nurse, thus the improper admission did not violate the Confrontation Clause and did not prejudice the defendant.[771]

(4) Ohio's position on the "testimonial" nature of statements that include the identity of offenders

(A) Pre-*Crawford*

i. The Ohio Supreme Court expressly declined to use the identity exception in *State v Dever*,[772] instead citing and adopting *U.S. v Renville*.[773] "Until such a rule [hearsay exception (807)] is approved, we, pursuant to our inherent powers, hold that an out-of-court statement of an allegedly abused child of tender years, including identification of a perpetrator, made to a qualified expert in child abuse, is admissible if the expert has independent evidence of physical or emotional abuse of the child, the child has no apparent motive for fabricating the statement and the child has been found unavailable after a good-faith effort to produce the child in court." Court recommended considering introducing evidence under 801(D)(1)(c).[774]

(B) Post-*Crawford*

[771] State v. Simmons, 8th Dist. No. 98613, 2013-Ohio-1789.

[772] State v. Dever, 64 Ohio St.3d 401, 1992-Ohio-41.

[773] United States v. Renville, 779 F.2d 430 (8th Cir.1985).

[774] State v. Boston, 46 Ohio St.3d 108, 127 (1989).

i. *State v. Stahl*: "objective witness" test applicable, analyzing statements on a case-by-case basis.[775]

d) Business Records Exception (R. 803(6)):

(1) In general

(A) "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Evid.R. 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."[776]

(2) Ohio courts have often utilized the business records exception of R. 803(6) to admit hearsay testimony contained in medical and other reports.

(A) Results of breath test found non-testimonial under business records exception where officer testifying about results averred that he was custodian and that the documents were made and kept in the ordinary course of business.[777]

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[775] *See* overview of Stahl, *supra*, at p. 9-11. *See also* In re D.L., *supra*, stating that "courts have consistently found that a description of the encounter and identification of the perpetrator are within [the] scope of statements for medical treatment and diagnosis."

[776] Evid.R. 803(6).

[777] Village of Granville v. Eastman, 5th Dist. Licking No. 2006CA00050, 2006-Ohio-6237.

(B) Autopsy report is a non-testimonial business record, and may be testified to by medical examiner who does not actually conduct the autopsy without violating defendant's confrontation rights.[778]

(3) While Ohio courts have yet to address the business records exception in the context of sexually-related crimes, other states have relied on Evid.R. 803(6) in finding statements made within medical records non-testimonial.

(A) Hospital records containing rape victim's statements deemed admissible under business records exception.[779]

e) The Effect of *Crawford* on R. 807:

(1) Evid.R. 807 provides that a child's out-of-court statement describing any act of physical violence committed against the child is not excluded as hearsay under certain circumstances.[780]

(A) The state must (1) establish the unavailability of the witness, (2) provide written notice to the defense at least ten days before trial, (3) show a good faith effort to obtain the child's testimony, (4) show that the child's testimony is not reasonably obtainable, and (5) demonstrate that the totality of the circumstances guarantee the trustworthiness of the statement.[781]

(B) If a statement otherwise qualifies as a hearsay exception under Evid.R. 803 or 804, analysis under Evid.R. 807 is unnecessary.[782]

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[778] State v. Harrop, 12th Dist. Fayette No. CA2005-12-036, 2006-Ohio-6080, *citing* State v. Craig, 110 Ohio St.3d 306, 2006-Ohio-4571.

[779] People v. Rogers, 780 N.Y.S.2d 393 (N.Y. App. 2004). However, the Rogers court also found a report of the victim's blood test improperly admitted as a business record, because it was requested and prepared by law enforcement for the purpose of prosecution. This is clearly "testimonial" within the framework of Crawford.

[780] *See* Evid.R. 807.

[781] *See* id.

[782] State v. Walker, 1st Dist. No. C-060910, 2007-Ohio-6337.

(2) Issue: is "trustworthiness" portion of the rule still good law in the wake of *Crawford*, which rejected the concepts of "reliability" and "trustworthiness" as criteria for admissibility in favor of a testimonial analysis?

6. *Crawford* and Cross-Examination of Child Witnesses:

a) Under *Crawford* and the Confrontation Clause, a defendant is entitled to an adequate opportunity to cross-examine declarants testifying against them.

b) Many defendants sense that their best challenge to child witnesses testifying against them is to claim that they did not receive an adequate opportunity to cross-examine the child.

(1) To support their position, they often rely on the argument that "if a child is so young that she cannot be cross-examined at all, or if she is 'simply too young and too frightened to be subjected to a thorough direct or cross-examination[,]' the fact that she is physically present in the courtroom should not, in and of itself, satisfy the demands of the [Confrontation] Clause."[783]

c) Most courts have rejected such arguments under *Crawford*.

(1) Where second-grade victim subject to substantial cross-examination, "imperfect memory " did not make her "unavailable" for Confrontation Clause purposes.[784]

(2) Young child's partial failure of recollection at trial did not prevent her from explaining prior statements or prevent jury from assessing her demeanor and credibility; therefore, opportunity for effective cross-examination existed.[785]

(3) Failure to respond to handful of questions does not render child unavailable.[786]

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[783] United States v. Spotted War Bonnet, 933 F.2d 1471, 1474 (8th Cir. 1991). This decision was rendered well before Crawford.

[784] *See* State v. McClanahan, No. 50866-1-I, 2004 WL 723283 (Wash. App. Apr. 4, 2004).

[785] *See* People v. Harless, 22 Cal. Rptr. 3d 625 (Cal. App. 2004).

[786] *See* State v. McKinney, 699 N.W.2d 471 (S.D. 2005).

(4) Court found child witness available for Confrontation Clause purposes and admitted videotaped statements to social worker and police, despite child's inability to recall what she told adults or what defendant did to her.[787]

d) However, other courts have found Confrontation Clause violations despite the child's presence at trial.

(1) Where trial court limited cross-examination of child witness regarding love notes she wrote to defendant after the alleged abuse occurred and no corroborating testimony or physical evidence existed, defendant's right of confrontation violated.[788]

(2) Court found child unavailable to testify where she froze on stand when asked to recount allegations of abuse.[789]

(3) Where child provided limited testimony at preliminary hearing and did not testify at trial, opportunity for cross-examination deemed insufficient.[790]

f) The effect on expert witness testimony

a. A defendant was not denied the right to confront witnesses when the lab technician who performed the DNA test was not present at trial. The lab technician no longer worked for the lab so her then supervisor, who had overseen her work on the case and had participated in some of the testing, testified as to the results. This was distinguishable from the United States Supreme Court's holding in *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2716, 180 L.E.2d 610 (2011) because in *Bullcoming* the person who testified was a peer of the absent lab technician rather than a supervisor who had ultimate responsibility over the outcome of the testing.[791]

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[787] State v. Yanez, Case No. A04-276, 2005 WL 894649 (Minn. App. Apr. 19, 2005).

[788] People v. Couturier, Case No. 323680, 2005 WL 323680 (Mich. App. Feb. 10, 2005), vacated, 704 N.W.2d 463 (Mich. 2005).

[789] In re T.T., 815 N.E.2d 789 (Ill. App. 2004).

[790] People v. Osio, Case No. H026953, 2005 WL 1231402 (Cal. App. May 25, 2005).

[791] State v. Smith, 7th Dist. Mahoning No. 11 MA 120, 2013-Ohio-756, ¶ 22-25.

7. *Crawford* and School Teachers

a) Statements of 3-year-old to his preschool teacher identifying defendant as causing marks on his body and the child's abuser were not testimonial since primary purpose was to create an out-of-court substitute for the non-testifying child to meet an ongoing emergency involving suspected child abuse. The child was not informed that his answers would be used to arrest or punish his abuser. The declarant never hinted that his statements were intended to be used by police or prosecutors. The court declined , however, to adopt a general rule that statements to individual who are not law enforcement are categorically outside the Sixth Amendment.[792]

b) Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system. *Id.* at 7.[793]

[792] Ohio v. Clark, 576 US ___ (2015), 135 S.Ct. 2173, citing Michigan v. Bryant, 562 US 344, 369, and reversing and remanding State v. Clark, 137 Ohio 3d 346, 2013-Ohio-4731.

[793] *Id., see also* State v. Saltz, 2015-Ohio-3097.

V. SPECIFIC SEXUAL CRIMES

A. Generally

1. Courts have consistently held that testimony of a victim, if believed, is sufficient to prove the elements of sexual offenses. In addition, there is no requirement that the testimony of the victim of a sexual offense be corroborated as a condition precedent to conviction.[794]

B. Force and/or Threats of Force

1. Generally:

   a) It may be necessary to determine, under various sexual crimes statutes, whether the defendant used force or the threat of force, e.g., with rape; moreover, it is necessary to show for "force" specifications; however, for crimes committed after June 13, 2002, not necessary to show force or threat of force for children less than 10 years of age for life sentence. (Sub. H.B.485).

2. Defining "Force or Threat of Force":

   a) "Force" is defined in R. C. § 2901.01(A) as "any violence, compulsion or constraint exerted by any means against a person or thing." The amount of force necessary is not fixed, but rather, depends on various factors including the age, size, and strength of the parties and their relationship to each other.[795]

   b) "Threat" indicates a direct threat or threat by innuendo or indirect remark. R.C. § 2905.12(E).

   c) Force or threat of force may be inferred where a defendant purposely compels an adult victim to submit to either explicit or implicit threats.[796]

      (1) Where defendant informs the victim of his violent criminal past and then engages in unwanted sexual contact with her,

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[794] State v. Laseur, 12th Dist. Warren Nos. CA2002-10-117, CA2002-11-121, 2003-Ohio-3874.

[795] State v. Dye, 82 Ohio St.3d 323, 1998-Ohio-234, *citing* State v. Eskridge, 38 Ohio St.3d 56 (1988).

[796] State v. Rupp, 7th Dist. Mahoning No. 05 MA 166, 2007-Ohio-1561.

the threat of force may be inferred from the circumstances of the victim's fear. [797]

3. "Force or Threat of Force" with Children:

a) Generally

(1) Research and statistics indicate that sexual conduct often occurs between a child and a known adult. The perpetrator will generally be coercive in a subtle fashion. [798]

(2) The Courts' Response to Force or Threats of Force with Children

(A) An Ohio Court of Appeals held that the degree of force required to compel an 8 or 12 year-old to perform a sexual act is necessarily less than the amount of force required to compel an adult to perform a similar act.[799]

(B) The Ohio Supreme Court in *State v. Eskridge* held that the degree of force required to compel a child to perform a sex act does not require an additional quantum of force beyond that inherent in the commission of the sexual conduct.[800]

(C) One court held that a mere pattern of incest, without more, i.e., that victim believed defendant might use force, is insufficient.[801]

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[797] Id.

[798] Suzanne M. Sgroi, M.D., HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE (1982), at 13.

[799] State v. Wilson, 1st Dist. No.C-840903, 1985 WL 11498 (Oct. 9, 1985).

[800] State v. Eskridge, 38 Ohio St.3d 56 (1988), *overruling*, 8th Dist. No. 52359, 1987 WL 13017 (June 18, 1987), and *implicitly overruling* State v. MacDonald, 1st Dist. No. C-860833, 1988 WL 3169 (Jan. 13, 1988), as to that issue. *See also*, State v. Fancher, 12th Dist. Clermont No. CA88-10-076, 1989 WL 85091 (July 31, 1989); State v. Leonard, 2d Dist. Montgomery No. 10973, 1989 WL 135306 (Nov. 6, 1989); State v. Stokes, 72 Ohio App.3d 735 (10th Dist. 1991).

[801] State v. Schaim, 65 Ohio St.3d 51, 1992-Ohio-31.

(D) An *Ohio Jury Instruction* that defines force as subtle and psychological was upheld where an 11 year-old was raped by her mother's boyfriend who often babysat.[802]

(E) Degree of force will vary according to age, size and strength of child as well as relationship between victim and rapist.[803] Young children who do not have mental ability to understand, can still be subject to force.[804] Giving cigarette to mentally retarded 15 year-old showed psychological force.[805]

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[802] State v. Love, 1st Dist. No. C-960498, 1997 WL 292349 (June 4, 1997).

[803] State v. Ambrosia, 67 Ohio App.3d 552 (6th Dist. 1990); State v. Jones, 12th Dist. Clermont No. CA92-12-117, 1993 WL 369243 (Sept. 20, 1993). In State v. Dye, 82 Ohio St.3d 323, 1998-Ohio-234, the Ohio Supreme Court reversed the Court of Appeals and found sufficient force: it examined the parties' ages, sizes, their respective physical strength, and their relation to each other; there was also substantial psychological force.

In State v. Fenton, 68 Ohio App.3d 412 (6th Dist. 1990), an Ohio court of appeals approved of the following jury instruction as to force and threat of force:

> Now in addition, the Court wishes to give you this added definition as to force and threat. The force and violence necessary in rape is naturally a relative term, depending upon the age, size and strength of the parties and their relationship to each other; as the relationship between a stepfather and a daughter under ten years of age. With the filial obligation of obedience to a stepparent, the same degree of force and violence may not be required upon a person of tender years, as would be required were the parties more nearly equal in age, size and strength. Force need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established.

Sexual activity between a parent and a minor child is not comparable to sexual activity between two adults with a history of consensual intercourse. The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to affect the abuser's purpose.

[804] State v. Fille, 12th Dist. Clermont No. CA 2001-08-066, 2002-Ohio-3879.

[805] State v. Jenkins, 6th Dist. Erie App. E-97-057 (May 11, 2001)(Defendant used cigarettes to lure 15 year-old mentally retarded female); *see also* State v. Mangus, 8th

(F) Alleged prior sexual conduct helped to demonstrate that defendant purposely compelled the victim to submit by force or threat of force.[806]

(G) Where victim is at least 13 years old, force may be proved with evidence of subtle and/or psychological force where the defendant is an authority figure to the child even in the absence of any express threat or physical restraint.[807]

b) The *Eskridge* standard applies to those in a parental relationship with the victim; *e.g.*, stepparents as well as parents.[808]

(1) Where defendant is in parental relationship with victim and victim believes that if she did not do as defendant told her, she would be deprived of the necessities of life provided by defendant, there was sufficient evidence of force.[809]

(2) *Eskridge* applies to "person in position of authority" which can include family friend where child is told to "mind" that friend.[810]

Dist. 68679, 1996 WL 50824 (Feb. 8, 1996) (17 year-old mentally retarded victim interest in bowling).

[806] State v. Wright, 4th Dist. Washington No. 00CA39, 2001-Ohio-2473.

[807] State v. Musgrave, 9th Dist. Summit No. 18260, 1998 WL 831574 (Nov. 25, 1998); *see also* State v. Daniel, 9th Dist. Summit No. 19809, 2000 WL 1287929 (Sept. 13, 2000); and State v. Jordan, 7th Dist. Harrison No. 06 HA 586, 2007-Ohio-3333.

[808] State v. Riffle, 110 Ohio App.3d 554 (9th Dist. 1996); State v. Kennedy, 8th Dist. No.57147, 1990 WL 84286 (June 21, 1990) (live in boyfriend); State v. Netherland, 132 Ohio App.3d 252 (1st Dist. 1999) (foster parent).

[809] State v. Browne, 2d Dist. Montgomery No. 11325, 1991 WL 19399 (Feb. 12, 1991); State v. Sloane, 7th Dist. Mahoning No. 06 MA 144, 2009-Ohio-1175.

[810] State v. Dye, 82 Ohio St.3d 323, 1998-Ohio-234.

(3) Explicit threats or display of force not necessary for foster parents[811] or natural parents.[812]

(4) Fourteen year-old victim not at so tender of an age as to apply *Eskridge* standard without determining if her will was overcome by fear or duress.[813]

c) Where Courts Have Found Sufficient Force:

(1) The superior size of the perpetrator and the fact that the parents of the victim approved, not only of this act but of prior sexual acts with the victim, were cumulatively considered to be a threat of force.[814]

(2) Victim did not tell anyone of sexual conduct because defendant told her that he would hurt her, her mother and her sister; victim had seen defendant hit her mother on various occasions; and victim was thus afraid of the defendant.[815] Defendant threatened to tell victim's mother who would commit suicide.

(3) The superior size of perpetrator, his demanding tone of voice and the nature of the statement made were considered to be a threat of force; the court stated that it was not necessary that the offender use language which directly threatened harm.[816]

(4) Force can be psychological, as where the defendant placed his hand on a 16 year-old victim's hand and then placed it on his

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[811] State v. Netherland, 132 Ohio App.3d 252 (1st Dist. 1999).

[812] State v. Linton, 5th Dist. Licking No. 99 CA 10, 1999 WL 770613 (Sept. 16, 1999).

[813] State v. Pollard, 5th Dist. Licking No. 08 CA 99, 2009-Ohio-2313; State v. Johnson, 7th Dist. Mahoning No. 08-MA-144, 2009-Ohio-6760 (third rape occurred when victim was 22 years-old so analysis of whether victim's will was overcome was required).

[814] State v. Humfleet, 12th Dist. Clermont Nos. CA84-04-031, CA84-05-036, 1985 WL 7728 (Sept. 9, 1985); State v. Duke, 8th Dist. No. 52604, 1988 WL 88862 (Aug. 25, 1988); State v. Geboy, 3rd Dist. Logan No.8-2000-36, 2001-Ohio-2214.

[815] State v. Banks, 117 Ohio App.3d 592 (7th Dist. 1997).

[816] State v. Hartsook, 12th Dist. Madison No. CA84-02-009, 1984 WL 3437 (Sept. 28, 1984).

genitals during fellatio by victim after repeated advances by defendant and repeated requests to leave by victim.[817]

(5) Twelve year-old victim reported sexual abuse by her stepfather that allegedly occurred over a period of time; defendant previously threatened to kill her and "mommy" if she told and he would go to jail; on date he was told to stop inserting fingers, she ran to the bedroom and he followed, pulled down her pants and performed cunnilingus; on date he told victim "it's your fault you make me hard" and victim felt mother would believe it was her fault and she, therefore, performed fellatio.[818]

(6) It makes no difference that defendant is not victim's parent where the facts show that he covered the victim's mouth and blocked door with furniture so she could not leave.[819]

(7) Forcible rape of child under 13 where defendant was living with victim in surrogate father-son relationship, thus giving defendant power and authority over victim, and psychologist testified that victim said defendant committed anal rape by "jamming" his penis into his rectum and that defendant "made" him perform fellatio.[820]

(8) Prior sexual abuse by various family members in which the defendant/mother assisted, including her taping the victims' mouths shut while family members told them they would be killed if they disclosed the nature of the abuse, was sufficient to show that the children were under a threat of force when the mother, without comment, performed fellatio on her 7 and 3 year-old sons.[821]

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[817] State v. Didio, 8th Dist. No. 53745, 1988 WL 51516 (May 19, 1988).

[818] State v. Hendricks, 10th Dist. No. 85AP-1066, 1987 WL 16795 (Sept. 8, 1987).

[819] State v. Cummings, 10th Dist. No. 93APA10-1386, 1994 WL 265665 (June 14, 1994).

[820] State v. Vaughn, 106 Ohio App.3d 775 (12th Dist. 1995).

[821] State v. Barnes, 12th Dist. Clermont No. CA84-05-041, 1985 WL 7980 (April 18, 1985).

(9) Whenever defendant molested the victim he threatened to burn her home and kill her sister.[822]

(10) Defendant threatened to injure and/or kill the victim's mother and boyfriend if she told anyone about the recurring sexual assaults, he became extremely angry when the victim would refuse his sexual advances, and he would persuade the victim to engage in sexual conduct by offering presents and special privileges.[823]

(11) Although there is sufficient force where a defendant was the legal guardian and father figure of the victim, where he used drugs and alcohol to make the teenagers "feel grownup," and where he used manipulation sufficient to negate the teenagers' freewill, where one of the victims did not consider the defendant as a father figure or authority figure and the defendant did not use drugs on that victim, there was insufficient evidence of force.[824]

(12) Grabbing or putting hands on 13 year-old victim and causing victim's penis to be inserted in defendant's anus, telling victim that defendant had to check victim's prostate as explanation for digital penetration, and defendant taking victim's penis and holding it against his own.[825]

(13) Defendant told 25 year-old mentally retarded victim he would hurt her if she told anyone about the rape prior to and during the sexual conduct.[826]

(14) Defendant fondled a 10 year-old girl repeatedly, despite being pushed away repeatedly; immediately after fondling her, the

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[822] State v. Hensley, 2d Dist. Montgomery No. 11410, 1990 WL 31840 (Mar. 19, 1990) (overturned on other grounds by State v. Hensley, 59 Ohio St.3d 136 (1991)); State v. Arrington, 9th Dist. Lorain No. 89CA004644, 1990 WL 51982 (April 25, 1990).

[823] State v. Tirey, 12th Dist. Warren No. CA92-06-050, 1992 WL 379308 (Dec. 21, 1992).

[824] State v. Rutan, 10th Dist. No. 97APA03-389, 1997 WL 781902 (Dec. 16, 1997) (gross sexual imposition with force specification case).

[825] State v. Musgrave, 9th Dist. Summit No. 18260, 1998 WL 831574 (Nov. 25, 1998).

[826] State v. Malin, 9th Dist. Lorain No. 97CA006898, 1999 WL 1775 (Dec. 30, 1998).

defendant engaged in sexual conduct with her older sister; that night, the older sister woke up to find the defendant putting his fingers in her vagina; she rolled over, thinking that he might stop, but he pushed her back over; defendant took his pants, and the older girl's shorts, off, pulled her legs open, and attempted to penetrate her; defendant masturbated and then performed cunnilingus on her; eventually the younger sister was able to leave the room and the defendant stopped abusing the older sister.[827]

(15) Defendant knew that victim fainted when the word "sex" was spoken, he approached the victim and said this word, she fainted, and defendant carried her upstairs to her room where he sexually abused her.[828]

(16) Defendant baby-sat for victim's mother; thus, he was in a position of authority; victim was afraid of defendant because she saw him hit her mother and he pulled the victim onto his lap on several occasions.[829]

(17) 5'10", 330 pound defendant's use of weight to restrain and subdue minor victim's sufficient for finding of force.[830]

(18) Where teenage victim had acquiesced to sexual demands of mother's live-in boyfriend, who had previously taken her to the county jail for smoking, because she was afraid that he would "get [her] in trouble," sufficient to show that victim's will was overcome by fear of authority figure.[831]

(19) Although there was no evidence that the victim feared defendant, or that she was told by her mother to obey him, her choice of words demonstrates that she did feel compelled to submit to the sexual abuse.[832]

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[827] State v. Nicodemus, 10th Dist. No. 96APA10-1359, 1997 WL 254095 (May 15, 1997).

[828] State v. Gray, 1st Dist. No. C-940276, 1995 WL 392509 (June 28, 1995).

[829] State v. Garrett, 8th Dist. No. 74759, 1999 WL 685648 (Sept. 2, 1999).

[830] State v. Eads, 8th Dist. No 87636, 2007-Ohio-539.

[831] State v. Jordan, 7th Dist. Harrison No. 06 HA 586, 2007-Ohio-3333.

[832] State v. Sloane, 7th Dist. Mahoning No. 06 MA 144, 2009-Ohio-1175.

(A) Victim consistently stated that defendant "made" her perform the acts for which he was convicted.[833]

(B) Moreover, victim testified that defendant held her head and manipulated it during oral sex.[834]

(20) A threat may be implied from the surrounding circumstances or past conduct:[835]

(A) Fear of temper due to previous violent outbursts.[836]

(B) Child commanded by stepfather to engage in intercourse and ordered not to tell anyone.[837]

(C) Defendant held child down and held his wrists behind him.[838]

(D) Defendant told child "not to tell anybody because he'd do something to her."[839]

(E) Series of rapes by father, each followed by warning of "whooping" if child told anyone.[840]

(F) Father pushed daughter onto bed and slapped her leg when she cried out.[841]

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[833] Id.

[834] Id.

[835] State v. Harvey, 12th Dist. Clermont No. CA 86-03-021, 1986 WL 15285 (Dec. 31, 1986).

[836] State v. Glover, 12th Dist. Clermont No. 85-12-106, 1988 WL 85899 (Aug. 15, 1988); State v. Campbell, 12th Dist. Butler Nos. 87-07-089, 87-09-116, 1988 WL 94042 (Sept. 12, 1988).

[837] State v. Fowler, 27 Ohio App.3d 149 (8th Dist. 1985).

[838] State v. Zalonis, 8th Dist. No. 49788, 1985 WL 3984 (Nov. 27, 1985).

[839] State v. Pettus, 8th Dist. No. 47239, 1984 WL 4580 (Mar. 22, 1984).

[840] State v. Lee, 8th Dist. No. 45803, 1983 WL 4602 (Aug. 11, 1983).

[841] State v. Pultz, 2d Dist. Darke No. 1087, 1983 WL 2533 (Nov. 2, 1983).

(G) Defendant would spank her or "bite her behind."[842]

(H) Defendant threatened to slap the victim.[843]

(I) Defendant threatened to kill victim's mother.[844]

(J) Stepfather, who was primary caregiver, promised to leave the victim's younger sister alone.[845]

(K) Defendant held the victim's head during fellatio.[846]

(L) After placing his hands inside the victims' clothing, defendant refused to allow them to leave, grabbed one victim's arm when she attempted to leave, and told passersby to leave thereby isolating the victims found sufficient for GSI.[847]

(M) Jury could reasonably infer force where victim testified that he tried to "get away" from defendant but could not and defendant was step-grandfather to victims.[848]

(N) Older brother's threat that he would not provide food to eleven year-old sister sufficient for force where believed by victim.[849]

(21) Force or threat of force elements met where a fourteen year-old victim was told by her step-father, an important authority

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[842] State v. Steed, 2d Dist. Greene No. 83-CA-73, 1984 WL 3819 (Aug. 13, 1984).

[843] State v. Pierce, 3rd Dist. Seneca No.13-87-27, 1989 WL 86258 (Aug. 3, 1989).

[844] State v. Fox, 66 Ohio App.3d 481 (6th Dist. 1990).

[845] State v. Lydicowens, 9th Dist. Summit No. 14054, 1989 WL 140617 (Nov. 22, 1989); *see also* State v. Foster, 9th Dist. Summit No. 14277, 1990 WL 72345 (May 23, 1990).

[846] State v. Gordon, 2d Dist. Greene No. 92 CA 127, 1994 WL 116171 (Apr. 6, 1994).

[847] State v. Drayer, 159 Ohio App.3d 189, 2004-Ohio-6120 (10th Dist.).

[848] State v. Dooley, 8th Dist. No. 84206, 2005-Ohio-628.

[849] In re A.E., 2d Dist. Greene No. 2006 CA 13, 2008-Ohio-1864.

figure to her, to commit sexual acts with him and not to tell anyone.[850]

(22) Force element established where defendant was the uncle of the 14 year-old victim and victim testified that defendant told her not to tell anyone and that she was scared.[851]

(23) Where there was testimony that defendant used force and threat of force to compel the alleged victim to submit, appellate court will not overturn conviction of defendant for rape. [852]

(24) Evidence that defendant was "authority figure" to his mother's step-grandchild and repeatedly struck him in the testicles was sufficient for force specification in rape prosecution, although he was not authority figure based solely on distant familial relationship, and was never in charge of caring for child or acting in loco parentis; defendant placed himself in a position of authority when he told the child he would be punished for damaging a car and that if he did not acquiesce to punishment, then defendant would get him into even more trouble, child was of tender years, and small for his age.[853]

d) Where Courts Have Found Insufficient Force:

(1) No force found on gross sexual imposition charge where victim asked to sit on her father's lap and he kissed her and attempted to pull down her panties, there was no evidence tending to show that her will was overcome.[854]

(2) No force found on gross sexual imposition charge where defendant merely rubbed victim's penis, there was no action beyond sexual contact itself.[855]

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[850] State v. Pollard, 5th Dist. Licking No. 08 CA 99, 2009-Ohio-2313.

[851] State v. Robinson, 8th Dist. No. 91320, 2009-Ohio-1879.

[852] State v. Fields, 9th Dist. Summit No. 24330, 2009-Ohio-1053.

[853] State v. Kaufman, 187 Ohio App.3d 50, 2010-Ohio-1536 (7th Dist.).

[854] State v. Mitchell, 8th Dist. No. 58447, 1991 WL 106037 (June 13, 1991).

[855] State v. Musgrave, 9th Dist. Summit No. 18260, 1998 WL 831574 (Dec. 3, 1998).

e) Evidence Issues with Force or Threat of Force:

(1) Testimony of defendant's prior sexual acts with victim does not violate rape shield statute if its purpose is to establish the element of force in rape.[856]

(2) Doctor may testify that the two year-old victim was acting consistent with the behavior of a child who is "forced;" here child was acting extremely passive.[857]

(3) Forcible rape upheld where vaginal tear extended far into two year-old's vagina, emergency room doctor concluded that the tear resulted from a forced entry, child's doctor noted that there were two tears across the child's hymen.[858]

C. Rape

1. Defined:

a) Under R.C. § 2907.02, there are two ways a rape can occur:

(1) If one engages in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(A) Defendant's argument that no force was present because he stopped when asked by the victim rejected; by the time defendant stopped at the victim's request, force had already been used to accomplish the act. [859]

(2) If one engages in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender when:

(A) To prevent resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other

[856] State v. Pierson, 9th Dist. Lorain No. 4197, 1987 WL 16991 (Sept. 16, 1987).

[857] State v. MacDonald, 1st Dist. No. C-860833, 1988 WL 3169 (Jan. 13, 1988).

[858] State v. Hale, 12th Dist. Butler No. CA2002-02-037, 2003-Ohio-4448.

[859] State v. Weimer, 8th Dist. No. 88135, 2007-Ohio-3774.

person, surreptitiously or by force, threat of force, of deception;

(B) the other person is less than 13 years of age, whether or not the offender knows this fact; or

(C) the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

2. Strict Liability Crime:

a) R.C. 2907.02(A)(1)(b) is a strict liability offense.[860]

(1) This statute's strict liability requiring does not violate due process and is not unconstitutional.[861]

(2) Consent is not a defense to a violation of the statute where the victim in under the age of thirteen.[862]

b) Rape of person under thirteen by means of fellatio is strict liability crime.[863]

c) Intoxication is not relevant in rape or GSI except in issue of purposely compelling (force) since strict liability.[864]

3. Use of Force:

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[860] State v. Green, 5th Dist. Knox No. 08-CA-20, 2009-Ohio-2065; State v. Craver, 2d Dist. Montgomery No. 11101, 1989 WL 43079 (Apr. 24, 1989); State v. Nicodemus, 10th Dist. No. 96APA10-1359, 1997 WL 254095 (May 15, 1997).

[861] State v. O'Dell, 2d Dist. Montgomery No. 22691, 2009-Ohio-1040.

[862] In re D.B., 5th Dist. Licking No. 2009 CA 00024, 2009-Ohio-6841 (reversed, statute unconstitutionally vague, as stated in In re D.B., 129 Ohio St.3d 104, 2011-Ohio-2671).

[863] State v. Smelcer, 89 Ohio App.3d 115 (8th Dist. 1993).

[864] State v. Nicodemus, *supra*.

a) Force is *not* an element of the crime of rape of a minor under the age of thirteen; rather, proof of force was necessary only to support life sentence. R.C. § 2907.02(A)(1)(b), (B),[865] Prior to June 13, 2002.

(1) However, the failure to give a force specification on a verdict form is not plain error where no objection is made.[866]

b) Rape with force is not same animus as felonious assault[867] or the same as abduction.[868]

c) Where there are significant intervening acts between the commission of one sexual act and the commission of rape, the two crimes do not merge.[869]

4. Medical and Physical Evidence/Claims:

a) It is possible to convict defendant of rape without medical or physical evidence.[870]

(1) Lack of corroborating physical evidence does not vitiate conviction for rape of an adult woman since force can be proved if it is shown that victim's will is overcome by fear or

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[865] State v. Payton, 119 Ohio App.3d 694 (11th Dist. 1997)(abrogated on other grounds as stated in State v. Delmonico, 11th Dist. Ashtabula No. 2003-A00022, 2005 WL 1384383); State v. Alexander, 8th Dist. No. 51565, 1987 WL 6800 (Feb. 19, 1987). However, effective June 13, 2002, no longer necessary to show force for child under 10 years of age. (Sub. H.B. 485).

[866] State v. Cummings, 10th Dist. No. 93APA10-1386, 1994 WL 265665 (June 14, 1994).

[867] State v. Boggs, 4th Dist. Adams No. CA 494, 1991 WL 13735 (Jan. 24, 1991), *rev'd on other grounds*, 63 Ohio St.3d 418 (1992); State v. Jones, 83 Ohio App.3d 723 (2d Dist. 1992).

[868] State v. Brown, 12th Dist. Fayette No. CA2000-10-027, 2001 WL 877406 (Aug. 6, 2001).

[869] State v. Abdullah, 9th Dist. Summit No. 19119, 1999 WL 270420 (Apr. 28, 1999) (*citing* State v. Jones, 78 Ohio St.3d 12, 1997-Ohio-38 and State v. Nicholas, 66 Ohio St.3d 431 (1993)).

[870] State v. Mayhew, 71 Ohio App.3d 622 (4th Dist. 1991); State v. Palacio, 12th Dist. Clermont No. CA2005-06-049, 2006-Ohio-1437.

duress; force need not be overt and physically brutal, but may be subtle and psychological.[871]

(2) However, where a 2½ year-old girl was bleeding from her rectum, and there was conflicting medical testimony, there was insufficient evidence for a conviction.[872]

b) R.C. § 2907.02(A)(1)(c) (sexual conduct when victim's ability to resist or consent is substantially impaired because of mental or physical condition) is violated when defendant knows that victim is substantially impaired by voluntary intoxication but does not cover "reduced inhibitions."[873]

(1) Lack of evidence of any specific behavior by the victim that might indicate substantial impairment makes evidence concerning Defendant's training in OPOTA and ADAP insufficient evidence that he knew, or had reasonable cause to believe, that the victim was substantially impaired in order to submit the charge to the jury. [874]

c) Presence of intact hymen does not preclude finding of rape by jury because slight penetration is possible.[875] Injury to hymen sufficient to find penetration; it is not necessary that the hymen be broken or that there be any injury to the vagina.[876]

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[871] State v. Scarborough, 12th Dist. Warren No. CA91-01-012, 1991 WL 241961 (Nov. 18, 1991); State v. Sklenar, 71 Ohio App.3d 444 (9th Dist. 1991); State v. Banks, 71 Ohio App.3d 214 (3rd Dist. 1991); State v. Mongold, 12th Dist. Fayette No. CA92-02-004, 1992 WL 210652 (Aug. 31, 1992); State v. Matha, 107 Ohio App.3d 756 (9th Dist. 1995); State v. Rankin, 12th Dist. Clinton No. CA2004-06-015, 2005-Ohio-6165.

[872] State v. Davis, 8th Dist. No. 72063, 1998 WL 57096 (Feb.12, 1998).

[873] State v. Martin, 12th Dist. Brown No. CA99-09-026, 2000 WL 1145465 (Aug. 14, 2000); State v. Duffy, 12th Dist. Fayette No. CA95-03-006, 1996 WL 144212 (Apr. 1, 1996).

[874] State v. Hatten, 186 Ohio App.3d. 286, 2010-Ohio-499 (2d Dist.).

[875] State v. Carpenter, 60 Ohio App.3d 104 (5th Dist. 1989); State v. Vang, 9th Dist. Summit No. 23206, 2007-Ohio-46.

[876] State v. Shoop, 87 Ohio App.3d 462 (3rd Dist. 1993).

d) Claimed incompetency of defendant not allowed when claim stems solely from defendant's statements that seven year-old victim was initiator of sexual contact.[877]

e) In rape convictions, court does not have authority to order restitution for psychological treatment under present S.B. #2.[878]

5. Elderly Victims:

a) Evidence clearly established a violation of R.C. 2907.02(A)(1)(c) where victim was 87 years old, wheelchair bound, and required around the clock care for bathing and feeding.[879]

b) Elderly rape victim's dementia rendered her unable to resist or consent to sexual activity; son-in-law's knowledge of her diagnosis and condition sufficient for finding of guilt under R.C. 2907.02(A)(1)(c). Trial court's failure to reference "mental condition" in its instruction to jury on "substantial impairment" not fatal error where indictment and bill of particulars each included "mental condition" in defining "substantial impairment." Classifying the cause of the impairment as physical or mental did not change the operative fact that the victim was impaired.[880]

6. Specific Conduct:

a) State must prove specific conduct:

(1) If State proved cunnilingus rape but bill of particulars states offense is vaginal rape - Rule 29.[881]

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[877] State v. Drescher, 4th Dist. Highland No. 08CA5, 2009-Ohio-2210.

[878] State v. Overholt, 77 Ohio App.3d 111 (3rd Dist. 1991) (pre Sen. Bill 2).

[879] State v. Smith, 8th Dist. No. 88594, 2007-Ohio-3648.

[880] State v. Dorsey, 5th Dist. Licking No. 2007-CA-091, 2008-Ohio-2515.

[881] State v. Fritsch, 1st Dist. No.C-850746, 1986 WL 13162 (Nov. 19, 1986) (no request to amend). The state may, however, properly amend the specific sexual conduct alleged in its rape indictment during trial pursuant to Crim.R. 7(D), as such an amendment changes neither the name nor the identity of the rape offense itself. State v. Martin, 10th Dist. No. 05AP-818, 2006-Ohio-2749.

(2) *But cf.*, where no type of rape specified, no need for jury to make determination as to type of rape.[882]

(3) Victim testimony that she had intercourse insufficient to establish vaginal or anal intercourse occurred.[883]

b) There is nothing in the law which requires that a rape victim's testimony be corroborated as a condition precedent to conviction.[884]

7. Jurisdiction:

a) Where rapes occur periodically over 5 year period beginning in Medina County and then in Summit County, charges can be brought in Summit County.[885]

8. Juvenile Offenders:

a) 13 year-old boy capable of committing rape if penetration proved.[886]

(1) A juvenile's adjudication for rape and related commitment to DYS was reversed where the acts alleged occurred when the juvenile was 12 years old.[887]

(2) A juvenile's adjudication for statutory rape was affirmed even though the juvenile was 12 when the acts alleged occurred because statutory rape requires no mens rea and therefore

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[882] State v. Thompson, 33 Ohio St.3d 1 (1987).

[883] State v. Ferguson, 5 Ohio St.3d 160 (1983). But where victim testified defendant penetrated her and she was concerned about getting pregnant sufficient. State v. Bell, 12th Dist. Butler App. CA99-07-122, 2001 WL 432737 (Apr. 30, 2001).

[884] In the Matter of Hollobaugh, 7th Dist. Mahoning No. 08 MA 22, 2009-Ohio-797; *see* State v. Alexander, 7th Dist. Carroll No. 03 CA 789, 2004-Ohio-5525; State v. Nichols, 85 Ohio App.3d 65, 76 (4th Dist. 1993).

[885] State v. Lydicowens, 9th Dist. Summit No. 14054, 1989 WL 140617 (Nov. 22, 1989), per R.C. § 2901.12 (H).

[886] In re Carter, 12th Dist. Butler No. CA95-05-087, 1996 WL 103778 (Mar. 11, 1996), *citing* In re Wilson, 2d Dist. Montgomery No. 10909, 1988 WL 129176 (Dec. 1, 1988), and distinguishing In re M.D., 38 Ohio St.3d 149 (1988).

[887] In re S. L. McC., 5th Dist. Coshocton No. 2013CA0016, 2014-Ohio-2485, ¶ 15-16.

does not require that the offender be old enough to have the requisite intent to commit the act.[888]

b) A child under the age of fourteen is capable of committing the crime of rape.[889]

c) Juvenile can be convicted of rape of one under 13.[890]

d) Court rejected argument that 2907.02(A)(2) applies to adult defendants only.[891]

e) 14 year-old juvenile could not be prosecuted for rape of 12 year-old where consensual.[892]

9. Whether Victim was Alive or Dead:

a) Where victim dies but expert unable to testify whether death occurred before or after rape sufficient evidence exists, State not required to prove victim was alive during rape.[893]

b) State does not have to prove that victim was alive during the rape to convict defendant of rape.[894]

c) Abuse of a Corpse is not a lesser offense of rape. Court cannot say that the defendant cannot ever commit a rape without also committing abuse of a corpse.[895]

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[888] In re K.A., 8th Dist. Nos. 98924, 99144, 2013-Ohio-2997, ¶ 11.

[889] In re Washington, 75 Ohio St.3d 390, 1996-Ohio-186, *overruling* Williams v. State, 14 Ohio 222 (1846) and Hiltabiddle v. State, 35 Ohio St. 52 (1878) and distinguishing *In re M.D.*, *supra*.

[890] In re C.M., 12th Dist. Butler No. CA2003-03-063, 2004-Ohio-2294 (affirming adjudication as a delinquent child of minor for rape of victim under thirteen).

[891] In the Matter of Daniel B., 6th Dist. Williams No. 93WM000016, 1994 WL 138442 (April 15, 1994).

[892] In re Frederick, 63 Ohio Misc.2d 229 (Cuyahoga Ct. Com. Pls. 1993).

[893] State v. Collins, 66 Ohio App.3d 438 (10th Dist. 1990).

[894] State v. Dieterle, 1st Dist. C-070796, 2009-Ohio-1801.

[895] Id.

10. Lesser Included Offenses and Animus:

a) Vaginal intercourse, cunnilingus, and digital penetration of the vagina not same animus.[896] Vaginal rape, anal rape and digital penetration are not same animus.[897]

b) Defendant not entitled to jury instruction on lesser included offense of gross sexual imposition because jury could not reasonably infer anything less than penetration from testimony that defendant tried to penetrate eight year-old victim but could not.[898]

c) Corruption of minor, R.C.2907.04 not lesser included offense of rape R.C.2907.02(A)(2).[899] Corruption of minor is offense of inferior degree to charge of rape because knowledge of age is mitigating factor not additional factor.[900]

d) Where the restraint or movement of the victim sufficient for kidnapping is merely incidental to a separate underlying rape, there exists no separate animus sufficient to sustain separate convictions.[901]

(1) Where rape of the victim by defendant occurred in different parts of the same room, the movement from one area of the room to another was merely incidental to the rape; making sentencing on a kidnapping charge improper.[902]

(2) However, where defendant grabs victim's hair and forces her downstairs, outside, and to the street corner after completing

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[896] State v. Nicholas, 66 Ohio St.3d 431 (1993).

[897] State v. Threlkeld, 12th Dist. Madison No. CA95-06-020, 1995 WL 728505 (Dec. 11, 1995), *overruling* State v. Nichols, Madison No. CA93-05-013, 1994 WL 93152 (Mar. 21, 1994).

[898] State v. Gray, 1st Dist. No. C-970933, 1998 WL 852299 (Dec. 11, 1998).

[899] State v. Hairston, 121 Ohio App.3d 750 (8th Dist. 1997); State v. Jakobiak, 65 Ohio App.3d 432 (6th Dist. 1989).

[900] Id.

[901] State v. Logan, 60 Ohio St.2d 126 (1979); State v. Hanni, 8th Dist. No. 91014, 2009-Ohio-139.

[902] State v. Quinones, 8th Dist. No. 87517, 2007-Ohio-70.

rape, movement is not incidental to the rape and sentencing on both rape and kidnapping charges is proper.[903]

(3) In addition, where the victim is forced into a van, driven to a secluded location, physically removed from the van, and raped in the bushes while being held down, separate restraints of the victim's liberty existed so as to provide separate animus for aiding and abetting kidnapping and rape convictions.[904]

(4) Where defendant lured victim out of train station and robbed her, then forcefully walked her through a parking lot, across a street, and behind a store, duration and distance sufficient evidence of separate animus on kidnapping and rape charges.[905]

(5) Where defendant held victim in hotel room for extended period of time, repeatedly raped her, and hid her shoes so she could not escape, rape and kidnapping committed with separate animus.[906]

11. Sufficiency / Manifest Weight of Evidence:

a) Lack of physical evidence from rape kit linking defendant to victim not enough to prove lack of sufficient evidence for conviction. Victim's testimony is sufficient evidence upon which the jury could convict defendant of rape. [907]

b) Some erroneous testimony about a specific contusion on victim's body not enough to outweigh evidence that victim was raped with a knife by defendant.[908]

c) Sufficient evidence presented for conviction of rape where four year-old boy tells social worker he was subjected to anal intercourse.[909]

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[903] State v. Knight, 8th Dist. No. 89534, 2008-Ohio-579.

[904] State v. Grant, 5th Dist. Richland No. 07 CA 32, 2008-Ohio-3429.

[905] State v. Lawson, 8th Dist. No. 90589, 2008-Ohio-5590.

[906] State v. Evans, 9th Dist. Medina No. 07CA0057-M, 2008-Ohio-4772.

[907] State v. Hanni, 8th Dist. No. 91014, 2009-Ohio-139.

[908] State v. Dieterle, 1st Dist. No. C-070796, 2009-Ohio-1801.

d) Victim's testimony that defendant held a knife to his throat and had anal sex with him against his will and threatened to kill him if he told anyone is sufficient evidence to support conviction.[910]

e) Sufficient evidence presented for conviction of rape where two victims testified, in detail, to several occasions where they were forced to perform oral sex upon defendant and where defendant performed anal sex upon them.[911]

f) Sufficient and credible evidence presented for conviction of rape where victim testified that he was paid money to perform oral sex upon the defendant on numerous occasions.[912]

g) Sufficient and credible evidence presented for conviction of rape where victim testified that her father had raped her vaginally and anally for many years and the victim had the same sexually transmitted disease as defendant.[913]

h) Sufficient and credible evidence presented for conviction of rape where defendant's DNA was found on the victim's clothing, vagina and rectum.[914]

i) Credible evidence presented where jury could and did consider the victim's prior contradictory statements regarding the allegations of rape. Moreover, the victim's testimony was not the only evidence of rape—DNA evidence was also presented.[915]

j) Victim's testimony is legally sufficient to support rape charge; force was established by victim's testimony that defendant laid on top of her and applied weight demonstrating physical constraint and also

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[909] State v. Gilfillan, 10th Dist. No. 08AP-317, 2009-Ohio-1104.

[910] State v. Bruce, 8th Dist. No. 90897, 2009-Ohio-1067.

[911] In the Matter of Hollobaugh, 7th Dist. Mahoning No. 08 MA 22, 2009-Ohio-797.

[912] State v. Southall, 5th Dist. Stark No. 2008 CA 00105, 2009-Ohio-768.

[913] State v. M.B., 10th Dist. No. 08AP-169, 2009-Ohio-752.

[914] State v. Gaines, 8th Dist. No. 91179, 2009-Ohio-622.

[915] State v. Foster, 8th Dist. No. 90870, 2009-Ohio-31.

shown by victim's testimony defendant used his arms to hold her legs apart, and violent manner in which defendant flipped victim onto her back. [916]

k) Conviction for rape and abduction were not against the manifest weight of the evidence where, despite significant questions about the victim's credibility, five girls who were in the car with the victim testified and the presence of the defendant's semen in the victim's vagina and underwear contradicted the defendant's version of events bolstering the victim's account.[917]

l) Convictions for rape and importuning were not against the manifest weight of the evidence where four witnesses testified regarding the alleged events for the prosecution and the State presented Facebook messages between the defendant and the victim in which defendant praised the victim's skills at fellatio, asked if the victim would have sexual intercourse with defendant again, and directed the victim to touch herself while thinking about the defendant.[918]

m) Convictions for rape of a child under 13 were not against the manifest weight because although there was no physical evidence, the defendant admitted that he began having sex with the victim, his daughter, when she was 12, corroborating the victim's testimony. The State presented recorded jail house conversations between the defendant and his wife, the victim's mother, in which defendant urged the wife not to come to court, he admitted he was ashamed of his behavior, and explained that the "flesh is weak."[919]

n) A juvenile's adjudication of delinquency for rape was based upon sufficient evidence because even though the victim initially had difficulty remembering the details of the incident, she eventually testified about the defendant forcing himself on her. The SANE nurse's report corroborated the victim's account and the defendant's DNA was found on the victim, despite his original claim that he had no involvement with the victim.[920]

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[916] State v. Bush, 4th Dist. Ross No. 09CA3112, 2009-Ohio-6697.

[917] State v. Jones, 6th Dist. Wood No. WD-12-049, 2013-Ohio-5906.

[918] State v. Jones, 9th Dist. Lorain No. 12CA010262, 2014-Ohio-2228.

[919] State v. Finklea, 8th Dist. No. 100066, 2014-Ohio-1515.

[920] In re S.H., 8th Dist. No. 100529, 2014-Ohio-2770.

12. Generally:

a) R.C. 2923.03(A)(3) and 2923.01 do not contemplate the offense of conspiracy to commit rape.[921]

b) Because the crime of rape does not specify that time is of the essence, defendant suffered no prejudice as a result of the State's amendment of the bill of particulars to reflect a different time the offense was committed.[922]

c) While R.C. 2907.02(D) generally prohibits admission of defendant's specific sexual activity and opinions or reputation regarding defendant's sexual activity, such evidence is admissible when establishing a "peculiar and unique pattern of activity" or a scheme, plan, or system for the defendant's conduct towards the victim.[923]

d) Court will not disturb jury's finding of vaginal penetration from picture of event showing defendant's finger either on or in the vaginal cavity of victim.[924]

13. Types of Rape:

a) Anal Intercourse

(1) Penetration is necessary[925]

(A) Penetrating buttocks but not anus is not sufficient to show the element of penetration required for anal intercourse. i.e. Alimentary Canal - the anal cavity must be penetrated, however slight.[926]

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[921] State v. Chewning, 12th Dist. Clermont Nos. CA2004-01-002, CA2004-01-003, 2004-Ohio-6661 (reversed in part by *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109); State v. Armas, 12th Dist. Clermont No. CA2004-01-007, 2005-Ohio-2793.

[922] State v. Sprauer, 12th Dist. Warren No. CA2005-02-022, 2006-Ohio-1146.

[923] State v. Liddle, 9th Dist. Summit No. 23287, 2007-Ohio-1820.

[924] State v. Schuster, 6th Dist. Lucas No. L-05-1356, 2007-Ohio-3463.

[925] State v. Ferguson, 5 Ohio St.3d 160 (1983).

[926] State v. Wells, 91 Ohio St.3d 32, 2001-Ohio-227.

(B) Penetrating buttock not anus sufficient for attempted anal rape.[927]

(C) Anal penetration by an object other than penis does not preclude anal rape when sufficient circumstantial evidence establishes that there was also penile penetration.[928]

(D) Anal intercourse is a separate offense from fellatio. [929]

(E) Anal rape is a separate offense from vaginal rape.[930]

(F) Testimony from child that "something" was "shoved up" his butt is enough to constitute anal rape, although the "something" was not identified.[931]

(G) Testimony from child that they felt what they believed to be fingers "in my bottom" followed by a clarifying question "and you said you felt what you think was fingers in your-bottom. Do you mean your butt where you go to poop out off?" The victim's response "yes" was sufficient evidence by which the jury could have found the element of anal penetration established.[932]

b) Fellatio

(1) Fellatio has been defined by the Ohio Supreme Court as the practice of obtaining sexual satisfaction by oral stimulation of the penis.[933]

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[927] Id. at 34.

[928] State v. Scott, 12th Dist. Butler No.CA92-03-052, 1994 WL 394976 (Aug. 1, 1994).

[929] State v. Carroll, 12th Dist. Warren App. CA91-01-013, 1991 WL 274319 (Dec. 23, 1991), *citing* State v. Barnes, 68 Ohio St.2d 13 (1981); State v. Winkle, 12th Dist. Warren No. CA91-04-035, 1992 WL 12616 (Jan.27, 1992).

[930] State v. Ware, 53 Ohio App.2d 210 (9th Dist. 1977).

[931] State v. Molen, 2d Dist. Montgomery No. 21941, 2008-Ohio-6237.

[932] State v. Phillips, 6th Dist. Lucas No. L-09-1149, 2010-Ohio-2577.

[933] In re M.D., 38 Ohio St.3d 149 (1988).

(A) Requires element of sexual satisfaction or oral stimulation or both.[934]

(B) Thus, five year-old infant is not physiologically or emotionally capable of being sexually stimulated or satisfied.[935]

(2) Many courts hold that penetration is not required.[936]

(A) Lack of penetration requirement is not unconstitutional.[937]

(B) Sufficient if mouth comes into contact.[938]

(C) Mouth need not touch, sufficient if penis is within the oral cavity for rape or GSI.[939]

(D) Sufficient if offender places penis on lips of sleeping victim.[940]

(E) Sufficient if offender places "weanie" [sic] on victim's lips.[941]

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[934] Id. *See also* State v. Bowling, 12th Dist. Clinton App. CA2001-11-038, 2002-Ohio-7283 (testimony from eight year-old victim that defendant asked victim to "suck his dick" and did it "up and down" and viewed by witness after act wiping his mouth, sufficient to support finding of fellatio rape).

[935] Id. *But see* In re Smith, 80 Ohio App.3d 502 (1st Dist. 1992) (involving the rape of a 10 year-old child and interpreting *In re M.D.*). *See also* State v. Barrett, 3rd Dist. No. 4-06-04, 2006-Ohio-4546 (rejecting narrow interpretation of *In re M.D.* in holding that sexual stimulation of defendant, not four year-old victim, suffices for proof of fellatio).

[936] State v. Hiltabidel, 9th Dist. Summit No. C.A.11971, 1985 WL 10801 (May 1, 1985); State v. Goins, 1st Dist. No. C-800261, 1981 WL 9730 (April 15, 1981).

[937] State v. Barnes, 12th Dist. Clermont No. CA84-05-041, 1985 WL 7980 (April 18, 1985).

[938] State v. Long, 64 Ohio App.3d 615 (9th Dist. 1989); State v. Clark, 106 Ohio App.3d 426 (3rd Dist. 1995).

[939] State v. Astley, 36 Ohio App.3d 247 (10th Dist. 1987).

[940] State v. Garner, 8th Dist. No. 89840, 2008-Ohio-1949.

[941] State v. Molen, *supra*.

(3) Other courts indicate that something must penetrate

(A) Sufficient if penis does not penetrate but ejaculum does.[942]

(B) Entry into separate body orifices constitutes separate acts of rape.[943]

(C) Two acts of fellatio, close in time, but separated by vaginal penetration and loss of erection, are separate acts of rape.[944]

c) Cunnilingus

(1) Penetration not required.[945] No further activity required beyond placing mouth on vagina.[946]

(2) Not a defense to cunnilingus that victim fell asleep too near to defendant which subconsciously allowed him to commit act.[947]

d) Attempted Rape

(1) "Substantial Step"

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[942] State v. Coleman, 1st Dist. No.C-860511, 1987 WL 13252 (June 24, 1987) (stating in dicta that fellatio historically is sodomy and requires some penetration).

[943] State v. Marshall, 12th Dist. Clinton No. CA90-04-010, 1991 WL 69356 (Apr. 29, 1991); State v. Ware, 53 Ohio App.2d 210 (9th Dist. 1977).

[944] State v. Jones, 78 Ohio St.3d 12, 1997-Ohio-38 (adult case).

[945] State v. Sherman, 5th Dist. Richland No. 98-CA-107, 1999 WL 976246 (Oct. 20, 1999); State v. Coleman, *supra*.

[946] State v. Bailey, 78 Ohio App.3d 394 (1st Dist. 1992); State v. Allen, 1st Dist. Nos. C-930159, C-930160, 1994 WL 201828 (May 25, 1994); State v. Ramirez, 98 Ohio App.3d 388 (3rd Dist. 1994); State v. Poe, 10th Dist. No.00AP 300 (Oct. 24, 2000).

[947] State v. Foster, 9th Dist. Summit No. 14277, 1990 WL 72345 (May 23, 1990).

(A) Having child strip is a "substantial step" indicating attempted rape.[948]

(B) Defendant's lower body positioned between victim's legs and eyewitness believed intercourse was taking place is "substantial step."[949]

(C) Seizing victim, dragging her into bushes, demanding fellatio while exposing penis is substantial step for an attempted rape.[950]

(D) Pushing victim to ground (touching thigh and straddling victim while lifting her skirt up and informing her he was going to have sex not sufficient for attempt rape but rather GSI.)[951]

(E) Defendant undressed himself, straddled her and held her down. His penis was in her pelvic region, and he attempted to pry her legs apart. Defendant grabbed her face and asked why she would not have sex with him. After the incident a bruise was found on her thigh where defendant tried to pry her legs apart. All of these factors show that the defendant took a "substantial step" towards the commission of rape.[952]

(2) A conviction for aiding and abetting the attempted rape of an eight year-old child was supported by sufficient evidence and was not against the manifest weight of the evidence, when there was testimony presented at trial to show that the defendant ordered the victim's nine year-old half-brother to

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[948] State v. Powell, 49 Ohio St.3d 255 (1990).

[949] State v. Robinson, 67 Ohio App.3d 743 (1st Dist. 1990).

[950] State v. Simpson, 1st Dist. No. C-890368, 1990 WL 83980 (June 20, 1990).

[951] In re Shubutidze, 8th Dist. 77879, 2001 WL 233400 (Mar. 8, 2001). *See also* In re Washington, 75 Ohio St.3d 390, 1996-Ohio-186. *But,* cf. State v. Ochoa, 3rd Dist. Putnam No.12-2000-06, 2000-Ohio-1867 (Penis of defendant touching victim where completely denied by defendant, court not required to give GSI lesser charge).

[952] In re J.O., 5th Dist. Licking No. 09-CA-0135, 2010-Ohio-4296. *See also* State v. Woods, 48 Ohio St.2d 127 (Dec. 1, 1976), judgment vacated on other grounds, Woods v. Ohio, 438 U.S. 910, 98 S.Ct. 3133 (1978) (An attempt occurs when one purposely does anything which is an act "constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.")

"grind on [the victim] like you are having sex;" it was not a defense that the boy may have been incapable of actually committing a rape.[953]

(3) Elements of attempted rape present where defendant was laying on top of adult victim while in bed, defendant dressed only in shorts and socks and had removed shirt, defendant covered victim's eyes and mouth and attempted to remove her underwear.[954]

(4) Attempted rape doesn't merge into rape charge when intervening acts between two include loss of erection, removal of tampon, and oral rape.[955]

(5) Trial court erred in sentencing defendant to a mandatory ten year sentence when he pled guilty to attempted rape, since this offense is a second degree felony and the statute only authorizes a sentence up to eight years.[956]

(6) Trial court did not err by sentencing a defendant to consecutive sentences for attempted rape and GSI because the trial court essentially made the three required findings in the lengthy colloquy with the defendant and then repeated those findings using the exact statutory language in the judgment entry.[957]

14. Not the Spouse of the Offender:

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[953] State v. Brown, 1st Dist. No. C-950300, 1996 WL 539785 (Sept. 25, 1996).

[954] State v. Proctor, 12th Dist. Butler Nos. CA96-12-255, CA96-12-256, 1997 WL 716886 (Nov. 17, 1997). *See also* State v. Ashford, 11th Dist. Trumbull No. 99-T-0015, 2001 WL 137595 (Feb. 16, 2001) (attempt to remove underwear and insert finger); State v. Ochoa, 3rd Dist. Putnam No.12-2000-06, 2000-Ohio-1867 (defendant pulled down victims pants, unzipped his pants, touched her anus with erect penis, but was interrupted by wife waking up); State v. Hutchinson, 135 Ohio App.3d 459 (12th Dist. 1999) (defendant pulled pants down of 8 year-old and stuck his penis in "butt" of victim."

[955] State v. Jones, 78 Ohio St.3d 12, 1997-Ohio-38 (adult rape case).

[956] State v. Roberts, 3rd Dist. Logan No. 8-98-33, 1999 WL 254394 (Apr. 9, 1999).

[957] State v. Jones, 7th Dist. Mahoning No. 13 MA 101, 2014-Ohio-2248.

a) Even though no one ever specifically asked whether or not victim and defendant were married, the jury may conclude that the victim was not the spouse of the defendant by circumstantial evidence.[958]

b) Jury could conclude victim was not married to defendant when victim was 14, defendant was 52, and victim stated that defendant lived across the street. Victim referred to defendant's wife in the third person. Defendant stated he had been married for 32 years and had not told his wife about victim.[959]

c) Circumstantial evidence could be used to prove that the seven year-old victim was not the spouse of the seventy-five year-old defendant, an element of the offense of gross sexual imposition, where the evidence showed that the victim was in the second grade and did not reside with defendant, and that defendant told police that the victim was at his house to play with his granddaughter.[960]

d) Failure to give instructions on element of "not the spouse" not prejudicial where it was inconceivable that the trier of fact could interpret that a 12 year-old boy would be the spouse of an adult male.[961] Female rape victim under 16 (legal age of marriage), and defendant referred to victim as "one of my children."[962]

15. Lacks the Mental Ability to Resist (Rape):

a) Conviction upheld where the victim had the IQ of 60 and experts testified that she was unable to withstand any coercion or understand what sorts of sexual intercourse were proper.[963]

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[958] State v. Rafferty, 12th Dist. Madison No.CA85-06-022 (Dec. 30, 1985); State v. Austin, 1st Dist. No.C-880782, 1990 WL 67988 (May 23, 1990); State v. Patton, 1st Dist. No. C-910479, 1992 WL 74197 (Apr. 8, 1992), *citing* State v. Jenks, 61 Ohio St.3d 259 (1991) (no longer requires evidence to be irreconcilable with reasonable theory of innocence); and State v. Wiggins, 1st Dist. No. C-910620, 1992 WL 156122 (July 1, 1992) (overruled on other grounds by In re Williams, 1st Dist. Nos. C-990841, C-990842, 2000 WL 1867467 (Dec. 22, 2002)).

[959] State v. Lewis, 6th Dist. Huron No. H-95-026, 1996 WL 139510 (Mar. 1, 1996).

[960] State v. Boeddeker, 1st Dist. No. C-950137, 1995 WL 699874 (Nov. 29, 1995).

[961] State v. Bock, 28 Ohio St.3d 108 (1986); State v. Moore, 12th Dist. Clermont No. CA85-09-068, 1986 WL 3524 (Mar. 24, 1986).

[962] State v. McGee, 1st Dist. No. C-880418, 1989 WL 110814 (Sept. 27, 1989).

[963] State v. Angle, 9th Dist. Medina No. 2875-M, 1999 WL 364564 (June 2, 1999).

b) Where defendant was a driver for a bus line serving the handicapped and was trained to recognize disabilities, and victim was a regular passenger known to defendant as mentally handicapped, argument that victim consented to perform fellatio unpersuasive.[964]

16. Post-Conviction Applications For DNA Testing:

a) Ohio courts did not recognize testing as a generally admissible and accepted form of evidence until 1992, in the case of *State v. Pierce*.

b) Ohio's post-conviction DNA testing application procedure is set forth in R.C. 2953.74-2953.82.

c) Definitiveness of inmate's prior DNA tests

(1) If inmate has already had a definitive DNA test, the court should reject the application. R.C. 2953.74(A).

(2) If inmate has had no test, or a prior inconclusive test, the elements of R.C. 2953.74(B) govern the acceptance or rejection of the application.

(A) For purposes of R.C. 2953.74, a blood grouping test is *not* the equivalent of a DNA test—performance of a blood grouping test meant that no DNA test had been conducted for the purposes of the statute.[965]

(B) Prior inclusive DNA test is not a basis for automatic rejection of inmate's application.[966]

d) Each of the criteria included within R.C. 2953.74(B)(1) or (B)(2) must be met for the acceptance of the inmate's application.[967]

(1) Reviewing inmate's application under R.C. 2953.74(B)(1), court determined that victim's uncertainty as to whether rapist ejaculated inside her during offense meant that results

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[964] State v. Thomas, 1st Dist. No. C-060318, 2007-Ohio 1723.

[965] State v. Wilkins, 9th Dist. Summit No. 22493, 2005-Ohio-5193.

[966] Id.

[967] Id.

of requested DNA test would not be "outcome determinative" as required; application rejected.[968]

e) At least one court has determined that the state's requirement to prepare a report of specific findings pursuant to R.C. 2953.76 does not trigger until the inmate satisfies the criteria of R.C. 2953.74(B)(1) or (B)(2).[969]

f) R.C. 2953.74(C) requires that a court find all six listed factors applicable to the inmate for the application to be accepted.

g) The fact that a defendant fails to request DNA testing at the time of trial is irrelevant to the determination of a post-conviction application.[970]

17. Use of DNA Evidence Procured From Suspects In Rape Prosecutions:

a) Where suspect permits taking of blood sample in connection with police investigation of rape, consent excepts the "search" from the Fourth Amendment.[971]

b) To rely on the consent exception to the Fourth Amendment's warrant requirement, the state must show by "clear and positive" evidence that the consent is "freely and voluntarily" given.[972]

c) Suspect deemed to have consented to DNA test where police requested blood sample, suspect did not inquire as to nature of investigation, suspect signed consent form after being informed that test was not required, suspect was not under influence of alcohol or drugs, and suspect was free to leave without providing sample.[973]

d) Fourth Amendment challenges to the "illegal search" of defendant by taking DNA have been uniformly rejected by the courts, because the

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[968] Id.

[969] Id.

[970] Wilkins, supra.

[971] State v. Bandy, 7th Dist. Mahoning No. 05-MA-49, 2007-Ohio-859; Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

[972] State v. Bandy, supra.

[973] Id.

government's compelling interests in crime control have consistently been deemed to outweigh the defendant's diminished privacy interests. [974]

(1) Court rejected appellant's claim that his Fourth Amendment rights were violated by the state's administration of a blood test and buccal swab.[975]

18. Constitutional Challenge to Ohio's Rape Statute:

a) R.C. 2907.02(B) does not require impermissible judicial fact-finding before a defendant can be sentenced to a non-minimum sentence of life without parole for rape of person under 10 resulting in serious physical harm. As applied, defendant's guilty plea functioned as an admission to facts that enhanced the penalty. [976]

19. Sentences for Rape:

a) Trial court erred by sentencing defendant to life in prison without parole for raping his 14 year-old daughter where the defendant was convicted under R.C. 2971.02(A)(2), which only permitted the trial court to sentence the defendant to an indefinite term of ten years to life in prison.[977]

b) A trial court cannot impose a no-contact order as part of a sentence for rape because the sentencing statute only provides for terms of imprisonment.[978]

c) Trial court erred by failing to impose a post-release control sanction with the defendant's life without parole sentence. Even though the defendant will never be released from prison, the express language of R.C. 2967.28(B)(1) requires that post-release control be imposed in every sentence for a felony.[979]

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[974] State v. Gaines, 2009-Ohio-622.

[975] Id.

[976] State v. Hardie, 171 Ohio App.3d 429, 2007-Ohio-2755 (4th Dist.).

[977] State v. Cartwright, 12th Dist. Preble No. 2012-03-003, 2013-Ohio-2156.

[978] State v. Anderson, OH Sup. Ct. No. 2014-Ohio-0674, 2015-Ohio-2089.

[979] State v. Jones, 12th Dist. Brown No. CA2014-09-017, 2015-Ohio-2314.

20. Allied offenses for Rape:

a) The defendant bears the burden to prove entitlement to merger due to allied offenses.[980]

b) The trial court did not commit plain error by finding that separate acts of digital penetration at different times on the same day with the same victim were not allied offenses.[981]

c) A trial court erred by failing to find that rape and unlawful sexual conduct with a minor charges were allied offenses where both charges stemmed from one incident of the defendant digitally penetrating the victim.[982]

D. Felonious Sexual Penetration

1. Now part of the rape statue and defined under sexual conduct (2907.02 and 2907.01) (2907.12 repealed effective Sept. 3, 1996).

2. A conviction for one count of felonious sexual penetration was contrary to law when there was only evidence to show that the defendant put his hands on the victim's hips, kissed the victim, and put his hands into her underpants, and no further evidence to show actual penetration into the vaginal or anal cavity.[983]

3. Sufficient evidence to conclude defendant "aided and abetted" her boyfriend to engage in felonious sexual penetration of her 14 year-old daughter where defendant knew her boyfriend was having sex with her daughter and she bought her birth control pills and allowed her boyfriend to be alone with her daughter in bed.[984]

4. Although verdict form was defective as to the specific and essential elements necessary before a life sentence or any sentence could be imposed, reversal

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[980] State v. Fahl, 2d Dist. Clark No. 2013-CA-5, 2014-Ohio-328.

[981] State v. Fahl, 2d Dist. Clark No. 2013-CA-5, 2014-Ohio-328.

[982] State v. Wooten, 11th Dist. Ashtabula No. 2012-A-0021, 2013-Ohio-1841.

[983] State v. Mixon, 1st Dist. Nos. C-930905, C-930906, 1994 WL 698481 (Dec. 14, 1994).

[984] State v. Stepp, 117 Ohio App.3d 561 (4th Dist. 1997).

is not warranted as the indictment informed the jury of all the elements comprising the life sentence offense of felonious sexual penetration.[985]

5. Where defendant and accomplice posed as police officers to lure women into their car, took them across state lines, and raped them, proper subject matter jurisdiction existed despite the out-of-state performance of the actual sexual penetration. Where sex offenses completed in another state were initiated by the application of force commencing in Ohio, Ohio courts have jurisdiction.[986]

E. Gross Sexual Imposition

1. Sexual Contact Requirement:

a) GSI requires proof of "sexual contact" with a person who is not the offender's spouse when the other person is less than 13 years of age. R.C. 2907.05(A)(4).

(1) Corroboration of victim's testimony with physical evidence not required for a conviction of GSI.[987]

(2) Strict liability offense where there is no need to include *mens rea* element.[988]

b) "Sexual Contact" is defined by R.C. 2907.01(B) as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or . . . breast, for the purpose of sexually arousing or gratifying either person."

(1) Where an eight year-old girl testifies that man touched her on her chest, breast area, between her legs, close to her vagina, and buttocks region, there was sufficient testimony to demonstrate "sexual contact."[989]

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[985] State v. Tebcherani, 9th Dist. Summit No. 19535, 2000 WL 1729456 (Nov. 22, 2000).

[986] State v. Moore, 6th Dist. Lucas No. L-06-1337, 2008-Ohio-1288.

[987] State v. Scott, 4th Dist. Adams No. 05CA809, 2006-Ohio-3527, *citing* State v. Economo, 76 Ohio St.3d 56, 1996-Ohio-426.

[988] State v. Duszynski, 6th Dist. Lucas No. L-08-1215, 2009-Ohio-2284; State v. Green, 5th Dist. Knox No. 08-CA-20, 2009-Ohio-2065.

[989] State v. Harrod, 1st Dist. No. C-990018, 1999 WL 797980 (Oct. 8, 1999).

(2) The use of terms such as "privates" or "private parts" by a child is legally sufficient to identify genitals and may be used to satisfy the state's burden of showing the touching of a child victim's erogenous zone.[990]

(3) Body parts listed in R.C. 2907.01 (B) are *per se* erogenous zones and the State is relieved from the obligation to prove that these listed parts are in fact erogenous.[991]

(4) Need not touch organ or skin; outer clothing or covered erogenous zone sufficient.[992]

(5) Sexual contact occurred where victim described instances of defendant touching her breasts, buttocks, and vagina.[993]

(6) R.C. 2907.01(B) provides a non-exhaustive list of erogenous zones. A male's breast may be an erogenous zone despite its absence from the list where it is touched for the purpose of sexually arousing or gratifying either person.[994]

2. Sexual Arousal or Gratification:

a) The Ohio Revised Code does not define "sexual arousal" or "sexual gratification." However, R.C. 2907.01 contemplates "any touching of the described areas which a reasonable person would perceive as sexually stimulating or gratifying."[995]

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[990] State v. Kring, 10th Dist. No. 07AP-610, 2008-Ohio-3290; *see also*, e.g., State v. Denkins, 1st Dist. No. C-030518, 2004-Ohio-1696; State v. Glass, 8th Dist. No. 81607, 2003-Ohio-879.

[991] State v Ackley, 12 Ohio Misc.2d 60, 2002-Ohio-6002 (Lake Cty. Ct. Com. Pls.).

[992] State v. Curry, 9th Dist. Lorain No. 90CA004862, 1991 WL 24975 (Feb. 27, 1991); State v. Wiggins, 1st Dist. No. C-910620, 1992 WL 156122 (July 1, 1992); State v. Gonzalez, 8th Dist. No. 64777, 1994 WL 144535 (Apr. 21, 1994); State v. Young, 4th Dist. Athens No. 96 CA 1780, 1997 WL 522808 (Aug. 15, 1997); State v. Goins, 12th Dist. Butler No. CA2000-09-190, 2001-Ohio-8647 (pried legs apart and touched between legs twice and gave victim candy afterwards); State v. Ackley, 120 Ohio Misc. 2d 60, 2002-Ohio-6002 (Lake Cty. Ct. Com. Pls.); State v. Garner, 8th Dist. No. 89840, 2008-Ohio-1949 (defendant touched buttocks of sleeping victim through comforter and pajamas).

[993] State v. Stewart, 10th Dist. No. 08AP-33, 2009-Ohio-1547.

[994] State v. Dooley, 8th Dist. No. 84206, 2005-Ohio-628.

b) Sexual arousal or gratification need not be proven; strict liability.[996]

(1) However some Courts require state to prove intention in touching was sexual arousal or gratification.[997] Whether the touching of another's erogenous zone was performed for sexual arousal or gratification is a question of fact to be inferred from the type, nature, and circumstances surrounding the contact.[998] Defendant not entitled to charge of reckless culpability.[999] Sexual contact can be proven by circumstantial evidence where facts are irreconcilable with any theory of innocuous touch.[1000] Court need not instruct jury on definition of sexual arousal or gratification; they may infer it from the evidence.[1001] Criminal intent can never be proven by the direct testimony of third parties; "consequently the existence of prurient motivations may be discerned from the type, nature, and circumstances of the contact, along with the personality of the defendant."[1002]

(2) Evidence that defendant came over and sat down beside victim, who was less than 13 years old, so as to position victim between his legs, and began tickling victim around her breasts

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[995] In re A.L., 12th Dist. No. CA2005-12-520, 2006-Ohio-4329, *citing* In re Anderson, 116 Ohio App.3d 441 (12th Dist. 1996); State v. Astley, 36 Ohio App.3d 247 (10th Dist. 1987).

[996] State v. Astley, 36 Ohio App.3d 247 (10th Dist. 1987).

[997] State v. Mundy, 99 Ohio App.3d 275 (2d Dist. 1994).

[998] In re David Price, 12th Dist. Butler No. CA2001-02-035, 2002-Ohio-1345.

[999] State v. Williams, 52 Ohio App.3d 19 (1st Dist. 1989).

[1000] State v. Harrison, 8th Dist. No. 53758, 1988 WL 47409 (May 12, 1988), *citing* State v. Cole, 8th Dist. No. 44714, 1983 WL 5718 (Jan. 27, 1983); State v. Frazier, 12th Dist. Butler No. 88-04-051, 1989 WL 8474 (Feb. 6, 1989).

[1001] State v. Schwartz, Clermont No. CA93-01-001, 1993 WL 229398 (June 28, 1993); State v. Anderson, Clermont No. CA93-03-019, 1993 WL 414164 (Oct. 18, 1993).

[1002] State v. Cobb, 81 Ohio App.3d 179 (9th Dist. 1991); State v. Uhler, 80 Ohio App.3d 113 (9th Dist. 1992); State v. Jones, 12th Dist. Clermont No. CA92-12-117, 1993 WL 369243 (Sept. 20, 1993); State v. Goins, 12th Dist. Butler No. CA2000-09-190, 2001-Ohio-8647.

and on her sides and then pushed victim's head toward defendant's clothed crotch was sufficient to support finding that touching or contact was for purpose of sexually arousing or gratifying either victim or offender, and was sufficient to support conviction for gross sexual imposition as alleged in bill of particulars.[1003]

(3) 10 year-old victim's testimony that defendant said "yeah" and "ooh" while rubbing her vaginal area and continued after victim requested that he stop is sufficient circumstantial evidence to demonstrate purpose or intention of sexual arousal or gratification.[1004]

(4) "A reasonable person would perceive the touching or licking of the breast regions... (or) touching of...(the) vagina with (the) penis ...as sexually arousing or gratifying."[1005]

(5) A rational fact finder could have reasonably inferred a purpose of sexual arousal from defendant's behavior of inserting his finger in a child's buttocks.[1006]

(6) Rubbing of thigh while victim laying on couch and request of defendant to have victim "join him upstairs" sufficient to show "purpose of sexually arousing."[1007]

(7) The fact of a touching by itself is insufficient; but coupled with facts that touching apparently not required for "spin the bottle" game, other children did not engage in touching,

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[1003] State v. Miller, 63 Ohio App.3d 479 (12th Dist. 1989); State v. Duke, 8th Dist. No. 52604, 1988 WL 88862 (Aug. 25, 1988); State v. Bunch, 62 Ohio App.3d 801 (9th Dist. 1989).

[1004] State v. Andrews, 12th Dist. Butler No. CA2005-04-088, 2006-Ohio-2021.

[1005] State v. Alderman, 4th Dist. Athens No. CA 1433, 1990 WL 253034 (Dec. 11, 1990). *See also* State v. Ackley, 120 Ohio Misc.2d. 60, 2002-Ohio-6002 (Lake Cty. Ct. Com. Pls.)(erogenous zone means any body part perceived by a reasonable person as being sexually arousing or gratifying).

[1006] State v. Dubose, 8th Dist. No. 56174, 1989 WL 142916 (Nov. 22, 1989), *citing* State v. Gregley, 8th Dist. No. 45881, 1983 WL 4743 (Sept. 22, 1983); State v. Wiggins, 1st Dist. No. C-910620, 1992 WL 156122 (July 1, 1992).

[1007] State v. Gullickson, 9th Dist. Lorain No. 96CA006432, 1997 WL 270539 (May 14, 1997).

defendant told one child not to tell and later denied touching the younger children, there was evidence that the defendant touched for the purpose of sexual arousal or gratification.[1008]

(8) Reasonable jury could conclude that conduct (kissing with tongue in mouth, touching buttocks, kissing or biting neck leaving red mark, lifting up shirt and blowing on stomach) "between grown man and 10 year-old girl whom he had known for only a short time, could have no innocent purpose" and therefore it was for purpose of sexual gratification.[1009]

(9) The trial court could infer that attempted contact was for the purpose of sexual gratification where the two minor victims testified that the defendant tried repeatedly to touch their breasts without legitimate explanation, the defendant refused to leave the room when the victims were changing clothes, and the defendant surreptitiously photographed the victims.[1010]

3. Instances of Gross Sexual Imposition:

a) Forcing one to masturbate is GSI.[1011]

b) Forcing male to suck defendant (female) breasts is GSI.[1012]

c) Forcing female to lick defendant's buttocks is GSI.[1013]

[1008] In the Matter of Anderson, 116 Ohio App.3d 441 (12th Dist. 1996).

[1009] State v. Haendiges, 9th Dist. Lorain No. 96CA006558, 1998 WL 103349 (Feb. 25, 1998); State v. Menke, 12th Dist. No. Butler App. CA2002-01-04, 2003-Ohio-77 (touching in hot tub with admission of erection sufficient sexual contact (sexual gratification) for sexual imposition; State v. Paluga, 12th Dist. Clinton App. CA2002-02-041, 2002-Ohio-6876 (Dec. 16, 2002)(defendant laying next to victim and telling her he wanted to lick her "from belly to butt hole" and "I'm going to give it to you hard," sufficient facts for sexual gratification); *see also* State v. Daniel, 9th Dist. Summit No. 19809, 2000 WL 1287929 (Sept. 13, 2000) (sexual act took place and called game by defendant creates jury issue as to sexual gratification).

[1010] State v. Maynard, 9th Dist. Wayne No. 12CA0026, 2013-Ohio-2796, ¶ 31.

[1011] State v. Arnold, 8th Dist. Nos. 51254, 51288, 1986 WL 13336 (Nov. 20, 1986).

[1012] State v. Freeman, 8th Dist. No. 54906, 1989 WL 4143 (Jan. 19, 1989).

[1013] State v. Mayhew, 71 Ohio App.3d 622 (4th Dist. 1991).

d) Lips and mouth of victim may be erogenous zone for sexual contact.[1014]

e) Conviction affirmed for gross sexual imposition under R.C. 2907.05(A)(4) after child testified that defendant "wiggled" the child's penis and showed the child "white stuff."[1015]

f) "A reasonable person could infer that placing one's hand down a young female's pants and touching her bare buttocks and perhaps her vagina is sexually stimulating."[1016]

g) Evidence sufficient where it shows defendant lay down next to victim, wrapped legs around her and rubbed her buttocks and genital area.[1017]

h) Evidence sufficient where defendant would lay down next to victim in only underwear and rub her chest and buttocks and once stuck fingers in vagina; helped that victim's account was supported by other witnesses.[1018]

i) Placing hands down one victim's pants and touching her buttocks and down another's shirt and touching her nipple area sufficient to establish purpose of sexual arousal.[1019]

j) Evidence supported defendant's conviction for gross sexual imposition. Victim testified that she had been sexually abused and that testimony was supported by two experts who also opined that she had been sexually abused. The victim's mother and sister offered further corroborating testimony.[1020]

[1014] State v. Wise, 6th Dist. Wood No. 91WD113, 1993 WL 18908 (Jan. 29, 1993).

[1015] State v. Woodward, 12th Dist. Warren No. CA94-04-046, 1994 WL 561992 (Oct. 17, 1994).

[1016] Matter of Bloxson, 11th Dist. Geauga No. 97-G-2062, 1998 WL 172998 (Feb. 6, 1998).

[1017] State v. Lansaw, 1st Dist. No. C-980067, 1999 WL 49377 (Feb. 5, 1999).

[1018] State v. Brooks, 12th Dist. Butler No. CA97-03-052, 1997 WL 656310 (Oct. 20, 1997).

[1019] State v. Drayer, 159 Ohio App.3d 189, 195, 2004-Ohio-6120 (10th Dist.).

[1020] State v. Rosas, 2d Dist. Montgomery No. 22424, 2009-Ohio-1404.

4. R.C. 2907.05(A)(1) requires the offender to purposely compel the victim to submit "by force or threat of force."

   a) Where defendant and victim found themselves together alone in the basement and defendant merely reached out and touched victim's breast through shirt, physical force was not present. The victim's actions in rebuffing defendant's attempts and immediately leaving the basement indicated that neither subtle nor psychological force was present.[1021]

   b) Since the parent-child relationship inherently involves dominance or control, the state need not prove explicit displays of force on the part of a parent. This is true regardless of whether the parent and child have been estranged for a long period of time.[1022]

   c) Where victim herself testified that defendant neither used nor threatened force while putting his hands down her pants or up her shirt, conviction overturned.[1023]

   d) Where evidence indicated that defendant forcibly touched and digitally penetrated victim's vagina while she asked him to stop, conviction affirmed.[1024]

   e) Where victim admitted that she had planned to have sexual relations with defendant in the morning, where parties had an "on-again off-again" relationship, defendant had spent the past four days at victim's home sharing parenting duties, and where jury acquitted defendant of rape charges, appellate court overturned conviction of GSI connected to parties' sexual relations.[1025]

5. Sufficiency of the Evidence:

   a) To evaluate whether victim's testimony is sufficient to support a conviction for gross sexual imposition, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the

[1021] State v. Riggs, 10th Dist. Nos. 04AP-1279 & 04AP-1280, 2005-Ohio-5244.

[1022] State v. Henson, 1st Dist. No. C-060320, 2007-Ohio-725.

[1023] State v. DeLuca, 8th Dist. No. 88615, 2007-Ohio-3905.

[1024] State v. Kushlan, 8th Dist. No. 91383, 2009-Ohio-2253.

[1025] State v. Ezell, 8th Dist. No. 88015, 2007-Ohio-3663.

prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."[1026]

b) *But cf.*, in order to convict defendant of gross sexual imposition, State must prove beyond a reasonable doubt that defendant's purpose or specific intention in touching victim on proscribed areas of the body was sexual arousal or gratification of either perpetrator or victim. Therefore, the jury should have been instructed on intoxication, to the effect that if jury found defendant had established by preponderance of the evidence that at times the crimes were committed he was so influenced by alcohol that he was not capable of forming required purpose or specific intent, jury was required to find him not guilty, because purpose or specific intent is essential element of crime charged.[1027]

c) The State presented sufficient evidence that the minor victim was substantially impaired rather than simply in an alcohol-induced state of lowered inhibitions. The minor victim testified that she drank two or three shots of vodka before she stumbled and needed the defendant's assistance to walk. Other witnesses corroborated that the minor victim appeared intoxicated when she left the bedroom after having sexual contact with the defendant.[1028]

6. Manifest Weight of the Evidence:

a) A conviction for attempted GSI following a bench trial was not contrary to the manifest weight of the evidence even though the two victims' accounts of the events different from each other and had changed over time because the trial court is in the best position to determine credibility.[1029]

7. Jury Need Not Make Finding Of Age.[1030]

[1026] State v. Jenks, 61 Ohio St.3d 259 (1991).

[1027] State v. Mundy, 99 Ohio App.3d 275 (2d Dist. 1994).

[1028] State v. Buzanowski, 8th Dist. No. 99854, 2014-Ohio-1947, ¶ 27.

[1029] State v. Maynard, 9th Dist. Wayne No. 12CA0026, 2013-Ohio-2796, ¶ 23.

[1030] State v. Heidelburg, 30 Ohio App.3d 265 (6th Dist. 1986); State v. Alderman, 4th Dist. Athens No. CA 1433, 1990 WL 253034 (Dec. 11, 1990).

a) But cf., failure to put age finding in verdict form is error, albeit harmless error.[1031] However, the prosecution must prove the victim was less than thirteen years old at the time of the crime.[1032]

b) Where age is an essential element of the crime, documentary evidence of age is not required. Rather, a witness may simply testify as to his or her age.[1033]

8. Lesser Included Offenses:

a) GSI Is Lesser Included Offense Of Rape.[1034]

(1) Defendant cannot generally be convicted of both rape and GSI where they arise from the same conduct.[1035] But not if rape denied or where complete defense made to crime charged.[1036]

(2) Defendant "is not entitled to a jury instruction on gross sexual imposition as a lesser included offense of rape where the defendant has denied participation in the alleged offense, and the jury, considering such defense, could not reasonably disbelieve the victim's testimony as to 'sexual conduct,' and at the same time, consistently and reasonably believe the testimony under a theory of mere 'sexual contact.'"[1037] Charge on lesser included offense (like gross sexual imposition) required only where evidence would reasonably support both acquittal on crime charged and conviction on lesser included

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[1031] State v. Kuhn, 4th Dist. Athens No. 1377, 1989 WL 128907 (Oct. 30, 1989).

[1032] State v. Girt, 5th Dist. Stark No. 1999CA00061, 2000 WL 222234 (Feb. 7, 2000).

[1033] State v. Hake, 11th Dist. Trumbull No. 2007-T-0091, 2008-Ohio-1332, *citing* State v. Selmon, 5th Dist. No. 05 CA 49, 2006-Ohio-65; State v. Cundiff, 10th Dist. No. 12AP-483, 2013-Ohio-1806.

[1034] State v. Johnson, 36 Ohio St.3d 224 (1988).

[1035] State v. Coles, 8th Dist. No. 90330, 2008-Ohio-5129.

[1036] State v. Clark, 4th Dist. Pike No. 408, 1988 WL 50506 (May 17, 1988); State v. Fancher, 12th Dist. Clermont No. CA88-10-076, 1989 WL 85091 (July 31, 1989).

[1037] State v. Sibert, 98 Ohio App.3d 412 (4th Dist. 1994).

offense.[1038] Where testimony shows penetration of penis and denial by defendant, GSI not lesser included offense.[1039]

(3) A defendant charged with rape was not entitled to jury instructions on lesser included of GSI and attempted rape where the State chose to narrowly focus on prosecution of the rape charge and the evidence consisted of the defendant and victim's conflicting testimony. The issue for the jury was essentially one of credibility and the defendant's claim, namely that the acts charged never occurred, was not consistent with either requested lesser included offense.[1040]

(4) Defendant's convictions for GSI were merged with his conviction of rape where his acts of fondling the victim's buttocks and touching the outside of her vaginal area were incidental to the rape. [1041]

(A) However, defendant's conduct of groping the victim's breasts was committed with separate animus. Therefore, the conviction for GSI based on that act did not merge into the rape conviction. [1042]

b) Corruption of minor is not lesser included nor offense of lesser degree to GSI.[1043] Disorderly may be a lesser included of GSI.[1044]

c) Attempted GSI is a lesser included offense to GSI and need not be charged separately.[1045]

9. Animus

[1038] State v. Tillman, 119 Ohio App.3d 449 (9th Dist. 1997); State v. Braxton, 102 Ohio App.3d 28 (8th Dist. 1995), *citing* State v. Thomas, 40 Ohio St.3d 213 (1988).

[1039] State v. Ashby, 8th Dist. No. 59616, 1991 WL 281026 (Dec. 26, 1991).

[1040] State v. Brown, 12th Dist. Butler No. CA2011-11-207, 2013-Ohio-1610.

[1041] State v. Teagarden, 5th Dist. Licking No. 08-CA-39, 2008-Ohio-6896.

[1042] Id.

[1043] State v. Hairston, 121 Ohio App.3d 750 (8th Dist. 1997).

[1044] In re Pennington, 150 Ohio App.3d 205, 2002-Ohio-6381 (2d Dist.).

[1045] State v. Maynard, 9th Dist. Wayne No. 12CA0026, 2013-Ohio-2796, ¶ 27.

a) Where defendant fondled victim's breasts and in continuous act has fellatio performed, no separate animus; GSI incidental to rape.[1046]

b) Attempted rape and GSI same animus.[1047]

c) Continuous act of touching breasts and vagina same animus.[1048]

d) *But cf.*, separate animus where acts occur over several occasions or several years.[1049]

e) *But cf.*, fact that Defendant fondled victim's breast, her vaginal area, and made her fondle his penis within a short period of time are not necessarily allied offenses; use two part test to determine whether the offenses should be merged for sentencing purposes.[1050] GSI and corruption of minor not same animus.[1051] Fondling and rape not necessarily same animus; depends on facts.[1052] Where restraint incidental to gross sexual imposition, kidnapping and GSI merge

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[1046] State v. Nash, 8th Dist. No. 41450, 1980 WL 355057 (Sept. 25, 1980); State v. Dehler, 8th Dist. Nos. 65006, 66020, 1994 WL 236298 (May 26, 1994) (here court vacated GSI conviction); State v. Abi-Sarkis, 41 Ohio App.3d 333 (8th Dist. 1988); State v. Stankorb, 12th Dist. Clermont No. CA90-03-027, 1990 WL 208870 (Dec. 17, 1990).

[1047] State v. Jarvis, 10th Dist. No. 88AP-611, 1989 WL 29366 (Mar. 28, 1989); State v. Brooks, 65 Ohio App.3d 300 (6th Dist. 1989).

[1048] State v. Delvalles, 8th Dist. No. 58659, 1991 WL 64322 (April 25, 1991).

[1049] State v. Sparks, 12th Dist. Brown No. CA91-02-004, 1991 WL 228924 (Nov. 4, 1991); State v. Thomas, 12th Dist. Brown No. CA2002-01-001, 2003-Ohio-74.

[1050] State v. Willis, 12th Dist. Clermont No. CA99-01-007, 1999 WL 601019 (Aug. 9, 1999) (finding reasoning consistent with the dissent in State v Nichols, 12th Dist. Madison No. CA93-05-013, 1994 WL 93152 (Mar. 21, 1994), and overruling *Nichols* to the extent the reasoning in *Willis* is in conflict).

[1051] State v. Riley, 8th Dist. No. 51120, 1986 WL 11644 (Oct. 16, 1986).

[1052] State v. Napier, 1st Dist. No. C-980999, 1999 WL 1263929 (Dec. 30, 1999); State v. Lefthandbull, 10th Dist. 00AP 584, 2001 WL 214179 (Mar. 6, 2001) (touching of breast and cunnilingus).

under same animus. [1053] But commission of GSI will not automatically result in the commission of kidnapping.[1054]

10. Where defendant touches crotch and breast of victim during single brief episode, conviction on two separate counts of GSI is possible—each sexual touching could have been completed without performing the other, and each therefore violated the statute.[1055]

11. As related to child under 13, GSI and kidnapping are not allied offenses of similar import; kidnapping of child victim does not require sexual contact; and GSI does not require removal or restraint.[1056]

12. Where defendant charged with Gross Sexual Imposition as titled in indictment, but body reads "sexual conduct" rather than "sexual contact," not error to allow amendment under (7)(D) before trial.[1057]

13. Where appellant appealed denial of his application for expungement of record of his conviction for gross sexual imposition, decision upheld. Trial court's decision was based on December 9, 1994 version of amended R.C. 2953.36, enacted after defendant filed application for expungement. (Under amended R.C. 2953.36, expungement statute no longer applies to convictions for gross sexual imposition.) Legislature has complete control over remedies afforded to parties in the courts, and an individual may not acquire vested right in a remedy.[1058]

14. Prior to Senate Bill 2 Court could not order restitution for medical bills.[1059]

[1053] State v. Mader, 8th Dist. No. 78200, 2001 WL 1002365 (Aug. 30, 2001) (kidnapping conviction "vacated"); State v. Valenzona, 8th Dist. No. 89099, 2007-Ohio-6892 (merging GSI and kidnapping convictions and ordering imposition of longer kidnapping sentence only).

[1054] State v. Sharp, 8th Dist. No. 84346, 2005-Ohio-390 (Feb. 3, 2005).

[1055] State v. Morgan, 9th Dist. Medina No. 07CA0124-M, 2008-Ohio-5530.

[1056] State v. Manning, 8th Dist. No. 90326, 2008-Ohio-3801.

[1057] State v. Shipp, 12th Dist. Clermont No. CA88-12-088, 1989 WL 92143 (Aug. 14, 1989).

[1058] State v. Heaton, 108 Ohio App.3d 38 (12th Dist. 1995) *citing* State ex rel. Michaels v. Morse, 165 Ohio St. 599 (1956) and State v. Thomas, 64 Ohio App.2d 141 (8th Dist. 1979).

[1059] State v. Wohlgemuth, 66 Ohio App.3d 195 (8th Dist. 1990).

15. Charge of 2907.05 (A)(4) (under 13 yrs) error to convict where state asks only how old victim is at trial and no information of victim birthday (incident occurred 11 mos. before trial).[1060]

16. No error in applying sentencing factors where trial court imposed maximum consecutive sentences of eighteen months on defendant when the court found such to be necessary to protect the public from likely future crime, to punish the offender, defendant had a prior history of similar abuse, a single term would not adequately reflect the seriousness of the crime, and defendant was under post-release control.[1061]

17. Where a defendant is charged with inappropriate conduct allegedly occurring both before and after the July 1, 1996 amendment of the GSI statute (which included a mandatory prison term), the rule of lenity requires the state to prove that the conduct occurred *after* the amendment for a mandatory sentence to be imposed. The argument that the conduct "could have" occurred after amendment to the GSI statute is insufficient.[1062]

F. Sexual Imposition

1. Corroboration

   a) R.C. 2907.06 requires corroboration even where trier of fact determines it to be a lesser included offense of GSI.[1063]

   b) Issue of insufficient corroboration must be raised at trial.

   c) Corroboration means independent evidence to support victim's testimony and must tend to connect the accused with the crime or must tend to identify the accused as a guilty actor.[1064]

[1060] State v. Girt, 5th Dist. Stark No.1999 CA99961, 2000 WL 222234 (Feb.7, 2000).

[1061] State v. Willis, 12th Dist. Clermont No. CA99-01-007, 1999 WL 601019 (Aug. 9, 1999).

[1062] State v. Kepiro, 10th Dist. No. 06AP-1302, 2007-Ohio-4593.

[1063] State v. Ervin, 4th Dist. Jackson No. 551, 1987 WL 16087 (Aug. 25, 1987), *citing* State v. Fawn, 12 Ohio App.3d 25 (10th Dist. 1983).

[1064] City of Akron v. Peavler, 9th Dist. Summit No. 13228, 1988 WL 24359 (Feb. 24, 1988) (adult GI), *citing* State v. Bond, 9th Dist. Summit No. 10682, 1982 WL 5167

d) Only required to connect defendant to crime by inference.[1065]

e) Not necessary that person witness sexual contact, only that some evidence is introduced to support the victim's story.[1066]

f) Victim's reporting of the crime with evidence that victim was visibly upset is sufficient corroboration.[1067]

g) Victim's reporting of the crime and defendant's admission to have sexual contact with victim is sufficient corroboration.[1068]

h) Corroborating evidence "need not be independently sufficient to convict the accused."[1069]

(1) Sufficient corroboration that when victim pinched she immediately responded by objecting and complaining to officer near her.[1070]

(2) Sufficient corroboration that witness saw victim immediately turn around and slap defendant, despite fact that witness did not actually see physical contact between defendant's hand and victim's buttocks.[1071]

(3) Where defendant answered door for pizza delivery in underwear while groping and exposing himself before "stumbling into" victim and grabbing her breasts, testimony

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(Dec. 8, 1982) (victim obviously frightened and tearful, and defendant admitted to being at scene; *see* dissent by Judge Cacioppo).

[1065] State v. Allsup, 67 Ohio App.2d 131 (3rd Dist. 1980).

[1066] State v. Arnold, 9th Dist. Summit No. 9226, 1979 207738 (July 25, 1979).

[1067] State v. Economo, 76 Ohio St.3d 56, 1996-Ohio-426; State v. Rossi, 2d Dist. Montgomery No. 22803, 2009-Ohio-1963.

[1068] State v Rossi, *supra*.

[1069] State v. Economo, *supra* at syllabus.

[1070] State v. Barefield, 12th Dist. Butler Nos. CA91-04-076, CA91-05-079, 1992 WL 281083 (Oct. 12, 1992).

[1071] State v. Gesell, 12th Dist. Butler No. CA2005-08-367, 2006-Ohio-3621.

of police officer establishing defendant's admissions that the victim came to his home on the date and time in question, that he answered the door in his underwear, and that he was intoxicated, along with the officer's testimony that the victim was upset while filing the police report sufficiently corroborated victim's testimony.[1072]

(4) Evidence was sufficient to sustain conviction for lesser offense of sexual imposition; victim testified that the defendant backed her against wall of office and touched her breasts, and stated that defendant placed his arms in such a way that she could not move away from him; version of incident was substantially supported by eyewitness, although eyewitness did not see actual touching of erogenous zone and was uncertain as to some of the details surrounding incident. R.C.2901.01(A), 2907.05(A)(1). Evidence regarding victim's alleged participation in sexually related discussions and horseplay prior to acts of sexual imposition alleged in indictment was properly excluded; although evidence of horseplay and sexual banter was probative of general atmosphere of workplace, it was not highly probative of defendant's attitude toward actual touching as alleged in indictment; evidence would have been unfairly prejudicial to prosecution in proving that sexual contact, as opposed to mere horseplay and conversation, was known by defendant to be offensive. Defendant was not convicted of sexual imposition based solely upon testimony of victim, in violation of statute requiring corroboration; rather, it was testimony of other witnesses that established each element of the offense; moreover, fact that victim's testimony itself did not establish each element of sexual imposition did not violate statute.[1073]

(5) Corroboration does not have to go to motive of crime. Where evidence that (1) victim patient of defendant, (2) victim was fearful of being alone and wanting someone with her to prevent touching by defendant and (3) came out of examining room crying was sufficient for corroboration. Corroboration need not go to every element nor be independently sufficient to convict the accused.[1074]

[1072] State v. White, 4th Dist. Washington No. 04CA52, 2005-Ohio-4506.

[1073] State v. Birkman, 86 Ohio App.3d 784 (12th Dist. 1993).

[1074] State v. Economo, 76 Ohio St.3d 56, 1996-Ohio-426; State v. Menke, 12th Dist. No. Butler App. CA2002-01-04, 2003-Ohio-77 (witness corroborated imposition by witnessing some touching).

(6) Where adult victim claimed defendant pressed against her from behind, pinned her against a counter and gyrated against her, third parties' testimony that victim was upset, and that when confronted defendant said "If she thinks that was hard, she hasn't felt anything yet," constituted "slight circumstances or evidence tending to support victim's testimony."[1075]

(7) The reason for requiring corroboration is "that the proscribed touching may be the product of inadvertence or accident — e.g., due to a pressing crowd — and its offensiveness the product of the victim's over-imaginative mind."[1076]

(8) Note, there is no corroboration requirement for the offense of corruption of a minor, to which sexual imposition is a lesser included offense.[1077]

2. Sexual Contact:

a) Sexual contact defined as "the touching of erogenous zone of another, including the thigh, genitals, buttock pubic region, or if the person is female, a breast for the purpose of sexually arousing or gratifying either person.[1078]

(1) No requirement that there be direct testimony regarding sexual arousal or gratification.[1079] Trier of fact may infer what the defendant's motivation was in making contact with the victim.[1080]

[1075] City of Avon Lake v. Pinson, 119 Ohio App.3d 567 (9th Dist. 1997). *See also* State v. Paluga, 12th Dist. Clinton App. CA2002-02-041, 2002-Ohio-6876 (Dec. 16, 2002) (Defendant apologized to victim in front of witness).

[1076] State v. Fawn, 12 Ohio App.3d 25 (10th Dist. 1983).

[1077] Id.; for discussion on corruption of a minor, see *infra*.

[1078] R.C. 2907.01(B).

[1079] State v. Carnes, 12th Dist. No. CA2005-01-001, 2006-Ohio-2134, at ¶ 41, *citing* State v. Anderson, 116 Ohio App.3d 441, 444 (12th Dist. 1996).

[1080] Id., *citing* Anderson, 116 Ohio App.3d at 443-444; *see also* State v. Cobb, 81 Ohio App.3d 179 (9th Dist. 1991).

(2) Not error to exclude defense expert's testimony that defendant's actions in massaging his daughter were not for purpose of sexual arousal since behavior was within jury's capacity to understand.[1081]

(3) Evidence of sexual purpose sufficient to adjudicate juvenile a delinquent child where victim testified that defendant was trying "to stick a finger up his butt" and didn't say anything but just started laughing.[1082]

(4) Delinquency adjudication overturned where reasonable doubt existed as to defendant's purpose for lifting victim's skirt where defendant was a "class clown" who lifted defendant's skirt in a public school hallway. This behavior could be readily interpreted as a poor attempt at humor.[1083]

(5) Mouth can be classified as an "erogenous zone" within the meaning of sexual imposition statute; statutory list of certain zones not exclusive.[1084]

(6) Evidence where defendant touched victim's "pubic region" implied sexual gratification for the jury, and evidence that defendant was reckless with regard to whether the conduct was offensive to the victim.[1085]

3. Animus:

a) Where defendant convicted of two counts of sexual imposition involving two different victims at different times, there is separate animus for each conviction.[1086]

4. Manifest Weight of the Evidence / Sufficient Evidence:

[1081] State v. Meredith, 12th Dist. No. CA2004-06-062, 2005-Ohio-2664.

[1082] In the Matter of D.S., 12th Dist. Nos. CA2004-04-036, CA2004-04-046, 2005-Ohio-1803.

[1083] In re Redmond, 3rd Dist. No. 1-06-90, 2007-Ohio-3125.

[1084] In re M.H., 9th Dist. Wayne No. 07CA0037, 2007-Ohio-7045.

[1085] State v. Curtis, 12th Dist. Butler No. CA2008-01-008, 2009-Ohio-192.

[1086] State v. Gillis, 1st Dist. No. C-990709, 2000 WL 492083 (Apr. 28, 2000).

a) Defendant's conviction for sexual imposition was not against manifest weight of the evidence where nurse testified that she saw the defendant laying on top of the victim whose private area was completely exposed. Although DNA evidence was not found, the medical examiner testified that the victim, a dementia patient at a nursing home, had vaginal trauma.[1087]

b) Defendant's conviction for sexual imposition was supported by the manifest weight of the evidence in that the testimony of the victim was deemed credible. Victim testified that defendant would enter victim's bedroom at night when he was "almost asleep" and "massage" him and then defendant would "jack off" the victim before placing the victim's penis in the defendant's mouth.[1088]

c) Victim's recollections that she was followed while walking home and touched by a "black" man with a "dark" complexion and a "close trimmed" beard with a "gold" but "open" front tooth and drove a "champagne" colored Focus was credible testimony corroborated by the defendant's testimony. Thus, the court refused to reverse the trial court's conviction.[1089]

d) Conviction for sexual imposition was not against the manifest weight of the evidence where defendant's claim that he was simply trying to steal the victim's wallet was belied by the fact that she was wearing yoga pants with no pockets, her purse was visibly hung from her arm, and the defendant made visual contact with another of the victim's body parts as he touched her buttocks.[1090]

5. Less Included Offense to Rape?

a) There is a split among jurisdictions as to whether sexual imposition is a lesser included offense of rape.

(1) This split relates to the second element of the *Deem* test for lesser included offenses—whether rape can be committed without committing sexual imposition.

[1087] State v. Smith, 5th Dist. Stark No. 2008CA00097, 2009-Ohio-1759.

[1088] State v. Bell, 12th Dist. Clermont No. CA2008-05-044, 2009-Ohio-2335.

[1089] State v. McGee, 8th Dist. No. 91161, 2009-Ohio-1240.

[1090] State v. Dickerson, 5th Dist. Licking No. 13-CA-69, 2014-Ohio-1391.

(A) The Third District has concluded that sexual imposition is not a lesser included offense of rape, basing its decision on the proof of knowledge required for sexual imposition but not for rape.[1091]

(B) The Second and Ninth Districts have concluded that sexual imposition is a lesser included offense of rape, finding that the accomplishment of rape by force requires a defendant's presumptive knowledge that the conduct is offensive to the victim or reckless in that regard.[1092]

G. Sexual Battery

1. Pertinent Statutes:

a) RC 2907.03(A)(2) proscribes sexual contact when the "offender knows that the other person's ability to appraise the nature of or control the other person's conduct is substantially impaired." Evidence that victim was extremely intoxicated in defendant's presence prior to going to bed sufficient to support proof of defendant's "knowledge" that her ability to appraise the nature of or control her conduct was substantially impaired.[1093]

b) Under RC 2907.03(A)(3) it is sexual battery to engage in sexual contact with another not your spouse when the "offender knows that the other person submits because the other person is unaware that the act is being committed." Where defendant undressed a woman while she was asleep (or "passed out" drunk) and penetrated her with his penis, such evidence was sufficient to establish sexual battery, even though the victim became aware of what was happening during intercourse.[1094]

2. Lesser Included Offenses and Allied Offenses:

[1091] State v. Collins, 60 Ohio App.2d 116 (3rd Dist. 1977).

[1092] In re M.H., 9th Dist. Wayne No. 07CA0037, 2007-Ohio-7045; State v. Herron, 2d.Dist. Champaign No. 95-CA-23, 1996 WL 715445 (Dec.13, 1996).

[1093] State v. Craven, 12th Dist. Butler No. CA2005-11-476, 2006-Ohio-4046.

[1094] State v. Macht, 1st Dist. No. C-980676, 1999 WL 387058 (Jun. 11, 1999) (but see the dissent, arguing that conviction for sexual battery was precluded as matter of law where victim testified that she was "aware" of the sexual conduct while it was occurring).

a) Sexual battery under R.C. 2907.05(A)(5) (sexual conduct when the offender is the natural parent) is not a lesser included offense of rape with force under 2907.02 (A)(2).[1095] Amendment of charge from rape to sexual battery (2907.05(A)(5)) not error; while "arguably" not a lesser included offense, defendant pled guilty, thereby waiving error.[1096] Sexual Battery 2907.05 (unclear which section), while a lesser included offense of rape 2907.02(A)(3) (person less than 13), is not warranted where defendant's total defense is that it did not happen.[1097]

b) Sexual battery (2907.03(A)(5) loco parentis) and GSI (fellatio) not allied offenses.[1098]

c) "Fellatial" sexual battery and "cunnilingual" sexual battery are not allied offenses of similar import under statute prohibiting conviction of more than one allied offense of similar import -- commission of sexual battery by means of fellatio does not result in commission of sexual battery by means of cunnilingus.[1099]

d) Sexual battery and gross sexual imposition are not allied offenses of similar import because, when examining the element of the two crimes, committing one offense would not necessarily result in committing the other.[1100]

3. General Issues:

[1095] State v. Rickenbaugh, 12th Dist. Butler No. 87-11-147, 1988 WL 76831 (July 25, 1988).

[1096] State v. Springer, 7th Dist. Columbiana No. 85-C-43, 1987 WL 32984 (Dec. 30, 1987).

[1097] State v. Quimby, 7th Dist. Columbiana No. 86-C-7, 1987 WL 15612 (Aug. 13, 1987); *but cf.* State v. Ratliff, 8th Dist. No. 56620, 1990 WL 28825 (Mar. 15, 1990).

[1098] State v. Mangrum, 86 Ohio App.3d 156 (12th Dist. 1993) (see dissent by J. Young).

[1099] State v. Mangrum (II), Clermont No. CA93-08-062, 1994 WL 93155 (Mar. 21, 1994); State v. Nicholas, 66 Ohio St.3d 431 (1993).

[1100] State v. Simmons, 7th Dist. Mahoning No. 12 MA 138, 2014-Ohio-582, ¶ 22-23, citing *State v. Van Gregg,* 2d Dist. No. 13395, 1992 WL 337644 (Nov. 20, 1992).

a) Phrase "a person in *loco parentis*" not unconstitutionally vague.[1101] Phrase "knowingly cause the other person to submit by means that would prevent resistance by a person of ordinary resolution" is not unconstitutionally vague.[1102]

b) Where series of sexual assaults, a conviction of sexual battery in the first assault not inconsistent with verdict of rape (2907.01 (A)(2)) in second assault where jury could have found that coercion occurred in first assault, which later turned into force.[1103] But cf., defendant was not entitled to instruction on sexual battery as a lesser included offense of rape, where there was no evidence presented at trial that coercion other than force was used.[1104]

c) Where jury found defendant guilty of lesser included offense of sexual battery of adult, (original charge rape with force (2907.01(A)(2)) court can sentence defendant to indefinite term, since original charge of rape has physical harm inherent in it and facts show physical harm to victim.[1105]

d) "Knowingly" not an element of battery.[1106]

e) Statute providing that incestuous acts are sexual battery, including sexual intercourse between stepparent and stepchild, did not violate substantive due process as applied to defendant, who was charged with having sexual intercourse with his 17 year-old stepdaughter, and who claimed that daughter initiated the conduct.[1107]

f) Where defendant charged as teacher with sexual battery under 2907.03 (A)(7) based on acts which occurred prior to July 19, 1994

[1101] State v. Hayes, 31 Ohio App.3d 40 (1st Dist. 1987).

[1102] State v. Tolliver, 49 Ohio App.2d 258 (1st Dist. 1976).

[1103] State v. Scarborough, 12th Dist. Warren No. CA91-01-012, 1991 WL 241961 (Nov. 18, 1991).

[1104] State v. Trummer, 114 Ohio App.3d 456 (7th Dist. 1996).

[1105] State v. Scarborough, *supra*.

[1106] State v. Yeager, 9th Dist. Wayne No. 2593, 1991 WL 57339 (Apr. 10, 1991).

[1107] State v. Benson, 81 Ohio App.3d 697 (4th Dist. 1992).

(passage of bill) statute applied retroactively and violates ex post facto provisions of U.S. constitution and R.C. 1.48.[1108]

g) Under R.C. 2901.13(F), statute of limitations does not run until the *corpus delicti* of the crime is discovered by a 'responsible adult' while in her official or professional capacity. Thus, where paramedic learned of criminal behavior in personal capacity seven years before arrest does not commence limitations period.[1109]

h) A school security guard is an "authority figure" for the purposes of R.C. 2907.03(A)(7).[1110]

4. Instances Where Sexually Battery Not Met:

a) Insufficient evidence for sexual battery conviction where only evidence of coercion is fact that defendant is a doctor and victim is patient. Inherent authority of doctor over patient insufficient to establish that person of ordinary resolution would be prevented from resisting.[1111]

b) Defendant convicted under 2907.03(A)(5) as teacher in *loco parentis*. Supreme Court reversed: *Loco parentis* applies to person who has assumed the dominant parental role.[1112] Person over 18, albeit mentally handicapped, is not "child" for purpose of loco parentis.[1113]

c) Under a charge of sexual battery 2907.03 (A)(6) (the victim is in custody) where prostitute performs sex act on policeman for money requires some showing that victim's liberty was restrained by some power conferred by the state.[1114]

[1108] State v. Sears, 119 Ohio Misc.2d, 86, 2002-Ohio-4225 (Clermont Cty. Ct. Com. Pls.).

[1109] State v. Rosenburger, 90 Ohio App.3d 735 (9th Dist. 1993).

[1110] State v. Thomas, 8th Dist. No. 88844, 2007-Ohio-4064.

[1111] State v. Bajaj, 7th Dist. Columbiana No. 03 CO 16, 2005-Ohio-2931.

[1112] State v. Noggle, 67 Ohio St.3d 31, 1993-Ohio-189.

[1113] State v. Price, 1st Dist. Nos. C-950372, C-950527, 1996 WL 148867 (Mar. 29, 1996).

[1114] State v. Walker, 140 Ohio App.3d 445 (1st Dist.).

5. Instances Where Sexual Battery Met:

a) Statute classifying incest as sexual battery did not violate defendant's right to privacy, even if the sex was consensual as defendant claimed.[1115]

b) Sufficient evidence of "temporary or occasion disciplinary control" over a minor under R.C. 2903(A)(9) found where minor victim lived with uncle for six months, performed requested household chores, confided in him and sought his advice, and informed him of her whereabouts when she left the home.[1116]

c) Where defendant recruited the victim to attend a basketball camp, discounted the fee, and attempted to work out with the victim before later touching her, sufficient evidence existed to classify defendant as a "coach" or "instructor" under R.C. 2907.03(A)(9).[1117]

d) Substantial evidence presented in attempted sexual battery case where a substantial step was taken in a series of events designed to result in the commission of the crime. Substantial step included the pastor–defendant "pulling down his pants and underwear, and expos[ing] his penis" to victim.[1118]

e) Defendant's conviction for sexual battery was supported by the manifest weight of the evidence in that the testimony of the victim was deemed credible. Victim testified that defendant would enter victim's bedroom at night when he was "almost asleep" and "massage" him and then defendant would place the victim's penis in his mouth.[1119]

f) Evidence supported defendant's conviction for sexual battery. Victim testified that she had been sexually abused and that testimony was supported by two experts who also opined that she had been sexually

[1115] State v. Freeman, 155 Ohio App.3d 492, 2003-Ohio-6730 (7th Dist.).

[1116] State v. Harris, 3rd Dist. Marion No. 9-04-011, 2005-Ohio-4618.

[1117] State v. Harris, 5th Dist. Licking No. 06Ca106, 2007-Ohio-2808.

[1118] State v. Curtis, 12th Dist. Butler No. CA2008-01-008, 2009-Ohio-192.

[1119] State v. Bell, 12th Dist. Clermont No. CA2008-05-044, 2009-Ohio-2335.

abused. The victim's mother and sister offered further corroborating testimony.[1120]

g) Evidence supported defendant's conviction for sexual battery. Victims and other testified that both victims woke up to appellant rubbing and/or placing his finger inside their vaginas. Additionally, photographic images were found on defendant's cell phone of female crotch areas.[1121]

h) Defendant's conviction not against the manifest weight of the evidence, as evidence showed that victim (defendant's daughter) was forced to remove her clothing and then defendant raped her for an extended period of time.[1122]

H. Criminal Child Enticement (R.C. § 2905.05)

1. Amended Jan.5, 2001, effective April 9, 2001. Entice or take any child under 14 years of age to accompany the person in any manner including entering into any vehicle.

2. Ruled not vague.[1123]

3. Not facially unconstitutional, nor unconstitutional as applied where defendant drives up to thirteen year-old girl, opens car door, exposes penis and invites her to "go for a ride"[1124]

4. Once it is established that defendant without privilege knowingly solicited or enticed child under 14 to enter vehicle, the burden shifts to defendant to prove that he enjoyed a statutory status per R.C. 2905.05 (A)(1) and (A)(2) citing *State v. Hurd* (1991),74 Ohio App.3d 94.

[1120] State v. Rosas, 2d Dist. Montgomery No. 22424, 2009-Ohio-1404.

[1121] State v. Kinsey, 5th Dist. Knox No. 08 CA 12, 2009-Ohio-23.

[1122] State v. Wilkinson, 7th Dist. Belmont No. 08-BE-3, 2008-Ohio-6098.

[1123] State v. Bertke, 1st Dist. No. C-870524, 1998 WL 83491 (Aug. 10, 1988); State v. Long, 64 Ohio App.3d 615 (9th Dist. 1989); State v. Kroner, 49 Ohio App.3d 133 (1st Dist. 1988).

[1124] State v. Kroner, 49 Ohio App.3d 133 (1st Dist. 1988); State v. Long, 64 Ohio App.3d 615 (9th Dist. 1989).

5. Evidence insufficient to convict where defendant told child she was pretty waved to her, blew kisses at her, and asked her to "come here."[1125]

6. Sexual motivation does not appear to be an element that the State is required to prove in order to obtain a conviction under subsection (A). Subsection (B) provides "No person, with a sexual motivation, shall violate division (A) of this section." The statute in no way links subsections (A) and (B) together.[1126]

I. Pandering Obscenity Involving Minor Per 2907.321 (A)(6)

1. Strict liability: *State v. Maxwell* 95 Ohio St.3d 254, 2002 Ohio 2121.

2. R.C. 2907.321 is not unconstitutionally overbroad.[1127]

J. Pandering Sexually Oriented Matter Involving a Minor (R.C. 2907.322 (A)(1))

1. Allied Offenses:

   a) Not allied offense of similar import with illegal use of a minor in nudity-oriented material, R.C. 2907.323(A)(1) where facts show two offenses arose from separate photograph of victim, although occurred in same location during same time period.[1128]

   b) Not allied offense of similar import with pandering obscenity involving a minor, R.C. 2907.321(A)(1).[1129]

2. Must Depict Actual Child

[1125] State v. Clark, 1st Dist. No. C040329, 2005-Ohio-1324 (March 25, 2005).

[1126] State v. Martzolf, 9th Dist. Summit No. 24459, 2009-Ohio-3001.

[1127] State v. Schneider, 9th Dist. Medina No. 06CA0072-M, 2007-Ohio-2553, *citing* State v. State v. Morris, 9th Dist. Wayne No. 04CA0036, 2005-Ohio-599.

[1128] State v. Lorenz, 59 Ohio App.3d 17 (12th Dist. 1988); State v. Bloom, 2d Dist. Montgomery No. 22103, 2008-Ohio-1747.

[1129] State v. Fancher, 12th Dist. Clermont No. CA88-10-076, 1989 WL 85091 (July 31, 1989).

a) The material at issue must depict an actual child, not a virtual one: "ideas which run through one's brain but no further cannot be the basis of an offense"[1130] (previous page). See also Section L, infra.

b) However, where the defendant's "ideas" are reduced to writings and drawings depicting a real and identifiable child, application of R.C. 2907.321 appropriate.[1131]

c) Testimony regarding whether the image in question is of an actual child is admissible, regardless of whether the testifier is an expert or not.[1132]

3. Generally:

a) Where defendant separately downloaded several obscene images of minors in a single two-minute setting, separate animus existed for each offense: each time he downloaded a new image, he made a new decision to obtain child pornography.[1133]

b) While term "masturbation" is not defined by R.C. 2907.322, photograph depicting manipulation of genitals with sex toy sufficient for satisfaction of statutory requirements.[1134]

c) Statute permits prosecution for advertising the dissemination of materials showing minors engaging in sexual activity; actual dissemination is not required.[1135]

d) Only violations of R.C. 2907.322(A)1 or (A)(3) are sexually oriented offenses per R.C. 2950.01.[1136]

[1130] State v. Hubbard, 12th Dist. Preble No. CA2004-12-018, 2005-Ohio-6425, *citing* Ashcroft v. The Free Speech Coalition, 535 U.S. 234, 122 S.Ct. 1389 (2002).

[1131] Id.

[1132] State v. Bates, 5th Dist. Guernsey No. 08 CA 15, 2009-Ohio-275.

[1133] State v. Stone, 1st Dist. No. C-040323, 2005-Ohio-5206.

[1134] State v. Brown, 12th Dist. Fayette No. CA2003-07-008, 2004-Ohio-3996.

[1135] State v. Kraft, 1st Dist. C-060238, 2007-Ohio-2247.

[1136] State v. Landers, 2d Dist. Champaign No. 2006-CA-42, 2008-Ohio-422, *citing* State v. Jessee, 2d Dist. Greene No. 06CA33, 2007-Ohio-670.

e) Defendant failed to show that his sentence for pandering was disproportionate to the sentence imposed for similar crimes committed by similar offenders. Defendant only compared pandering, a second degree felony, with crimes that were third degree felonies.[1137]

f) A reasonable juror can find that downloading may be the same as reproducing, thus supporting a conviction under R.C. 2907.322(A)(1).[1138]

K. Illegal Use of Minor in Nudity-Oriented Material (R.C. § 2907.323)

1. Historically:

a) Possession of child pornography statute (R.C.2907.323(A)(3)) does not violate First Amendment, nor is it overly broad. See Section L, infra. However, it violated due process as applied in particular case where court failed to instruct on element of child pornography under Ohio law.[1139] But cf., law found constitutional but court reversed because unclear whether conviction was based on finding that State had proved element of offense.[1140]

2. Modern Interpretation:

a) Illegal use of minor in nudity-oriented material in violation of R. C. 2907.323(A)(2) is unconstitutional violation of First Amendment.[1141]

b) *See* H.B. 008 effective Aug. 5, 2002 to expand definition of "material" to include computer images.

c) Only violations of R.C. 2907.323(A)(1) or (A)(2) constitute sexually oriented offenses per R.C. 2950.01.[1142]

[1137] State v. Blanchard, 8th Dist. No. 90935, 2009-Ohio-1357.

[1138] State v. Hodge, 2d Dist. Miami No.2013 CA 7, 2014-Ohio-1860.

[1139] Osborne v. Ohio, 495 U.S. 103, 110 S.Ct. 1691 (1990).

[1140] Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074 (1965); State v. Young, 37 Ohio St.3d 249 (1988).

[1141] State v. Schmakel, 6th Dist. Lucas No. L-88-300 (Oct. 13, 1989).

[1142] State v. Landers, 2d Dist. Champaign No. 2006-CA-42, 2008-Ohio-422, *citing* State v. Jessee, 2d Dist. Greene No. 06CA33, 2007-Ohio-670.

d) Argument that R.C. 2907.323 violates the privacy rights of married or consenting minors summarily rejected.[1143]

e) Illegal use of a minor in nudity-oriented material (R.C. 2907.323(A)(3)) and pandering sexually oriented matter involving a minor (R.C. 2907.322(A)(5)) are not allied offenses of similar import, as the second does not require "nudity."[1144]

3. Defining Nudity:

a) Nudity must mean "a lewd exhibition or involves a graphic focus on the genitals."[1145]

b) Child pornography statute criminalizing possession or viewing of material or performance showing minors in state of nudity was not unconstitutionally vague and overbroad, premised on prior precedent construing term "nudity" as used in statute to mean lewd exhibition or graphic focus on genitals, although defendant prosecuted under statute argued that it was overbroad because, among other things, included within its purview morally innocent states of nudity; terms "lewd exhibition" and "graphic focus on genitals" were plainly susceptible of common understanding and gave fair warning.[1146]

c) Although child pornography may be a violation of the law, depictions of child nudity, without more, is protected speech.[1147]

4. Sufficiency of the Evidence:

a) Evidence was sufficient to sustain convictions for illegal use of a minor in nudity-oriented material or performance premised on discovery of pornographic images of minors saved on hard drive of defendant's computer, although defendant alleged that state failed to

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[1143] State v. Schneider, 9th Dist. Medina No. 06CA0072-M, 2007-Ohio-2553.

[1144] State v. Bloom, 2d Dist. Montgomery No. 22103, 2008-Ohio-1747.

[1145] State v. Young, 37 Ohio St.3d 249 (1988); State v. Graves, 4th Dist. Ross No. 07CA2994, 2009-Ohio-974; Osborne v. Ohio, 495 U.S. 103, 112-113, 110 S.Ct. 1691 (1990).

[1146] State v. Gann, 154 Ohio App.3d 170, 2003-Ohio-4000 (12th Dist.) (12th Dist.).

[1147] New York v. Ferber, 458 U.S. 747, 765, 102 S.Ct. 3348 (1982).

prove he recklessly possessed images because it failed to prove he had accessed filed or had knowledge or notice of their content; expert testified files were not deleted but had been categorized and sorted into different directories, and there was circumstantial evidence defendant had accessed them.[1148]

b) Evidence sufficient where officer testifies that user-made directories contained child pornography, that some affirmative action by user is required to save material into these directories, and that material could not be unintentionally placed in directories when surfing the internet.[1149]

5. State's failure to list a requisite mental state in the indictment is plain error. But, error was harmless because the defendant opted a bench trial rather than a jury trial.[1150]

6. State not required to present evidence or expert testimony establishing that images depict real children rather than altered images or collages. Trier of fact is capable of reviewing evidence to determine whether the prosecution met burden of establishing the images depict real children. Prosecution need not establish that images depict actual children in order to have images admitted under Evid.R. 901(A).[1151]

L. Effect of *Ashcroft v. The Free Speech Coalition* on R.C. 2907.322 and 2907.323

1. In *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389 (2002), the United States Supreme Court struck down as overly broad a federal statute criminalizing the production or possession of virtual child pornography—sexually explicit images that appear to depict minors but were produced using youthful-looking adults or computer imaging technology.

2. *Ashcroft's* effect on Ohio law:

[1148] Id.

[1149] State v. Bettis, 12th Dist. Butler No. CA2004-02-034, 2005-Ohio-2917.

[1150] State v. McDonald, 12th Dist. Clermont No. CA2008-05-045, 2009-Ohio-1168.

[1151] Id.

a) One Ohio appellate court has found R.C. 2907.322 and 2907.323 unconstitutional.[1152]

(1) The Eleventh District found Ohio's statute regarding the use of minors in nudity-oriented material unconstitutionally broad because its "recklessness" mens rea requirement chilled one's right to view protected virtual child pornography due to the difficulty in telling whether an image is real or virtual.[1153]

(2) The same court found Ohio's pandering statute unconstitutionally broad because it permits the trier of fact to infer that a person is a minor if the material represents or depicts the person as a minor, thereby prohibiting protected virtual child pornography.[1154]

b) However, other post-*Ashcroft* Ohio decisions have disagreed with the Eleventh District and determined that the distinction between real and virtual child pornography is a question of fact, not one of law, and that the statutes implicated are constitutional.

(1) Expert testimony not necessary to establish that explicit images found on defendant's computer hard drive were of real children; jury capable of making distinction between real and virtual children.[1155]

(2) Argument that statutory language of R.C. 2907.323 was overbroad and vague rejected; limitation on statute's operation to cases where minor's nudity constitutes lewd exhibition or involves graphic focus on the genitals sufficiently avoided penalties for viewing or possessing protected material.[1156]

[1152] State v. Tooley, 11th Dist. Portage No. 2004-P-0064, 2005-Ohio-6709.

[1153] Id.

[1154] Id.

[1155] State v. Steele, Butler No. CA2003-11-276, 2005-Ohio-943.

[1156] State v. Gann, 154 Ohio App.3d 170, 2003-Ohio 4000 (12th Dist.), *citing* Osborne v. Ohio, 495 U.S. 103, 110 S.Ct. 1691 (1990); *see also* State v. Kraft, 1st Dist. C-060238, 2007-Ohio-2247 and State v. Ashby, 9th Dist. Medina No. 06CA0077-M, 2007-Ohio-3118 (upholding R.C. 2907.322 from attack for over breadth and vagueness).

(3) Testimony of investigating officer sufficient to establish that seized images depicted real children.[1157]

(4) Lay testimony of witnesses who personally knew children depicted in pornographic images sufficient to establish that children were actual children.[1158]

(5) In prosecution for pandering sexually oriented material involving a minor, proof that images in question are of real children may be established by view of images themselves or by non-expert testimony. Additional evidence and expert testimony is not required.[1159]

(6) The term "publish" includes the digital delivery of an image from one person to another.[1160]

c) Ohio courts disagree as to whether an expert's inability to recreate images while distinguishing between real and "virtual" pornography denies a defendant a fair trial by rendering expert assistance unavailable.[1161]

d) The Ohio Supreme Court has overruled the Eleventh District's *Tooley* decision, finding that the "permissive inference" of R.C. 2907.322 does not render the statute unconstitutionally overbroad and prohibit protected virtual child pornography. The inference permitted by R.C. 2907.322 merely permits the state to prove such cases by circumstantial evidence, as permitted in any other cases.[1162]

(1) Therefore, it has been held that the Eleventh District's *Tooley* decision does not provide a reasonable and legitimate basis to

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[1157] State v. Bettis, 12th Dist. Butler No. CA2004-02-034, 2005-Ohio-2917.

[1158] State v. Huffman, 165 Ohio App.3d 518, 2006-Ohio-1106 (1st Dist.).

[1159] Id.; *see also* State v. Ashby, 9th Dist. Medina No. 06CA0077-M, 2007-Ohio-3118.

[1160] State v. Ashby, 9th Dist. Medina No. 06CA0077-M, 2007-Ohio-3118.

[1161] *Compare* State v. Brady, 11th Dist. Ashtabula No. 2005-A-0085, 2007-Ohio-1779, rev'd on other grounds, 119 Ohio St.3d 375, 2008-Ohio-4493 (affirming dismissal of charges on defendant's inability to receive fair trial) with State v. Schneider, 9th Dist. Medina No. 06CA0072-M, 2007-Ohio-2553 (rejecting argument on grounds that expert does not need to recreate a crime to explain difference between real or virtual images).

[1162] State v. Tooley, 114 Ohio St.3d 336, 2007-Ohio-3698.

permit post-sentencing motions to withdraw a plea of guilty to offenses under R.C. 2907.322.[1163]

3. The rationale of the *Ashcroft* decision has been used as the basis for striking down federal age-verification and record-keeping requirements placed upon producers of images depicting "actual sexually explicit conduct" under 18 U.S.C. § 2257. The Sixth Circuit has determined that such requirements impermissibly apply to constitutionally-protected images depicting adults and thereby violate the First Amendment.[1164]

M. Importuning (R.C. § 2907.07)

1. Under R.C. § 2907.07(A), no person shall solicit a person under thirteen years of age to engage in sexual activity with the offender, whether or not the offender knows the age of such person.[1165]

   a) Importuning statute does not require defendant's "actual knowledge" that the person with whom he communicated is a minor; rather, state must prove only that defendant believed he communicated with a minor, or was reckless in that regard.[1166]

2. Persons may not be punished for soliciting a person of the same sex to engage in sexual activity with the offender, when the offender knows such solicitation is offensive to the other person, or is reckless in that regard unless the solicitation, by its very utterance, inflicts injury or is likely to provoke the average person to an immediate breach of the peace.[1167] R.C. 2907.07(B) is facially invalid under the Fourteenth Amendment to the United States Constitution and Section 2, Article I of the Ohio Constitution.[1168]

3. Constitutionality of Statutes:

[1163] State v. Ziefle, 11th Dist. Ashtabula No. 2007-A-0019, 2007-Ohio-5621.

[1164] Connection Distrib. Co. v. Keisler, 505 F.3d 545 (6th Cir. 2007).

[1165] State v. Epstein, 9th Dist. Lorain No. 99CA007362, 2000 WL 1706414 (Nov. 15, 2000).

[1166] State v. Worst, 12th Dist. No. CA2004-10-270, 2005-Ohio-6550.

[1167] State v. Phipps, 58 Ohio St.2d 271 (1979) (overruled in State v. Thompson, 95 Ohio St.3d 264, 2002-Ohio-2124).

[1168] State v. Thompson, 95 Ohio St.3d 264, 2002-Ohio-2124.

a) Statute defining offense of importuning did not violate First Amendment, where statute met constitutional requirement that person of ordinary intelligence would have reasonable opportunity to know what is prohibited and to act accordingly; statute clearly informed person of reasonable intelligence that adults were prohibited from using telecommunications device to solicit minor for sexual activity, even if alleged minor being solicited was actually a law enforcement officer posing as a minor.[1169]

b) Statute defining offense of importuning was not overbroad since it does not have a "chilling effect" on protected speech because the offender must believe he is soliciting a minor for sexual activity, a criminal act, before liability attaches under the statute. The statute was narrowly tailored and does not restrict more conduct or speech than is necessary to achieve the State's compelling interest of protecting children from sexual solicitation by adults through the use of telecommunications devices.[1170]

c) Statute defining offense of importuning did not violate the Commerce Clause where the conduct proscribed was not protected by the First Amendment and did not serve any meaningful purpose in interstate commerce.[1171]

[1169] State v. Snyder, 155 Ohio App.3d 453, 2003-Ohio-6399; State v. Tarbay, 157 Ohio App.3d 261, 2004-Ohio-2721 (1st Dist.); State v. Turner, 156 Ohio App.3d 177, 2004-Ohio-464 (2d Dist.) (2d Dist.); State v. Cearley, 12th Dist. Butler No. CA2003-08-213, 2004-Ohio-4837; State v. Graham, 9th Dist. Medina No. 04CA0048-M, 2005-Ohio-594.

[1170] Id., State v. Lobo, 12th Dist. Butler No. CA2004-03-063, 2004-Ohio-5821.

[1171] Id.; State v. Cunningham, 156 Ohio App.3d 714, 2004-Ohio-1935; State v. Anthony, 1st Dist. No. C-030510, 2004-Ohio-3894 (overruled on other grounds); State v. Cooper, 1st Dist. No. C-030921, 2004-Ohio-6428; State v. Gross, 1st Dist. Nos. C-040196 & C-040208, 2004-Ohio-6997; State v. Snyder, 155 Ohio App.3d 453, 2003-Ohio-6399; State v. Graham, 9th Dist. Medina No. 04CA0048-M, 2005-Ohio-594.

d) Importuning statute did not violate the First Amendment principles of *Ashcroft v. Free Speech Coalition*[1172] since it governs the conduct of soliciting children rather than the expression of ideas.[1173]

4. Police conduct did not meet test for outrageous governmental conduct defense where officer posed as 14 year-old girl, sent picture of police intern taken when she was 14 year-old, and behavior of officer overall was "passive" rather than "coercive."[1174]

5. Importuning does not merge with unlawful sexual conduct with a minor since each crime could be committed without committing the other and thus are not allied offenses of similar import.[1175]

6. For the offense of importuning, "the harm is in the asking" for sexual contact. It does not involve an actual attempt to engage in the activity solicited. Therefore, the charge of attempted importuning is not an "attempt of an attempt" and is a cognizable crime. Importuning requires a minor victim. Attempted importuning occurs when the defendant is not a minor, but rather an adult posing as a minor.[1176]

7. Defendant's conduct sufficient to meet requirements of importuning when defendant asked eight year-old victim for lap dance and victim's mother testified that she observed the defendant sitting on the floor with his penis exposed.[1177]

8. Evidence was sufficient to prove importuning where 37 year-old defendant sent sexually explicit texts to undercover officer who he believed to be a 15

[1172] Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (holding Child Pornography Prevention Act of 1996 unconstitutional where it criminalized actions, including production and possession of images that appeared to be children but were actually produced without using real children, that did not in fact harm children).

[1173] State v. Tarbay, 157 Ohio App.3d 261, 2004-Ohio-2721 (1st Dist.); State v. Helle, 3rd Dist. Allen No. 1-04-18, 2004-Ohio-4398; State v. Cearley, 12th Dist. Butler No. CA2003-08-213, 2004-Ohio-4837; State v. Lobo, 12th Dist. Butler No. CA2004-03-063, 2004-Ohio-5821.

[1174] State v. Cunningham, *supra*.

[1175] State v. Turner, 156 Ohio App.3d 177, 2004-Ohio-464 (2d Dist.) (2d Dist.).

[1176] State v. Andrews, 171 Ohio App.3d 332, 2007-Ohio-2013 (1st Dist.).

[1177] State v. Hartman, 8th Dist. No. 91040, 2009-Ohio-1069.

year-old girl that included multiple references to defendant being twice her age and that the officer was a virgin.[1178]

N. Disseminating Matter Harmful to Juveniles (R.C. § 2907.31)

1. A store owner is not liable for the acts of its clerks when they sell adult oriented videos to juveniles (i.e., no vicarious criminal liability), as the legislature has not made such passive action a crime, and there is no criminal common law in Ohio.[1179]

2. Rational trier of fact could find that defendant was reckless beyond a reasonable doubt where she never required any form of ID from juvenile.[1180]

O. Unlawful Sexual Conduct with a Minor (Corruption of a Minor) (R.C. 2907.04)

1. No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but is less than sixteen years of age, or the offender is reckless in that regard.

    a) Unlawful sexual contact with a minor does not require defendant's "actual knowledge" that the person with whom he communicated is a minor; rather, state must prove only that defendant believed he communicated with a minor, or was reckless in that regard.[1181]

2. R.C. 2097.04 is not unconstitutional, even though it provides different penalties for different adults committing the same offense and even though a lesser degree of proof is required for conviction under this section than under R.C. 2907.06 (sexual imposition, a less serious misdemeanor).[1182]

3. Sufficient evidence that defendant knew victim's age where victim lived in household with defendant for a period of time, her age was mentioned in

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[1178] State v. Paster, 8th Dist. No. 100458, 2014-Ohio-3231.

[1179] State v. Tomaino, 135 Ohio App.3d 309 (12th Dist. 1999).

[1180] State v. Doan, Butler No. CA98-10-225, 1999 WL 988797 (Nov. 1, 1999).

[1181] State v. Nader, 10th Dist. No. 05AP-91, 2005-Ohio-5171 and State v. Perkins, 5th Dist. Tuscarawas No. 09-CA-69, 2010-Ohio-4416.

[1182] State v. Fawn, 12 Ohio App.3d 25 (10th Dist. 1983).

his presence on numerous occasions and one witness to the proscribed sexual acts knew the defendant was "around thirty."[1183]

4. Conviction for attempted unlawful sexual conduct with a minor was sufficiently supported by evidence showing that defendant communicated with victim over the internet and telephone four times a week for several months and defendant told victim that he wanted to have oral sex with victim in back of a movie theatre.[1184]

5. Evidence sufficient for defendant's conviction for attempted unlawful sexual conduct with a minor; defendant's communication with "victim" about sex by e-mail and phone and admissions during NBC interview that he believed the "victim" was underage and that he had a "fifty-fifty" chance of sex with her indicated intent and driving to the location constituted a "substantial step" in conduct planned to culminate in the crime.[1185]

6. Conviction for attempted unlawful sexual conduct with a minor was properly supported by evidence showing that victim told defendant that she was 15 years old, even though she acknowledged listing her age as 16 on her Yahoo profile; defendant sent victim two photographs over the internet, each showing a girl engaged in fellatio; defendant and victim agreed to meet at a Wendy's restaurant where a box of unopened condoms was found in defendant's vehicle.[1186]

7. Trial court did not abuse its discretion in excluding from evidence a Valentine's Day card and an adult-themed card, which had been sent by victim to defendant who was charged under R.C. 2907.04. Cards were sent to defendant after he learned that victim was 14 years old, and whatever probative value the cards may have had in showing that the victim "portrayed herself as an adult who did adult things" was substantially outweighed by the danger of unfair prejudice, since the jury may have been persuaded to view victim in an unduly negative light and acquit defendant on the improper basis. However, trial court did not abuse its discretion in admitting into evidence a love letter that defendant had written to victim, showing that the two were involved in a consensual, sexual relationship, because, under R.C. 2907.04(A), proving that defendant and victim

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[1183] Id.

[1184] State v. Gann, 154 Ohio App.3d 170, 2003-Ohio-4000 (12th Dist.).

[1185] State v. Stephens-Tun, 2d Dist. Darke No. 07-CA-1721, 2008-Ohio-3491.

[1186] Id.

engaged in sexual conduct was an essential element of the state's case against defendant.[1187]

8. Evidence was sufficient to support conviction for attempted unlawful sexual conduct with a minor, even though police officer, posing as a minor, corresponded with defendant over the internet, and thus no minor was actually involved in the offense; defendant, clearly believed that the person from whom he had solicited sex was 14 year-old girl and that she would meet him for that purpose at a specific location, and defendant drove to that specific location.[1188]

9. Unlawful sexual conduct with a minor does not merge with importuning since each crime could be committed without committing the other and thus are not allied offenses of similar import.[1189]

10. "A prosecution under R.C. 2907.04(A), the key issue is whether defendant engaged in sexual conduct with the minor victim." It is "irrelevant whether the victim was a virgin, whether she seduced defendant, or whether she previously engaged in sexual conduct with other men." Ultimately, a court does not abuse its discretion when it refuses to admit evidence of a minor victim's past sexual history since the "minimal relevance and probative value of that evidence to impeach the victim's credibility, was substantially outweighed by the inflammatory character of that evidence and the danger of unfair prejudice" pursuant to Evidence Rule 403(A).[1190]

11. Sentence for unlawful sexual conduct with a minor was proper where, despite the trial court opining at the sentencing hearing that the minor victim was a "little girl" who would likely be "scarred for life" and failing to specifically mention the statutory sentencing factors, the entry contains language indicating that the trial court considered the statutory sentencing factors as required.[1191]

12. There was sufficient evidence to support defendant's conviction for attempted unlawful sexual conduct with a minor where the evidence

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[1187] State v. Hardy, 12th Dist. Butler No. CA2002-06-141, 2003-Ohio-4745.

[1188] State v. Shaefer, 155 Ohio App.3d 448, 2003-Ohio-6538 (2d Dist.); *see also* State v. Lobo, 12th Dist. Butler No. CA2004-03-063, 2004-Ohio-5821.

[1189] State v. Turner, 156 Ohio App.3d 177, 2004-Ohio-464 (2d Dist.).

[1190] State v. Smiddy, 2d Dist. Clark No. 06-CA-0028, 2007-Ohio-1342. *See also* State v. Gresham, 2d Dist. Montgomery No. 22766, 2009-Ohio-3305.

[1191] State v. Toma, 7th Dist. Columbiana No. 13 CO 19, 2014-Ohio-2256.

showed that the defendant drove to the arranged meeting place on the date that he had asked the undercover detective posing as a minor they would meet for sex.[1192]

P. Exposure

1. No reversible error in case of exposure where prosecutor made factually inaccurate remarks in closing statement; where the jury chose to believe a witness, whose statements were often conflicting, over defendant; and trial court refused to grant mistrial where prosecutor brought up subject of defendant's alleged undressing in the county jail on prior occasions in violation of Evid.R. 404(B).[1193]

Q. Incest (R.C. 2907.03(A)(5))

1. Ohio's incest statute is constitutional as applied to consensual sexual conduct between a parent and adult child and a stepparent and an adult stepchild because it bears a rational relationship to the legitimate state interest of protecting the family. [1194]

R. Compelling Prostitution (R.C. 2907.21)

1. Conviction under R.C. 2907.21(A)(3) requires evidence that, if believed, would prove that a defendant paid for or agreed to pay an *actual* minor to engage in sexual activity. Because the statute does not prohibit agreements "*believed* to be with a minor," conviction of defendant agreeing with police officer to a sexual encounter with non-existent mother and non-existent 11 year-old daughter was not supported by sufficient evidence.[1195]

S. Kidnapping for the Purpose of Engaging in Sexual Activity Against the Will of the Victim (R.C. 2905.01(A)(4))

[1192] State v. Paster, 8th Dist. No. 100458, 2014-Ohio-3231.

[1193] City of Hamilton v. Kuehne, 12th Dist. Butler No. CA97-10-198, 1998 WL 568697 (Sept. 8, 1998).

[1194] State v. Lowe, 112 Ohio St.3d 507, 2007-Ohio-606; State v. Freeman, 155 Ohio App.3d 492, 2003-Ohio-6730 (7th Dist.).

[1195] State v. Bartrum, 9th Dist. Summit No. 23549, 2007-Ohio-5410.

1. A completed kidnapping under R.C. 2905.01(A)(4) does not require that sexual activity actually take place. It requires only restraint or removal of the victim for the purpose of engaging in nonconsensual sexual activity.[1196]

    a) Where defendant did not actually engage in sexual conduct with eleven year-old victim, but straddled her and began to lift her shirt after binding her with zip ties and duct tape before changing his mind, conviction under R.C. 2905.01(A)(4) upheld.[1197]
    b) Where defendant restrained the victim before the rape so that the victim could not escape while the defendant went to the vehicle to retrieve the baby. The victim was then untied during the rape, and the victim was again restrained after the rape. A separate animus existed with respect to both rape and kidnapping offenses, and the kidnapping offense was found not "incidental" to the rape offense, conviction upheld.[1198]

T. Voyeurism (R.C. 2907.08)

1. Convictions for voyeurism do not constitute sexually oriented offenses unless the victim is under 18 years old per R.C. 2950.01.[1199]

2. Evidence supported defendant's conviction for voyeurism. Photographic images were found on defendant's cell phone of female crotch areas.[1200]

U. Criminal Child Enticement (R.C. 2905.05)

1. R.C. 2905.05(A) found unconstitutionally overbroad on its face; as it forbids anyone from asking any child under 14 to accompany the person for any purpose whatsoever absent privilege, a perceived emergency, or parental consent. R.C. 2905.05 (A) thus criminalizes a substantial amount of legitimate activity protected by the First Amendment.[1201]

[1196] State v. Davis, 116 Ohio St.3d 404, 2008-Ohio-2.

[1197] State v. Wightman, 12th Dist. Fayette No. CA2006-12-045, 2008-Ohio-95.

[1198] State v. McGeary, 4th Dist. Ross No. 08CA3063, 2009-Ohio-3175.

[1199] State v. Landers, 2d Dist. Champaign No. 2006-CA-42, 2008-Ohio-422.

[1200] State v. Kinsey, 5th Dist. Knox No. 08 CA 12, 2009-Ohio-23.

[1201] State v. Chapple, 2d Dist. Montgomery No. 22198, 2008-Ohio-1157.

2. R.C. 2905.05(A) found unconstitutional in violation of the First Amendment because the statute failed to require that the prohibited solicitation, coaxing, enticing, or luring occurred with the intent to commit any unlawful act, and thus the broad language could have supported criminal charges against a person in many innocent scenarios. Severing the word "solicit" from child-enticement statute would not fix the unconstitutional application of the statute because the remaining language still encompassed a wide range of innocent and protected conduct, such as an elderly person offering a child under 14 years old money to come with her to help with chores. The Ohio Supreme Court's decision clarified a certified conflict between the holdings in *State v. Chapple*, 175 Ohio App.3d 658, 2008-Ohio-1157, 888 N.E.2d 1121, ¶ 18 (2d Dist.); *Cleveland v. Cieslak*, 8th Dist. 8th Dist. No. 92017, 2009-Ohio-4035, 2009 WL 2462647, ¶ 7–9, 16 finding and the holding in *State v. Clark*, 1st Dist. 1st Dist. No. C–040329, 2005-Ohio-1324, 2005 WL 678565 in which the First District found the statute to be constitutional as written.[1202]

[1202] State v. Romage, 138 Ohio St.3d 390, 2014-Ohio-783.

VI. SEXUAL CLASSIFICATION UNDER R. C. CHAPTER 2950

A. Generally

1. In 1996, the General Assembly substantially rewrote laws regarding sexual offenders. These laws were enacted as House Bill 180, codified as R.C. Ch. 2950. House Bill 180 is similar to laws being passed in many states requiring registration and community notification of sexual offenders. Under H.B. 180, sexual offenders are grouped into one of three categories: sexual predators (those convicted of a "sexually oriented offense" who are likely to offend in the future) habitual sex offenders (those who have previously been convicted of a "sexually oriented offense") and other sex offenders (those who have been convicted of a "sexually oriented offense" but do not fit into one of the other two categories.) A sentencing court must determine whether sex offenders fall into one of these three classifications.[1203] Offenders are required to register, and notification of the community is based upon which category the offender falls into. Those already serving a sentence for a sexual offense can be adjudicated as a sexual predator by a trial court and thus be subject to the registration and notification requirements.[1204]

2. The paramount purpose of the sexual predator statute, also known as "Megan's Law," is protecting children from those persons in society who prey on them, and then weighing that risk against the obviously limited law enforcement resources available for notification and monitoring.[1205]

3. Almost immediately amendments were passed to plug "gaps" in the legislation, e.g. originally offenders in prison had to be classified before release, but now are given one year from release.[1206]

[1203] However, if the court does not make a determination regarding sexual predator or habitual sex offender classification, a hearing for sexually oriented offender classification is not required under pre S.B. 5 law. State v. Grider, 144 Ohio App.3d 323 (8th Dist. 2001), *discretionary appeal not allowed by* 93 Ohio St.3d 1446 (2001).

[1204] According to recent reports, "[sex] offenders who are under correctional supervision — in combination with sex offender-specific treatment — are *less likely* to reoffend." Laurie Robinson, *Sex Offender Recidivism: A Challenge for the Court*, COURT REVIEW, Spring 1999, at 16 (stating that effective supervision includes, among other things, notification).

[1205] State v. Overcash, 133 Ohio App.3d 90, 1999-Ohio-836 (3rd Dist.).

[1206] Effective March 15, 2001 the amendment added "anytime within one year of release."

4. Am. Sub. S.B. No. 5, effective July 31, 2003, created a sweeping amendment including creating a child victim offender category and a lifetime irrevocable classification of predator; shorting initial registration.

    a) The Ohio Supreme Court has specifically addressed and upheld retroactive application of the irrevocable sexual predator classification as well as several other changes to the SORN laws wrought by S.B. 5.[1207]

5. Am. Sub. S.B. No. 5 classified these offenses, if done with sexual motivation, as sexually oriented offenses: aggravated murder (R.C. 2903.01); murder (R.C. 2903.02); felonious assault (R.C. 2903.11); kidnapping (R.C. 2905.01); involuntary manslaughter (R.C. 2903.04(A)). It also continued sexually violent offenders for the following: rape (R.C. 2907.02); sexual battery (R.C. 2907.03) GSI of victim under 13 (R.C. 2907.05(A)(4); any homicide, assault or kidnapping with sexual motivation specification.[1208]

6. Clarified that complicity and attempt are included.

7. Am. Sub. S.B. No. 5 also created presumptive registration for sexually oriented offenses when a victim is 18 years or older for sexual imposition (R.C. 2907.06); voyeurism (R.C. 2907.08); and menacing by stalking with sexual motivation (R.C. 2903.211).[1209]

8. Replaces Chapter R.C. 2950.

9. Also creates a classification called "child victim oriented offense" and "child victim offender" where a victim is under 18 and not the child of the perpetrator committed with a non-sexual motivation in kidnapping, abduction, unlawful restraint; criminal child enticement and child stealing. The classification mirrors the sexual classification scheme and imposes offender registration verification responsibilities as in sexual offenses.

[1207] State v. Ferguson, 120 Ohio St.3d 7, 2008-Ohio-4824; State v. Hollis, 8th Dist. No. 91467, 2009-Ohio-2368 (trial courts must apply new classifications regardless of date original offense was committed); Sewell v. State, 181 Ohio App.3d 280, 2009-Ohio-872 (1st Dist.).

[1208] *See also* R.C. 2950.01(D)(1)(d).

[1209] For a good discussion of when and how presumptive registration works, see Keating, L. & Krebs, R., "A Guide to Offender Classification, Ohio Judicial College" outline (2005).

10. A defendant's classification is merely a remedial condition imposed upon offenders, and therefore falls outside the scope of a negotiated plea agreement. The trial court may consider the facts of the offense itself in making its determination, and is not limited to the plea bargain between the defendant and the state.[1210]

11. Because a sexual offender classification does not result in a restraint on an offender's liberty, habeas corpus relief is an improper remedy.[1211]

12. The applicable standard of review for a sexual predator classification is the civil manifest weight of the evidence standard. Judgments supported by some competent, credible evidence going to all the essential elements of the case will not reversed by a reviewing court.[1212]

    a) It is error for an appellate court to reverse a sexual predator classification by employing a different standard.[1213]

13. A trial court erred when it determined that it lacked jurisdiction to review a juvenile's challenge to his out-of-state sexual predator classification under Megan's Law because Megan's Law allowed a sexual predator to petition the court to challenge automatic classification.[1214]

B. Sexually Oriented Offenses

1. In order for R.C. Ch. 2950 to apply, the offense must be "sexually oriented."

[1210] See State v. Hayden, 96 Ohio St.3d 211, 2002-Ohio-4169; State v. Grider, 144 Ohio App.3d 323 (8th Dist. 2001).

[1211] Jordan v. State, 11th Dist. Trumbull No. 2006-T-0103, 2007-Ohio-341 (habeas corpus action otherwise moot due to offender's release from confinement).

[1212] State v. Wilson, 113 Ohio St.3d 382, 2007-Ohio-2202. *See also* State v. Cooper, 1st Dist. No. C-060677, 2007-Ohio-4464 (classification stemming from sexual battery conviction); State v. Gebbie, 1st Dist. No. C-060505, 2007-Ohio-3089 (classification stemming from abduction conviction); State v. Wolfe, 1st Dist. No. C-060428, 2007-Ohio-3088 (classification stemming from rape conviction); State v. Welborn, 5th Dist. Stark No 2006 CA 00095, 2007-Ohio-2180 (classification stemming from convictions of unlawful sexual contact with a minor and importuning); State v. Carpenter, 6th Dist. Lucas No. L-06-1203, 2007-Ohio-3947 (classification stemming from GSI conviction).

[1213] State v. Wilson, *supra*.

[1214] In re D.W., 6th Dist. Lucas No.L-12-1318, 2013-Ohio-3955.

a) However, a sexual motivation specification on a kidnapping or murder charge is not a necessary prerequisite for the trial court to hold a sex offender classification hearing. Without such a specification, the issue becomes whether the facts leading to a conviction for kidnapping establish it as a "sexually oriented offense."[1215]

2. Commission of a "sexually oriented" offense results in the attachment of the "sexually oriented offender" classification as a matter of law.[1216] No hearing is required to determine whether a defendant is a sexually oriented offender.[1217]

a) The defendant's plea of guilty to attempted rape, a sexually oriented offense, automatically resulted in his classification as a sexually oriented offender.[1218]

(1) According to the Revised Code, a sexually oriented offense is defined as a violation of R.C.§§ 2907.02 (rape), 2907.03 (sexual battery), 2907.05 (gross sexual imposition), or 2907.12 (felonious sexual penetration), regardless of the age of the victim, or if the victim is a minor, a violation of 2905.01 (kidnapping), 2905.01 (abduction), 2905.03 (unlawful restraint), 2905.04 (child stealing), 2905.05 (criminal child enticement), 2907.04 (corruption of a minor), 2907.21 (compelling prostitution), 2907.321(A)(1) & (3) (pandering obscenity involving a minor), 2907.322(A)(1) & (3) (pandering sexually oriented material involving a minor), 2907.323(A)(1) & (2) (illegal use of a minor in nudity-oriented

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[1215] State v. Smith, 9th Dist. Summit Nos. 23468 & 23464, 2007-Ohio-5524; State v. Nagy, 8th Dist. No. 90400, 2008-Ohio-4703.

[1216] State v. Moncrief, 8th Dist. No. 85749, 2005-Ohio-4812.

[1217] Where a defendant is convicted of a sexually oriented offense, he or she is automatically classified and must comply with the necessary registration requirements. Where the sentencing court failed to notify an offender of his duty to register until five years after his conviction, no prejudice occurred because no efforts had been made to criminally charge the defendant for failure to register. In re Kevin Abney, 1st Dist. No. C-080053, 2008-Ohio-4379 and In re Ben Hawkins, 1st Dist. No. C-080052, 2008-Ohio-4381.

[1218] State v. Gilman, 12th Dist. Warren App. CA97-05-041, 1998 WL 87417 (Mar. 2, 1998) (defendant beat wife to force her to submit to rape), *appeal not allowed by*, 82 Ohio St.3d 1440 (1998).

material), or 2919.22(B)(5) (endangering children); further, a violation of R. C. §§ 2903.01 (aggravated murder), 2903.02 (murder), 2903.11 (felonious assault), 2905.01 (kidnapping), or 2903.04(A) (involuntary murder) is a sexually oriented offense if done with the purpose of gratifying the sexual needs of the defendant, as any sexually violent offense.[1219]

b) Classification of murder as an offense "committed with a purpose to gratify the sexual needs or desires of the offender" presents a question of fact.[1220]

(1) Questions of fact regarding intent may also appear with respect to offenses generally regarded as sexual in nature.

(A) Defendant's claim that digital penetration and threats of rectal penetration served purpose of extracting whereabouts of drugs and money during robbery presented question of fact regarding purpose of sexual gratification; however, fact that acts were performed on female victim only provided competent and credible evidence supporting defendant's classification as sexual predator.[1221]

c) At least one Ohio appellate district has developed a standard of review for claims challenging evidence in support of the gratification prong of the Revised Code's definition of "sexual predator" as applied to offenses—like murder—that are not sexual by their statutory definition.[1222]

d) Several courts has held that unless there is evidence of sexual motivation, there is no rational basis for categorizing an abduction

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[1219] State v. Iden, 5th Dist. Stark No. 1997CA00365, 1999 WL 174648 (Feb. 16, 1999); State v. Warren, 5th Dist. Stark No. 2005CA00030, 2005-Ohio-5218.

[1220] *See, e.g.,* State v. Florer, 5th Dist. Fairfield No. 2005-CA-47, 2006-Ohio-4441.

[1221] State v. Martin, 5th Dist. Stark No. 2006 CA 00306, 2007-Ohio-5642.

[1222] State v. Anderson, 2d Dist. Miami No. 99-CA-19, 2000 WL 234706 (Mar. 3, 2000). Where testimony or direct evidence that the offender was gratifying himself sexually is lacking, a finding of purpose of sexual arousal or gratification may be inferred from the type, nature, and circumstances surrounding the conduct.

of a victim who is less than eighteen years old as a sexually oriented offense.[1223]

e) The court cannot classify defendant a sexually oriented offender when he had consensual sex with the murder victim earlier in the day, where the sex and the murder were not connected.[1224]

f) One cannot be classified as a habitual sex offender without having been previously convicted of a sexually oriented offense. Pleading guilty to multiple sexual charges in the same case does not constitute having been previously convicted of a sexually oriented offense.[1225]

(1) However, a defendant can waive the right to have the state prove that he has been convicted of another sexually oriented offense and stipulate to the fact that he is a habitual sex offender.[1226]

g) Permissible to find defendant a sexually oriented offender where classification hearing held but no factors applicable.[1227]

h) Generally, multiple sexual predator designations are not redundant, since each case may have a different victim who will be required to be notified as a result of the designation in that victim's case.[1228]

(1) However, a defendant may not complain that the trial court erred by designating him a sexual predator without a hearing and without consideration of the factors required by statute, when his trial counsel, at the hearing, stipulated that the doctrine of res judicata required the designation.[1229]

[1223] State v. Washington, 11th Dist. Lake App. 99-L-015, 2001-Ohio-8905; State v. Small, 162 Ohio App.3d 375, 2005-Ohio-3813 (10th Dist.).

[1224] State v. King, 10th Dist. No. 97APA04-455, 1997 WL 607479 (Sept. 30, 1997).

[1225] State v. West, 134 Ohio App.3d 45 (1st Dist. 1999), *discretionary appeal not allowed by*, 87 Ohio St.3d 1418 (1999).

[1226] State v. Brintzenhofe, 9th Dist. Summit No. 18924, 1999 WL 292195 (May 12, 1999), *appeal not allowed by* 86 Ohio St.3d 1488 (1999).

[1227] State v. Juarez, 1st Dist. No. C-970368, 1998 WL 397375 (Jul. 17, 1998), *discretionary appeal not allowed by* 84 Ohio St.3d 1438 (1998).

[1228] State v. Wipperman, 2d Dist. Montgomery No. 18398, 2001-Ohio-1918.

[1229] Id.

i) Registration requirements attach as a matter of law to sexually oriented offender even if found not to be sexual predator at hearing (i.e., "classifying" offender as sexually oriented offender at sexual predator hearing adds nothing.)[1230]

j) A 1960 conviction for "indecent liberties" constitutes previous conviction for sexually oriented offense for purposes of finding defendant a habitual sex offender.[1231]

k) Felonious assault was sexually oriented offense where defendant lured victim to his house under false pretenses and, once she was there, was "solely concerned with sexual matters," in this case whether victim was dating other men. Court found that "assault was committed in order to dominate and/or control [victim's] sexual behavior."[1232]

l) Consensual sex with another under the age of 18 by an offender who knows he is HIV positive is a felonious assault with sexual motivation.[1233]

m) Contributing to the delinquency of a minor and sale to an underage person are not "sexually oriented offenses" for purposes of the sex offender classification statutes.[1234]

n) Sex Offender Registration and Notification Law does not include a public indecency offense within the definition of sexually oriented offenses and a court errs in requiring registration as a sexually oriented offender as a term of probation because registration does

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[1230] State v. Goodballet, 7th Dist. Columbiana No. 98 CO 15, 1999 WL 182514 (Mar. 30, 1999), *appeal not allowed by* 87 Ohio St.3d 1449 (1999).

[1231] State v. Shaddoan, 1st Dist. No. C-970502, 1998 WL 412422 (Jul. 24, 1998), appeal not allowed by, 84 Ohio St.3d 1434 (1998); *see also* State v. Boyce, 8th Dist. No. 73375, 1999 WL 135270 (Mar. 11, 1999) (stating that it was appropriate to base a sexual predator determination on "old conviction data," but remanded because the trial judge did not indicate which factors supported the classification).

[1232] State v. Slade, 10th Dist. No. 98AP-1618, 1999 WL 1262051 (Dec. 28, 1999), *appeal not allowed by* 88 Ohio St.3d. 1482.

[1233] State v. Christian, 7th Dist. Jefferson No. 07 JE 9, 2007-Ohio-7205.

[1234] State v. Wilkerson, 138 Ohio App.3d 861 (1st Dist. 2000).

nothing to rehabilitate the offender or to insure his good behavior; rather, it serves only to aid the sheriff's department in the event that the offender engages in similar criminal behavior in the future.[1235]

o) Crime of soliciting prostitution following positive HIV test is not a "sexually oriented offense" for purposes of statutes imposing address registration and verification requirements on sexually oriented offenders.[1236]

p) Previous adjudication of juvenile delinquency, which was based on sexually oriented offense, did not qualify as prior conviction for purposes of determining whether defendant was habitual sex offender; statute that permitted juvenile delinquency adjudications to be used in considering crime to be charged or sentence to be imposed was inapplicable as classification as sexual offender was neither crime nor sentence.[1237]

q) Defendant was not convicted of, nor did he plead guilty to, "sexually oriented offense," for purposes of determining whether defendant had to be adjudicated as sexual predator, where defendant pleaded guilty to and was convicted of child endangering, an offense not enumerated in the sexual predator statute.[1238]

r) Where a defendant was convicted of rape and aggravated burglary, the trial court's mislabeling of the aggravated burglary as a sexually oriented offense was harmless error; ample evidence existed to support sexual predator classification for rape charge.[1239]

3. However, the defendant's commission of a "sexually oriented" offense is not proof, in and of itself, that he or she is likely to engage in future "sexually oriented" offenses.[1240]

[1235] State v. Lusher, 6th Dist. Wood No. WD-97-006, 1997 WL 703339 (Nov. 7, 1997).

[1236] State v. McPherson, 143 Ohio App.3d 741 (8th Dist. 2001).

[1237] State v. Prether, 141 Ohio App.3d 6 (2d Dist. 2001).

[1238] State v. Zupan, 138 Ohio App.3d 171 (9th Dist. 2000).

[1239] State v. Guy, 7th Dist. Columbiana No. 06 CO 12, 2007-Ohio-3178.

[1240] State v. Archer, 7th Dist. Columbiana No. 06 CO 6, 2007-Ohio-1566, *citing* State v. Eppinger, 91 Ohio St.3d 158, 2001-Ohio-247 and State v. Ward, 130 Ohio App.3d 551 (8th Dist. 1999).

4. Although evidence rules in a sexual classification hearing are relaxed, the prosecutor may not simply read from a police report without moving to admit the report into evidence. The prosecutor's statements are not evidence and may not be considered.[1241]

5. Clear and convincing evidence supported the finding that defendant had been convicted of a sexually oriented offense and was likely to engage in one or more future sexually oriented offenses, and thus, the trial court's decision to label defendant as a sexual predator was proper. [1242]

    a) Defendant committed the instant offenses at age 26. Defendant's prior criminal record showed in 2002 that he was convicted of assault, disorderly conduct, and carrying a concealed weapon, and in 2003, unlawful sexual conduct. Subsequent to serving the prison term for the sexual offense, defendant was convicted of theft and aggravated disorderly conduct. The victims of the sex offenses were 14 and 15.[1243]

C. Timing of the Sexual Predator Hearing

1. Generally:

    a) The court cannot require defendants to register as sexually oriented offenders under R.C. § 2950.04 before the law's effective date of July 1, 1997;[1244] the court may only consider whether or not defendant is a sexual predator--not whether defendant is a sexually oriented offender--at a sexual predator classification hearing.[1245] However, it is not error or prejudicial to label the defendant a sexually oriented offender, as this is a legal status not a factual determination.[1246]

[1241] State v. Nagy, 8th Dist. No. 90400, 2008-Ohio-4703.

[1242] State v. Brunelle-Apley, 11th Dist. Lake No. 2008-L-014, 2008-Ohio-6412.

[1243] Id.

[1244] State v. McLaughlin, 6th Dist. Erie App. E-97-042, 1998 WL 102188 (Feb. 27, 1998).

[1245] State v. Cox, 10th Dist. No. 97APA08-1006, 1997 WL 151117 (Mar. 31, 1998).

[1246] State v. Redden, 6th Dist. Lucas No. L-98-1087, 1999 WL 739671 (Mar. 19, 1999); State v. Bennett, 1st Dist. No. C-970466, 1998 WL 226448 (May 8, 1998); State v. Lindsay, 1st Dist. No. C-970525, 1998 WL 226396 (May 8, 1998) (court can label a

b) Under the language of R.C. 2950.09(C)(2)(a), a sentencing court may do one of two things once it receives an ODRC recommendation that an offender be adjudicated as being a sexual predator. First, the court may conduct a hearing and determine whether the offender is a sexual predator. Alternatively, the court may determine without a hearing that the offender is not a sexual predator, and, if it does so, it must include its determination in the offender's institutional record. The court may not, however, fail to act after it receives the ODRC recommendation.[1247] Note that the bulk of Ohio case law characterizes the ODRC recommendation and notification as "merely advisory" in nature and not a "mandatory jurisdictional prerequisite" for court action.[1248]

c) Court has no right to compel a defendant to register when he was released prior to July 1, 1997, was sentenced prior to July 1, 1997, and was never adjudicated a habitual sex offender and was not required to register under R.C. Ch. 2950; however, the court can adjudge defendant as sexual predator.[1249]

d) An offender can properly be adjudicated a sexual predator, but not have the duty to register under sexual offender statute. Therefore, defendant convicted of gross sexual imposition could be classified as a sexual predator, where defendant was convicted of gross sexual imposition before date specified in predator statute but was imprisoned for aggravated robbery after the date specified in the predator statute.[1250]

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defendant "sexually oriented offender" at a hearing under R.C. § 2950.09 but no duty to register attaches).

[1247] State ex rel. Mason v. Griffin, 90 Ohio St.3d 299, 2000-Ohio-62.

[1248] See State v. Miller, 11th Dist. Trumbull Nos. 2006-T-0059 & 2006-T-0060, 2007-Ohio-6931 ("Miller II"), disagreeing with State v. Miller, 11th Dist. Trumbull Nos. 2004-T-0019 & 2004-T-0020, 2005-Ohio-4780 ("Miller I").

[1249] State v. Taylor, 100 Ohio St.3d 172, 2003-Ohio-5452; State v. Bellman, 86 Ohio St.3d 208, 1999-Ohio-95.

[1250] State v. Riley, 142 Ohio App.3d 580 (1st Dist. 2001); State v. Geran, 12th Dist. Butler No. CA99-03-054, 2002-Ohio-2599; State v. Taylor, 8th Dist. No. 79475, 2002-Ohio-1554, *affirmed by* 2003-Ohio-5452, supra; State v. Benson, 12th Dist. Butler No. CA99-11-194, 2000 WL 1221851 (Aug. 28, 2000), *appeal not allowed by* 91 Ohio St.3d 1414 (2001); State v. Staples, 11th Dist. Lake No. 98-L-238, 2001-Ohio-4295.

2. Automatic Classification:

a) Under R.C. § 2950.09(A), a defendant is automatically classified as a sexual predator only if:

(1) On or after January 1, 1997 he or she is convicted of or pleads guilty to committing a sexually violent offense, and he or she also is convicted of or pleads guilty to a sexually violent predator specification included in the indictment or information.[1251]

(2) He or she is convicted, pleads guilty, or adjudicated a delinquent child in a court of another state for committing a sexually oriented offense that is not a registration-exempt sexually oriented offense, and is required by that state as a result of that offense to register as a sex offender, but can challenge classification under R.C. 2950.09(F).

b) R.C. 2950.09 prohibits a trial court from classifying a defendant as a sexual predator once that defendant has been acquitted of a sexually violent predator specification.[1252] However, R.C. 2950 was amended per S.B. 175, effective May 7, 2002, to permit this.

(1) Even if offender who has not been convicted of a violent sexually oriented offense and a sexually—violent predator specification, the trial court must determine whether to apply the habitual sex offender classification.[1253]

c) Where defendant is not charged in an indictment with being a sexual predator, he cannot be automatically classified as a sexual predator under R.C. § 2950.09(A), rather, the court must hold a hearing on the matter.[1254]

[1251] State v. Casper, 8th Dist. No. 73061, 1999 WL 380437 (June 10, 1999); State v. Tillett, 8th Dist. No. 74275, 1999 WL 435763 (June 24, 1999).

[1252] State v. Jones, 93 Ohio St.3d 391, 2001-Ohio-1341, abrogated on other grounds as recognized in State v. Mathis, 109 Ohio St.3d 54, 2006-Ohio-855; *See also* State v. Macht, 1st Dist. No. C-980676, 1999 WL 387058 (Jun. 11, 1999); State v. Harrod, 1st Dist. No. C-990018, 1999 WL 797980 (Oct. 8, 1999); State v. Wynn, 8th Dist. No. 75281, 1999 WL 1087497 (Dec. 2, 1999).

[1253] State v. Wilkerson, 138 Ohio App.3d 861 (1st Dist. 2000).

[1254] State v. Pumerano, 8th Dist. No. 72694, 1999 WL 148463 (Mar. 18, 1999).

d) By operation of statute, a defendant is automatically classified as a "sexually oriented offender" under R.C. § 2950.04(A)(1) where he is convicted of sexual imposition and felonious sexual penetration and is sentenced to a term of imprisonment and is released after the effective date of the statute; the trial court need not hold a hearing on the matter.[1255]

e) The automatic classification as a sexual predator under R.C. 2950 (D)(2)(a) of a defendant convicted of kidnapping where there was no sexual motivation and no sexual offense committed is violative of the due process clause of both the Ohio and United States constitutions.[1256]

f) Automatic classification was upheld for conviction of kidnapping where defendant pled guilty to a violation of R.C. 2905.01(A)(4), kidnapping for the purpose of engaging in sexual activity.[1257]

g) When an out-of-state offender who is automatically classified challenges his classification pursuant to R.C. 2950.09(F), the trial court must first determine whether the sexually-oriented offense in the other state is substantially equivalent to one of the offenses in R.C. 2950.01(D)(1)(a),(b),(c), or (d); if the offense is similar, then the offender is entitled to a hearing where he has the burden of showing by clear and convincing evidence that he is not likely to commit a sexually-oriented offense in the future.[1258]

3. Classification at Sentencing:

a) Under R.C. § 2950.09(B), the sentencing judge shall conduct a classification hearing prior to or concurrent with sentencing where:

(1) The defendant is to be sentenced on or after March 30, 1999 for a non-violent sexual offense; or

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[1255] State v. Erwin, 5th Dist. Licking No. 99-CA-54, 1999 WL 770676 (Sept. 2, 1999); State v. Hayden, 96 Ohio St.3d 211, 2002-Ohio-4169.

[1256] State v. Barksdale, 2d Dist. Montgomery No. 19294, 2003-Ohio-43; State v. Reine, 2d Dist. Montgomery No. 19157, 2003-Ohio-50.

[1257] State v. Mixner, 12th Dist. Warren No. CA2002-10-105, 2003-Ohio-4470.

[1258] State v. Pasqua, 157 Ohio App.3d 427, 2004-Ohio-2992 (1st Dist.).

(2) The defendant is to be sentenced on or after January 1, 1997 for a sexually violent offense but there was no sexually violent predator specification in the indictment or information.

b) It is error for the court to hold a sexual predator classification hearing under R.C. § 2950.09(B) after sentencing.[1259] Similarly, it is error to hold a sexual predator classification hearing before a defendant's conviction or plea of guilty to the sexually-oriented offense.[1260]

(1) Where classification hearing held over five months after sentencing and defendant sentenced after January 1, 1997, classification was error; court had no authority to order defendant to register because he did not fall within three categories of § 2950.04(A).[1261]

(2) Where defendant was incarcerated for a prior sexual offense, the trial court was held to be in error for bringing defendant out of his incarceration to hold a sexual predator hearing and adjudging him a habitual sex offender.[1262]

(3) But, no error to adjudge Defendant sexual predator after sentencing when the Defendant waived his right to have the hearing precede sentencing; the hearing requirement is not jurisdictional.[1263]

(4) R.C. § 2950.09(B)(1) is directory, not jurisdictional. In other words, where at same hearing court announces sentence

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[1259] State v. Russell, 1st Dist. No. C-97027, 1998 WL 151066 (April 3, 1998); State v. Jones, 12th Dist. Butler Nos. CA97-05-103, CA97-05-106, CA97-05-111, CA97-05-112, CA97-06-122, CA97-06-124, CA97-06-131, 1998 WL 130209 (Mar. 23, 1998).

[1260] State v. Hultz, 9th Dist. Wayne No. 06CA0032, 2007-Ohio-2040.

[1261] State v. Martin, 1st Dist. No. C-970925, 1998 WL 418033 (Jul. 24, 1998); State v. Cole, 12th Dist. Warren No. CA99-08-097, 2000 WL 127098 (Jan. 24, 2000) (seven months after sentencing.)

[1262] State v. Parker, 134 Ohio App.3d 660 (7th Dist. 1999).

[1263] State v. Bellman, 86 Ohio St.3d 208, 1999-Ohio-95, State v. Wyant, 12th Dist. Madison No. CA2003-08-029, 2004-Ohio-6663; State v. Shelton, 1st Dist. Nos. C-060789 & C-060790, 2007-Ohio-5460.

before declaring defendant a sexual predator, and then files entry of sentence, jurisdiction not removed.[1264]

(5) Where the classification hearing is held immediately following sentencing without objection, it is not plain error.[1265]

c) Where court holds hearing per § 2950 prior to sentencing and sentencing is later appealed and remanded, no obligation to hold new predator hearing.[1266]

4. Pre-Release Classification:

a) Under R.C. § 2950.09(C), prior to March 15, 2001, a court may conduct a classification hearing prior to a defendant's release from a term of imprisonment if that defendant:

(1) Was convicted of or pleaded guilty to a sexually oriented offense prior to January 1, 1997,

(2) Was not sentenced on or after January 1, 1997, and

(3) On or after January 1, 1997, is serving a term of imprisonment in a state correctional institution.[1267]

b) Prior to March 15, 2001, a court must adjudicate a defendant a sexual predator prior to release.[1268]

(1) Invalid if adjudicated at a probation revocation hearing.[1269]

[1264] State v. Flaugher, 12th Dist. Clermont No. CA99-04-034, 1999 WL 1016162 (Nov. 8, 1999).

[1265] State v. Hurst, 2d Dist. Montgomery No. 20435, 2005-Ohio-128.

[1266] State v. Southerland, 12th Dist. Butler No. CA99-01-013, 1999 WL 1279304 (Dec. 30, 1999).

[1267] State v. Gregory, 8th Dist. No. 74859, 1999 WL 777860 (Sept. 30, 1999).

[1268] Effective March 15, 2001, R.C. 2950.09 (B) was amended to delete "prior to the offender's release from term of imprisonment" and added in (C)(2) "or at any time within one year following the offender's release."

[1269] State v. Davis, 12th Dist. Clermont No. CA97-03-031, 1997 WL 746064 (Dec. 1, 1997).

(2) Invalid if adjudicated after the defendant has been released from prison.[1270]

(3) A court may not order that a defendant be kept confined past his supposed release date so that a sexual predator hearing can be held.[1271]

(4) When classification hearing begins prior to defendant's release, but does not conclude until after release, defendant cannot be classified a sexual predator.[1272]

(5) Hearing must be scheduled far enough in advance of release so that officials may satisfy notification duties of § 2950.03(A)(1).[1273]

(6) After retroactively classifying sex offender as sexual predator due to prior rape convictions, trial court lacked authority to impose requirement for registration with sheriff's department, where offender at time of classification hearing was in prison for burglary or aggravated burglary and not for a sexual offense.[1274]

[1270] State v. Brewer, 12th Dist. Clermont No. CA97-03-030, 1998 WL 8693 (Jan. 12, 1998), *aff'd*, 86 Ohio St.3d 160 (1999) (stating that although a trial court may not lose jurisdiction to hold a hearing, the hearing cannot result in the offender's being adjudged a sexual predator). *See also* State v. Jones, 5th Dist. Stark No. 1997CA00233, 1999 WL 668834 (Aug. 2, 1999). *But see* State v. Palma, 1st Dist. No. C-970438, 1998 WL 226453 (May 8, 1998) (court can adjudicate defendant a sexual predator after release from prison, but defendant has no duty to register).

[1271] State v. Stepler, 5th Dist. Guernsey No. 98-CA-14, 1999 WL 770225 (Aug. 27, 1999).

[1272] State v. Ake, 133 Ohio App.3d 459 (9th Dist. 1999). But note strong disagreement by Court of Appeals, which states that *Brewer* does not uphold legislature's intent in enacting Ch. 2950, and comparing State v. Bellman, 86 Ohio St.3d 208, 1999-Ohio-95, which deals with § 2950.01(B)(1) and State v. Brewer*, supra*, which deals with § 2950.01(C)(2).

[1273] State v. Mowery, 12th Dist. Clermont No. CA98-11-104, 1999 WL 619052 (Aug. 16, 1999).

[1274] State v. Taylor, 8th Dist. No. 79475, 2002-Ohio-1554 (Apr. 4, 2002).

(7) Where defendant had completed his concurrent sentences for gross sexual imposition which were consecutive and prior to his sentences for corrupting another with drugs, it was error for the court to dismiss the sexual predator hearing. The court ruled that the defendant's continued imprisonment need not be for a sexually-oriented offense.[1275]

(8) Where defendant had completed sentence for gross sexual imposition and released prior to sexual predator hearing, subsequent parole violation for a non-sexually oriented offense did not preclude a sexual predator hearing on the prior conviction. Furthermore, since appellant was returned to prison after violating parole, he was still serving an aggregate sentence for a sexually-oriented offense.[1276]

c) After March 15, 2001, the trial court must make a sexual predator determination prior to an offender's release from prison or within one year of the offender's release from prison.

(1) Where the defendant was imprisoned in 1983 and released in 2005, the amended Ch. 2950 applied to permit the court to hold the sexual predator classification hearing within one year after the defendant's release from prison. Because offender classification is remedial rather than punitive, the amended Ch. 2950 applied retroactively to sex offenders convicted and sentenced prior to the original statute's effective date.[1277]

(2) Where the defendant was initially released in 2004, violated his probation shortly thereafter, and was returned to prison until August 2006, no error in holding his classification hearing in February 2007. Because the defendant returned to prison to complete his original sentence shortly after his initial release, a hearing held within a year from his final release was timely.[1278]

[1275] State v. Thiel, 2d Dist. Montgomery No. 17908, 2000 WL 262663 (Mar. 10, 2000); State v. Benson, 12th Dist. Butler No. CA99-11-194, 2000 WL 1221851 (Aug. 28 2000); State v. Wilson, 8th Dist. No. 77530, 2000 WL 1594577 (Oct. 26, 2000).

[1276] State v. Bolser, 12th Dist. Butler No. CA2002-02-034, 2003-Ohio-1231.

[1277] State v. Seigers, 8th Dist. No. 87722, 2007-Ohio-285.

[1278] State v. Ford, 10th Dist. No 07AP-221, 2007-Ohio-6855.

d) In the case of juvenile sex offenders, the trial court must classify the offender at the time of the adjudication rather than at the time of release if the elements of R.C. 2152.82 are met. The remedy for classifying the offender at the improper time is a remand to the trial court for entry of a new disposition consistent with R.C. 2152.82.[1279]

(1) In such a case, a new sentencing hearing must be conducted. While the punishment cannot be increased where the offender has already served his or her full commitment, classification and registration requirements under Chapter 2950 are classified as public safety measures rather than punishment. [1280]

(2) Because a juvenile court hearing to revoke probation is a "dispositional hearing," the court may classify a juvenile offender at that time under R.C. 2152.83.[1281]

5. Effect of State's Failure to Appeal Dismissal of H.B. 180 Proceedings

a) Where trial court granted defendant's motion to dismiss H.B. 180 proceedings on constitutional grounds while defendant was serving his sentence and state failed to appeal, subsequent proceedings instituted after defendant's release were barred by res judicata.[1282]

6. Reclassification Discretionary Under Former R.C. Chapter 2950

a) Former R.C. Chapter 2950 did not provide offenders with the "right" to petition the court for reclassification and receive a reclassification hearing. Because the statutes left the decisions to review the petition and grant a hearing to the discretion of the court, the General Assembly's later abrogation of this scheme did not violate R.C. 1.58.[1283]

[1279] In the Matter of A.R., 12th Dist. Butler No. CA2006-09-112, 2007-Ohio-5191.

[1280] See id., *citing* State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250, overruled as stated in State v. Fischer, 128 Ohio St.3d 92, 2010-Ohio-6238 (trial court could not resentence offender to include post-release control after offender fully served incorrectly imposed sentence) and State v. Jordan, 2004-Ohio-6085 (remedy for void sentence is resentencing); State v. Arszman, 1st Dist. No. C-130133, 2014-Ohio-2727.

[1281] In re Rodney Carr, 5th Dist. Licking No. 08 CA 19, 2008-Ohio-5689.

[1282] State v. Lucerno, 8th Dist. No. 89039, 2007-Ohio-5537.

[1283] State v. Carter, 6th Dist. Lucas No. L-07-1088, 2007-Ohio-6359.

b) While former R.C. 2950.09(D) provided a mechanism for adult offenders to petition a court for removal of a sexual predator classification, S.B. 5 removed this provision on July 31, 2003. Courts are without jurisdiction to hear petitions for reclassification filed after this date.[1284]

D. Failure to Register

1. Defendant should have been convicted of failing to register as a third degree felony under Megan's law rather than as a first degree felony under the Adam Walsh Act because the defendant was in prison for rape when Megan's law was enacted, but the AWA, on the other hand, cannot be applied retroactively.[1285]

E. Failure to Verify Change Of Address

1. A person whose prison term was completed before July 1, 1997, is not required to register under R.C. 2950.04(A)(1)(a) or periodically verify a current address under R.C. 2950.06(A), even if the person returns to prison on a parole violation for a term served concurrently with the sexually oriented offense.[1286]

    a) But, a person is required to register under R.C. 2950.04(A)(1)(a) or periodically verify a current address under R.C. 2950.06(A) if that person returned to prison on a parole violation for the *same* sexually oriented offense. [1287]

2. Homelessness not a defense to registration requirement of R.C. 2950.05(E). Offender who moved out of residence voluntarily was required to alert the local sheriff of his move, even if he had no address. Under R.C. 2950.05(A) as amended by 2004 Am. Sub. H.B. No. 473, effective April 29, 2005, offender must provide a detailed description of the place or places at which the offender intends to stay, and, upon obtaining a fixed address, notify the sheriff's office within one business day.[1288]

[1284] State v. Leftridge, 8th Dist. No. 89397, 2007-Ohio-6807.

[1285] State v. Harris, 1st Dist. 1st Dist. No. C-130395, 2014-Ohio-1589.

[1286] State v. Champion, 106 Ohio St.3d 120, 2005-Ohio-4098.

[1287] State v. Gunckel, 2d Dist. Montgomery No. 22641, 2009-Ohio-893.

[1288] State v. Ohmer, 162 Ohio App.3d 150, 2005-Ohio-3487 (1st Dist.).

a) However, a sheriff must send the warning notification required by R.C. 2950.06(G)(1) to a homeless sex offender's last known address before he may be prosecuted for failure to periodically verify a current address.[1289]

b) While R.C. 2950.05 positively prohibits failing to provide notification of a change in telephone numbers, the plain language of R.C. 2950.99 provides no penalty for violation. Because there is no penalty, failing to provide notice of a change in telephone numbers cannot, under R.C. 2901.03, constitute a criminal offense. Therefore, the trial court had no subject-matter jurisdiction over this case.[1290]

3. To prove that it is impossible to provide written notice as required by R.C. 2950.05(A), the offender must show that:

a) By a preponderance of the evidence

(1) He did not know of the address change on the date specified for the provision of the written notice, and

(2) He had provided notice of the address change, by telephone or in writing, "as soon as possible, but not later than the end of the first business day, after learning of the address change."[1291]

4. Defendant testifying that he had stayed at his cousin's home from the time he had left the VOA facility under he was arrested about 25 days later, and admitting that he had known he was obligated to report his address change to the sheriff, is sufficient evidence to convict defendant.[1292]

5. Violation of R.C. 2950.06 is a strict-liability offense based. This does not violate due process.[1293]

[1289] State v. Williams, 114 Ohio St.3d 103, 2007-Ohio-3268.

[1290] State v. Chessman, 2d Dist. Montgomery No. 23412, 2010-Ohio-3239. See, also, State v. Hous, 2d Dist. Greene No. 02-CA-116, 2004-Ohio-666, quoting State v. Cimpritz, 158 Ohio St. 490 (1953).

[1291] State v. Mitchell, 1st Dist. No. C-080340, 2009-Ohio-1264.

[1292] Id.

[1293] State v. Williams, 1st Dist. No. C-090076, 2010-Ohio-2456; See also, State v. Willis, 8th Dist. No. 93237, 2010-Ohio-1751, at ¶ 16.

6. Because R.C. 2950.99 is silent as to how to sentence first time offenders of the registration law, the trial court is required to apply the felony sentencing statutes. A trial court erred by sentencing a first-time registration violator to community control instead of a prison term of at least three years as required by R.C. 2929.13(F)(6).[1294]

7. An indictment for failure to verify address is proper even if it erroneously lists the wrong law to be applied. A trial court erred by dismissing such an indictment rather than simply applying the correct law.[1295]

8. A defendant who was convicted in another state for a sexually oriented offense must register in Ohio only if (1) the defendant was convicted of a sexually oriented offense that is "substantially equivalent" to a sex offense subject to registration requirements in Ohio, and (2) the defendant was under a duty to register in the other jurisdiction at the time he moved to Ohio. The Illinois aggravated criminal sexual abuse statute is not substantially similar to Ohio's unlawful sexual conduct statute because the Illinois statute criminalized some conduct that is legal in Ohio.[1296]

F. Formalities of Sexual Predator Hearing

1. Jurisdictional Requirements:

   a) Department of Rehabilitation and Correction's recommendation to classify defendant as a sexual predator was not a jurisdictional requirement that must be fulfilled for the trial court to engage in a sexual predator determination, rather, statutory language regarding the Department's recommendation merely established a mechanism through which the trial court may consider the issue of whether an offender is a sexual predator, and thus, the trial court had jurisdiction to conduct defendant's sexual predator determination regardless of whether the Department properly completed its form recommendation.[1297]

[1294] State v. Morris, 2d Dist. Montgomery No. 26051, 2014-Ohio-5578, ¶ 16-18.

[1295] State v. Wood, 1st Dist. No. C-120598, 2013-Ohio-2724. But see State v. Monk, 5th Dist. Knox No. 12CA18, 2013-Ohio-2582 (affirming a trial court's dismissal of an indictment for failure to register under the AWA as a first degree felony when Megan's Law applied, making the proper charge a third degree felony).

[1296] State v. Collier, 8th Dist. Nos. 1000906, 101235, 101272, 2014-Ohio-5683.

[1297] State v. Brown, 151 Ohio App.3d 36, 2002-Ohio-5207 (7th Dist.); State v. Shepherd, 9th Dist. Summit No. 20364, 2002-Ohio-455; *but see* State v. Austin, 3rd Dist.

2. Notice and Hearing Required:

a) The advance notice requirements of Ch. 2950 are mandatory.[1298] A defendant is entitled to adequate notice and time to prepare before a sexual predator classification hearing.[1299]

(1) Statute also requires that the court inform a defendant that he has the right to counsel and is allowed to contest the classification.[1300]

(2) The 6th Amendment right to counsel does not apply to sexual predator hearings, but defendant does have the right to be represented under the 5th amendment.[1301]

(3) Neither party to a sexual predator hearing is required to present new evidence or call and examine witnesses; all that is required by R.C. § 2950.09(B)(1) is that the parties are given an opportunity to do so.[1302]

Allen No. 1-03-95, 2004-Ohio-2359 (finding that under R.C. 2950.09(C)(1)(b) trial court is prohibited from making a sexual predator determination absent a recommendation from the ODRC).

[1298] State v. Gowdy, 88 Ohio St.3d 387, 2000-Ohio-355; State v. Linscott, 9th Dist. Summit Nos. 19947, 20021, 2001 WL 22304 (Jan. 10, 2001); State v. Purser, 8th Dist. No. 76416, 2000 WL 1144781 (Aug. 10, 2000); State v. Franklin, 2d Dist. Greene No. 99-CA-117, 2000 WL 1867524 (Dec. 22, 2000).

[1299] State v. McCane, 12th Dist. Clermont No. CA97-03-023, 1997 WL 746049 (Dec. 1, 1997); State v. Hanrahan, 10th Dist. No. 97APA03-394, 1998 WL 90732 (Mar. 5, 1998), *aff'd* 86 Ohio St.3d 160 (1999); State v. Hardy, 8th Dist. No. 72463, 1997 WL 638801 (Oct. 16, 1997); State v. Glynn, 9th Dist. Medina No. 2712-M, 1998 WL 150359 (Apr. 1, 1998); State v. Parsons, 1st Dist. No. C-980900, 1999 WL 1100138 (Nov. 26, 1999).

[1300] State v. Lawless, 4th Dist. Washington No. 97 CA 823, 1998 WL 729233 (Oct. 14, 1998); State v. Gregory, 8th Dist. No. 74859, 1999 WL 777860 (Sept. 30, 1999).

[1301] State v. Whorton, 1st Dist. No. C-970901, 1998 WL 515964 (Aug. 21, 1998).

[1302] State v. Baker, 12th Dist. Clermont No. CA98-11-108, 1999 WL 636479 (Aug. 23, 1999).

(4) If a defendant believes an indictment is not sufficiently definite to provide adequate notice, it is defendant's privilege and duty to request a bill of particulars.[1303]

b) Failure to comply with the notice and hearing requirements is error.

(1) It has been held that due process is denied where a defendant is not notified of the hearing or its subject matter, and where he was not afforded the right to representation or allowed to call witnesses.[1304]

(2) Failure to give defendant notice of hearing is plain error.[1305]

(3) Failure to conduct separate sexual predator hearing is plain error.[1306]

(4) Where only evidence presented by state was grand jury testimony which defendant was not permitted to review, classification was error; defendants have right to counter state's evidence.[1307]

(5) New sexual offender classification hearing required where there is no evidence on the in the record that the appellant received either oral or written notice of the actual hearing date, time and location.[1308]

[1303] State v. Plymale, 11th Dist. Portage No. 99-P-0012, 2001-Ohio-8892; State v. Reyna, 24 Ohio App.3d 79 (9th Dist. 1985).

[1304] State v. Cady, 3d Dist. Crawford No. 3-98-14, 1998 WL 799213 (Nov. 5, 1998). *But see* State v. Ridenbaugh, 5th Dist. Licking Nos. 97CA149, 97CA154, 97CA150, 97CA153, 1999 WL 436769 (May 27, 1999) (stating that R.C. § 2950.09 does not deprive the defendant of notice). However, where Defendant is to be classified as a sexually oriented offender, no hearing is constitutionally required. State v. Hayden, 96 Ohio St.3d 211, 2002-Ohio-4169.

[1305] State v. Jones, 8th Dist. No. 74503, 1999 WL 777901 (Sept. 30, 1999); State v. Collins, 8th Dist. No. 78596, 2004-Ohio-5855.

[1306] State v. Collins, 8th Dist. No. 78596, 2004-Ohio-5855.

[1307] State v. Green, 1st Dist. C-990625, 2000 WL 353165 (Apr. 7, 2000).

[1308] State v. Moore, 8th Dist. 8th Dist. No. 79951, 2002-Ohio-1268.

(6) Defendant did not have sufficient notice of sexual predator hearing where trial court proceeded with hearing on the same day jury returned with a verdict on the underlying sex charges.[1309]

(7) Insufficient notice where Defendant was only notified of hearing 15 minutes prior to that hearing and where record is silent as to whether counsel ever contacted Defendant prior to the hearing.[1310]

(8) Classification as a Tier III juvenile sexual offender is reversible error when no notice or meaningful hearing was provided.[1311]

(9) A trial court substantially complied with the notice requirement of the sex offender classification at the time a defendant entered a guilty plea because the defendant's plea agreement outlined that, as part of the plea, the defendant would be labeled a Tier III sex offender for life and described the related restrictions and the trial court indicated three times at the plea hearing that the defendant would be a Tier III sex offender for life.[1312]

(10) Trial court erred by labeling defendant as a Tier III sex offender where the journal entries fail to properly indicate that the state elected to proceed on two charges with Tier II reporting requirements.[1313]

(11) Trial court erred by classifying defendant as a Tier II sex offender without a hearing and without factual findings by a jury where, during his no contest plea, the judge specifically told the defendant that his no-contest plea would preserve his challenge to the sexual offender classification for appellate review, including the issue the defendant ultimately raised on

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[1309] State v. Heffner, 6th Dist. Lucas No. L-99-1006, 2000 WL 1363187 (Sept. 22, 2000).

[1310] State v. McKinniss, 3d Dist. Crawford No. 3-2000-23, 2001-Ohio-2346.

[1311] In re D.D., 5th Dist. Stark No. 2008 CA 0167, 2009-Ohio-2501.

[1312] State v. McGinnis, 8th Dist. 8th Dist. No. 99918, 2014-Ohio-2385, ¶ 16-18.

[1313] State v. Boyd, 8th Dist. 8th Dist. No. 100225, 2014-Ohio-1081, ¶ 20-22.

appeal. Under those circumstances, the no-contest plea was not knowingly, intelligently, and voluntarily made.[1314]

c) A sexual predator hearing pursuant to R.C. § 2950.09(C)(2) must be scheduled far enough in advance of the offender's release date to allow officials to satisfy their statutory notification duties under R.C. § 2950.03(A)(1).[1315]

(1) Where the hearing is not held at least 10 days prior to the release date, the hearing has no effect.[1316]

d) Where a defendant has already been adjudged to be a sexual predator in a prior proceeding, which has been upheld on appeal, the trial court need not (under R.C. § 2950.09(B)(1)), in a later proceeding, hold a sexual predator hearing. A valid sexual predator determination has already been made and appealing a second sexual predator determination would be "superfluous."[1317]

3. Findings by Court:

a) For an offender to be designated a sexual predator, clear and convincing evidence is needed that:

(1) the offender has been convicted of a sexually oriented offense, and

(2) the offender is likely to engage in the future in one or more sexually oriented offenses.[1318]

(A) Note that the court need not find a sexual animus for the offense necessitating the classification. Where a victim is tied, beaten, and raped for purposes of

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[1314] State v. Moore, 2d Dist. Darke No. 2013-CA-9, 2014-Ohio-1123.

[1315] State v. Brewer, 86 Ohio St.3d 160, 1999-Ohio-146.

[1316] Id.; State v. Stepler, 5th Dist. Guernsey No. 98-CA-14, 1999 WL 770225 (Aug. 27, 1999).

[1317] State v. Abdullah, 9th Dist. Summit No. 19119, 1999 WL 270420 (Apr. 28, 1999).

[1318] State v. Gaines, 6th Dist. Lake Nos. 2006-L-059 & 2006-L-060, 2007-Ohio-1375.

retaliation and as an "example" to others, a sexual predator classification is certainly appropriate.[1319]

b) Court must mention that it considered all criteria under R.C. 2950.09.

c) While the trial court must mention that it considered all of the factors, there is no requisite number of factors the court must apply before finding a defendant to be a sexual predator. The trial court has discretion to determine the weight to be given to the factors. Even one or two factors are sufficient as long as the evidence of likely recidivism is clear and convincing.[1320]

d) If the Court determines that the defendant is sexual predator it shall specify that the determination was made pursuant to R.C. 2950.09(B).[1321]

e) When an individual has been convicted of or has pled guilty to a sexually oriented offense, the statute specifically requires the trial court to make a finding regarding an offender's status as a habitual sex offender.[1322] This finding must be expressly made regardless of whether the offender was already adjudicated as a sexual predator, and, although the habitual sex offender finding will have no impact on the registration requirements after a sexual predator determination, the statute, nonetheless, mandates such a finding.[1323]

[1319] See, e.g., State v. Jackson, 1st Dist. No. C-070605, 2008-Ohio-2847.

[1320] State v. S.E., 10th Dist. No. 13AP-325, 2014-Ohio-413, ¶ 20 (internal citations omitted).

[1321] State v. Craig, 5th Dist. Licking No. 2004CA00047, 2005-Ohio-81 (Jan. 10, 2005).

[1322] State v. Hurst, 2d Dist. Montgomery No. 20435, 2005-Ohio-128; State v. Gopp, 154 Ohio App.3d 385, 2003-Ohio-4908 (9th Dist.). *See also* State v. Otheberg, 8th Dist. 8th Dist. No. 83342, 2004-Ohio-6103.

[1323] State v. Hurst, 2d Dist. Montgomery No. 20435, 2005-Ohio-128; State v. Rhodes, 7th Dist. Belmont No. 99 BA 62, 2002-Ohio-1572 (recognizing that a habitual sex offender determination "must be made regardless of whether the offender was already adjudicated as a sexual predator for the commission of a sexually oriented offense" because an offender may be declared a sexual predator and a habitual sex offender for the same offense). But see State v. Seigers, 8th Dist. No. 87722, 2007-Ohio-285 (holding that since a habitual sex offender classification is a lesser included classification of a sexual predator classification and is subsumed within such a classification, failure to

f) A trial court's failure to make a determination as to whether a defendant is a habitual sex offender constitutes plain error.[1324]

g) Findings of trial court must expressly state that the offender is "likely to re-offend" for compliance with R.C. 2950.09(B). Alternative language that there was a "possibility" that offender would re-offend or that the offender "could" re-offend found insufficient to support sexual predator determination.[1325]

h) Viewing defendant's "moderate risk" assessment in totality with the other evidence before the court, including the victim's young age and defendant's insistence that the victim enjoyed the sexual activity, the court could not say that the expert's assessment is inherently inconsistent with or precludes the sexual predator adjudication.[1326]

i) Insofar as the only presentation made by the state in support of its assertion that appellant was a sexual predator was argument of counsel, the court concluded that the state failed to sustain its burden of proof, and that this matter should be reversed and remanded to the trial court to vacate the finding that appellant is a sexual predator, enter a finding that appellant is a sexually oriented offender, and advise appellant appropriately.[1327]

j) No Right to Jury Trial:

(1) Even though article 1, § 5 of the Ohio Constitution holds the right to a jury trial inviolate, the right does not apply to statutory actions unknown at common law unless the statute provides the right. Sexual predator classifications were

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make a habitual sex offender determination after finding the offender to be a sexual predator does not constitute reversible error).

[1324] State v. Hurst, 2d Dist. Montgomery No. 20435, 2005-Ohio-128; State v. Otheberg, 8th Dist. No. 83342, 2004-Ohio-6103.

[1325] *See* State v. Clingerman, 11th Dist. Trumbull No. 2004-T-0054, 2005-Ohio-5282; State v. Martin, 11th Dist. Trumbull No. 2002-P-0078, 2003-Ohio-6410. *But, cf.* State v. Naples, 11th Dist. Trumbull No. 2000-T-0122, 2001-Ohio-8728 (upholding classification based upon trial court's finding that "the chances of recidivism [are] great").

[1326] Stat v. Bielfelt, 11th Dist. Lake No. 2008-L-050, 2009-Ohio-1144.

[1327] State v. Woolridge, 8th Dist. No. 90113, 2008-Ohio-3066; State v. Lee, 8th Dist. No. 91285, 2009-Ohio-1787.

unknown at common law and the statute does not provide the right to jury trial, thus, there is no right to a jury trial.[1328]

k) When conducting a sexual predator hearing, a trial court may rely on information that was not introduced at trial.[1329]

4. Sufficiency of Evidence to Be Adjudged a Sexual Predator:

a) R.C. § 2950.09(B) lists factors a trial judge should consider when determining whether a defendant is a sexual predator, including:

(1) The defendant's and victim's age,[1330]

(2) The defendant's prior criminal record,

(3) Whether the offense involved multiple victims,

(4) Whether the defendant used drugs or alcohol to impair the victim or to prevent the victim from resisting,

(5) If the defendant has previously been convicted, whether the defendant completed any sentence imposed and, if the prior offense was a sexually oriented offense, whether the defendant participated in available programs for sexual offenders,

(6) Any mental illness of the defendant,

(7) The nature of the offense and whether the sexual conduct was part of a demonstrated pattern of abuse,

(8) Whether the defendant displayed cruelty, and

[1328] State v. Ridenbaugh, 5th Dist. Licking Nos. 97CA149, 97CA154, 97CA150, 97CA153, 1999 WL 436769 (May 27, 1999).

[1329] State v. Bursey, 8th Dist. No. 88924, 2007-Ohio-4847, *citing* State v. Thompson, 140 Ohio App.3d 638, 748 N.E.2d 1144 (8th Dist. 1999).

[1330] State v. Bradley, 2d Dist. Montgomery Nos. 16662, 16664, 1998 WL 321306 (June 19, 1998) (stating that the age of the victim is a factor to be considered in the hearing); *accord* State v. Condron, 2d Dist. Montgomery No. 16430, 1998 WL 135817 (Mar. 27, 1998), *aff'd* 84 Ohio St.3d 11; State v. Holland, 12th Dist. Brown No. CA2000-11-031, 2001WL 1023576 (Sept. 10, 2001).

(9) Any other evidence that the judge deems relevant to determining the likelihood of recidivism.[1331]

(A) Judge may consider juvenile adjudications under this provision.[1332]

(10) Any additional behavioral characteristics that contribute to the offender's conduct.

(11) Expert testimony may be offered by either party, but is not required.[1333]

(12) The stated purpose for the trial court's consideration of these standard factors is the aiding of appellate courts in reviewing the evidence on appeal and ensuring a fair and complete hearing for the offender.[1334]

b) Pursuant to R.C. 2950.09(B)(4), if the court determines by clear and convincing evidence that the subject offender is a sexual predator, the court shall specify in the offender's sentence and judgment of conviction that contains the sentence that the court has determined that the offender is a sexual predator and shall specify that the determination was pursuant to division (B).

(1) Trial court's failure to follow statutory mandates for adjudicating defendant a sexual predator warranted reversal of the sexual predator classification; although the judgment entry did not refer to defendant's sexual predator status or the factors used in determining his status, the "Judgment Entry and Notice of Duties to Register as an Offender of a Sexually Oriented Offense" revealed that defendant was classified as a sexual predator. In that document, the trial court checked the box indicating that defendant had a duty to register as a sexual predator. The court held that this did not comply with the mandate in R.C. 2950.09(B)(4).[1335]

[1331] R.C. 2950.09(B)(2).

[1332] State v. McBooth, 8th Dist. No. 85209, 2005-Ohio-3592.

[1333] State v. Russell, 8th Dist. No. 73237, 1999 WL 195657 (Apr. 8, 1999); State v. Coopwood, 8th Dist. No.85098, 2005-Ohio-3016.

[1334] State v. Miller, 12th Dist. Preble No. CA2006-05-011, 2007-Ohio-784, *citing* State v. Eppinger, 91 Ohio St.3d 158, 2001-Ohio-247.

[1335] State v. Gopp, 154 Ohio App.3d 385, 2003-Ohio-4908 (9th Dist.).

c) It is not a requirement to adjudging a defendant a sexual predator that a majority of the factors listed in 2950.09(B)(2) be present.[1336] No specific number of factors must be satisfied.[1337]

(1) The court must at least consider all the elements listed.[1338] But the court may rely upon one factor more than another.[1339]

(2) The requirement that a court must consider the factors of R.C. 2950.09(B)(2) before classifying an offender a sexual predator, simply means that the trial court must reflect upon them or "think about them with a degree of care or caution."[1340]

(3) A trial court may find an offender to be a sexual predator even if only one or two statutory factors are present, so long as the totality of the relevant circumstances provides clear and convincing evidence that the offender is likely to commit a future sexually oriented offense.[1341]

(4) Expert evidence as to the offender's likelihood of recidivism is not required when making a sexual predator determination.

[1336] State v. Goney, 2d Dist. Montgomery No. 16990, 1998 WL 735922 (Oct. 23, 1998); State v. Fugate, 12th Dist. Butler No. CA97-03-065, 1998 WL 42232 (Feb. 2, 1998).

[1337] State v. Buckley, 8th Dist. No. 87950, 2007-Ohio-1284. At least one court has determined that clear and convincing evidence of just one of the factors is sufficient. See State v. Ferguson, 11th Dist. Lake No. 2007-L-110, 2008-Ohio-1495.

[1338] State v. Grewell, 5th Dist. Coshocton No. 98 CA 21, 1999 WL 436735 (June 11, 1999); State v. Schrader, 5th Dist. Coshocton No. 98 CA 17, 1999 WL 436731 (June 8, 1999); State v. Burke, 10th Dist. No. 00AP-54, 2000 WL 1358111 (Sept. 21, 2000).

[1339] State v. Bolser, 12th Dist. Butler No. CA2002-02-034, 2003-Ohio-1231; State v. Boshko, 139 Ohio App.3d 827 (12th Dist. 2000); State v. Bradley, 2d Dist. Montgomery Nos. 16662, 16664, 1998 WL 321306 (June 19, 1998); State v. Griggs, 12th Dist. Butler No. CA2001-08-194, 2002-Ohio-4375.

[1340] State v. Dunaway, 12th Dist. Butler No. CA2001-12-280, 2003-Ohio-1062, quoting State v. Thompson, 92 Ohio St.3d 584, 588, 2001-Ohio-1288.

[1341] State v. Randall, 141 Ohio App.3d 160 (11th Dist. 2001).

Even if such evidence is offered, the trial court is not required to accept the expert's conclusions.[1342]

(5) Although the sexual predator statute requires a court to consider all relevant factors in order to determine if an offender is likely to engage in future sexually oriented offenses, the statute does not require a trial court to make explicit findings regarding those factors.[1343] However, after the Ohio Supreme Court's decision in *State v. Eppinger* (2001), 91 Ohio St.3d 158, a trial court's pronunciation of its decision on a defendant's sexual predator classification without any discussion has been held to constitute reversible error.[1344]

(6) Where the trial court failed to identify or discuss any of the R.C. § 2950.09(B) factors and referenced only evidence supporting a sexual predator finding in its discussion while reaching the opposite result, information found insufficient for appellate review and case remanded for explanation of decision.[1345] However, it has also been said that "the court need not elaborate on its reasons for finding certain factors so long as the record includes the particular evidence upon which the trial court relied in making its adjudication."[1346]

(7) Trial court's failure to discuss any particular evidence or factors relied upon in its sexual predator classification on the record, in its opinion, or in its judgment entry constitutes cause for finding of reversible error and vacation of sexual predator classification.[1347]

[1342] State v. Brewer, 12th Dist. Fayette No. CA2005-040-14, 2006-Ohio-1898.

[1343] State v. Hardie, 141 Ohio App.3d 1, 2000-Ohio-2044 (4th Dist.).

[1344] State v. Lee, 8th Dist. No. 78899, 2001 WL 1110299 (Sept. 13, 2001); State v. Millow, 1st Dist. Nos. C-000524, C-000510, 2001 WL 693918 (June 15, 2001); State v. Marshall, 2d Dist. Montgomery No. 18587, 2001 WL 1468893 (Nov. 16, 2001).

[1345] State v. Humphrey, 10th Dist. No. 05AP-136, 2005-Ohio-5246; *see also* State v. Funderburk, 8th Dist. No. 90228, 2008-Ohio-3449.

[1346] State v. Buckley, 8th Dist. No. 87950, 2007-Ohio-1284, *citing* State v. Machado, 8th Dist. No. 87609, 2006-Ohio-6423.

[1347] State v. Parker, 7th Dist. Mahoning No. 03-MA-190, 2005-Ohio-4888, State v. Carpenter, 6th Dist. Lucas No. L-04-1195, 2005-Ohio-6133.

(8) Where the trial court indicated that it could disregard the elements listed in R.C. § 2950.09(B)(2), the sexual predator hearing was improperly conducted.[1348]

(9) Although the trial court did not specifically name any of the statutory factors from R.C. 2950.09(B)(2) in its discussion of its findings at the predator hearing, the judgment entry and its discussion at the hearing reflects that it did so.[1349]

(10) Where the DRC's Screening Instrument incorrectly identified the source of the information, but the Instrument considered the factors listed in R.C. § 2950.09(B)(2) and there was no indication that the information was inaccurate, such a fact is irrelevant.[1350]

(11) In considering the factors, one court has noted that luring a three year-old child with candy is comparable to impairing an older victim by the use of alcohol or drugs.[1351]

(12) The Ohio Supreme Court has expressly held that a trial court judge must consider the guidelines set out in R.C. § 2950.09(B)(2), but the judge has discretion to determine what weight, if any, to assign each guideline. Also, pursuant to R.C. § 2950.09(B)(2), the judge may also consider any other evidence that it deems relevant to determining the likelihood of recidivism.[1352]

[1348] State v. Casper, 8th Dist. No. 73061, 1999 WL 380437 (June 10, 1999) (also the prosecutor misreported the circumstances and offenses, there was no indication of where the information presented came from, and the court gave no weight to defense evidence).

[1349] State v. Koehler, 12th Dist. Butler No. CA2002-02-036, 2003-Ohio-1871.

[1350] State v. Goodballet, 7th Dist. Columbiana No. 98 CO 15, 1999 WL 182514 (Mar. 30, 1999). *But see* State v. Taylor, 8th Dist. No. 73342, 1999 WL 135269 (Mar. 11, 1999) (stating that the sexual predator determination must be remanded because the only supporting document in record was a sexual predator screening report which did not identify its author, was not made under oath, and did not identify the source of its information).

[1351] State v. Umbel, 6th Dist. Wood No. WD-06-074, 2008-Ohio-476.

[1352] State v. Thompson, 92 Ohio St.3d 584, 2001-Ohio-1288; State v. Cook, 149 Ohio App.3d 422, 2002-Ohio-4812; State v. Brown, 12th Dist. Fayette No. CA2000-10-027, 2001 WL 877406 (Aug. 6, 2001) (stating that the court may consider all relevant aspects of the offender's behavior when making its sexual predator determination); State

(A) Relevant factors may include:

i. Whether participation in a sexual offender program had resolved the problem.[1353]

ii. Whether defendant suffers from continuing personality disorder.[1354]

iii. Refusal to acknowledge any wrongdoing during psychological treatment despite being indicted on two separate counts relating to another victim.[1355]

iv. Prior convictions for nonsexual offenses.[1356]

v. History of crossing age groups in choosing victims.[1357]

vi. Defendant stated he felt he could be homicidal if his sex urges were not handled; defendant indicated that he found five year-old victim sexually attractive and that he wanted to have sex with the victim as part of some sort of ritual; defendant reportedly collected children's toys and clothing for years which was indicative of defendant's pedophilic interest; defendant indicated that his traumatic youth stunted his growth and therefore he believed that a five year-old would be a good sex partner for him.[1358]

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v. Copley, 10th Dist. No. 04AP-1128, 2006-Ohio-2737 (finding offender's abuse of position of trust as to the child victim a factor supporting his classification as sexual predator).

[1353] State v. Hills, 8th Dist. No. 78546, 2002-Ohio-497.

[1354] Id; State v. Rich, 12th Dist. Butler No. CA2001-12-297, 2002-Ohio-4992.

[1355] Id.

[1356] State v. Bolser, 12th Dist. Butler No. CA2002-02-034, 2003 WL 1193801 (Mar. 17, 2003).

[1357] Id.

[1358] State v. Koehler, 12th Dist. Butler No. CA2002-02-036, 2003-Ohio-1871.

vii. When there is a rape of a child of tender years, and a twelve year-old is a child of tender years, it is an indication of probative recidivism.[1359]

(B) However, likelihood of recidivism based on psychiatric test results not outcome determinative.

i. Whether an offender is likely to reoffend sexually, for purposes of sexual predator classification, is not bound by or couched in terms of recidivism test results, but is instead defined by application and examination of statutory factors and consideration of relevant circumstances and evidence on a case-by-case basis.[1360]

ii. Consideration not limited to prior convictions, but criminal record, which can include prior arrests and charges not resulting in conviction since such information can be probative of the likelihood of defendant engaging in future sexual offenses.[1361]

iii. Although Defendant had a twenty-percent probability of reoffending based on Static 99 results, the law does not rely solely on psychiatric findings for determination of recidivism.[1362]

iv. Sexual predator classification reversed and remanded where trial court made no finding that the defendant was likely to commit a future sexual offense. Defendant had a low to moderate risk based on the Static-99 test and there was no evidence of drug influence.[1363]

[1359] State v. Wilkinson, 1st Dist. No. C-010229, 2002-Ohio-1032.

[1360] State v. Robertson, 147 Ohio App.3d 94, 2002-Ohio-494 (3rd Dist.).

[1361] State v. Shough, 2d Dist. Montgomery No. 20531, 2005-Ohio-661.

[1362] Id.; State v. Morales, 151 Ohio App.3d 635, 2003-Ohio-4200 (1st Dist.); State v. Arter, 3rd Dist. Logan No. 8-01-71, 2001-Ohio-2334.

[1363] State v. Bidinost, 8th Dist. 8th Dist. No.100466, 2014-Ohio-3136, ¶ 16.

d) In *State v. Thompson*, the Ohio Supreme Court held that R.C. 2950.09 (B)(2) does not violate the separation of powers doctrine. This decision overruled a line of cases from the Second District Court of Appeals which had held that the factors listed in R.C. § 2950.09 unconstitutionally violated the separation of powers doctrine, as "the statute impermissibly encroaches upon the judicial power, by prescribing factors that the trial court is required to consider in making a finding of fact."[1364] However, the Third District had expressly rejected this theory.[1365]

(1) In order to ensure that the appropriate criteria are addressed, the Ohio Supreme Court has suggested three objectives for a sexual offender classification hearing:

(A) to create a clear and accurate record for review;

(B) to appoint an expert, if necessary, to assist the trial court in making a determination concerning the offender's likelihood of recidivism; and

(C) to discuss on the record the particular evidence and statutory factors upon which the trial court relies in determining the offender's likelihood of recidivism.[1366]

e) The prosecution must prove "by clear and convincing evidence" that the defendant is likely to engage in the future in one or more sexually oriented offenses.

(1) This standard is the measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt;" it is the measure of proof which produces in the mind

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[1364] *See generally,* State v. White, 2d Dist. Miami No. 98-CA-37, 1999 WL 1000000 (Nov. 5, 1999); State v. Elliot, 2d Dist. Miami No. 98-CA-36, 1999 WL 999941 (Nov. 5, 1999); State v. Spade, 2d Dist. Miami No. 98-CA-40, 1999 WL 1000084 (Nov. 5, 1999); State v. Anderson, 2d Dist. Miami No. 98-CA-44, 1999 WL 99746 (Nov. 5, 1999); State v. Reynolds, 2d Dist. Miami No. 98-CA-45, 1999 WL 1000054 (Nov. 5, 1999).

[1365] State v. Barnett, 3d Dist. Seneca No. 13-99-48, 2000 WL 140850 (Feb. 8, 2000).

[1366] State v. Eppinger, 91 Ohio St.3d 158, 2001-Ohio-247.

of the trier of facts a firm belief as to the facts sought to be established[1367] and it does not mean clear and unequivocal.[1368]

(2) R.C. § 2950.09 does not impermissibly lower the burden of proof from beyond a reasonable doubt (the standard applied in criminal proceedings) to clear and convincing evidence as the statute is not criminal in nature, but remedial; thus, the constitutional protections afforded criminal defendants are not implicated.[1369]

(3) Even though, in making its determination as to whether a defendant is a sexual predator, the trial court is not required to refer to each statutory factor, the court is required to provide a general discussion of the factors so that the substance of the determination can be properly reviewed for purposes of appeal; such a discussion can be set forth on the record during the sexual offender hearing or in the court's judgment entry. Furthermore, in determining whether a defendant qualifies as a sexual predator, when a psychiatric evaluation is in direct conflict with the finding of the trial court, some discussion on the record is required as to why the court rejected the expert's conclusion.[1370]

(4) A reviewing court will reverse a finding by trial court that the evidence was clear and convincing only if there is sufficient conflict in, or lack of, evidence presented,[1371] or, where the

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[1367] State v. Johnson, 8th Dist. No. 74841, 1999 WL 777868 (Sept. 30, 1999); State v. Gregory, 8th Dist. No. 74859, 1999 WL 777860 (Sept. 30, 1999); State v. Allen, 142 Ohio App.3d 291 (1st Dist. 2001).

[1368] State v. Allen, 142 Ohio App.3d 291 (1st Dist. 2001), *citing* Cross v. Ledford, 161 Ohio St. 469, 477 (1954).

[1369] State v. Ridenbaugh, 5th Dist. Licking Nos. 97CA149, 97CA154, 97CA150, 97CA153, 1999 WL 436769 (May 27, 1999).

[1370] State v. Randall, 141 Ohio App.3d 160 (11th Dist. 2001). However, note that there is no requirement for the court to articulate its reasons for the imposition of the community notification requirement. State v. Selinka, 8th Dist. No. 89248, 2007-Ohio-6983.

[1371] State v. Brown, 12th Dist. Warren Nos. CA98-03-034, CA98-04-046, CA98-05-059, 1998 WL 731574 (Oct. 19, 1998).

trial court's determination is against the manifest weight of the evidence.[1372]

(A) For example, it has been stated that a sexual predator classification is improper where a psychologist is unable to offer an opinion as to whether defendant is likely to engage in future sexual offenses.[1373]

(B) But where a 66 year-old defendant had been convicted of rape in 1988 at 40 years old, convicted of rape in 1981, convicted of attempted rape in 1979, convicted of aggravated assault in 1972, and had two other convictions that were sexual in nature, the finding that the defendant was a sexual predator was upheld as supported by clear and convincing evidence.[1374]

(5) Just because the defendant was not found by clear and convincing evidence likely to engage in future sexually oriented offenses for purposes of being classified as a sexual predator does not mean that the defendant is not likely to commit future offenses for purposes of determining whether he should be subject to the notification requirements as a habitual sex offender.[1375]

f) In 2007, the Ohio Supreme Court clarified the standard of review applicable manifest weight and sufficiency appeals of sex offender classifications.[1376] Prior to this time, appellate districts reached different conclusions as to which standard should apply when balancing the declared civil nature of predator proceedings with the inherently criminal context in which they arise.[1377]

[1372] State v. Murphy, 11th Dist. Lake No. 2003-L-049, 2005-Ohio-412 (Feb. 4, 2005), *citing* State v. Davis, Lake No.2000-L-190, 2002-Ohio-1957.

[1373] State v. Norwood, 8th Dist. No. 73633, 1999 WL 195667 (Apr. 8, 1999); State v. Head, 11th Dist. Lake No. 99-L-152, 2001 WL 46243 (Jan. 19, 2001).

[1374] State v. Buskirk, 8th Dist. 8th Dist. No. 101221, 2014-Ohio-5551, ¶ 21.

[1375] State v. Sanders, 12th Dist. Clermont No. CA99-07-069, 2000 WL 630822 (May 15, 2000).

[1376] State v. Wilson, 113 Ohio St.3d 382, 2007-Ohio-2202 (applying civil manifest weight of the evidence standard).

[1377] State v. Morrison, 10th Dist. No. 01AP-66, 2001 WL 1098086 (Sept. 20, 2001).

(1) At least one Ohio appellate district chose to apply the civil standard set forth in *C.E. Morris Co. v. Foley Construction Co.*, 54 Ohio St.2d 279 (1978). This standard tends to merge the concepts of sufficiency and manifest weight.[1378]

(A) Under *C.E. Morris,* "[j]udgments supported by some competent, credible evidence going to all essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence."[1379]

(2) A majority of districts held that the criminal standard set forth in *State v. Thompkins* (1997), 78 Ohio St.3d 380, will apply when addressing manifest weight and sufficiency of the evidence arguments raised in an appeal from an R.C. Ch. 2950 proceeding.[1380]

(A) Under *Thompkins,* a court of appeals addressing manifest weight arguments will show less deference to the fact finder of fact's resolution of conflicting testimony, sitting as a "thirteenth juror."[1381]

g) The Tenth District Court of Appeals reversed a defendant's classification where the trial judge failed to offer any analysis or findings in support of the determination. Note, however, the concurring opinion of Judge Bryant wherein it is noted that *State v. Cook* merely requires the court to consider all relevant factors, but does not require the court to set forth those factors.[1382]

[1378] State v. Hunter, 144 Ohio App.3d 116 (1st Dist. 2001).

[1379] C.E. Morris Co. v. Foley Construction Co., 54 Ohio St.2d 279 (1978).

[1380] State v. Bolin, 2d Dist. Montgomery No. 18605, 2001 WL 669825 (June 15, 2001); State v. Liles, 6th Dist. Huron No. H-00-019, 2001-Ohio-2689; State v. Sims, 7th Dist. Jefferson No. 99-JE-43, 99-JE-57, 2001-Ohio-3316; State v Morrison, 10th Dist. No. 01AP-66, 2001 WL 1098086 (Sept. 20, 2001); State v. Dell, 11th Dist. Ashtabula No. 99-A-038, 2001 WL 909334 (Aug. 10, 2001); State v. Burgess, 12th Dist. Fayette No. CA99-08-021, 2000 WL 929685 (July 10, 2000).

[1381] State v. Thompkins, 78 Ohio St.3d 380, 1997-Ohio-52.

[1382] State v. Lewis, 10th Dist. No. 99AP-752, 2000 WL 557943 (May 9, 2000).

h) Sexual predator classifications based upon the mere facts of the crime for which defendant is serving his sentence; i.e., new evidence was not presented.

i) Cases Where Classifications Have Been Upheld:

(1) A 17 year-old who fellatially raped a 7 year-old handicapped boy was found to be a sexual predator.[1383]

(2) While employed at a daycare facility, defendant raped and sexually abused multiple victims between the ages of 3 and 10.[1384]

(3) Defendant was 41 and his victims were 8, 11, and 12; he was under the influence of alcohol; he threatened them with force not to tell of the abuse; and he took photographs of the victims in sexually provocative poses that he later used for his own sexual gratification.[1385]

(4) Relying on forensic report and facts documented in PSI report, trial court properly found defendant a sexual predator based on defendant's threat to kill the victim if she did not comply; defendant raped victim twice on the night in question; defendant provided victim and friends with alcohol; defendant was 37 years-old and victim was 14 years of age.[1386]

(5) Evidence supported classification as a sexual predator of defendant who pled guilty to unlawful sexual conduct with a 14 year-old girl; victim was incapacitated at time of offense in that she was given drugs by defendant's cousin at a party, defendant harassed victim long after offense, charges were pending against defendant in another county concerning two 12 year-old girls, doctor reported that defendant met criteria for anti-social personality disorder and a classic psychopath, he lacked remorse and accepted no responsibility for offense, was self-centered, impulsive, and immature, and had a history

[1383] State v. Striley, 12th Dist. Clermont No. CA97-05-046, 1997 WL 795659 (Dec. 29, 1997).

[1384] State v. Butner, 5th Dist. No. 2005CA0101, 2006-Ohio-3399.

[1385] State v. Burke, 9th Dist. Lorain No. 97CA006781, 1999 WL 247210 (Apr. 28, 1999).

[1386] State v. Robinson, 12th Dist. Butler No. CA2002-05-127, 2003-Ohio-2009.

of alcohol and drug abuse, and a 100% chance existed that defendant would reoffend.[1387]

(6) Defendant made *Alford* pleas to ten counts of sexually abusing children over the span of a decade, his wife and other friends stated at the hearing that they did not consider him to be a threat to others.[1388]

(7) Defendant failed to provide the appellate court with a transcript of the sexual predator hearing, but he was convicted of multiple counts of sexually oriented offenses.[1389]

(8) Multiple incidents of molestation involving the same 8 year-old girl, the defendant admitted he was sexually attracted to her and requested incarceration over probation with sexual offender treatment.[1390]

(9) Defendant, who was 39, engaged in fellatio, vaginal intercourse, cunnilingus, vaginal penetration, masturbation, with three girls aged 7, 6, and 5, and some of these incidents occurred while the girls were tied to a bed.[1391]

(10) Although offenses involved only one victim, and defendant had no criminal record, at time of rape and gross sexual imposition offenses defendant was 51 years old, while victim was 10, defendant was in position of trust over victim as he was her baby-sitter, defendant committed multiple offenses against her and failed to show remorse or take responsibility for his actions, as he testified that he never had sexual contact with victim, and only confessed to crimes due to the fact that an anonymous caller threatened to harm children he was

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[1387] State v. Winkle, 12th Dist. Butler No. CA2001-12-296, 2003-Ohio-2005.

[1388] State v. Godfrey, 5th Dist. Licking No. 97CA0155, 1999 WL 770253 (Sept. 2, 1999).

[1389] State v. Smith, 5th Dist. Perry No. CA98-2, 1999 WL 547914 (June 30, 1999).

[1390] State v. Lattimer, 5th Dist. Holmes No. CA589, 1999 WL 770244 (Sept. 27, 1999).

[1391] State v. Eisennach, 5th Dist. Ashland No. 99-CA-1293, 1999 WL 770165 (Sept. 13, 1999).

baby-sitting, his wife, and his own child if he did not confess.[1392]

(11) Defendant with criminal record but with lack of prior sexual record who scored high on violence risk appraisal guide and sex offender assessment guide, who committed sexual battery by having sex with intoxicated women, after striking her with boot, spitting on her, inserting objects in her vagina and filming event and who thought incident "funny" sufficient to justify finding of sexual predator.[1393]

(12) The victim's young age (13 years old) and "disturbing nature of the offense" sufficient to support a sexual predator classification.[1394]

(13) Defendant on 3 occasions inserted his finger in vagina, performed cunnilingus, and had sexual contact with a victim under 13 years of age.[1395]

(14) The young age of the victim (4 years old) and failure to complete a sexual offenders counseling program was sufficient to adjudicate defendant a sexual predator.[1396]

(15) Defendant had sexual contact with his stepdaughter over a 4 year period, beginning when she was 9, including mutual masturbation, oral sex, vaginal intercourse, and anal intercourse, and provided alcohol to the victim on at least one occasion.[1397]

[1392] State v. Thomas, 12th Dist. Brown No. CA2002-01-001, 2003-Ohio-74.

[1393] State v. Bowman, 12th Dist. Butler Nos. CA2001-05-117-and CA2001-06-147, 2002-Ohio-4373.

[1394] State v. Davis, 64 Ohio App.3d 334 (12th Dist. 1989).

[1395] State v. Bartis, 10th Dist. No. 97APA05-600, 1997 WL 771021 (Dec. 9, 1997), *aff'd by* 84 Ohio St.3d 9 (1998).

[1396] State v. Daniels, 10th Dist. No. 97APA06-830, 1998 WL 85882 (Feb. 24, 1998), *aff'd by* 84 Ohio St.3d 12 (1998).

[1397] State v. Warner, 12th Dist. Butler No. CA97-03-064, 1998 WL 191412 (Apr. 20, 1998).

(16) Defendant raped and brutalized a 72 year-old woman while burglarizing her home.[1398]

(17) Two separate convictions for rape, committed 12 years apart.[1399]

(18) Evidence contained in bill of particulars, transcript of original proceedings and defendant's taped statement to police sufficient to support classification.[1400]

(19) Not error for prosecutor to summarize the facts surrounding the offense per § 2950.09(B)(1).[1401]

(20) Conviction was for two sexually oriented offenses, defendant continued to deny his actions, and the victim was only 3 years old.[1402]

(21) Where multiple instances of oral sex, touching, vaginal intercourse between 43 year-old male and 12 year-old for eighteen months, pregnancy and use of drugs, but not during sex, and exposing victim to pornography, court erred in NOT finding defendant a predator.[1403]

(22) Defendant classified based on the offense for which he was sentenced which involved child pornography of graphic nature and presentence investigation report. Furthermore, children are "victims" of the possession of child pornography.[1404]

[1398] State v. Lance, 1st Dist. No. C-970301, 1998 WL 57359 (Feb. 13, 1998).

[1399] State v. Neeley, 1st Dist. No. C-970924, 1998 WL 515963 (Aug. 21, 1998).

[1400] State v. Taylor, 1st Dist. No. C-970547, 1998 WL 414671 (Jul. 24, 1998).

[1401] State v. Fields, 1st Dist. No. C-970430, 1998 WL 337022 (Jun. 26, 1998).

[1402] State v. Dickens, 12th Dist. Clermont No. CA98-09-075, 1999 WL 562125 (Aug. 2, 1999).

[1403] State v. Ballard, 12th Dist. Warren No. CA99-06-067, 2000 WL 19013 (Jan. 10, 2000).

[1404] State v. Maynard, 132 Ohio App.3d 820 (9th Dist. 1999), *discretionary appeal not allowed by* 86 Ohio St.3d 1437 (1999).

(23) Defendant, 21 years old, had a prior conviction for corruption of a minor for which he was adjudicated a registered sexual offender, was adjudicated delinquent as a juvenile for an additional incident of gross sexual imposition and was sent to a sex offender institution for juveniles, victim was Defendant's 11 year-old neighbor who he, on more than one occasion, touched in the breast and vaginal areas.[1405]

(24) Classification upheld where the defendant had no prior criminal record, suffered from a personality disorder, and no drugs or alcohol were involved. Offense involved multiple victims, aged 9 to 13, occurred under circumstances in which defendant was in position of trust, defendant had approached one victim more than once, and incident involved a threat of shooting.[1406]

(25) Probation officer's testimony that offender was a preferential child molester, tender age of victims, offender's relation to victims (step-father), and a pattern of abuse sufficient for sexual predator classification.[1407]

(26) Defendant's prior history of criminal behavior and mental illness or disability, the violent nature of the offense in which defendant pointed firearm at victim's head and handcuffed the victim and defendant's dominance control needs, inter alia, sufficient for classification. Although psychological evaluation failed to expressly recommend classification as sexual predator, this alone does not establish that trial court's adjudication was against the manifest weight of the evidence.[1408]

(27) Defendant's attack upon the victim was premeditated where he observed the victim in a bar, followed her for two blocks, and then knocked her to the ground and attempted to rape her, already wearing a condom. [1409]

[1405] State v. Cartwright, 9th Dist. Summit No. 22025, 2004-Ohio-5951.

[1406] State v. Murphy, 11th Dist. Lake No. 2003-L-049, 2005-Ohio-412.

[1407] State v. Craig, 5th Dist. Licking No. 2004CA00047, 2005-Ohio-81.

[1408] State v. Schaub, Lake No. 2003-L-091, 2005-Ohio-703.

[1409] State v. Norris, 10th Dist. No. 06AP-799, 2007-Ohio-1467.

(28) Defendant's sexual predator classification upheld where, in response to his ten year-old daughter's questions about oral sex and masturbation, he "taught her about sex" by masturbating in front of her, engaging in oral sex with her, and showing her sexually graphic pictures.[1410]

(29) Offender's argument that his age upon release made reoffending unlikely unpersuasive where Static-99 scoring placed him within the "high risk" category for reoffending, the victim was nine years old, the abuse continued for two years, and the offender had two previous convictions for sexual offenses against minors; trial court's decision to classify the offender as a sexual predator was supported by competent and credible evidence.[1411]

j) Cases Where Classifications Have Been Reversed:

(1) The underlying crime was based on defendant picking up four girls, providing them with alcohol and marijuana, driving them around, and performing cunnilingus and sexual intercourse on one of the 12 year-old girls; however, the court noted that the defendant had obtained his GED in prison and had completed interpersonal counseling and sex offender counseling, as well as an after-care program for sex offenders, and had served as a tutor for the after-care program.[1412]

(2) Although defendant was a diagnosed pedophile, and admitted it was highly sexually arousing for him to have fantasies involving touching of boys ages 13 years and under, defendant stated that he had complete or nearly complete control over his behavior, that molestation of children was illegal and wrong, and that he gained tools to work on the problem.[1413]

(3) State's only evidence was the indictment for rape and aggravated burglary and guilty pleas.[1414]

[1410] State v. Kinser, 5th Dist. Fairfield No. 06-CA-18, 2007-Ohio-706.

[1411] State v. Renshaw, 8th Dist. No. 88840, 2007-Ohio-4063.

[1412] State v. Nicholas, 12th Dist. Warren No. CA97-05-045, 1998 WL 166436 (Apr. 6, 1998).

[1413] State v. Youlten, 151 Ohio App.3d 518, 2003-Ohio-430 (8th Dist.).

[1414] State v. Hicks, 128 Ohio App.3d 647 (1st Dist. 1998).

(4) Evidence of an offender's criminal record, standing alone, is insufficient to support classification as sexual predator.[1415]

(5) Only evidence was that of underlying sexually oriented offense and none of the factors set forth in R.C. § 2950.09(B)(2) were met.[1416]

(6) Defendant did not use drugs or alcohol to impair the victim nor did he engage in a pattern of abusing the child. There was no criminal record, and he has not committed a similar crime while incarcerated. While serving his sentence, he had completed, a year-long counseling program designed to educate offenders about anger and how that emotion can cause a person to act out sexually. Appellant also participated in a six-month aftercare program, and was scheduled to begin another year long sex offender treatment program in July 2000. The Defendant exhibited a desire to begin counseling shortly after his sentence commenced. This was evidenced by the fact that in 1998, he filed various motions for "shock probation", pleading for early release because, at the time, the correctional facility did not offer sex offender treatment programs that could be obtained by the general public. Per State v. Dennis (Sept. 7, 2000), Logan No. 8-2000-08, unreported, the Court refused to adopt the proposition that a single crime, regardless of the seriousness or violent nature of the offense, cannot, as a matter of law, form the basis for the finding that an offender is a sexual predator. The review must be on a case-by-case basis.[1417]

(7) No evidence that defendant was likely to engage in future sexually oriented offenses, the only evidence offered was the fact of the underlying conviction (i.e., defendant drunk, one 18 year-old victim, two nonsexual prior convictions and defendant received counseling.)[1418]

[1415] State v. Miller, 8th Dist. No. 78032, 2001 WL 528020 (May 17, 2001).

[1416] State v. Eppinger, 8th Dist. No. 72686, 1999 WL 135267 (Mar. 11, 1999) *aff'd as modified by* State v. Eppinger, 91 Ohio St.3d 158, 2001-Ohio-247.

[1417] State v. Dewitt, 3rd Dist. Union No. 14-2000-21, 2000-Ohio-1696.

[1418] State v. Ferrell, 8th Dist. No. 72732, 1999 WL 148467 (Mar. 18, 1999).

(8) No evidence of pattern of abuse, only evidence provided was based on the underlying conviction' this was insufficient to show defendant's likelihood to commit future sexually oriented offenses.[1419]

(9) Only providing evidence of the underlying conviction was insufficient to show defendant's likelihood to commit future sexually oriented offenses; the only factor in the record was cruelty.[1420]

(10) Only proof provided was the fact of conviction (a plea), the victim's age (12) and threat of force; there was no showing that the defendant was more likely than not predisposed to commit another sexual offense.[1421]

(11) Prosecutor merely recited the fact of defendant's underlying conviction and the bare allegation that defendant had a prior sex conviction.[1422]

(12) There was no evidence that defendant had been engaged in any sort of sexually deviant behavior since his rape conviction 25 years previously.[1423]

(13) Defendant committed sexual offenses on one occasion but witnesses at the sexual predator hearing stated that he has a low probability of reoccurrence and he has sought out treatment and been well behaved in prison.[1424]

(14) State presented no evidence other than facts surrounding crime which occurred twelve years prior and failed to rebut defendant's evidence of rehabilitation.[1425]

[1419] State v. Hart, 8th Dist. No. 73307, 1999 WL 148478 (Mar. 18, 1999).

[1420] State v. O'Connor, 8th Dist. No. 73848, 1999 WL 195666 (Apr. 8, 1999); State v. Russell, 8th Dist. No. 73237, 1999 WL 195657 (Apr. 8, 1999).

[1421] State v. Gregory, 8th Dist. No. 74859, 1999 WL 777860 (Sept. 30, 1999).

[1422] State v. Johnson, 8th Dist. No. 74841, 1999 WL 777868 (Sept. 30, 1999).

[1423] State v. Parker, 134 Ohio App.3d 660 (7th Dist. 1999).

[1424] State v. Worthy, 10th Dist. No. 99AP-260, 1999 WL 1029293 (Nov. 12, 1999).

[1425] State v. Pryor, 1st Dist. No. C-990497, 2000 WL 262383 (Mar. 10, 2000); *see also*, State v. Tasseff, 139 Ohio App.3d 753 (1st Dist. 2000); State v. Winchester, 145 Ohio

(15) Not clear and convincing evidence where defendant was convicted of rape, but received counseling, had no prior criminal record and no evidence besides that of crime itself was submitted.[1426]

(16) Rape conviction and use of force insufficient evidence that defendant likely to reoffend.[1427]

(17) State's only evidence of underlying conviction and testimony of police officer who investigated the charges, disclosing no additional information, was insufficient to show defendant's likelihood to engage in the future in one or more sexually oriented offenses.[1428]

(18) Trial court's discussion on the record did not establish its sexual predator finding by clear and convincing evidence where it referred only to the defendant's current offenses and its dissatisfaction with the self-reporting assessment.[1429]

(19) Trial court's joint classification of the defendant as both a sexual predator and a sexually habitual offender was error, as once trial court finds a defendant is a sexual predator, the analysis is concluded. R.C. 2950.09(C) requires a trial court to make a determination as to whether a defendant is an habitual sexual offender only if he was not found to be a sexual predator.[1430]

k) From these cases it is clear that, when making their decisions, courts must consider more than the information contained in the

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App.3d 92 (8th Dist. 2001); State v. Lewis, 1st Dist. No. C-000217, 2000 WL 1793156 (Dec. 8, 2000).

[1426] State v. Higgins, 1st Dist. No. C-990615, 2000 WL 376426 (Apr. 14, 2000).

[1427] State v. Hull, 8th Dist. No. 76460, 2000 WL 868461 (June 29, 2000).

[1428] State v. Hall, 138 Ohio App.3d 522 (1st Dist. 2000).

[1429] State v. Dyer, 8th Dist. No. 88202, 2007-Ohio-1704.

[1430] State v. Buskirk, 8th Dist. 8th Dist. No. 101221, 2014-Ohio-5551, ¶ 12.

indictment,[1431] in the pre-sentence report,[1432] or in the indictment and guilty plea.[1433]

l) Under certain circumstances, it is possible that one sexually oriented conviction alone can support a sexual predator adjudication pursuant to statute governing sexual offender classification hearings.[1434]

(1) Cases where classification has been upheld:

(A) Evidence supporting classification included defendant's sexual motivation, defendant's age at the time of the offense, defendant's history of violent offenses, the nature of the offense, and the impact on the victim.[1435]

(B) Despite no prior sexual offenses and failure to show up at arranged meeting with undercover police officer, evidence that defendant "trolled" internet chat rooms in search of young girls, engaged in sexually explicit conversations with persons he believed to be young girls, and was incapable of forming adult relationships deemed sufficient to support classification.[1436]

(C) Evidence supporting classification included defendant's prior criminal convictions for domestic violence, theft, and DUI; defendant's score of five on the SOARG (Sexual Offender Risk Assessment Guide); and defendant's anger and distain toward women as

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[1431] State v. Russell, 1st Dist. 1st Dist. No. C-970275, 1998 WL 151066 (Apr. 3, 1998); State v. Hicks, 128 Ohio App.3d 647 (1st Dist. 1998).

[1432] State v. Cook, 83 Ohio St. 3d 404, 1998-Ohio-291; State v. Wilson, 1st Dist. No. C-970880, 1998 WL 597649 (Sept. 11, 1998).

[1433] State v. Hicks, 128 Ohio App.3d 647 (1st Dist. 1998).

[1434] State v. Eppinger, 91 Ohio St.3d 158, 2001-Ohio-247.

[1435] State v. Naegele, 12th Dist. Clermont No. CA97-04-043, 1998 WL 8684 (Jan. 12, 1998).

[1436] State v. Spitzig, 8th Dist. No. 86515, 2006-Ohio-3006.

indicated by his pattern of treating them abusively - physically, emotionally, and sexually.[1437]

(D) Single conviction for sexually oriented offense may support a finding that a defendant is a sexual predator where defendant was 28 years old and victim was 6 years old; victim suffered severe physical and psychological harm from the offenses; and although defendant was only charged regarding two incidents, victim claimed defendant engaged in this activity on five different occasions.[1438]

(E) Defendant was properly classified as a sexual predator, although defendant did not have any other convictions for sexually oriented offenses, because defendant was 26 years of age and victim was eight years old at time of offenses, defendant cruelly perpetrated crime through use of force and threats, prior criminal record reflected disposition towards violent crime, defendant received very poor job performance evaluations in prison, and defendant refused to cooperate during pre-hearing psychological evaluation ordered by the court.[1439]

(F) Evidence supporting classification included young victims (6-9), there were multiple victims, there was oral and anal abuse and the defendant possessed other characteristics making it likely he would repeat offense.[1440]

(G) Evidence supporting classification included that defendant was significantly older than the victim, the victim was only eight when the offenses began, the abuse continued for five years, and the defendant abused a position of trust with the victim and her

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[1437] State v. Dunaway, 12th Dist. Butler No. CA2001-12-280, 2003-Ohio-1062.

[1438] State v. Osborne, 12th Dist. Clermont No. CA2001-12-097, 2002-Ohio-5510.

[1439] State v. Cole, 12th Dist. Clinton No. CA2001-12-044, 2002-Ohio-5144.

[1440] State v. Carroll, 12th Dist. Warren No. CA98-09-124, 1999 WL 225176 (Apr. 19, 1999).

family, and defendant showed little remorse for his actions.[1441]

(H) No prior convictions and no presentence investigation report, however, the defendant's estranged wife stated that he had engaged in similar past behavior.[1442]

(I) Evidence supported finding that female sex offender was sexual predator; medical expert outlined many characteristics of offender and her offenses against multiple victims, provision of alcohol to victims, offender's chronic low self-esteem and tendency to place responsibility for her offenses on other persons, and her continuation of offense until she was caught.[1443]

(J) Evidence supporting classification included that there were multiple victims, the defendant was in a position of trust over the victims, one victim became pregnant, and the forensic psychologist's opinion that defendant had a high risk of recidivism.[1444]

(K) Evidence supporting classification included the disparity of defendant's age to that of his victim, the defendant was in a position of trust over the victim, the incestuous nature of the contact with his own daughter, the defendant had a prior voyeurism charge, defendant's substantial criminal history, his problems with alcohol, and that defendant failed to show remorse or take responsibility for his actions.[1445]

(L) Evidence supporting classification included defendant's extensive and alcohol related criminal history, including a number of violent criminal

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[1441] State v. Baker, 12th Dist. Clermont No. CA98-11-108, 1999 WL 636479 (Aug. 23, 1999).

[1442] State v. Tillett, 8th Dist. No. 74275, 1999 WL 435763 (June 24, 1999).

[1443] State v. Hardie, 141 Ohio App.3d 1, 2000-Ohio-2044 (4th Dist.).

[1444] State v. Retherford, 12th Dist. Butler Nos. CA2000-10-201 and -202, 2001 WL 950661 (Aug. 20, 2001).

[1445] State v. Mason, 12th Dist. Clermont No. CA2001-03-032, 2001-Ohio-8653.

offenses, the young age of the victims, the multiple number of victims, and defendant's refusal to accept responsibility for his actions.[1446]

(M) Evidence showed that defendant had prior conviction for felony sexual offense with a minor, and that defendant was not cooperative with offer of psychotherapy in current case of possession of computer images of nude minors, warranted classifying defendant as sexual predator.[1447]

(N) Defendant was twenty-three to twenty-five years old during the time that the offenses occurred. During that period of time, the victim was between three and five years old. She was the only victim. Over a two-and-one-half year period. Defendant committed at least three separate acts of rape and gross sexual imposition on his own daughter, with the likelihood that the abuse occurred at least biweekly. Defendant also had prior convictions for domestic violence. There is nothing in the record to indicate that Defendant had a mental illness or impaired the victim through drugs or alcohol. There is clear and convincing evidence to justify Defendant's adjudication as a sexual predator. Defendant abused his own young child over a lengthy period of time. Courts have noted that the abuse of young children is an indicator of an offender's likelihood to reoffend.[1448]

(O) Defendant, though only incarcerated for one sexual offense, had extensive juvenile history, was sanctioned several times for rules infractions while incarcerated, including sanction for inappropriate sexual relationship with prison guard, failed to complete any sexual offender treatment program, and CDTC report concluded he was a medium risk to commit another

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[1446] State v. Bare, 12th Dist. Butler No. CA2001-08-190, 2002-Ohio-799.

[1447] State v. Cook, 149 Ohio App.3d 422, 2002-Ohio-4812 (2d Dist.).

[1448] State v. Daniel, 9th Dist. Summit No.19809, 2000 WL 1287929 (Sept. 13, 2000).

sexual offense and high risk to commit another violent offense.[1449]

(P) Single conviction for attempted rape sufficient where defendant used his relationship with victim (step-father) to facilitate the commission of the offense and where defendant failed to accept responsibility for his crime.[1450]

(Q) Conviction for sexual battery sufficient where a great disparity exists between age of defendant and victims, victims were stepdaughters of defendant, defendant abused drugs and alcohol, defendant had prior criminal record including three prison sentences, defendant blamed victim for "teasing" him with behavior and dress, defendant admitted he lacked willpower and consistently maintained that his activities with the victims were part of a loving romance.[1451]

(R) Defendant's history of institutional violence, lengthy criminal past which included violence against women, failure to complete sex offender treatment, diagnosis with antisocial disorder and his failure to accept responsibility for his conduct sufficient to adjudicate defendant a sexual predator.[1452]

(2) Cases Where Classifications Have Been Reversed:

(A) One-time occurrence with single victim, no cruelty or pattern of abuse, no prior sex offenses, and the defendant was cooperative and remorseful.[1453]

[1449] State v. Shephard, 3d Dist. Hancock No. 5-04-32, 2005-Ohio-420 (Feb. 7, 2005).

[1450] State v. Phillips, 2d Dist. Montgomery No. 2002CR-06-074, 2004-Ohio-2301.

[1451] State v. Borders, 12th Dist. Clermont No. CA2004-12-101, 2005-Ohio-4339.

[1452] State v. Cornwell, 8th Dist. No. 85119, 2005-Ohio-3019.

[1453] State v. Cartwright, 9th Dist. Lorain No. 97CA006782, 1998 WL 831402 (Nov. 25, 1998).

(B) Only one conviction resulted from sexual animus and no other facts that the defendant was likely to engage in further sexual crimes.[1454]

(C) Insufficient evidence to show defendant might reoffend where only one sexual conviction and psychological report which indicated it would be important for defendant not to be around young girls unclear as to whether it was based on conviction or actual difficulties or diagnosis.[1455]

(D) The court can also consider non-sexual criminal convictions in determining whether a defendant is a sexual predator.

(E) Classification upheld where victim was defendant's 12 year-old niece, there was actual intercourse and defendant had prior convictions, although none were sex offenses.[1456]

(F) Although prior conviction information, in some cases, may be sufficient to prove by clear and convincing evidence that a defendant is a predator, it is not sufficient where the prior conviction was merely for robbery.[1457]

(G) Multiple prior convictions, although none sexual, coupled with rape of mentally retarded woman could constitute clear and convincing evidence that defendant is sexual predator.[1458]

(H) Multiple prior drug convictions, along with one conviction for sexual battery, coupled with the present

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[1454] State v. Franklin, 8th Dist. No. 72733, 1999 WL 126103 (Feb. 25, 1999).

[1455] State v. Jackson, 10th Dist. No. 99AP-1250, 2000 WL 860814 (Jun. 29, 2000).

[1456] State v. Martin, 1st Dist. No. C-970925, 1998 WL 418033 (Jul. 24, 1998).

[1457] State v. Stubbs, 8th Dist. No. 72661, 1999 WL 125967 (Feb. 25, 1999).

[1458] State v. Malin, 9th Dist. Lorain No. 97CA006898, 1999 WL 1775 (Dec. 30, 1998).

case where defendant pleaded guilty to abduction and gross sexual imposition.[1459]

(I) Evidence supporting classification included the victim was a fourteen year-old girl, the defendant had an extensive prior criminal record, and that the defendant supplied alcohol and drugs to the victim prior to the sexually-oriented offense, even though the victim requested and paid for the alcohol and drugs.[1460]

(J) Evidence supporting classification included cruelty, the use of a weapon, the degree of sexual assault, and that the defendant had been previously incarcerated, although not for sexually related offenses.[1461]

(K) The court can consider apparently non-sexual criminal convictions that may have been for the purpose of gratifying the offender's sexual needs.

(L) Classification upheld where defendant plead guilty to involuntary manslaughter, where he was never charged with rape, where the prosecutor made no mention of sexually oriented offenses at the plea hearing, and no forensic evidence was presented indicating sexual abuse of dead victim; court relied solely on testimony of another inmate to whom defendant confided and told he had attempted to have sex with the three year-old victim, and he had engaged in sexual activity with her on occasions other than the day she died.[1462]

(M) Classification upheld where defendant convicted of felonious assault. The court found that defendant's conduct in beating and choking the victim while he engaged in forcible sexual intercourse with her was

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[1459] State v. Worthy, 9th Dist. Lorain No. 97CA006796, 1999 WL 312400 (May 12, 1999).

[1460] State v. McCullough, 12th Dist. Fayette No. CA2001-02-004, 2001 WL 1218915 (Oct. 15, 2001).

[1461] State v. Eaton, 2d Dist. Montgomery No. 18690, 2001-Ohio-1760.

[1462] State v. Lower, 10th Dist. No. 98AP-1275, 1999 WL 694856 (Sept. 9, 1999).

designed to gratify a sexual need or desire and therefore a "sexually oriented offense."[1463]

(3) Generally, Classifications Have Been Upheld:

(A) Trial court correctly adjudicated defendant a sexual predator considering the age of the victim (3 months), defendant's prior criminal record, the nature of the offense, and the cruelty of the offense.[1464]

(B) Court correctly found defendant was a sexual predator when the evidence showed that he displayed cruelty, knew the victim prior to the offense, used a firearm to subdue the victim, and drugs were involved.[1465]

(C) Court properly adjudicated the defendant a sexual predator when there was an underlying rape conviction, a history of domestic violence, and defendant said he wanted to get in "some type of program to make sure this doesn't happen again."[1466]

(D) Evidence that defendant had a prior criminal record, which included a sexually oriented offense, that there were multiple victims aged 15 and 16 and defendant had engaged in ongoing pattern of abuse with step-grandchildren.[1467]

(E) Court correctly found defendant sexual predator when he admitted to performing oral sex on his 8 year-old stepson and had 2 prior convictions for attempted rape and GSI.[1468]

[1463] State v. Sanford, 12th Dist. Butler No. CA2000-12-249, 2001 WL 877306 (Aug. 6, 2001).

[1464] State v. Fugate, 12th Dist. Butler No. CA97-03-065, 1998 WL 42232 (Feb. 2, 1998).

[1465] State v. Fields, 1st Dist. No. C-970430, 1998 WL 337022 (Jun. 26, 1998).

[1466] State v. Neblett, 1st Dist. No. C-970541, 1998 WL 515968 (Aug. 21, 1998).

[1467] State v. Dooley, 8th Dist. No. 84206, 2005-Ohio-628.

[1468] State v. Ferris, 12th Dist. Warren No. CA98-03-035, 1998 WL 568608 (Sept. 8, 1998).

(F) Defendant was properly classified considering he engaged in a pattern of abuse against his victims, threatened them at knifepoint, had prior convictions for forceful rapes and psychological tests indicated he was in highest categorical risk for reoffending.[1469]

(G) Court correctly adjudicated the defendant a sexual predator where there were multiple victims, ages 6, 8 and 12, drugs were offered to victim and the defendant displayed cruelty.[1470]

(H) Court correctly adjudicated the defendant as a sexual predator where the court found elements of defendant's explanation for conduct (i.e., stress) were likely to reoccur.[1471]

(I) Court correctly found defendant to be a sexual predator where there was a large age difference between the defendant and the victim, there was evidence of prior sexual abuse.[1472]

(J) Court correctly found defendant to be a sexual predator where the defendant was 18 years old and the victim was 5 years old, the defendant committed fellatio on an unknown victim by stealth, there was no mental illness/disability or criminal record and defendant engaged in counseling.[1473]

(K) Court correctly found defendant to be a sexual predator where the offense was sexually oriented, there was

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[1469] State v. Gainer, 8th Dist. No. 84192, 2005-Ohio-629.

[1470] State v. Willeford, 12th Dist. Butler No. CA98-01-003, 1998 WL 1969120 (Oct. 26, 1998).

[1471] State v. Smithers, 12th Dist. Warren No. CA98-06-038, 1999 WL 17685 (Jan. 19, 1999).

[1472] State v. Young, 12th Dist. Brown Nos. CA98-06-022, CA98-06-024, 1999 WL 98972 (Mar. 1, 1999).

[1473] State v. Rawlings, 1st Dist. No. C-970596, 1998 WL 397376 (Jul. 17, 1998).

cruelty and drugs involved and the defendant had prior conviction for domestic violence.[1474]

(L) Court correctly adjudged defendant to be a sexual predator where the defendant committed rape and gross sexual imposition, there were two victims (stepchildren of defendant), the conduct occurred over a period of time, and there were threats of harm or cruelty.[1475]

(M) Court correctly found that defendant was a sexual predator where the defendant had a history of mental problems, had a long list of convictions, and knew at the time that his attempted rape was wrong but was unable to conform his actions to the law.[1476]

(N) Not against the manifest weight of the evidence to adjudge the defendant a sexual predator where he committed fellatio on a boy, threatened force and locked him in a room while on probation for another sexual offense.[1477]

(O) Where pattern of abuse over 8-9 years and defendant resistant to treatment.[1478]

(P) Court correctly found defendant to be a sexual predator where only the state's evaluating psychologist testified as to the defendant's high degree of risk of recidivism where the defendant had a significant criminal history, he broke into the victim's apartment, threatened her, hit her with a hammer, and raped her twice.[1479]

[1474] State v. Fields, 1st Dist. No. C-970430, 1998 WL 337022 (Jun. 26, 1998).

[1475] State v. Ridenbaugh, 5th Dist. Licking Nos. 97CA149, 97CA154, 97CA150, 97CA153, 1999 WL 436769 (May 27, 1999).

[1476] State v. Lee, 128 Ohio App.3d 710 (1st Dist. 1998).

[1477] State v. Urey, 5th Dist. Coshocton No. 98CA26, 1999 WL 770169 (Aug. 26, 1999).

[1478] State v. Southerland, 12th Dist. Butler No. CA99-01-013, 1999 WL 1279304 (Dec. 30, 1999).

[1479] State v. Cookingham, 11th Dist. Ashtabula No. 2000-A-0067, 2001 WL 848513 (July 27, 2001).

(Q) Court properly found the defendant to be a sexual predator where the offense was sexually oriented, there was cruelty and defendant's prior criminal record included sexually oriented offenses.[1480]

(R) Court correctly adjudicated the defendant a sexual predator where 58 year-old defendant was 18 years old when he raped the mother of one of his friends, defendant's conduct during the rape was severe and cruel, defendant had also been convicted of second degree murder and larceny and defendant had repeatedly physically and sexually assaulted other inmates while in prison.[1481]

(S) Court correctly adjudicated defendant a sexual predator where defendant committed two sexual offenses which were separate in time, the sexual offenses constituted a pattern, defendant's offenses involved child victims, defendant held a position of trust with his victims, and defendant had not taken responsibility for his deviancy.[1482]

(T) Court properly adjudicated defendant a sexual predator where victim was three years old, Defendant's written statement revealed tendencies toward pedophilia, and indicated a pattern of abuse.[1483]

(U) Adjudication was appropriate given that defendant was 18 at time of the offense, had a prior criminal record including assault and gross sexual imposition, was diagnosed with antisocial personality disorder, and had a 53% chance of reoffending within 15 years.[1484]

[1480] State v. Britton, 12th Dist. Clermont No. CA2001-01-007, 2001-Ohio-8687.

[1481] State v. Kelly, 142 Ohio App.3d 179, 2001-Ohio-3158 (7th Dist.).

[1482] State v. Vinston, 144 Ohio App.3d 339 (8th Dist. 2001).

[1483] State v. Wyant, 12th Dist. Madison No. CA2003-08-029, 2004-Ohio-6663.

[1484] State v. Davis, 8th Dist. No. 85348, 2005-Ohio-3571.

(V) Evidence of defendant's lengthy criminal history, including prior a prior sex offense, cruelty of attempted rape and assault for which he was convicted, lack of self-control and use of drugs sufficient to sustain classification as sexual predator.[1485]

(W) Disparity in age between 14 year-old victim and 30 year-old defendant as well as defendant's prior sexually oriented offense involving a minor and prior juvenile adjudications and psychological report which found that he was likely to reoffend sufficient to adjudicate defendant a sexual predator.[1486]

(X) Where defendant's previous criminal record included a sexually-oriented offense involving a minor, subsequent attempt to meet a 13 year-old girl to engage in sexual conduct sufficient to support sexual predator classification.[1487]

(Y) Trial court did not abuse its discretion in finding 21 year-old defendant to be a sexual predator where 8 year-old victim was orally and anally raped, where trial court considered defendant's below average IQ and lengthy criminal record, fact that defendant threatened to kill victim and his parents if he told anyone about the rape, and the "atrociousness" of the crime itself.[1488]

(Z) Sexual predator classification not against manifest weight of the evidence despite Static-99 and RRASOR results showing the offender's low risk for reoffending; "the utility of the Static-99 evaluation as a diagnostic tool for individual risk assessment is open to question."[1489]

m) At least a handful of courts have held that the trial court may consider an offender's entire criminal history, which includes any charge

[1485] State v. Coopwood, 8th Dist. No. 85098, 2005-Ohio-3016.

[1486] State v. McBooth, 8th Dist. No. 85209, 2005-Ohio-3592.

[1487] State v. Brown, 12th Dist. Butler No. CA2005-04-085, 2006-Ohio-338.

[1488] State v. Byers, 3rd Dist. Hardin No. 6-05-07, 2005-Ohio-6169.

[1489] State v. Vanek, 8th Dist. No. 89125, 2007-Ohio-6194.

which did not result in conviction.[1490] Thus, the testimony underlying an acquittal may be reviewed for the purposes of deciding the likelihood of the commission of a new offense.[1491]

(1) "[P]rior arrests for other sexually oriented offenses, some but not all of which resulted in convictions, are appropriate for consideration ... because they are relevant to pertinent aspects of a defendant's criminal and social history and probative of the propensity of an offender to engage in [future offenses]."[1492]

(2) This logic has been extended to allow a pattern of abuse to be found through the trial court's consideration of additional acts which were never charged.[1493]

n) The court can consider factors not listed in R.C. 2950.09:

(1) Whether the offender completed sexual offender programs;[1494]

(2) The offender's penitentiary disobedience report;[1495]

(3) The offender's criminal history;[1496]

[1490] State v. Slough, 2d Dist. No. 20531, 2005-Ohio-661.

[1491] State v. Childs, 142 Ohio App.3d 389 (8th Dist. 2001). An acquittal does not act as a bar to relitigation of a factual issue in a different proceeding if the state's burden of proof is lower than what it had been in the first case. Because a sexual predator classification requires only clear and convincing evidence, facts underlying prior acquittals may therefore be considered.

[1492] State v. Allen, 8th Dist. No. 86880, 2006-Ohio-3838, *citing* State v. Anderson, 135 Ohio App.3d 759, 1999-Ohio-928 (3rd Dist.).

[1493] State v. Flores, 11th Dist. Lake No. 2004-L-030, 2005-Ohio-5277.

[1494] State v. Philpott, 147 Ohio App.3d 505, 512, 2002-Ohio-808 (8th Dist.); State v. Irvin, 8th Dist. No. 88601, 2007-Ohio-5328.

[1495] Id.; State v. Birt, 2d Dist. Montgomery No. 18595, 2001 WL 726709 (June 29, 2001) and State v. Irvin, 8th Dist. No. 88601, 2007-Ohio-5328; *but see*, State v. Winchester, 145 Ohio App.3d 92, 96 (8th Dist. 2001) (noting that prison disciplinary report is not indicative of recidivism).

[1496] State v. McFadden, 10th Dist. No. 01AP-1476, 2002-Ohio-5073; State v. Johnson, 10th Dist. No. 00AP-763, 2001 WL 242586 (March 13, 2001).

(4) The offender's lack of remorse or acceptance of responsibility;[1497]

(5) The offender's possession or use of pornography;[1498]

(6) The offender's history of promiscuity;[1499]

(7) The offender's aberrant sexual behavior;[1500]

(8) The offender's abuse of drugs;[1501]

(9) Any sexually-oriented offenses for which the offender has not been charged;[1502]

(10) Diagnostic tools (e.g. Violence Risk Appraisal Guide, the Sex Offender Risk Assessment Guide, and the Minnesota Multiphasic Personality Inventory);[1503]

[1497] See notes 1196, 1243, 1248, supra.

[1498] See footnotes 1212, 1245, 1250, supra.

[1499] State v. Ivory, 8th Dist. No. 79722, 2002-Ohio-1275; State v. Birt, 2d Dist. Montgomery No. 18595, 2001 WL 726709 (June 29, 2001).

[1500] See footnote 1245, *supra*.

[1501] State v. Kairis, 10th Dist. No. 00AP-1053, 2001 WL 185476 (Feb. 27, 2001); State v. Ballard, 12th Dist. Warren No. CA99-06-067, 2000 WL 19013 (Jan. 10, 2000); State v. Lauderdale, 2d Dist. Montgomery No. 17036, 1998 WL 906482 (Dec. 31, 1998).

[1502] State v. Leyman, 5th Dist. Stark No. 2001CA00175, 2001-Ohio-7045; State v. Reed, 7th Dist. Jefferson No. 00 JE 22, 2001-Ohio-3271 (May 16, 2001); State v. Burgess, 12th Dist. Fayette No. CA99-08-021, 2000 WL 929685 (July 10, 2000); State v. Pryce, 9th Dist. Summit No. 19888, 2000 WL 840499 (June 28, 2000); State v. Bedinghaus, 1st Dist. No. C-970833, 1998 WL 430441 (July 31, 1998); *see also* Section K, *supra*.

[1503] State v. Bowman, 12th Dist. Butler Nos. CA2001-05-117, CA2001-06-147, 2002-Ohio-4373 (Aug. 26, 2002); State v. Hammerberg, 6th Dist. Lucas No. L-01-1377, 2002-Ohio-3050 (June 24, 2002); State v. Dodson, 10th Dist. Nos. 02AP-141, 02AP-169, 02AP-142, 02AP-168, 2002-Ohio-4771; State v. Barber, 2d Dist. Montgomery No. 18804, 2002-Ohio-1785.

(11) Whether the offender's victim was a child;[1504]

(12) Reliable hearsay, such as pre-sentence investigation reports and trial testimony that is subject to cross-examination.[1505]

(13) In sum, "[a] trial court has the discretion to consider all evidence which is cogent to the issues so long as the evidence satisfies a basic standard of being reliable, substantive, and probative."[1506]

5. Rules of Evidence:

a) Although the Ohio Rules of Evidence do not apply to sexual predator classification hearings,[1507] the evidence presented must have some indicia of reliability.[1508]

(1) Not plain error to admit hearsay testimony in a sexual predator classification hearing.[1509]

(2) Reliable hearsay (i.e., presentence and forensic reports to which defendant stipulated admission and did not object to or

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[1504] *See* State v. Eppinger, 91 Ohio St.3d 158, 162, 2001-Ohio-247.

[1505] State v. Basham, 5th Dist. Muskingum No. CT2007-0010, 2007-Ohio-6995 (upholding trial court's reliance upon victim's sister's testimony that she had also been victimized by defendant for its ultimate finding that defendant's conduct involved multiple victims).

[1506] State v. Walton, 8th Dist. No. 89771, 2008-Ohio-3137, *citing* State v. Lee, 128 Ohio App.3d 710 (1st Dist. 1998).

[1507] State v. Cook, 83 Ohio St. 3d 404, 1998-Ohio-291; State v. Young, 12th Dist. Brown Nos. CA98-06-022, CA98-06-024, 1999 WL 98972 (Mar. 1, 1999); State v. Russell, 8th Dist. No. 73237, 1999 WL 195657 (Apr. 8, 1999).

[1508] State v. Brown, 151 Ohio App.3d 36, 2002-Ohio-5207 (7th Dist.); State v. Lee, 128 Ohio App.3d 710 (1st Dist. 1998); State v. Byrum, 1st Dist. No. C-970834, 1998 WL 430435 (Jul. 31, 1998); State v. Brooks, 1st Dist. No. C-970831, 1998 WL 597648 (Sept. 11, 1998); State v. Schrader, 5th Dist. Coshocton No. 98 CA 17, 1999 WL 436731 (June 8, 1999).

[1509] State v. Shelton, 1st Dist. No. C-970231, 1998 WL 95377 (Mar. 6, 1998); State v. Stanifer, 12th Dist. Butler No. CA97-11-206, 1998 WL 233385 (May 11, 1998).

challenge) admissible in classification hearing.[1510] Hearsay statements of victim to police in police report properly admitted.[1511]

(3) Testimony of Police Chief was reliable hearsay and therefore admissible where substance of testimony was reflected in pre-sentence investigation and psychological report.[1512]

(4) Passage of time between date that offense occurred and preparation of post-sentence investigation report did not significantly affect the reliability of the report, and thus, trial court's reliance upon post-sentence investigation report during sexual predator hearing was warranted, where all details regarding offense were gleaned from prior case file material on a codefendant, and bulk of report consisted of statements witnesses, codefendants, and defendant made to police within 17 months of offense.[1513]

(5) Trial court's use of the polygraph examiner's opinion did not involve reliable hearsay suitable for use at the sexual-predator hearing and was an abuse of discretion at sentencing absent written stipulation by the prosecutor, Defendant, and his counsel.[1514]

(6) Reliable hearsay such as a pre-sentence investigation report[1515] or victim impact statements may be considered by a court.[1516]

[1510] State v. Gilbert, 12th Dist. Butler Nos. CA98-06-138, CA98-06-139, 1998 WL 904704 (Dec. 30, 1998); State v. Grewell, 5th Dist. Coshocton No. 98 CA 21, 1999 WL 436735 (June 11, 1999); State v. Schrader, 5th Dist. Coshocton No. 98 CA 17, 1999 WL 436731 (June 8, 1999).

[1511] State v. Southerland, 12th Dist. Butler No. CA99-01-013, 1999 WL 1279304 (Dec. 30, 1999).

[1512] State v. Phillips, 12th Dist. Madison No. 2002CR-06-074, 2004-Ohio-2301.

[1513] State v. Brown, 151 Ohio App.3d 36, 2002-Ohio-5207 (7th Dist.).

[1514] State v. Caperton, 1st Dist. No. C-000666, 2001-Ohio-5242.

[1515] State v. Black, 12th Dist. Butler No. CA2002-04-082, 2003-Ohio-2215; State v. Shaddoan, 1st Dist. No. C-970502, 1998 WL 412422 (Jul. 24, 1998); *see also* State v. Cook, 83 Ohio St. 3d 404, 425, 1998-Ohio-291.

[1516] Id.; State v. Melton, 142 Ohio App.3d 129 (8th Dist. 2001).

(A) Evidence from a pre-sentence investigation may be relied on in determining an offender is a sexual predator, even if a trial court does not fully comply with the rules of evidence in admitting it.[1517] However statements adopted from a PSI report must bear some indicia of reliability beyond a mere prejudicial allegation of past misconduct, without specifying source, nature, or origin of information.[1518]

(7) Hearsay testimony that defendant failed to comply with treatment programs and violated terms of conditional release plan admissible as relevant to whether defendant is likely to engage in future sex offenses.[1519]

(8) Psychology report was admissible in sexual predator determination hearing as such report constituted reliable hearsay and the defendant had the ability to attack the findings within the report during the hearing.[1520]

(9) The trial court may consider reliable information regarding other victims even if the defendant was not charged or convicted for those acts of abuse.[1521]

(10) The trial court may look into the defendant's past behavior in determining future propensity.[1522]

[1517] State v. Grimes, 143 Ohio App.3d 86 (8th Dist. 2001).

[1518] State v. Bowers, 10th Dist. No. 00AP-1453, 2001 WL 1013090 (Sept. 6, 2001).

[1519] State v. Shough, 2d Dist. Montgomery No. 20531, 2005-Ohio-661.

[1520] State v. Kelly, 142 Ohio App.3d 179, 2001-Ohio-3158 (7th Dist.).

[1521] State v. Burgess, 12th Dist. Fayette No. CA99-08-021, 2000 WL 929685 (July 10, 2000).

[1522] State v. Boshko, 139 Ohio App.3d 827 (12th Dist. 2000); State v. Hardie, 141 Ohio App.3d 1, 2000-Ohio-2044; State v. Johns, 12th Dist. Clermont No. CA2001-05-054, 2002-Ohio-289; State v. Maye, 129 Ohio App.3d 165 (10th Dist. 1998); State v. Smith, 12th Dist. Butler No. CA2000-04-066, 15549 (Jan. 8, 2001).

(11) Transcript of defendant's plea and sentencing hearings and victim impact statement admissible where relevant to the § 2950.09(B)(2) factors.[1523]

(A) A victim is not subject to cross-examination regarding the content of a victim impact statement.[1524]

(B) In considering whether to grant a defendant's request to review a victim impact statement, one appellate court noted that trial courts should consider whether a victim impact statement contains new material facts upon which the court intends to rely in making a sexual predator determination.[1525]

i. While the rules of evidence do not apply to a sexual predator hearing, if the prosecutor testifies, he must be sworn.[1526]

ii. A judge at a sexual predator hearing who presided at the original trial can take judicial notice of prior proceedings.[1527] But a trial court is not required to judicial notice, and appellate counsel is not ineffective for failing to raise the issue of judicial notice, where the result would have been the same.[1528]

(12) A judge at a sexual predator hearing who presided over the original trial (which was not immediately before the hearing) may consider the evidence admitted at the original trial if:

[1523] State v. Higgins, 12th Dist. Clermont No. CA99-07-068, 2000 WL 665541 (May 22, 2000).

[1524] State v. Koch, 11th Dist. Lake No. 97-L-142, 2001 WL 1647214 (Dec. 21, 2001) (abrogated by State v. Comer, 99 Ohio St.3d 463, 2003-Ohio-4165).

[1525] Id.

[1526] State v. Fields, 1st Dist. No. C-970430, 1998 WL 337022 (Jun. 26, 1998).

[1527] State v. Owens, 1st Dist. No. C-970676, 1998 WL 320915 (June 19, 1998); State v. Goney, 2d Dist. Montgomery No. 16990, 1998 WL 735922 (Oct. 23, 1998).

[1528] State v. Price, 8th Dist. No. 99058, 2014-Ohio-2047, ¶ 14.

(A) The court states specifically on the record what evidence was considered, and

(B) A record of the trial, or parts thereof, exist to verify the information used by the trial court.[1529]

(C) As sexual predator hearings are civil in nature, Criminal Rule 16 (regarding discovery) is not applicable.[1530]

6. Appointment of Psychologist or Psychiatrist:

a) An expert witness shall be provided to an indigent defendant at the classification hearing if the court determines, within its sound discretion, that such services are reasonably necessary to determine whether the offender is likely to engage in one or more sexually oriented offenses in the future.[1531]

b) Particularized showing by defendant of need for psychiatric expert at state expense in sexual predator hearing must take the form of a reasonable probability that the requested expert would aid in his defense and that denial of the requested expert assistance would result in an unfair trial; defendant must demonstrate more than a mere possibility of assistance from expert.[1532]

(1) A trial court abuses its discretion in denying defendant's motion for psychiatric evaluation where the only psychiatric evaluation was conducted six years before the sexual predator hearing was held.[1533]

(2) A trial court abuses its discretion in denying defendant's motion for psychiatric evaluation where there was no trial

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[1529] State v. Schrader, 5th Dist. Coshocton No. 98 CA 17, 1999 WL 436731 (June 8, 1999); State v. Grewell, 5th Dist. Coshocton No. 98 CA 21, 1999 WL 436735 (June 11, 1999).

[1530] State v. Ridenbaugh, 5th Dist. Licking Nos. 97CA149, 97CA154, 97CA150, 97CA153, 1999 WL 436769 (May 27, 1999).

[1531] State v. Eppinger, 91 Ohio St.3d 158, 2001-Ohio-247; *affirming* State v. Eppinger, 8th Dist. No. 72686, 1999 WL 135267 (Mar. 11, 1999).

[1532] State v. Abelt, 144 Ohio App.3d 168 (8th Dist. 2001).

[1533] State v. Dobies, 147 Ohio App.3d 568, 2001-Ohio-8823 (11th Dist.).

transcript, no victim impact statements, no pre-sentence report, no offense reports, or other background material to assist the court in making a predator determination.[1534]

(3) However, the denial of a motion for psychological evaluation was not an abuse of discretion where the defendant failed to offer any evidence that the expert would be "reasonably necessary" for a proper representation.[1535]

(4) Indigent defendant's request for the appointment of psychological expert was properly denied where defendant offered no specific facts or evidence concerning how the appointment of such an expert would aid his defense in the sexual predator determination hearing.[1536]

(5) Defendant's request for appointment of expert properly denied where court had before it other evidence, defendant's written statement revealing impulses of pedophilia, Sexual Offender Assessment, and Presentence Investigation Report, sufficient to make sexual predator classification.[1537]

(6) It was abuse of trial court's discretion to deny defendant's motion for a continuance of classification hearing in order to secure expert witness testimony.[1538]

7. The Court Order — Effect and Procedure:

a) A sexual predator determination is a final appealable order, which may be appealed before any appeal on the merits are perfected or heard.[1539]

[1534] State v. Adkins, 2d Dist. Greene No. 2000-CA-15, 2001 WL 726690 (June 29, 2001).

[1535] State v. Russell, 8th Dist. No. 73237, 1999 WL 195657 (Apr. 8, 1999); State v. Casper, 8th Dist. No. 73061, 1999 WL 380437 (June 10, 1999).

[1536] State v. Herron, 7th Dist. Columbiana Nos. 98-CO-52, 98-CO-68, 2000-Ohio-2258.

[1537] State v. Wyant, 12th Dist. Madison No. CA2003-08-029, 2004-Ohio-6663.

[1538] State v. Hillis, 162 Ohio App.3d 280, 2005-Ohio-3591 (1st Dist.).

[1539] State v. Ridenbaugh, 5th Dist. Licking Nos. 97CA149, 97CA154, 97CA150, 97CA153, 1999 WL 436769 (May 27, 1999).

b) Trial court was not required to consider defendant's ability to pay before imposing fines, counsel costs, and fees, in prosecution for two counts of gross sexual imposition; the costs of prosecution were not considered punishment, the trial court stated that it considered defendant's ability to pay when it fined defendant $5,000.00 per offense, and the court stated that it considered defendant's presentence investigative report, which included financial data, when it determined that defendant had the means to pay all or part of the costs of legal services rendered to him.[1540]

c) Some appellate courts hold that a defendant's status as a sexually oriented offender arises by operation of law, not by judgment of the trial court. Thus, such entry does not present a live controversy and cannot form the basis for an appeal.[1541]

(1) However, at least one appellate court has declined to adopt this holding. The Eleventh Appellate District has held that the fact that R.C. 2950.09 does not expressly provide a defendant with the right to appeal his classification as a sexually oriented offender is not dispositive. A defendant's status as a sexually oriented offender arises from a finding rendered by the trial court, because a trial court must determine whether the sex offender falls into one of three classifications, which in turn adversely affects a defendant's rights by the imposition of registration requirements.[1542]

d) A classification hearing is not a "prosecution" for purposes of collateral estoppel.[1543]

e) Upon finding a defendant to be a "sexual predator" the court must include in the sentencing journal entry that it had found the defendant, by clear and convincing evidence, to be a sexual predator

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[1540] State v. Lane, 12th Dist. Clermont No. CA2002-03-069, 2003-Ohio-1246.

[1541] State v. Moyers, 137 Ohio App.3d 130, 2000-Ohio-1669 (3rd Dist.); State v. Hampp, 4th Dist. Ross No. 99CA2517, 2000-Ohio-1969; State v. Redden, 6th dist. Lucas No. L-98-1087, 1999 WL 739671 (Mar. 19, 1999); State v. Burkey, 9th Dist. Summit No. 19741, 2000 WL 727533 (June 7, 2000).

[1542] State v. Washington, 11th Dist. Lake No. 99-L-015, 2001-Ohio-8905.

[1543] State v. Casper, 8th Dist. No. 73061, 1999 WL 380437 (June 10, 1999) (noting also that the defendant was unable to show that the issue of his status as predator was decided in the original proceeding).

pursuant to R.C.§ 2950.09(B)(1) as mandated by § 2950.09(B)(3).[1544]

f) Trial court has no authority to order Sheriff to obtain information from offender where the defendant is adjudicated a sexually oriented offender.[1545]

g) Dismissal of state's original petition for adjudication of convicted sex offender's statutory classification on constitutional grounds was res judicata with respect to subsequent petition, where state failed to appeal dismissal of original petition; original judgment order determining sexual predator classification statute to be unconstitutionally retroactive was final and appealable by the state, and constitutional grounds upon which original petition was dismissed were part of merits of the case.[1546]

h) Where an individual is sentenced by two different courts for sexually oriented offenses committed by the offender in two different counties, the sexual predator hearing may take place in any court that has sentenced the offender for a sexually oriented offense. Because the issue of determining appellant's status as a habitual sexual offender was never actually and directly in issue during one county's classification hearing, since appellant induced the court to ignore that issue, res judicata did not bar another county to determine classification because appellant's status as a habitual sexual offender was never determined by the other court.[1547]

8. Appeal of Sexual Predator Classification and Applicable Evidentiary Standard of Review

a) The civil manifest weight of the evidence standard provides the applicable standard of review.[1548]

[1544] State v. Jones, 8th Dist. No. 74503, 1999 WL 777901 (Sept. 30, 1999).

[1545] State v. Kelsor, 1st Dist. No. C-970499, 1998 WL 754317 (Oct. 30, 1998).

[1546] State v. Dick, 137 Ohio App.3d 260, 2000-Ohio-1685; State v. Zimmerman, 3rd Dist. Seneca No. 13-2000-20, 2000-Ohio-1717.

[1547] State v. Baird, 12th Dist. Butler No. CA2001-03-043, 2002-Ohio-1913.

[1548] State v. Wilson, 113 Ohio St.3d 382, 2007-Ohio-2202.

b) Prior to *Wilson*, Ohio appellate districts expressed disagreement regarding the applicable standard of review when considering a manifest weight challenge to a sexual predator classification.

(1) Certain appellate courts viewed the sexual predator classification hearing as civil in nature, and have applied the civil manifest weight standard of review set forth *in C.E. Morris Co. v. Foley Construction Co.*, 54 Ohio St.2d 279 (1978).[1549]

(A) First District
(B) Fourth District
(C) Fifth District
(D) Sixth District
(E) Eighth District

(2) Other appellate courts applied the criminal manifest weight standard set forth in *State v. Thompkins* (1997), 78 Ohio St.3d 380.[1550]

(A) Second District
(B) Third District
(C) Ninth District
(D) Tenth District
(E) Twelfth District

(3) At least one appellate district applied both standards.[1551]

(A) Eleventh District

[1549] *See, e.g.,* State v. Hunter, 144 Ohio App.3d 116, 121 (1st Dist. 2001); State v. Morris, 4th Dist. No. 99 CA 47, 2000 WL 1010822 (July 18, 2000); State v. McHenry, 5th Dist. Stark No. 2001CA00062, 2001 WL 1265598 (Oct. 15, 2000); State v. Parsons, 6th Dist. Huron No. H-00-042, 2001 WL 950043 (Aug. 17, 2001); State v. Vanek, 8th Dist. No. 89125, 2007-Ohio-6194.

[1550] *See* State v. Bolin, 2d Dist. No. 18605, 2001 WL 669825 (June 15, 2001); State v. Turner, 3rd Dist. Hancock No. 5-01-27, 2001 WL 1240134, 2001-Ohio-2292; State v. Sims, 7th Dist. Jefferson No. 99-JE-43, 99-JE-57, 2001-Ohio-3316; State v. Pryce, 9th Dist. Summit No. 19888, 2001-Ohio-2292; State v. Morrison, 10th Dist. No. 01AP-66, 2001 WL 1098086 (Sept. 20, 2001); State v. Dama, 11th Dist. No.2000-T-0086, 2001-Ohio-8811; State v. Benson, 12th Dist. Butler No. CA99-11-194, 2000 WL 1221851 (Aug. 28, 2000).

[1551] *See* State v. Bounthisavath, 11th Dist. Lake No. 2005-L-080, 2006-Ohio-2777 (discussing disagreement among appellate districts).

G. Presumptively Registration-Exempt Offenses - R.C. 2950.01(P)

1. GSI committed by an adult is a non-exempt sexually oriented offense.[1552]

2. Where an offender is convicted of a presumptively registration-exempt offense, the trial court must first overcome the presumption of exemption by complying with former R.C. 2950.021(A) before requiring registration. The court must issue an order containing its determination and include the order in the offender's sentence.[1553]

H. Child Victim Offenders

1. Child Victim Predator, R.C. 2950.01(U)

   a) Defendant convicted of GSI cannot be adjudicated child victim predator since GSI is not within statutory definition of child victim oriented offense under R.C. 2950.01(S)(1)(a)(i).[1554]

   b) A court can classify an offender as a child victim predator based on psychiatric tests even though the offense was non-sexual in nature.[1555]

2. Child Victim Oriented Offender, R.C. 2950.041

   a) H.B. 5 (sic) is constitutional, and facts showing abduction of 3 year-old support finding of child victim oriented offender.[1556]

[1552] State v. Cooper, 1st Dist. No. C-030921, 2004-Ohio-6428.

[1553] State v. Romeo, 11th Dist. Portage No. 2007-P-0066, 2008-Ohio-1499.

[1554] State v. Schuerman, 9th Dist. Lorain No. 03CA008468, 2004-Ohio-4581.

[1555] State v. Cheetham, 8th Dist. No. 94193, 2004-Ohio-6013 (good discussion of child victim classification); Sigler v. State, 5th Dist. Richland No. 08-CA-79, 2009-Ohio-2010 (rev'd. in part by In re Sexual-Offender Reclassification Cases, 126 OhioSt.3d 322, 2010-Ohio-3753); State v. Foreman, 5th dist. Coshocton No. 08-CA-0019, 2009-Ohio-2469; State v. Gallagher, 5th Dist. Coshocton No. 08 CA 0022, 2009-Ohio-2470.

[1556] State v. Alexander, 5th Dist. Stark No. 2004CA00206, 2005-Ohio-635.

I. Constitutionality of Ohio's Sexual Predator Statute

1. Ex Post Facto and Retroactivity Clauses

a) R.C. Ch. 2950 is neither unconstitutional as an ex post facto law under the U.S. Constitution nor as a retroactive law under the Ohio Constitution. This is because the registration and notification provisions are not "punishment," (so as to trigger constitutional issues); rather, these requirements are remedial.[1557] The 2003 version (S.B. 5) withstands these arguments following the changes brought about by 2008 S.B. 10, which implemented the Adam Walsh Act.[1558]

[1557] State v. Cook, 83 Ohio St. 3d 404, 1998-Ohio-291 (did not address double jeopardy, cruel and unusual punishment, equal protection, due process or vagueness). For other cases, *see* State v. Sturgeon, 131 Ohio App.3d 538 (1st Dist. 1998); State v. White, 2d Dist. Miami No. 98-CA-37, 1999 WL 1000000 (Nov. 5, 1999); State v. Cady, 3rd Dist. Crawford No. 3-98-14, 1998 WL 799213 (Nov. 5, 1998); State v. Myers, 4th Dist. Washington No. 97 CA 36, 1998 WL 729192 (Oct. 14, 1998); State v. Ridenbaugh, 5th Dist. Licking Nos. 97CA149, 97CA154, 97CA150, 97CA153, 1999 WL 436769 (May 27, 1999); State v. Ross, 6th Dist. Erie No. E-97-053, 1998 WL 785293 (Nov. 13, 1998); State v. Woodburn, 7th Dist. Columbiana No. 98 CO 6, 1999 WL 167848 (March 23, 1999); State v. Gregory, 8th Dist. No. E-97-053, 1999 WL 777860 (Sept. 30, 1999); State v. Baron, 156 Ohio App.3d 241, 2004-Ohio-747 (8th Dist.); State v. Markovitz, 9th Dist. Medina No. 2786-M, 1998 WL 852653 (Dec. 9, 1998); State v. White, 131 Ohio App.3d 587 (10th Dist. 1998); State v. Sizemore, 12th Dist. Butler No. CA97-10-192, 1998 WL 704312 (Oct. 12, 1998); State ex rel. White v. Billings, 139 Ohio Misc.2d 76, 2006-Ohio-4743 (Clermont Cty. Ct. Com. Pls.)(reversed on retroactivity grounds, 117 Ohio St.3d 536, 2008-Ohio-1590); Lyndhurst v. Rapoport, 8th Dist. No. 89270, 2007-Ohio-3406. But c.f. Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140 (2003) (Alaska Sex Offender Registration Law); State v. Kershner, 5th Dist. Ashland No. 06-COA-015, 2007-Ohio-5527; State v. Bursey, 8th Dist. No. 88924, 2007-Ohio-4847; State. v. Walton, 8th Dist. No. 89771, 2008-Ohio-3137.

[1558] State v. Ferguson, 120 Ohio St.3d 7, 2008-Ohio-4824; Sigler v. State, 5th Dist. Richland No. 08-CA-79, 2009-Ohio-2010; Cox v. State, 5th Dist. Richland No. 2008-CA-146, 2009-Ohio-3661; Bachman v. State, 5th Dist. Richland No. 08-CA-167, 2009-Ohio-3569; Razo v. State, 5th Dist. Richland No. 2008-CA-198, 2009-Ohio-3662; Pflaging v. State, 5th Dist. Richland No. 2008-CA-207, 2009-Ohio-3663; Culgan v. State, 5th Dist. Richland No. 08-CA-217, 2009-Ohio-3570; Golphin v. State, 5th Dist. Richland No. 2008-CA-0240, 2009-Ohio-3664; Alexander v. State, 5th Dist. Richland No. 08-CA-252, 2009-Ohio-3571; Ball v. State, 5th Dist. Richland No. 2008-CA-271, 2009-Ohio-3572; Bluford v. State, 5th Dist. Richland No. 2008-CA-295, 2009-Ohio-3264; Evans v. State, 5th Dist. Richland No. 08-CA-247, 2009-Ohio-3634; Milam v. State, 5th Dist. Richland No. 08-CA-300, 2009-Ohio-3573; Adams v. State, 5th Dist. Richland No. 08-CA-321, 2009-Ohio-3609.

(1) However, applying R.C. 2950.031 (now 2950.034) to persons (1) who were convicted before the statute's enactment is improper because R.C. 2950.31 does not contain express language of retroactivity.[1559]

(2) A defendant in prison, not then seeking to live within an area restricted by R.C. 2950.31, and who did not own property within the restricted area, is not injured by the operation of the statute and therefore cannot challenge its constitutionality. [1560] Such challenges are not ripe.[1561]

(3) Former R.C. 2950.09

b) The length of the offenders' sentence is irrelevant to these constitutional issues.[1562]

c) "Felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation."[1563]

[1559] Hyle v. Porter, 117 Ohio St.3d 165, 2008-Ohio-542 (deciding issue on grounds that statute failed to include express language of retroactivity). For arguments that a retroactive application of R.C. 2950.031 is unconstitutional, see State v. Mutter, 2d Dist. Montgomery No. 21374, 2007-Ohio-1052; Nasal v. Dover, 169 Ohio App.3d 262, 2006-Ohio-5584; State v. Bodyke, 126 Ohio St.3d 266, 2010-Ohio-2424. See, also, Welker v. State, 5th Dist. Richland No. 08-CA-262, 2009-Ohio-3632; State v. Green, 2d Dist. Montgomery Nos. 23326, 23307, 2010-Ohio-3448; Smith v. State, 5th Dist. Richland No. 08-CA-112, 2009-Ohio-3633 (judgments reversed in part by In re Sexual-Offender Reclassification Cases, 126 OhioSt.3d 322, 2010-Ohio-3753) State v. Williams, 2d Dist. Montgomery No. 22574, 2010-Ohio-3537; State v. Patterson, 8th Dist. No. 93096, 2010-Ohio-3715; State v. Butler, 5th Dist. Ashland No. 10 CA 5, 2010-Ohio-4619. For support of its retroactive application, see State v. Scanlon, 5th Dist. Licking No. 07 CA 17, 2007-Ohio-5133 (rejecting Mutter and Nasal and *citing* State ex rel. Yost v. Slack, 5th Dist. Delaware No. 06CAE030022, 2007-Ohio-1077; and Hyle v. Porter, 1st Dist. No. C-050768, 2006-Ohio-5454 for support of R.C. 2950.031's constitutionality) and Franklin Cty. Prosecuting Attorney v. Walker, 10th Dist. No. 07AP-165, 2007-Ohio-5095 (distinguishing pre-existing property rights addressed by Nasal and Mutter on grounds that defendant rented, rather than owned, his residence).

[1560] State v. Johnson, 8th Dist. No. 88600, 2007-Ohio-3072.

[1561] State v. Freer, 8th Dist. No. 89392, 2008-Ohio-1257.

[1562] State v. Epps, 1st Dist. No. C-830307, 1984 WL 6745 (Feb. 15, 1984).

[1563] State v. Lyttle, 12th Dist. Butler No. CA97-03-060, 1997 WL 786216 (Dec. 22, 1997), *quoting* State ex rel. Matz v. Brown, 37 Ohio St.3d 279 (1988).

d) Where a trial court earlier refused to hold a sexual predator hearing regarding a particular defendant because it ruled that R.C. § 2950.09 was unconstitutional under the retroactivity clause, but the Ohio Supreme Court later held otherwise, res judicata does not bar the trial court from holding another sexual predator hearing regarding that defendant.[1564]

e) The argument has also been made that R.C. Ch.2950 violates R.C. § 1.58, but this argument is virtually identical to the argument that it violates the Ohio Constitution's retroactive clause.[1565]

f) Because changes to R.C. 2950.09 over time have not changed its remedial character, courts need not revisit its constitutionality under the ex post facto or retroactivity clauses.[1566]

(1) However, note that each amendment to Ohio's SORN law appears to result in increased Supreme Court support for the minority position—that retroactive application of ever-harsher amendments to these statutes is becoming punitive in nature.[1567]

(2) Decision of the Ohio Supreme Court in State v. Smith that a conviction of a sexually violent offense could not support a specification that the offender was a sexually violent predator (SVP) if the conduct leading to the conviction and the sexually violent predator specification were charged in the same indictment did not apply retroactively to defendant's conviction on an SVP specification, where defendant's case

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[1564] State ex rel. Miller v. Reed, 87 Ohio St.3d 159 1999-Ohio-315. *See* State v. Cook, 83 Ohio St. 3d 404, 1998-Ohio-291 (holding that R.C. § 2950.09 does not to violate the state retroactivity clause).

[1565] State v. Ramsey, 12th Dist. Clermont No. CA97-03-025, 1997 WL 786198 (Dec. 22, 1997); State v. Nicholas, 12th Dist. Warren No. CA97-05-045, 1998 WL 166436 (Apr. 6, 1998); State v. Myers, 4th Dist. Washington No. 97 CA 36, 1998 WL 729192 (Oct. 14, 1998). *Cf.*, State v. Bradley, 2d Dist. Montgomery Nos. 16662, 16664, 1998 WL 321306 (June 19, 1998).

[1566] State v. Ford, 10th Dist. No. 07AP-221, 2007-Ohio-6855.

[1567] *See dissent*, State v. Ferguson, 120 Ohio St.3d 7, 2008-Ohio-4824 (4-3 decision upholding S.B. 5 amendments against ex post facto and retroactivity clause challenge).

was no longer pending when the Supreme Court decided Smith.[1568]

2. Double Jeopardy Clause

a) R.C. § 2950.09 does not violate the double jeopardy clause because the registration and notification requirements are not punishment.[1569]

3. Due Process and Equal Protection:

a) R.C. § 2950 does not violate the due process and equal protection clauses; "rational basis" review is appropriate because sexual predators are not a suspect class. Ohio's laws do bear a rational relationship to a legitimate government interest.[1570]

b) A trial court's decision to proceed with a defendant's sexual predator hearing, after it found that defendant was incompetent, is a violation of the due process rights granted to defendant in R.C. 2950.09;

[1568] State v. Stansell, ___ Ohio St.3d ___, 2014-Ohio-1633, 10 N.E.3d 795.

[1569] State v. Lance, 1st Dist. No. C-970301, 1998 WL 57359 (Feb. 13, 1998); State v. Bradley, 2d Dist. Montgomery Nos. 16662, 16664, 1998 WL 321306 (June 19, 1998); State v. Anderson, 135 Ohio App.3d 759 (3rd Dist. 1999); State v. Penix, 4th Dist. Jackson No. 831, 1999 WL 129645 (Mar. 9, 1999); State v. Ridenbaugh, 5th Dist. Licking Nos. 97CA149, 97CA154, 97CA150, 97CA153, 1999 WL 436769 (May 27, 1999); State v. Young, 6th Dist. Lucas No. L-97-1325, 1998 WL 735342 (Oct. 19, 1998); State v. Woodburn, 7th Dist. Columbiana No. 98 CO 6, 1999 WL 167848 (March 23, 1999); State v. Gregory, 8th Dist. No. 74859, 1999 WL 777860 (Sept. 30, 1999); State v. Gropp, 9th Dist. Lorain No. 97CA006744, 1998 WL 162853 (Apr. 8, 1998); State v. White, 131 Ohio App.3d 587 (10th Dist. 1998); State v. Naegele, 12th Dist. Clermont No. CA97-04-043, 1998 WL 8684 (Jan. 12, 1998); State v. Foreman, 5th Dist. Coshocton No. 08 CA 0019, 2009-Ohio-2469; State v. Gallagher, 5th Dist. Coshocton No. 08 CA 0022, 2009-Ohio-2470; Sewell v. State, 181 Ohio App.3d 280, 2009-Ohio-872 (1st Dist.).

[1570] State v. Sturgeon, 131 Ohio App.3d 538 (1st Dist. 1998); State v. Thomas, 2d Dist. Greene No. 97 CA 86, 1998 WL 401838 (Mar. 27, 1998); State v. Bradley, 3rd Dist. Logan No. 8-99-07, 1999 WL 824616 (Oct. 13, 1999); State v. Ridenbaugh, 5th Dist. Licking Nos. 97CA149, 97CA154, 97CA150, 97CA153, 1999 WL 436769 (May 27, 1999); State v. Kershner, 5th Dist. Ashland No. 06-COA-015, 2007-Ohio-5527; State v. Redden, 6th Dist. Lucas No. L-98-1087, 1999 WL 739671 (Mar. 19, 1999); State v. Woodburn, 7th Dist. Columbiana No. 98 CO 6, 1999 WL 167848 (March 23, 1999); State v. Ward, 130 Ohio App.3d 551 (8th Dist. 1999); State v. Jameson, 9th Dist. Lorain No. 97CA006704, 1998 WL 193489 (Apr. 22, 1998); State v. White, 131 Ohio App.3d 587 (10th Dist. 1998); State v. Nicholas, 12th Dist. Warren No. CA97-05-045 1998 WL 166436 (Apr. 6, 1998).

however, there is no due process violation, if conviction mandates automatic classification under the statute.[1571]

c) R.C. § 2950 does not violate substantive due process by violating defendants' right to privacy because the conviction is already a matter of public record.[1572]

d) Out-of-state sex offender bringing petition for reclassification in Ohio had procedural due process right to hearing to determine likelihood of recidivism.[1573]

e) Defendant has no standing to raise the issue of whether it is a denial of due process to classify an offender convicted prior to the effective date of the statute as a sexual predator where the offense was not previously considered a sex offense, because such offenses as rape and gross sexual imposition are clearly sex offenses.[1574]

f) One court, although refusing to declare the statute facially invalid, held that the registration requirements of R.C. §§ 2950.04-.06 violate the due process and equal protection clauses as applied to defendants classified as sexually oriented offenders, reasoning that unlike sexual predators, other sexually oriented offenders have not been shown to be at risk of re-offending.[1575] However, the First District Court of Appeals has since overruled this holding.[1576]

[1571] State v. Chambers, 151 Ohio App.3d 243, 2002-Ohio-7345 (11th Dist.).

[1572] State v. Roy, 12th Dist. Butler No. CA97-11-216, 1998 WL 667668 (Sept. 28, 1998).

[1573] State v. Pasqua, 157 Ohio App.3d 427, 2004-Ohio-2992 (1st Dist.).

[1574] State v. Ridenbaugh, 5th Dist. Licking Nos. 97CA149, 97CA154, 97CA150, 97CA153, 1999 WL 436769 (May 27, 1999) and State v. Reddish, 2d Dist. Montgomery No. 22866, 2009-Ohio-3643.

[1575] State v. Boeddeker, 1st Dist. No. C-970471, 1998 WL 57234 (Feb. 13, 1998). *See also* State v. Lindsay, 1st Dist. No. C-970525, 1998 WL 226396 (May 8, 1998); State v. Ferris, 12th Dist. Warren No. CA98-03-035, 1998 WL 568608 (Sept. 8, 1998); State v. Anthony, 1st Dist. No. C-03-510, 2004-Ohio-3894. Other courts have, of course, rejected this. *See, e.g.*, State v. Fleck, 6th Dist. Lucas No. L-98-1249, 1999 WL 682583 (Sept. 3, 1999); State v. Redden, 6th Dist. Lucas No. L-98-1087, 1999 WL 739671 (Mar. 19, 1999); *see also,* State v. Hayden, 96 Ohio St.3d 211, 2002-Ohio-4169.

[1576] State v. Cooper, 1st Dist. No. C-030921, 2004-Ohio-6428; *See also*, State v. Meredith, 12th Dist. No. CA2004-06-062, 2005-Ohio-2664.

g) Failure to conduct hearing to determine sexually oriented offender does not violate due process.

h) Trial court's conducting sexual predator hearing so far in advance of rape defendant's release from prison does not violate due process given that defendant had option of petitioning, within one year prior to his release from prison, a determination that he was no longer a sexual predator.[1577]

i) The statutory scheme set forth in R.C. 2950.01 et seq. does not violate constitutional guarantees of due process of law and equal protection under the law as it provides sufficient guidance to the trial court regarding application of the factors listed in R.C. 2950.09(B)(2).[1578]

j) The absence of written notice of the evidence and reasoning underlying a corrections department's recommendation that a defendant be found to be a sexual predator, does not deprive a defendant of procedural due process. R.C. 2950.09 affords the offender adequate notice and opportunity to defend.[1579]

k) R.C. Chapter 2950 does not violate equal protection in its application to juvenile offenders.[1580]

l) Defendants lack standing to challenge the residency restrictions of R.C. 2950.031 where they show no evidence that they reside within a prohibited area at the time of classification. Additionally, failure to

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[1577] State v. Hills, 8th Dist. No. 78546, 2002-Ohio-497. *See also* State v. Steele, 8th Dist. No. 76205, 2000 WL 1281246 (Sept. 7, 2000); State v. Green, 8th Dist. No. 77771, 2001 WL 428270 (Apr. 26, 2001); State v. Abelt, 144 Ohio App.3d 168 (8th Dist. 2001).

[1578] Id; State v. Steele, 8th Dist. No. 76205, 2000 WL 1281246 (Sept. 7, 2000); State v. Wilson, 12th Dist. Fayette No. CA99-09-024, 2000 WL 1693493 (Nov. 3, 2000), cited with approval by State v. Copeland, 8th Dist. Nos. 77333, 77500, 77501, 77502, 77517, 2000 WL 1847566 (Dec. 18, 2000). *See also* State v. Green, 8th Dist. No. 77771, 2001 WL 428270 (Apr. 26, 2001); State v. McKinney, 8th Dist. No. 77659, 2001 WL 66234 (Jan 25, 2001); State v. Gibson, 8th Dist. No. 76875, 2000 WL 1800630 (Dec. 7, 2000).

[1579] Id. *See also* State v. Copeland, 8th Dist. Nos. 77333, 77502, 77500, 77517, 77501, 2000 WL 1847566; State v. McKinney, 8th Dist. No. 77659, 2001 WL 66234 (Jan 25, 2001).

[1580] In re Goodman, 161 Ohio App.3d 192, 2005-Ohio-2364 (11th Dist.); In re M.H., 9th Dist. Wayne No. 07CA0037, 2007-Ohio-7045.

raise a due process argument to the residency restrictions at the trial court level results in waiver.[1581]

4. Vagueness:

   a) R. C. Ch.2950 is not void for vagueness.[1582]

   b) Specifically, § 2950.09(C)(2)(b)(ii), regarding the notification requirements of an habitual sex offender, is not void for vagueness. Although the judge has discretion in making the determination, that is appropriate as a habitual offender is somewhere between a sexually oriented offender, who is not subject to the notification requirement, and a sexual predator, who is. Furthermore, the judge's discretion is not unbridled as the determination must be rationally related to the furtherance of public safety.[1583]

5. Eighth Amendment:

   a) The registration and notification requirements of R.C. Ch. 2950 do not constitute cruel and unusual punishment under the 8th Amendment because they are not punishment; rather, they are remedial measures designed to ensure the safety of the public.[1584]

[1581] State v. Walton, 8th Dist. No. 89771, 2008-Ohio-3137; State v. Huddleston, 8th Dist. No. 90494, 2008-Ohio-4222. *See also* State v. Bruce, 8th Dist. No. 89641, 2008-Ohio-926 (discussing waiver).

[1582] State v. Williams, 88 Ohio St.3d 513, 2000-Ohio-428; State v. Sturgeon, 131 Ohio App.3d 538 (1st Dist. 1998); State v. Fortman, 2d Dist. Montgomery Nos. 16565, 16569, 1998 WL 135811 (Mar. 27, 1998); State v. Avery, 126 Ohio App.3d 36 (3rd Dist. 1998); State v. Meade, 4th Dist. Scioto No. 98CA2566, 1999 WL 299890 (April 30, 1999); State v. Ridenbaugh, 5th Dist. Licking Nos. 97CA149, 97CA154, 97CA150, 97CA153, 1999 WL 436769 (May 27, 1999); State v. Kanavel, 6th Dist. Lucas No. L-97-1455, 1999 WL 63661 (Feb. 12, 1999); State v. Woodburn, 7th Dist. Columbiana No. 98 CO 6, 1999 WL 167848 (March 23, 1999); State v. Gregory, 8th Dist. No. 74859, 1999 WL 777860 (Sept. 30, 1999); State v. Burke, 9th Dist. Lorain No. 97CA006781, 1999 WL 247210 (Apr. 28, 1999); State v. White, 131 Ohio App.3d 587 (10th Dist. 1998); State v. Dunaway, 12th Dist. Butler No. CA2001-12-280, 2003-Ohio-1062; State v. Ramsey, 12th Dist. Clermont No. CA97-03-025, 1997 WL 786198 (Dec. 22, 1997).

[1583] State v. Sanders, 12th Dist. Clermont No. CA99-07-069, 2000 WL 630822 (May 15, 2000).

[1584] State v. Douglas, 66 Ohio App.3d 788 (2d Dist. 1989); State v. Ridenbaugh, 5th Dist. Licking Nos. 97CA149, 97CA154, 97CA150, 97CA153, 1999 WL 436769 (May 27, 1999); State v. Gregory, 8th Dist. No. 74859, 1999 WL 777860 (Sept. 30, 1999); State v.

6. Bill of Attainder:

    a) R.C. § 2950.01 is not an unconstitutional Bill of Attainder.[1585]

7. Ohio Constitution Article I, Section 1:

    a) R.C. Ch. 2950 does not violate Section I, Article I of the Ohio Constitution.[1586]

8. Separation of Powers Doctrine:

    a) R.C. 2950.09 (B)(2) does not encroach upon the trial court in its fact-finding authority and thus does not violate the separation of powers doctrine.

        (1) A trial judge must consider the guidelines set out in R.C. 2950.09(B)(2), but it has discretion to determine what weight, if any, he or she will assign to each guideline.

        (2) Pursuant to R.C. 2950.09(B)(2), a judge may also consider any other evidence that he or she deems relevant to determining the likelihood of recidivism.[1587]

        (3) Courts may consider recidivism rates or statistics as they might impact on a sexual predator classification for a particular offense.[1588]

9. Privacy:

Nicholas, 12th Dist. Warren No. CA97-05-045, 1998 WL 166436 (Apr. 6, 1998); State v. Blankenship, 2d Dist. Clark No. 2012-CA-74, 2014-Ohio-232.

[1585] State v. Gregory, 8th Dist. No. 74859, 1999 WL 777860 (Sept. 30, 1999); State v. Smith, 5th Dist. Perry No. CA98-2, 1999 WL 547914 (June 30, 1999).

[1586] State v. Williams, 88 Ohio St.3d 513, 2000-Ohio-428, reversing State v. Williams, 11th Dist. Lake No. 97-L-191, 1999 WL 76633 (Jan. 29, 1999).

[1587] State v. Thompson, 92 Ohio St.3d 584, 2001-Ohio-1288.

[1588] State v. Ellison, 8th Dist. No. 78256, 2002-Ohio-4024. *See also* State v. Hill, 8th Dist. No. 78546, 2000 WL 222121 (Feb. 7, 2000); State v. Eppinger, 91 Ohio St.3d 158, 2001-Ohio-247.; State v. Krueger, 8th Dist. No. 76624, 2000 WL 1876391 (Dec. 19, 2000).

a) Notification provisions of the sexual predator law do not violate any fundamental right to privacy; offender has reduced expectation of privacy, given public's interest in public safety, any right would only extend to personal information, not information available to the public in public records, and law applies only to those offenders found likely to repeat their offenses.[1589]

10. Sixth Amendment:

a) Because R.C. Chapter 2950 is neither criminal nor punitive in nature, the Sixth Amendment rights that an accused would enjoy during criminal prosecutions do not attach to a sexual predator hearing. The judicial fact-finding made pursuant to R.C. Chapter 2950 does not run afoul of the proscription against imposing a sentence greater than that allowed by the jury verdict or by the accused's admissions at a plea hearing.[1590]

b) Speedy trial rights do not apply to sexual predator determinations because such proceedings are civil in nature. Nothing prevented an incarcerated offender from withdrawing his earlier request to close the record and asking to supplement the record with additional evidence for the court's consideration during a four year delay in classification. While the delay of over four years from hearing to classification was substantial, the offender did not demonstrate prejudice.[1591]

11. Constitutionality of Similar Statutes in Other States:

a) *Tennessee*: Sexual Offender Registration and Monitoring Act, Tenn. Code §§ 40-39-101 et seq., requires sex offenders to register with law enforcement agencies, and allows law enforcement officials to release registry information when necessary to protect the public.

(1) The Act's registration and notification provisions do not violate the federal Constitution's Double Jeopardy, Ex Post Facto, Bill of Attainder, Equal Protection and Due Process

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[1589] State v. Ward, 130 Ohio App.3d 551 (8th Dist. 1999); State v. High, 143 Ohio App.3d 232, 2001-Ohio-3530 (7th Dist.).

[1590] State v. Snow, 1st Dist. No. C-060963, 2007-Ohio-6338, referencing Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2541 (2004). *See also* State v. Harrison, 12th Dist. Madison No. CA2006-08-028, 2007-Ohio-7078 (finding principles of State v. Foster inapplicable to non-punitive civil legislation such as R.C. 2950.09).

[1591] State v. Croft, 10th Dist. No. 07AP-563, 2007-Ohio-7013.

Clauses; the 8th Amendment' prohibition of cruel and unusual punishment; or the federal constitutional right to interstate travel; and there is no Tennessee State constitutional right to the non-disclosure of private facts.[1592]

b) *Alaska*: *Smith v. Doe* (2003), 538 U.S. 84, 123 S.Ct. 1140 (set criteria for determining whether sexual offense registration act is non-punitive and therefore retroactively applied).

J. The Adam Walsh Act (the "AWA") (S.B. 10)

1. Background:

a) Effective as of January 1, 2008, the AWA replaced Ohio's previous three-tiered sexual offender designations by a three-tiered classification scheme. *See* R.C. 2950 *et seq*.

b) Tier designations under the AWA are determined solely by the type of offense committed by the offender, and not by the offender's likelihood of recidivism.

c) The AWA applies retrospectively to crimes committed before its effective date.

(1) That said, an offender who was convicted and sentenced under Megan's Law is not subject to classification and registration duties under the AWA but is subject to the classifications and restrictions originally imposed by Megan's Law.[1593]

d) AWA does not consider an offender's propensity to reoffend.[1594]

2. Early Issues Arising Under the AWA:

a) Where the trial court does not inform an offender of post-release control during the original pre-AWA sentencing hearing, the

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[1592] Cutshall v. Sundquist, 193 F.3d 466 (6th Cir.1999) (*but see* the dissent of Jones, C.J., averring that the guarantees of the 14th Amendment Due Process Clause require at least a hearing be held prior to the public disclosure of a sex offender's registration and verification information).

[1593] State v. Grimes, 2d Montgomery No. 25375, 2013-Ohio-2569.

[1594] State v. Jones, 7th Dist. Mahoning No. 07 MA 58, 2008-Ohio-6078.

defendant's sentence is void. At rehearing after the AWA's effective date, the trial court does not have the authority to reclassify the offender under the AWA's tier system. By statute, responsibility for AWA reclassification falls to the attorney general.[1595]

b) For a good example of the interplay between the prior and current registration and community notification requirements, see *State v. Clay*, 177 Ohio App.3d 78, 2008-Ohio-2980.

(1) Trial court's reliance on AWA in classifying offender as sexual predator prior to January 1, 2008 improper.[1596]

c) At least one court has found that challenges to a sexual predator determination was rendered moot by the subsequent effectiveness of the AWA and defendant's automatic reclassification as a Tier II sex offender.[1597]

d) A challenge to reclassification is "premature" if the challenger was not classified under the AWA at the time of filing the challenge.[1598]

e) Legislature would have explicitly provided its desire to have six-month hiatus between July 1, 2007 and January 1, 2008 for the numerous sections of the Revised Code affected by Senate Bill 10.[1599]

f) R.C. 2950.11(F)(2) provides that the notification requirements of the AWA will not apply to a person who would not have been subject to the notification requirements under the prior law. [1600]

(1) If the legislature intended R. C. 2950(11)(F)(2) to apply to only persons previously classified under the prior law, then the

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[1595] State v. Williams, 9th Dist. Lorain No. 08CA009350, 2008-Ohio-3586.

[1596] State v. Clay, 177 Ohio App.3d 78, 2008-Ohio-2980 (1st Dist.).

[1597] State v. Graves, 4th Dist. Ross No. 07CA3004, 2008-Ohio-5763; State v. Jones, 7th Dist. Mahoning No. 07 MA 58, 2008-Ohio-6078.

[1598] State v. Snyder, 9th Dist. Summit No. 23969, 2009-Ohio-1057.

[1599] In re E.L., 8th Dist. No. 90848, 2008-Ohio-5094; In the Matter of S.R.P., 12th Dist. Butler No. CA2007-11-027, 2009-Ohio-11.

[1600] R.C. 2950.11(F)(2); *see also* State v. McConville, 9th Dist. Lorain No. 08CA009444, 2009-Ohio-1713.

legislature could have included language imposing such a limitation. [1601]

g) A defendant receives effective assistance of counsel where, even though counsel cited the wrong law, the defendant was properly reclassified under the AWA.[1602]

3. Juvenile Classification Issues Under the AWA:

a) S.B. 10 provides a juvenile court with full discretion to determine whether to classify a delinquent child as a Tier I, II, or III offender, because it does not forbid a juvenile court from considering multiple factors when classifying a delinquent child.[1603]

b) Where a juvenile's case was remanded to juvenile court for a classification error under the former law, his reclassification under the newly effective AWA provisions did not result in a "resentencing"—instead, the juvenile court merely corrected its previous classification error by applying the law in effect at the time of the January 2008 hearing.[1604]

(1) Reversal and remand proper where it is unclear whether a juvenile court used its discretion in classifying a juvenile offender under the AWA.[1605]

c) Juvenile court has no authority under R.C. 2950.11(A) and R.C. 2152.83(C)(2) to impose community notification on a juvenile classified as a Tier II juvenile sex offender. [1606]

4. Constitutional Challenges to the AWA:

a) The mere effectiveness of the AWA does not provide an offender with standing to challenge its constitutionality—the offender must first

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[1601] State v. McConville, *supra*.

[1602] State v. Glosson, 12th Dist. Butler No. CA2013-05-082, 2014-Ohio-1321, ¶ 13.

[1603] In re G.E.S., 9th Dist. Summit No. 24079, 2008-Ohio-4076; *see also* In re P.M., 8th Dist. No. 91922, 2009-Ohio-1694.

[1604] In re A.R., 12th Dist. Warren No. CA2008-03-036, 2008-Ohio-6566.

[1605] Id; *see also* In the Matter of S.R.P., *supra*.

[1606] In re P.M., *supra*.

actually be reclassified under the AWA before suffering an alleged injury.[1607]

b) Retroactivity Clause

(1) Early challenges to the AWA on the grounds of retroactivity have been rejected.[1608]

(2) Recently, the Seventh, Eighth, and Tenth District Courts of Appeals found that the AWA was unconstitutional as applied retroactively to a defendant whose offense occurred before the law was enacted.[1609]

c) Ex Post Facto Clause

(1) Early challenges to the AWA under the Ex Post Facto Clause of the Ohio Constitution have been rejected.[1610]

d) Separation of Powers

[1607] State v. Taft, 6th Dist. Wood No. WD-07-059, 2008-Ohio-5790.

[1608] In re E.B., 9th Dist. Summit No. 24148, 2008-Ohio-5441; State v. Williams, 12th Dist. Warren No. CA2008-02-029, 2008-Ohio-6195; In re A.R., 12th Dist. Warren No. CA2008-03-036, 2008-Ohio-6566; State v. Randlett, 4th Dist. Ross. No, 08CA3046, 2009-Ohio-112; State v. Christian, 10th Dist. No. 08AP-170, 2008-Ohio-6304; State v. Ellis, 8th Dist. No. 90844, 2008-Ohio-6283; State v. Moore, 2d Dist. Greene No. 07CA093, 2008-Ohio-6238; State v. Netherland, 4th Dist. Ross No. 08CA3043, 2008-Ohio-7007; State v. Bodyke, 6th Dist. Huron Nos. H-07-040, H-07-041, H-07-042, 2008-Ohio-6387; State v. Coburn, 4th Dist. Ross No. 08CA3062, 2009-Ohio-632; State v. Sewell, 4th Dist. Ross No. 08CA3042, 2009-Ohio-594; State v. Ohler, 6th Dist. Huron No. H-08-010, 2009-Ohio-665; State v. Henning, 6th Dist. Ottawa No. OT-08-035, 2009-Ohio-1466; Ritchie v. State, 12th Dist. Clermont No. CA2008-07-073, 2009-Ohio-1841; Moran v. State, 12th Dist. Clermont No. CA2008-05-057, 2009-Ohio-1840; Brooks, et al., v. State, et al., 9th Dist. Lorain No. 08CA009452, 2009-Ohio-1825; State v. Lee, 8th Dist. No. 91285, 2009-Ohio-1787; Downing v. State, 3rd Dist. Logan No. 8-08-29, 2009-Ohio-1834; Toney v. State, 8th Dist. Nos. 91582-91585, 91588-91596, 91870-91872, 2009-Ohio-1881; Sigler v. State, 5th Dist. Richland No. 08-CA-79, 2009-Ohio-2010; In re T.C.H., 9th Dist. Summit Nos. 24130, 24131, 2008-Ohio-6614.

[1609] State v. Worley, 7th Dist. Belmont No. 13 BE 8, 2014-Ohio-2465, ¶ 7-8; State v. Buckwald, 8th Dist. 8th Dist. No. 10629, 2014-Ohio-1953, ¶ 5; State v. Salser, 10th Dist. 10th Dist. No. 12AP-792, 2014-Ohio-87, ¶ 9.

[1610] Id.

(1) Early challenges to the AWA under the principle of Separation of Powers have been rejected.[1611]

e) Due Process Clause

(1) Early challenges to the AWA under due process have been rejected.[1612]

f) Cruel and Unusual Punishment

(1) Early challenges to the AWA under the principle of cruel and unusual punishment have been rejected.[1613]

g) Double Jeopardy Clause

(1) Early challenges to the AWA under the concept of double jeopardy have been rejected.[1614]

h) Contract Clause

(1) Plea agreements are contracts between the state and criminal defendants are subject to contract law principles.[1615]

(A) Ohio Constitution: "the general assembly shall have no power to pass laws impairing the obligations of contracts."[1616]

(B) Federal Constitution: "no state shall…pass any…law impairing the obligation of contracts."[1617]

[1611] Id.

[1612] State v. Williams, 12th Dist. Warren No. CA2008-02-029, 2008-Ohio-6195; In re A.R., 12th Dist. Warren No. CA2008-03-036, 2008-Ohio-6566.

[1613] State v. Williams, 12th Dist. Warren No. CA2008-02-029, 2008-Ohio-6195.

[1614] Id.; In re A.R., 12th Dist. Warren No. CA2008-03-036, 2008-Ohio-6566.

[1615] State v. Netherland, 4th Dist. Ross No. 08CA3043, 2008-Ohio-7007.

[1616] Ohio Constitution, Article II, Sec. 28.

[1617] United States Constitution, Article I, Sec. 10.

(2) Once a defendant has pled guilty to the offense charged and the trial court has sentenced him, both the defendant and the state have performed their respective parts of the plea agreement. Consequently, no action by the state after this date could have breached the plea agreement.[1618]

(3) Additionally, the prosecution, as a member of the executive branch, could not enter into an agreement that would abrogate the right of the Ohio legislature to revise the classification scheme.[1619]

i) It was error for the trial court to classify defendant as a sex offender under R.C. Chapter 2950 as amended by Senate Bill 10 because defendant committed and pleaded guilty to a violation of R.C. 2907.323(A)(3), which was not a sexually oriented offense subject to registration at the time.[1620]

j) It was error for trial court to apply the Adam Walsh Act to defendant because defendant commenced registration on May 7, 1997 upon the directive of the State of Ohio despite the trial court's order defendant register prior to July 15, 2007. The state prior to his release from jail that defendant continue to register for the next ten years. Therefore duty to register ceased in May of 2007. The Act required prior offenders whose duty to register terminated after July 1, 2007 but prior to January 1, 2008 to comply with the reclassification.[1621]

[1618] State v. Pointer, 8th Dist. No. 85195, 2005-Ohio-3587; State v. Netherland, *supra*; State v. Bodyke, *supra*; State v. Ohler, *supra*.

[1619] Ritchie v. State, *supra*, *citing* Slagle v. State, 145 Ohio Misc.2d 98, 2008-Ohio-593 (Clermont Cty. Ct. Com. Pls.).

[1620] State v. Bloom, 1st Dist. No. C-080068, 2009-Ohio-1371, *citing* State v. Cook, 2d Dist. Miami No. 2008 CA 19, 2008-Ohio-6543.

[1621] State v. Hagedorn, 5th Dist. Stark No. 2009CA00152, 2010-Ohio-2758.

VII. SEXUALLY VIOLENT PREDATOR CLASSIFICATION UNDER R.C. CHAPTER 2971

A. Generally

1. R.C. § 2971.02 is a penalty provision that enhances an offender's sentence and must be proven by evidence beyond a reasonable doubt. [1622]

2. As such, R.C. 2971.01(H) occupies a distinctly punitive role separate from the remedial concerns attached to civil sexual offender classifications.[1623]

3. R.C. § 2971.01 sets forth the factors to be considered in determining who is a sexually violent predator.

   a) The offense must occur on or after January 1, 1997;

   b) The offense must be sexually violent; and

   c) It is likely that the offender will engage in at least one more sexually violent offense in the future.[1624]

4. The language of the current statute does not require the offender to have been convicted of a previous sexually violent offense at the time of the indictment—only that the sexually violent offense was committed after January 1, 1997. The classification may therefore apply to first-time offenders.[1625]

5. R.C. 2941.148 provides the requirements for an indictment containing a sexually violent predator specification:

   > "A specification * * * that an offender is a sexually violent predator shall be stated at the end of the body of the indictment, count, or information and shall be stated in substantial the following form: SPECIFICATION (OR, SPECIFICATION TO THE FIRST COUNT). The grand jury (or insert person's or prosecuting attorney's name

[1622] State v. Ward, 130 Ohio App.3d 551 (8th Dist. 1999).

[1623] State v. Hardges, 9th Dist. Summit No. 24175, 2008-Ohio-5567.

[1624] Id.

[1625] Id.

when appropriate) further find and specify that the offender is a sexually violation predator."[1626]

6. In determining whether a person is likely to commit a sexually violent offense in the future, the trier of fact may consider any of the following as evidence:

   a) The person has been convicted two or more times, in separate criminal actions, of a sexually oriented offense or a child-victim oriented offense. However, note that convictions resulting from or connected with the same act or from offenses committed at the same time are one conviction. Convictions set aside pursuant to law are also not convictions.

   b) The person has a documented history from childhood, into the juvenile developmental years, that exhibits sexually deviant behavior.

   c) Available information or evidence suggests that the person chronically commits offenses with a sexual motivation.

   d) The person has committed one or more offenses in which the person has tortured or engaged in ritualistic acts with one or more victims.

   e) The person has committed one or more offenses in which one or more victims were physically harmed to the degree that the particular victim's life was in jeopardy.

   f) Any other relevant evidence.[1627]

7. Evidence that defendant was convicted in 1997 for statutory sexual assault of a 12 year-old girl, as well as the testimony of others alleging additional violent sexual acts, supports the trial court's finding that defendant is likely to engage in other sexually violent offenses in the future.[1628]

8. Where the defendant is acquitted of the sexually violent predator specification, the court cannot classify the defendant as a predator.[1629]

[1626] *See also* State v. Bruce, 8th Dist. No. 90897, 2009-Ohio-1067.

[1627] R.C. 2971.01(H)(2).

[1628] State v. Tayse, 9th Dist. Summit No. 23978, 2009-Ohio-1209.

[1629] State v. Jones, 93 Ohio St.3d 391, 2001-Ohio-1341. Effective 5/7/02 per SB 175, Court now has jurisdiction to do so.

9. R.C. 2971.01(H)(2)(c) and (f) explicitly permit a trial court judge to consider available information or evidence that suggests the person chronically commits offenses with a sexual motivation and any other relevant evidence. These provisions allowed the judge to consider the evidence presented during the trial to discern whether the defendant was a sexually violent predator. Trial counsel is not ineffective for failing to object because it can be presumed that trial counsel knows such an objection would be futile.[1630]

10. The General Assembly specifically amended R.C. 2971.01(H)(1) to its current version, which defines a [sexually violent predator] as a "person who, * * * *commits* a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses." Thus, the statute now provides that a sexually violent offense in the current indictment can be the basis for the sexually violent predator specification. The prior version of the statute defined a sexually violent predator as, "a person *who has been convicted of or pleaded guilty to committing* * * * *a sexually violent offense* and is likely to engage in the future in one or more sexually violent offenses," which meant that a trial court could not rely on the present conviction to establish that the defendant had been convicted twice or more to justify the sexually violent predator classification.[1631]

[1630] State v. Price, 8th Dist. No. 99058, 2014-Ohio-2047, ¶ 16.

[1631] State v. Blair-Walker, 11th Dist. Portage No. 2012-P-0125, 2013-Ohio-4118.