[Cite as *State v. Fortson*, 2010-Ohio-2337.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92337

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHNNY FORTSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED
AND MODIFIED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511654

BEFORE: Sweeney, J., Kilbane, P.J., and Stewart, J.

RELEASED: May 27, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Johnny Fortson ("defendant"), appeals his convictions for multiple sexual offenses. After reviewing the facts of the case and pertinent law, we affirm in part, and reverse and modify in part.

{¶ 2} In 2006 and 2007, defendant was employed as a relief corrections officer at Northeast Prerelease Center ("NPC"), a minimum security state prison facility for female offenders. A relief officer is not assigned to a particular unit within the prison; rather, he or she is assigned to different areas as needed. Defendant's job duties included checking the inmates' rooms every 30 minutes and recording these checks in a log book.

{¶ 3} In November 2007, Melissa Cantoni, who is an institutional investigator for NPC, received an anonymous letter from an inmate that sparked both an administrative and a criminal investigation of defendant's conduct. Per NPC's policy, Cantoni alerted the Ohio State Patrol, who assigned investigator Thomas Shevlin to work on the criminal investigation of defendant.

{¶ 4} As part of the administrative investigation, Cantoni viewed six day's worth of footage from NPC's security cameras and compared defendant's whereabouts to the entries in his log book for the same period. Cantoni found 98 entries in defendant's log book noting routine security checks that did not match up with defendant's whereabouts in the videos. Cantoni also discovered that defendant spent unauthorized time in an inmate's room, bringing her coffee and dancing for her, which is against NPC's policy.

{¶ 5} Cantoni interviewed defendant about these alleged infractions. Defendant denied any wrongdoing. In February 2008, NPC placed defendant on administrative leave and ultimately terminated his employment.

{¶ 6} Meanwhile, Shevlin conducted the criminal investigation, which is the subject of this appeal. The investigation also stemmed from the anonymous letter, which alleged that defendant committed sexual offenses against an NPC inmate. Shevlin instructed Cantoni to review the paperwork of released inmates to see if there was any additional information that might be useful to the investigation.

{¶ 7} As a result, Cantoni supplied Shevlin with the names of several former inmates. Shevlin began interviewing these women, some of whom provided him with the names of additional inmates who had information regarding defendant's sexual misconduct with various NPC inmates. Overall, Shevlin interviewed 27 women and received 12 written statements. Shevlin compiled a list of victims and turned it over to the prosecutor's office.

{¶ 8} On June 13, 2008, defendant was charged with four counts of rape in violation of R.C. 2907.02(A)(2); four counts of sexual battery in violation of R.C. 2907.03(A)(6); and 12 counts of gross sexual imposition ("GSI") in violation of R.C. 2907.05(A)(1). The charges involved six victims who were all inmates at NPC at the time of the offenses.

{¶ 9} On October 1, 2008, a jury found defendant guilty of three counts of rape, three counts of sexual battery, and three counts of GSI. Defendant was found not guilty of one count of GSI and the remaining charges were dismissed.

On October 3, 2008, the court sentenced defendant to an aggregate of seven years in prison.

{¶ 10} Defendant appeals and raises 12 assignments of error for our review, some of which shall be addressed together and out of order where appropriate.

{¶ 11} "I. Defendant was denied due process of law when he was convicted for offenses of rape, sexual battery, [and] gross sexual imposition on an indictment which failed to allege a culpable mental state."

{¶ 12} In *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, the Ohio Supreme Court held that an indictment is defective if it omits the necessary mens rea as an essential element of the offense. However, the indictment in the instant case is not defective under *Colon* because it contains the mens rea for each offense when necessary.

{¶ 13} Sexual battery in violation of R.C. 2907.03(A)(6) is a strict liability offense; therefore, an offender's state of mind, or mens rea, is irrelevant in determining guilt. R.C. 2907.03(A)(6) states that "[n]o person shall engage in sexual conduct with another * * * when * * * [t]he other person is in custody of law * * * and the offender has supervisory or disciplinary authority over the other person." Additionally, R.C. 2901.21(B) states that "[w]hen the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense." See, also, *State v. Singleton*, Lake App. No. 2002-L-077, 2004-Ohio-1517, at ¶56 (holding that

sexual battery of a victim "under the direct control or supervision" of the offender is a strict liability offense).

{¶ 14} Furthermore, *Colon* does not apply to indictments charging rape in violation of R.C. 2907.02(A)(2) or GSI in violation of R.C. 2907.05(A)(1), as long as the indictment parrots the statutes, both of which contain the mens rea "purposely." See *State v. Ralston*, Lorain App. No. 08CA009384, 2008-Ohio-6347; *State v. Solether*, Wood App. No. WD-07-053, 2008-Ohio-4738.

{¶ 15} In the instant case, all 16 counts of rape and GSI that defendant was indicted for contain the language "by purposely compelling [the victim] to submit by force or threat of force."

{¶ 16} Accordingly, Assignment of Error I is overruled.

{¶ 17} "II. Defendant was denied due process of law when the indictments were amended by including names for various Jane Does."

{¶ 18} Defendant was indicted for crimes against "Jane Doe I" through "Jane Doe VI." At the close of the State's case, the court amended the indictment to replace each "Jane Doe" with a victim's name. Defendant objected on grounds that the State failed to present evidence linking each particular victim to a "Jane Doe."

{¶ 19} Crim.R. 7(D) states in pertinent part that the "court may at any time before, during, or after a trial amend the indictment * * * in respect to any * * * omission * * * provided no change is made in the name or identity of the crime charged." In *State v. Henley*, Cuyahoga App. No. 86591, 2006-Ohio-2728, this

Court held that "[i]t is well settled that an amendment to an indictment which changes the name of the victim changes neither the substance nor the identity of the crime charged." See, also, *State v. Mitchell*, Cuyahoga App. No. 88977, 2007-Ohio-6190; *State v. Valenzona*, Cuyahoga App. No. 89099, 2007-Ohio-6892.

{¶ 20} Accordingly, Assignment of Error II is overruled.

{¶ 21} "IV. Defendant was denied a fair trial by reason of the introduction of irrelevant and prejudicial testimony.

{¶ 22} "V. Defendant was denied due process of law and [a] fair trial when defendant was cross-examined in a humiliating and totally improper manner."

{¶ 23} Specifically, defendant argues that the court erred by admitting other acts evidence at trial, including testimony about his sexual conduct with inmates that was unrelated to the indictment and evidence that he altered his prison log entries.[1] The standard of review for admissibility of evidence is abuse of discretion. See *Peters v. Ohio State Lottery Comm*. (1992), 63 Ohio St.3d 296, 587 N.E.2d 290.

{¶ 24} Evid.R. 404(B) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however be admissible for other purposes, such as

[1]Defendant also argues under Assignment of Error IV that testimony about the anonymous letter was improper. However, the anonymous letter is not "other acts" evidence and defendant does not cite to any law that covers the admissibility of an anonymous letter. We disregard this argument under App.R. 12 and App.R. 16.

proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See, also, R.C. 2945.59.

Sexual conduct with victims not related to crimes charged

{¶ 25} Defendant argues that the following evidence is inadmissible because it "did nothing more than present defendant's alleged proclivity for sexual activity or sexual dialogue":

{¶ 26} The videotape showing defendant laughing and dancing with an inmate, which was part of the administrative investigation, along with Cantoni's and Shevlin's testimony about this video.

{¶ 27} An inmate's testimony that defendant told her she was "the prettiest of the white girls and [her girlfriend] was the hottest black girl in the prison." This inmate also testified that defendant allowed her and her girlfriend to have sex in the corrections officers' bathroom while defendant watched.

{¶ 28} Another inmate testified that as she was going to the shower, defendant asked if she "wanted to see if his privates were big enough." This inmate responded by touching defendant's penis.

{¶ 29} A third inmate testified that she overheard defendant and her cellmate "talking about money, streets, bars, sex," and other things, including defendant "talking about how big his penis was."

{¶ 30} One of the inmate-victims testified that she saw defendant "put [another inmate] on the bunk and was proceeding to kiss her." This victim-inmate also testified that defendant brushed up against her sister during a visitation.

{¶ 31} The State argues that evidence of defendant committing other sexual acts with inmates was properly admitted under Evid.R. 404(B) because it shows that defendant had the time and opportunity to commit the charged acts within the prison.

{¶ 32} Our review of the record shows that the State's evidence of defendant's other sexual acts "established a modus operandi that shared common features with the crimes for which [defendant] was presently charged." *State v. Conner*, Cuyahoga App. No. 84073, 2005-Ohio-1971, at ¶45.

{¶ 33} We find the instant case to be similar to Ohio cases in which evidence of a defendant's prior sexual acts was admissible to demonstrate defendant's scheme, plan, or course of conduct. This Court has held that other acts evidence was admissible to show "defendant's pattern of engaging in sexual intercourse with young girls in his family while occupying a position of trust and authority." *State v. Ervin*, Cuyahoga App. No. 80473, 2002-Ohio-4093, at ¶51. See, also, *State v. Paige*, Cuyahoga App. No. 84574, 2004-Ohio-7029, at ¶15 (holding that testimony of the defendant's daughters was properly "used to demonstrate a pattern of sexual abuse with young female family members," and the defendant's practice of purchasing "gifts for the victims if they engaged in sexual conduct with him"); *State v. Russell*, Cuyahoga App. No. 83699, 2004-Ohio-5031, at ¶37 (holding that the "State proved appellant chose female victims of a filial position to him who were under the age of 12. Appellant began touching his victims in a progressively

sexual manner. When he became sure he could do so, he then sexually gratified himself, also in a progressive manner").

{¶ 34} We also find that the testimony in question in the instant case is admissible because it tends to show defendant's motive or intent to commit the sexual offenses against the victim-inmates. In *State v. Williams*, Cuyahoga App. No. 92714, 2010-Ohio-70, at ¶48, we held the following:

{¶ 35} "Evidence of a defendant's previous sexual activity is not admissible to show motive or intent if it is too remote from, or not closely related in time to, the offense charged. For other acts evidence 'to be relevant to the issue of intent, [it] "must have such a temporal, modal and situational relationship with the acts constituting the crime charged that evidence of the other acts discloses purposeful action in the commission of the offense in question."'" (Citing *State v. Gardner* (1979), 59 Ohio St.2d 14, 20, 391 N.E.2d 337; *State v. Burson* (1974), 38 Ohio St.2d 157, 159, 311 N.E.2d 526.)

{¶ 36} In *State v. Kellon* (Sept. 20, 2001), Cuyahoga App. No. 78668, we found the following "other acts" evidence admissible under Evid.R. 404(B) and R.C. 2945.59 to prove motive, scheme, plan, or system: evidence of "Kellon's sexual proclivities, activities, and practices with females, and whether he had an 'open' marriage, preferred certain types of clothing to be worn by his wife or used vibrators as a part of their sexual practices, and whether he had an extramarital affair."

{¶ 37} Additionally, the Ohio Supreme Court has held that "other acts" evidence tending to show "an idiosyncratic pattern of conduct" is admissible. "The

key to the probative value of such conduct lies in its peculiar character rather than its proximity to the event at issue." *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-45471, 853 N.E.2d 621, at ¶46 (quoting *State v. DePina* (1984), 21 Ohio App.3d 91, 92, 486 N.E.2d 1155).

{¶ 38} In the instant case, defendant is charged with taking advantage of the inmates he was monitoring by engaging in improper sexual conduct with them. We see no error in allowing other acts evidence that tends to prove this.

Log book falsification

{¶ 39} Defendant argues that evidence regarding whether he falsified records in his log book is inadmissible because he "was not charged with fabricating his log book or otherwise making improper entries into the log book." However, we find that this evidence fits squarely within at least one of the exceptions listed in Evid.R. 404(B).

{¶ 40} It is undisputed that NPC is a minimum security facility, and, at most times, the inmates are free to walk around as they please. However, the corrections officers' interaction with inmates is limited by NPC's policies. Evidence showing that defendant violated prison policy and was not where his log book said he was — 98 times in six days — tends to show that he had more of an opportunity to interact with inmates and commit the offenses than corrections officers who performed their duties as required. See *State v. Simms*, Columbiana App. No. 05-CO-4, 2005-Ohio-6934, at ¶42 (holding that other acts testimony was

admissible to show that the defendant "had a plan to get his wife to leave him alone with the girls so that he would have an opportunity to abuse them").

{¶ 41} The dissent takes issue with our holding that other acts evidence was properly admitted to show opportunity under Evid.R. 404(B), calling it "obscure." However, the dissent misreads our opinion. We ruled that the log book falsification evidence — and not the other acts evidence relating to sexual activity — was admissible to show opportunity. It is elementary that if one does not perform his or her job duties as required, one will have extra time, and thus an increased opportunity, to engage in other activities.

{¶ 42} In summary, the State showed that defendant repeatedly and systematically abused his position at the prison for his own sexual gratification. Defendant was convicted of sexual offenses involving three victims; all three victims testified, offering independent, direct evidence of defendant's conduct. The victims' testimony is overwhelming proof of defendant's guilt, and, standing alone, tends to show that defendant committed the crimes with which he was charged.

{¶ 43} In addition, the State offered other acts evidence showing that it was defendant's pattern to take advantage of inmates sexually. He did this numerous times with countless inmates, and he planned, prepared, and increased his opportunity to commit these offenses by fabricating entries in his log book.

{¶ 44} Assignments of Error IV and V are overruled.

{¶ 45} "III. Defendant was denied due process of law when the court failed to give an instruction concerning evidence of other alleged bad acts."

{¶ 46} We first note that defendant failed to request a jury instruction limiting the use of other acts evidence, thus waiving all but plain error on appeal.[2] *State v. Grant* (1993), 67 Ohio St.3d 465, 472, 620 N.E.2d 50. Plain errors are obvious defects in trial proceedings that affect "substantial rights," and "although they were not brought to the attention of the court," they may be raised on appeal. Crim.R. 52(B). To affect substantial rights, "the trial court's error must have affected the outcome of the trial." *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. Plain error is recognized "only in exceptional circumstances * * * to avoid a miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 94-95, 372 N.E.2d 804 (internal citations omitted).

{¶ 47} Because we hold that the other acts evidence in the instant case was properly admitted and did not affect the outcome of the trial, we cannot say that the failure to include a limiting jury instruction amounted to plain error. See our analysis of Assignments of Error IV and V, infra. Nothing in the record suggests that the jury used the "other acts" evidence to convict defendant because he was a

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[2]At the close of the State's case, defendant orally requested an instruction regarding the testimony of a witness who was an inmate at NPC, but not a victim in the instant case. Pursuant to Crim.R. 30(A), a party's requested jury instruction must be in writing and filed with the court. The court denied defendant's request for the time being, adding that it would "consider any written suggested charge to the jury." No additional jury charges regarding other acts evidence were submitted to the court.

"bad person." Rather, each victim testified as to what happened to her, and under Ohio law, a rape victim's testimony alone, if believed, is enough evidence for a conviction. See, e.g., *State v. Blankenship* (Dec. 13, 2001), Cuyahoga App. No. 77900.

{¶ 48} Assignment of Error III is overruled.

{¶ 49} "VI. Defendant was denied due process of law when the court failed to include defendant's requested instruction on credibility of witnesses."

{¶ 50} Specifically, defendant argues that the court erred when it rejected the following proposed jury instruction, which he submitted to the court after the jury began deliberating:

{¶ 51} "You have been shown a number of State's witnesses were convicted felons, some for crimes of violence, or for serious drug offenses and other crimes. A conviction is a factor you may consider in deciding whether to believe any witness, but it does not necessarily destroy the witness's credibility. It has been brought to your attention only because you may wish to consider it when you decide whether you believe the witness's testimony."

{¶ 52} In *State v. Fulmer*, 117 Ohio St.3d 319, 2008-Ohio-936, 883 N.E.2d 1052, at ¶72, the Ohio Supreme Court held that "the trial judge is in the best position to gauge the evidence before the jury and is provided the discretion to determine whether the evidence adduced at trial was sufficient to require an instruction." (Citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443.)

{¶ 53} When the subject of witness credibility is covered in the court's general charge to the jury, there is no need for a special instruction regarding the credibility of specific witnesses. *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, 781 N.E.2d 980, at ¶117.

{¶ 54} The *Group* court further stated that even if a proposed instruction is not covered by the general charge to the jury, "a jury assessing the credibility of a witness is not likely to overlook the witness's record of prior convictions," and any such resulting error would be harmless. Id. at ¶119.

{¶ 55} In the instant case, the court instructed the jury that they are the sole judges of witness credibility, and in making determinations, they should consider the witness's "interest or bias * * * in the outcome of the verdict, their appearance, manner, demeanor while testifying before you, their frankness or lack of frankness, or honesty and dishonesty, * * * their candor, or lack of candor, consistency of the witness's testimony with other known facts in the case, the accuracy or inaccuracy of memory, intelligence or lack of intelligence, their reasonableness or unreasonableness of what they testified to you, the opportunity the witness had to see or hear or know the truth and facts and circumstances concerning the things to which they testified. That's a general thing, right? Think about it. Whatever they've testified. And any other facts and circumstances surrounding testimony which, in your judgment, would add or detract from the credibility or weight to be given to the witness' testimony."

{¶ 56} Additionally, when the court denied defendant's proposed jury instruction, it stated that it felt an instruction specifically regarding the credibility of witnesses with prior convictions was redundant and unnecessary. The court concluded that it was an obvious and simple fact that many of the witnesses were current or former prisoners with criminal convictions. The court also noted that defense counsel spoke "expansively" about this issue, trying to "enhance and magnify it" during closing arguments. See Crim.R. 30(A).

{¶ 57} After reviewing the record, we cannot say that the court abused its discretion in rejecting defendant's additional instruction regarding the credibility of witnesses with felony convictions.

{¶ 58} Assignment of Error VI is overruled.

{¶ 59} "VII. Defendant was denied due process of law and a fair trial by reason of the conflicting and confusing jury instructions and references to totally irrelevant crimes."

{¶ 60} We note that defendant did not object to the court's jury instructions relating to this assignment of error; therefore, we review this issue for plain error. See *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45, at ¶25. See, also, Crim.R. 30(A).

{¶ 61} In the instant case, defendant argues that the court's instructions to the jury were "convoluted * * * [because] [t]hey included statements concerning matters for which defendant was not charged and were incomprehensible at times."

{¶ 62} A review of the court's jury instructions shows that the court, in explaining what was meant by "elements of a crime," used the example of murder. "Now, when we talk about elements — like to use murder for an example, because murder, everybody is familiar with murder. TV, the movies, at least. Right?" The court then defined murder and gave hypothetical examples of each element. The court followed this with the statutory definition of the crimes with which defendant was charged, and told the jury it was the State's burden to prove each of these essential elements beyond a reasonable doubt.

{¶ 63} Additionally, when the court instructed the jury that it must consider each count separately, it explained this concept using the example of forgery. "If you had a hundred forgery counts on trial, the jury could find somebody not guilty of the first 99 and guilty of one, vice versa."

{¶ 64} Defendant points to no evidence, and we find none in the record, that the court's instructions were unclear or confusing to the jury, as defendant was convicted of nine counts that he was charged with and acquitted of one count. Absent evidence otherwise, "it must generally be presumed that the jury followed the instructions of the trial judge." *State v. Ferguson* (1983), 5 Ohio St.3d 160, 163, 450 N.E.2d 265.

{¶ 65} Assignment of Error VII is overruled.

{¶ 66} "VIII. Defendant was denied due process of law when the court modified the definition of gross sexual imposition."

{¶ 67} Specifically, defendant argues that the court omitted an essential element of GSI when it improperly defined "sexual contact" in its instructions to the jury. A cursory review of the transcript shows that the court defined "sexual contact" as follows to the jury: "Sexual contact means any touching of an erogenous zone of another, including, without limitation, the thigh, genitals, buttock, pubic region, or if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." This definition mirrors, verbatim, the statutory definition of "sexual contact" found in R.C. 2907.01(B), which is the statute that defines terms associated with sex offenses.

{¶ 68} Assignment of Error VIII is overruled.

{¶ 69} "IX. Defendant was denied due process of law when the court overruled his motions for judgment of acquittal."

{¶ 70} Specifically, defendant argues that there was insufficient evidence to support his convictions for three counts of rape and three counts of GSI. When reviewing sufficiency of the evidence, an appellate court must determine "[w]hether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492.

Rape

{¶ 71} Defendant was convicted of three counts of rape in violation of R.C. 2907.02(A)(2). All three counts involved the same victim-inmate. R.C. 2907.02(A)(2) defines rapes as follows: "No person shall engage in sexual

conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶ 72} In the instant case, defendant argues that there was no evidence of force, which is defined in R.C. 2901.01(A)(1) as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."

{¶ 73} The victim testified that on multiple occasions, she woke up in the morning to find defendant penetrating her vagina with this fingers, performing oral sex on her, and putting his exposed penis near her face and one time in her mouth.

{¶ 74} This Court has consistently held that in situations "where the victim is sleeping and thus not aware of the defendant's intentions, only minimal force is necessary to facilitate the act" of rape. *State v. Clark*, Cuyahoga App. No. 90148, 2008-Ohio-3358, at ¶17. In *Clark*, the defendant was found guilty of forcible rape in violation of R.C. 2907.02(A)(2) when he inserted his finger in the victim's vagina, while she was sleeping, after moving the victim's nightgown and underwear. Id. at ¶6. See, also, *State v. Graves*, Cuyahoga App. No. 88845, 2007-Ohio-5430; *State v. Simpson*, Cuyahoga App. No. 88731, 2007-Ohio-5944, at ¶50; *State v. Lilliard* (May 23, 1996), Cuyahoga App. No. 69242; *State v. Sullivan* (Oct. 7, 1993), Cuyahoga App. No. 63818.

{¶ 75} Although there was no evidence in the instant case that defendant removed or manipulated the rape victim's clothing while she was sleeping, we find that a rational trier of fact could have inferred that defendant must have used minimal force to facilitate sexual conduct with a sleeping inmate. As this evidence

is sufficient to prove rape, we find that the court properly denied defendant's Crim.R. 29 motion on these three charges.

{¶ 76} **GSI**

{¶ 77} Defendant next argues that there was insufficient evidence to convict him of three counts of GSI against three different victims.

{¶ 78} Gross sexual imposition is defined, in pertinent part, as follows: "No person shall have sexual contact with another * * * when * * * [t]he offender purposely compels the other person * * * to submit by force or threat of force." R.C. 2907.05(A)(1). Sexual contact is defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

{¶ 79} Victim one testified that she awoke to defendant kissing her on the mouth and smelling "as though he had been giving someone else oral sex like right before that." On another occasion, she awoke in her cell to find defendant touching her breasts.

{¶ 80} The second victim testified that she was working as a porter in one of NPC's buildings when she had the following encounter with defendant: "I was in the porter closet preparing a mop bucket and he came in behind me and said, give me a kiss. I turned around to see if I was hearing him correctly and he had put his tongue in my mouth." She further testified that she was "shocked" that this

happened and she did not report the incident because she "was scared [she would go to the hole."

{¶ 81} The third inmate testified about the following encounter she had with defendant: "He asked me to get a mop ready in the mop closet. So I was down there. CO says something, you better do it. So I went in there and got the mop, and I went to turn around and he pushed me in the closet and he stuck his tongue in my mouth. So I pushed him off me and I walked out of the B building. And after that it was just I was trying to avoid him at all costs."

{¶ 82} She further testified that defendant would "brush past me in the hallway and get his little cheap feels. * * * [T]here would be an ample opportunity to walk by and he would walk by and touch my breasts and slide by and stuff like that. * * * [H]e would just slide his hand across * * * my butt, trying to get a feel while he was doing it." This victim testified that defendant's hands came into contact with the private parts of her body, "whether it be the breasts or brushing past my vagina," approximately four to five times.

{¶ 83} All three inmates testified that they did not report defendant's conduct to NPC for fear of retaliation or other negative consequences. For example, one inmate testified as follows: "There's cameras, there's people. I didn't want to be related. I have too much time and too many years to be dealing with that. * * * First of all, the inmates would start talking out and then get to the staff, and then he would find out, and then his buddies would start treating me like crap. So it was better to

keep your mouth shut." Other inmates kept quiet because they did not want to risk being sent to the "hole," or other repercussions resulting from the "snitch factor."

{¶ 84} As stated earlier in this opinion, force is defined in R.C. 2901.01(A)(1) as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." This Court has noted that the use of the word "any" in the statutory definition of force indicates that the degree of force necessary to commit a sex offense may vary situationally. See, e.g., *State v. Clark*, Cuyahoga App. No. 90148, 2008-Ohio-3358.

{¶ 85} In *State v. Eskridge* (1988), 38 Ohio St.3d 56, 58-59, 526 N.E.2d 304, the Ohio Supreme Court stated that "[f]orce 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." (Internal citations omitted.) See, also, *State v. Riffle* (1996), 110 Ohio App.3d 554, 560, 674 N.E.2d 1214 (holding that the "amount of force necessary to commit rape is not fixed; it depends on the parties' age, size, strength, and relation to each other"); *State v. Kennedy* (holding that the victim's "youth and vulnerability coupled with the power and dominance of an adult male in a position of authority, who had maintained a pattern of abuse * * * created a situation in which it was unnecessary for defendant to use brutal force to effect his purpose").

{¶ 86} Although the *Eskridge* rule commonly applies to parent-child or other domestic situations, we extend it to the unique facts of the case at hand. It is undisputed that defendant, who was a corrections officer, was in a position of

authority over his victims, who were prisoners at the facility where defendant was employed. The evidence is sufficient to show that defendant used or threatened psychological force to touch erogenous zones of various inmates for his sexual gratification. For example, the act of turning around only to have a person with authority over you put his tongue in your mouth is sufficient to imply force, as legally defined.

{¶ 87} The court properly denied defendant's Crim.R. 29 motion on the three GSI counts.

{¶ 88} Assignment of Error IX is overruled.

{¶ 89} "X. Defendant was denied due process of law when the court failed to merge the counts of rape and sexual battery."

{¶ 90} R.C. 2941.25(A) states that when "the same conduct by a defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

{¶ 91} In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, at paragraph one of the syllabus, the Ohio Supreme Court held: "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will

necessarily result in commission of the other, then the offenses are allied offenses of similar import. (*State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, clarified.)" The *Cabrales* Court further held that "[i]f the offenses are allied, the court proceeds to the second step and considers whether the offenses were committed separately or with a separate animus." Id. at ¶16.

{¶ 92} In the instant case, the State conceded that the court should not have sentenced defendant for the rape and the sexual battery counts as indicted. Accordingly, the sentences for these offenses should merge.

{¶ 93} Assignment of Error X is sustained.

{¶ 94} "XI. Defendant was denied due process of law when the court sentenced defendant without any consideration of the statutory criteria."

{¶ 95} The Ohio Supreme Court set forth the standard for reviewing felony sentencing decisions in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. See, also, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. *Kalish*, in a plurality decision, holds that appellate courts must apply a two-step approach when analyzing alleged error in a trial court's sentencing. "First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." Id. at ¶4.

{¶ 96} In determining whether defendant's sentence is contrary to law, we look to R.C. 2929.14(A)(1), which states that courts shall impose a prison term of between three and ten years, for first degree felony offenses; between one and

{¶ 97} five years for third degree felony offenses; and between six and 18 months for fourth degree felony offenses. Defendant's convictions for rape are first degree felonies; his convictions for sexual battery are third degree felonies; and his GSI convictions are fourth degree felonies.

{¶ 98} The court sentenced defendant to five years in prison for the charges against the first victim, which included five years for rape, one year for sexual battery,[3] and nine months for GSI, to run concurrently. The court sentenced defendant to one year in prison for the GSI count against the second victim and one year in prison for the GSI count against the third victim, to run consecutive to each other, and consecutive to the five years. Defendant's aggregate prison sentence of seven years is within the statutory range.

{¶ 99} We also find that the court properly included postrelease control as part of defendant's sentence, stating that at the conclusion of defendant's prison term, he is required to serve five years of postrelease control. See *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864.

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[3]We modify defendant's sentence, supra, in conjunction with sustaining his tenth assignment of error. This modification does not change defendant's aggregate prison term, which is within the statutory range.

{¶ 100} Next, we must determine whether the trial court considered the purpose and principles found in R.C. 2929.11 and the seriousness and recidivism factors of R.C. 2929.12 when sentencing defendant. While the court in the instant case did not expressly mention the sentencing statutes on the record, it made findings in accordance with the guidelines, showing that proper consideration was given. See *State v. Barnette*, Mahoning App. No. 06-MA-135, 2007-Ohio-7209 (holding that when "the court placed on the record a range of pronouncements and findings that coincide with various statutory factors," it could be concluded on appeal that "the sentencing court has sufficiently fulfilled its duty under these statutes").

{¶ 101} Accordingly, under the first prong of the *Kalish* test we conclude that the court "clearly and convincingly complied with the pertinent laws." Id. at ¶18. The details of the court's findings will be analyzed below under the second prong of *Kalish*.

{¶ 102} We now review the trial court's decision for an abuse of discretion. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 103} In the instant case, the court took the following into consideration on the record: defendant's conduct was serious and one of the purposes of sentencing is to punish the offender; defendant "violated these

women's rights" and their trust; defendant violated the trust of the prison and failed to perform his job; defendant "preyed upon" and "took advantage" of the very people who he was hired to protect and supervise; defendant had no remorse for his actions; other women would be protected "in the future from molestation by [defendant]; every woman has the right to be free of sexual attack, whether they be a millionaire living in the mansion on the lake or the female inmate at the * * * prison. They have the same rights. And they are not subhuman. They cannot be attacked." They cannot be coerced. They cannot be forced into sex or involuntarily grabbed by you or others. It's wrong."

{¶ 104} As there is nothing in the record suggesting that defendant's sentence is unreasonable, arbitrary or unconscionable, we find that the court did not abuse its discretion.

{¶ 105} Assignment of Error XI is overruled.

{¶ 106} "XII. Defendant was denied due process of law when the court fined defendant after defendant had been declared indigent."

{¶ 107} R.C. 2929.18 authorizes a trial court to impose fines against a felony offender. Furthermore, a trial court may impose a financial sanction against a criminal defendant even though that defendant has been declared indigent for the purpose of receiving appointed counsel. "Many criminal defendants, even those who have steady income, are not able to raise sufficient funds to pay the retainer fee required by private counsel before counsel will make an initial appearance. This difference is even more evident in cases where the defendant has to utilize his

financial resources to raise sufficient bond money in order to be released from jail. In contrast, the payment of a mandatory fine over a period of time is not equivalent to the immediate need for legal representation at the initiation of criminal proceedings." *State v. Powell* (1992), 78 Ohio App.3d 784, 789-790, 605 N.E.2d at 1341.

{¶ 108} Pursuant to R.C. 2929.18(B)(6) the sentencing court must "consider the offender's ability to pay," when imposing a fine. In the instant case, the court imposed a $25,000 fine, and stated that "costs can be worked off through community work service approved by the warden at the prison you will be located in."

{¶ 109} We find that the record supports the financial sanctions imposed against defendant.

{¶ 110} Assignment of Error XII is overruled.

{¶ 111} Judgment affirmed in part and reversed and modified in part. We merge defendant's sexual battery convictions into his rape convictions and vacate the separate but concurrent one-year sentences imposed on the sexual battery charges. As modified, defendant's convictions and modified sentence are affirmed. See *State v. Winn*, Montgomery App. No. 21710, 2007-Ohio-4327, at ¶35, affirmed by *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154.

It is ordered that appellant and appellee shall each pay their respective costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

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

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS;
MELODY J. STEWART, J., DISSENTS WITH
SEPARATE DISSENTING OPINION

MELODY J. STEWART, J., DISSENTING:

{¶ 112} I respectfully dissent from the decision reached by the majority. The state failed to offer sufficient evidence to support a conviction for gross sexual imposition in Count 10, so I would order the court to vacate the conviction on that count. Apart from this evidentiary deficiency, I find that the state's use of other acts evidence was so erroneous and prejudicial that Fortson should receive a new trial.

I

{¶ 113} Gross sexual imposition, as charged in this case under R.C. 2907.05(A)(1), states that no person shall have sexual contact with another by compelling such person to submit by force or threat of force. Sexual contact is

defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B). Although not specifically listed, the mouth has been considered an erogenous zone. See *In re M.H.*, Wayne App. No. 07CA0037, 2007-Ohio-7045, at ¶8.

{¶ 114} Consistent with the state's theory in Count 10 of the indictment, Inmate 2[4] testified that "I was in the porter closet preparing a mop bucket and [Fortson] came in behind me and said, give me a kiss. I turned around to see if I was hearing him correctly and he had put his tongue in my mouth. I told him that there was a white shirt [guard] and he walked away."

{¶ 115} Inmate 2 did not testify that Fortson used force or threatened force, nor could the jury infer from Inmate 2's testimony that force had been used. Fortson did not use any violence, compulsion, or physical constraint on Inmate 2. Her testimony shows that he kissed her before she had the opportunity to react. In doing so, he might have committed the offense of sexual imposition under R.C. 2907.06(A)(1), which requires sexual contact with another when the offender knows that such contact is offensive to the other or

[4]The inmates are designated by number for the purpose of clarity.

is reckless in that regard. But absent evidence of force or threat of force, Fortson did not commit gross sexual imposition.

II

{¶ 116} The basis for my conclusion that Fortson is entitled to a new trial is that the court's admission of irrelevant and prejudicial other acts testimony deprived him of a fair trial.

A

{¶ 117} During trial, the state called as witnesses three prison inmates who were not listed as victims in the indictment.[5] They testified to voluntary acts they engaged in with Fortson or to statements he made in their presence. Fortson maintains that the court should have instructed the jury on the use of other acts evidence under Evid.R. 404(B) and that, in any event, the other acts evidence was so irrelevant and prejudicial that the court should not have allowed it into evidence.

1

{¶ 118} Fortson did not request a jury instruction on other acts evidence, so he waived all but plain error. *State v. Grant* (1993), 67 Ohio St.3d

[5]One of these inmates, Inmate 4, was listed as a victim of gross sexual imposition in the indictment, but the court granted a Crim.R. 29 motion for judgment of acquittal on that charge. Inmate 4 testified that her relationship with Fortson began with flirtatious remarks and culminated with sexual contact between the two. Inmate 4 admitted that she invited this conduct because she liked Fortson.

465, 472, 620 N.E.2d 50; *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, at ¶91. "Plain error" exists if the trial court deviated from a legal rule, the error constituted an obvious defect in the proceedings, and the error affected a substantial right of the accused. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. We recognize plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91,372 N.E.2d 804, at paragraph three of the syllabus.

2

{¶ 119} Evid.R. 404(B) states that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." The rule prohibits the introduction of other acts because there is the danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crimes charged in the indictment. *State v. Cotton* (1996), 113 Ohio App.3d 125, 131, 680 N.E.2d 657. In *Michelson v. United States* (1948), 335 U.S. 469, 475-476, 69 S.Ct. 213, 93 L.Ed. 168, the United States Supreme Court explained:

{¶ 120} "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of

evidence of a defendant's evil character to establish the probability of his guilt * * *. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." (Footnotes omitted.)

{¶ 121} Furthermore, while the rule creates an exception for the admissibility of "other acts" evidence when it is probative of a particular matter, that matter must genuinely be at issue — the acts constituting the scheme, plan, or system must be a part of the immediate background of the crime and inextricably related to it. *State v. Curry* (1975), 43 Ohio St.2d 66, 69, 330 N.E.2d 720.

{¶ 122} Although other acts evidence is inadmissible to prove the character of a person in order to show that he acted in conformity therewith, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See Evid.R. 404(B). But even if other acts evidence might be admissible for a stated purpose, it must still be relevant under Evid.R. 402. *State v. Judd*, Cuyahoga App. No. 89278, 2007-Ohio-6811, at ¶49. Other acts

evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or of misleading the jury. See Evid.R. 403(A). As with all other evidentiary issues at trial, the admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Jacks* (1989), 63 Ohio App.3d 200, 207, 578 N.E.2d 512.

3

{¶ 123} Inmate 5 testified that she had been showing Fortson a scrapbook with pictures of her prison girlfriend. Fortson commented that Inmate 5 was the prettiest of the white girls and that Inmate 5's girlfriend was the "hottest black girl in the prison." Inmate 5 told Fortson that she and her girlfriend had sexual relations and asked him if he could arrange for them to be alone for sex. Fortson granted them access to the correctional officers' bathroom and watched as they had sex. He had no physical contact with either Inmate 5 or her girlfriend.

{¶ 124} Inmate 6 testified that she had been preparing to shower when Fortson appeared. She said that she "wanted to see if his privates were big enough." In response, she touched him on his penis for a few seconds. She had no other interactions with Fortson and said her touching him was "no big deal."

{¶ 125} Inmate 7 said that she did not have any conversations of a sexual nature with Fortson, but that she overheard Fortson speaking with her cellmate, Inmate 4, about his sex life at home and the size of his penis.

{¶ 126} Although listed in the indictment as a victim, Inmate 2 testified that she saw Fortson kiss her cellmate. She also testified that Fortson had "brushed" against her sister during a visitation.

{¶ 127} The majority concedes that all of this testimony is other acts evidence, but argues that it was admissible in order to establish Fortson's "opportunity" to commit the charged offenses. The word "opportunity" is usually defined as a situation or condition favorable to the attainment of a goal and the majority maintains that the other acts evidence showed that Fortson had the ability to move about the prison and create time to engage in sexual encounters. The assertion that Fortson had the "opportunity" to commit the charged offenses is obscure. That he could move about the prison facility is obvious — he worked as a guard at the correctional facility in which the charged offenses occurred and he had regular interaction with the inmates. But not only did other guards at the facility have the same "opportunity" to move freely about the facility, the testimony showed and the majority concedes that the inmates, too, had the same freedom of movement within the facility. Since guards and inmates had equal access to the entire facility, there was

nothing unique about the other acts evidence that would show Fortson's opportunity to commit the charged crimes.

{¶ 128} There is likewise no basis for admitting these other acts on grounds that they showed Fortson's scheme, plan, or course of conduct. The other acts evidence admitted by the court showed that Fortson engaged in consensual acts with other inmates and, in the case of two inmates, in response to their direct advances. The instance where Fortson had been overheard making remarks about his sexual activities at home failed to show a course of conduct relevant to proving the elements of the charges against him. There might have been some merit to the contention that these comments showed a scheme or course of conduct had Fortson been overheard to brag about his specific acts with inmates. But Fortson's comments about his sexual activities at home did nothing to show that these acts made it more likely that he committed the charged offenses.

{¶ 129} Evid.R. 404(B) must be strictly construed against admissibility. *State v. Broom* (1988), 40 Ohio St.3d 277, 282, 533 N.E.2d 682. The other acts evidence offered by the prison inmates did nothing to show "opportunity" under Evid.R. 404(B).

4

{¶ 130} I believe that the majority also errs when it claims that the other acts evidence tended to show Fortson's motive or intent to commit the

charged offenses. Apart from failing to qualify as admissible other acts evidence under Evid.R. 404(B), the testimony likewise could not be admitted under R.C. 2945.59. In *State v. Schaim*, 65 Ohio St.3d 51, 59-60, 1992-Ohio-31, 600 N.E.2d 661, the supreme court addressed the use of other acts evidence in the context of sexual offenses:

{¶ 131} "This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature, as is certainly true in this case. The legislature has recognized the problems raised by the admission of other acts evidence in prosecutions for sexual offenses, and has carefully limited the circumstances in which evidence of the defendant's other sexual activity is admissible. The forcible rape statute and the gross sexual imposition statute both contain subsections that address the admissibility of evidence of other sexual activity by either the victim or the defendant."

{¶ 132} The statutes referred to in *Schaim* are R.C. 2907.02(D) [rape] and 2907.05(D) [gross sexual imposition], which both provide in relevant part:

{¶ 133} "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 section 2945.59[6] 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."

{¶ 134} "Sexual activity" is defined in R.C. 2907.01(C) as either sexual conduct or sexual contact, or both. "Sexual conduct" means vaginal intercourse between a male and female and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. R.C. 2907.01(A). "Sexual contact" means "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

{¶ 135} Inmate 2 gave the only nonvictim testimony involving Fortson's sexual activity — his uncharged act of "brush[ing]" against her sister's buttocks. However, that evidence was inadmissible under R.C.

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[6]R.C. 2945.59 states:

"In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

2945.59 because the state's basis for admitting the testimony — opportunity — is not a permissible basis for admission of the evidence. Although similarly-worded to Evid.R. 404(B), R.C. 2945.59 does not provide for the admission of evidence of sexual activity to show "opportunity." Since the state only sought admission of the other acts testimony for this reason, it lacked any basis for seeking admission of the inmate testimony under R.C. 2945.59, thus rendering that testimony irrelevant.

{¶ 136} The remaining testimony about Fortson's conduct did not allude to "bad acts." The act of kissing another inmate, watching two inmates have sex or speaking about his genitalia may have violated rules of Fortson's employment, but those acts were not illegal and were consensual in nature. And the testimony that another inmate touched Fortson's penis is not an act committed by him. With no basis for admission under either Evid.R. 404(B) or R.C. 2945.59, the testimony detailing Fortson's conduct was irrelevant.

B

{¶ 137} I would also find that the trial court erred by allowing the state to cross-examine Fortson about false entries he made in his log book.

1

{¶ 138} The prison investigator testified that guards were required to check prison units every 30 minutes and document that activity in a log book. The log books were also used by correctional officers to note anything

that happened within the unit. The investigator testified that there were 98 different log book entries by Fortson that were contradicted by surveillance videotape.

{¶ 139} During Fortson's direct examination, defense counsel brought up the subject of the log books, asking Fortson if it became difficult to make the required log entries every 30 minutes as required by institution rules. Fortson replied that he was very busy while making his rounds and that "sometimes you got to log your book, sometimes you do get to where you get busy and have to catch up."

{¶ 140} On cross-examination, the state marked the log book as an exhibit and proceeded to question Fortson about a specific date, February 3, 2008, and a notation by Fortson that he had performed a security check at 6:05 a.m. Fortson agreed that his notation meant that he did perform the security check. The state then referenced the investigator's testimony that she checked the log book entry against the videotape surveillance, and asked: "So she testified that you were not there at 6:05, where you said security check, all secure, would that be a lie or would that be true or that you actually weren't there?" The court overruled Fortson's objection, and Fortson answered, "[y]ou know, that's a lie * * *."

{¶ 141} The state then questioned Fortson about the accuracy of his log entries on February 4, 2008 and February 18, 2008. On both dates,

Fortson made log entries showing that he completed his security check. However, a video camera placed in an inmate's room by the investigator showed that on February 4, 2008 Fortson brought a cup of coffee to an inmate and danced with her, and a videotape from February 18, 2008 showed Fortson speaking and laughing with that same inmate. Fortson explained that sometimes other duties might prevent him from his making his security check, but that he would mark in the log book that the security check had been completed. The state inquired how he could spend so much time in an inmate's room yet be too busy to complete his security check.

{¶ 142} Evid.R. 611(B) permits cross-examination on "all relevant matters and matters affecting credibility." Even though Fortson conceded in his direct examination that he made false entries in his log book, I believe that the state was entitled to cross-examine Fortson on that point. Fortson did admit to dishonest conduct, so the state's questioning was relevant under Evid.R. 611(B).

{¶ 143} The more difficult problem is whether the court abused its discretion by overruling Fortson's Evid.R. 403(A) objection to the state's questions. Under Evid.R. 403(A), the court must exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The probative value of

evidence must not be confused with relevancy: the probative value of evidence is the tendency of evidence to establish the proposition it is offered to prove. McCormick, Evidence (6th Ed.2006) 514, Section 185. Evidence can be relevant but not probative.

{¶ 144} The state's impeachment of Fortson had very little, if any, probative value. Fortson conceded during his direct examination that he made false entries in the log book, so the state's continued cross-examination of him with the log book did little to undermine his credibility beyond what had been admitted.

{¶ 145} The state also asserted that it was entitled to use Fortson's admission that he falsified his log book to demonstrate that he had "the time and opportunity to put himself alone with inmates for a somewhat extended period." As earlier noted, the evidence showed that guards and inmates moved freely about the facility — Fortson had no greater opportunity to be alone with inmates than did other guards. That point had been made very clear during the state's case, so there was very little probative value to evidence showing that Fortson falsified his log entries to cover up his activities. But more importantly, the falsified log book entries pertained to events that occurred nearly five months *after* the last date of any offenses charged in the indictment. So even if the falsified log book entries were probative to proving that Fortson had the opportunity to put himself alone with inmates, it only

proved that fact for a point in time occurring well after the alleged offenses had been completed. The log book had no probative value to proving that he altered his log books during the time in which the charged offenses were alleged to have occurred.

{¶ 146} The prejudicial effect of the state's evidence was manifest. The state did not charge Fortson with falsifying his log book, yet the manner in which the state cross-examined him on the matter — pointing out specific log book entries by time and playing surveillance videotape to contradict those entries — emphasized Fortson's actions to the point where the jury could have understood that falsifying the log book was a part of the charges against him. Not only was there a very real risk of jury confusion over whether the log book entries were charged conduct, the log book evidence may have been viewed by the jury as other acts evidence that might have convinced it that Fortson's misdeeds with the log book showed that he was capable of committing the charged offenses. Again, this conduct occurred well after the charged offenses had occurred, but the jury may well have understood the evidence to be probative of guilt.

III

{¶ 147} This is the rare case that meets the very high threshold for showing that the trial court's errors affected Fortson's right to a fair trial. The state's use of the other acts in the form of inmate testimony and altered log

books was so pervasive that the jury could not have been expected to differentiate between acts of charged conduct and acts of uncharged conduct. The court did nothing to alleviate any chance of confusion by failing to give a jury instruction on other acts evidence. "Where evidence has been admitted for a limited purpose which the state claims shows the defendant did certain * * * 'other acts' which show the motive or intent of the accused, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing the act in question which is alleged in the indictment, the jury should be instructed that such evidence must not be considered by them as any proof whatsoever that the accused did any act alleged in the indictment." *State v. Flonnory* (1972), 31 Ohio St.2d 124, 129, 285 N.E.2d 726. See, also, *State v. Meador*, Warren App. No. CA2008-03-042, 2009-Ohio-2195, at ¶82; *State v. Tisdale*, Montgomery App. No. 19346, 2003-Ohio-4209, at ¶47.

{¶ 148} The state arguably offered more evidence of Fortson's other acts than evidence of the charged offenses. Even without an objection from Fortson, the pervasive nature of this evidence should have prompted the court to give the jury guidance on how to distinguish between proper and improper evidence of guilt. Without such guidance, the jury's verdict was hopelessly tainted by inadmissible and irrelevant evidence. Believing that Fortson is entitled to a new trial, I dissent.