[Cite as *State v. Baer,* 2009-Ohio-3248.]

STATE OF OHIO, HARRISON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 07 HA 8
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
WILLIAM H. BAER,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. CRI-2206-0691.
JUDGMENT:	Affirmed.

APPEARANCES:

For Plaintiff-Appellee:	Attorney T. Shawn Hervey Prosecuting Attorney P.O. Box 248 111 W. Warren Avenue Cadiz, OH 43907
For Defendant-Appellant:	Attorney Gerald A. Latanich 201 North Main Street P.O. Box 272 Uhrichsville, OH 44683

JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: June 23, 2009

[Cite as *State v. Baer,* 2009-Ohio-3248.]
DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this court. Appellant, William Baer, appeals the October 31, 2007 decision of the Harrison County Court of Common Pleas that found him guilty on two counts of Rape, in violation of R.C. 2907.02(A)(1)(b), with specifications that both victims were under ten years old and that Baer used force or threat of force. Baer was also found guilty on two counts each of Sexual Battery and Gross Sexual Imposition, in violation of R.C. 2907.03(A)(5) and R.C. 2907.05(A)(1).

{¶2} On appeal, Baer argues that the trial court erroneously allowed the indictment to be amended, that his speedy trial waiver did not apply to the indictment as amended, and that the inclusion of hearsay testimony of the children from counselors violated his right to confrontation. Baer also claims ineffective assistance of counsel for failure to object to the above errors, and claims that the overall prejudicial effect of all assigned errors mandates reversal. Additionally, Baer argues that there was insufficient evidence to support his conviction, and that the State violated Baer's due process rights by the peremptory challenge of a juror solely based on race.

{¶3} The trial court's amendment of Baer's indictment did not change the name or identity of the crimes charged, and thus did not require a new grand jury submission or renewed waiver of speedy trial. The inclusion of counselor testimony was done with the explicit agreement of Baer, the children actually testified at trial and were subject to cross-examination, and Baer's failure to object to the inclusion of the counselors' testimony waives such argument on appeal. Baer's trial attorney's failure to object to the above issues was within the realm of sound trial strategy. The State presented evidence which, if believed, satisfied all elements of the crimes charged against Baer. The challenge of one juror from the panel may have been suspect due to his being the only member of that race in the jury pool. However, the trial court appropriately determined that the State had valid alternative reasons for excluding said juror. Given that the above claims did not involve errors by the trial court, their cumulative effect was not of prejudicial error.

{¶4} Accordingly, the trial court's decision is affirmed.

Facts and Procedural History

{¶5} On June 26, 2006, AB told her mother that Baer, ABs' father, had sexually abused her. Her mother, Christina, called her family physician and was told to bring AB in the following day. Christina later asked another daughter, SB, if anything bad had happened to her, and SB made similar allegations. AB and SB were taken to their family physician, referred to emergency services at the Harrison Community Hospital, and reported to the Harrison County Department of Job & Family Services. Demitrius Carrothers of the Harrison County Department of Job & Family Services interviewed AB and SB on June 27 and 28. The interviews were documented on video tape and formalized in a written "Investigative Report." AB and SB were referred to another emergency services facility with specialists in sexual assault, and underwent examinations on June 28, 2006.

{¶6} The trial court held a preliminary hearing to determine the competency of AB and SB on July 3, 2006. On July 7, 2006, Baer was indicted by a Grand Jury on two counts of rape, in violation of R.C. 2907.02(A)(1)(b), and two counts each of Sexual Battery and Gross Sexual Imposition, in violation of R.C. 2907.03(A)(5) and R.C. 2907.05(A)(1). The indictment identified the two victims as being under the age of ten. Baer entered a plea of not guilty.

{¶7} On September 20, 2006, Baer submitted a statutory time waiver for a period of sixty days in connection with motions for discovery and to modify bond. At Baer's request, the State filed a Bill of Particulars on October 4, 2006 which stated that Baer was charged with rape in violation of R.C. 2907.02(A)(2), prohibiting sexual conduct with another person "when the offender purposely compels the other person to submit by force or threat of force." The bill of particulars identified the offense as a special first degree felony. The description of the charges included specifics as to the sexual conduct involved, the age of the victims, and the threats of force involved.

{¶8} On December 12, 2006, Baer submitted a Motion to Determine Competency of Witnesses and an additional statutory time waiver for a period of one hundred twenty days. On February 22, 2007, the trial court held another competency hearing and found AB and SB competent to testify. On April 30, 2007 Baer's attorney moved for a

continuance of at least sixty days from the May 14, 2007 trial date and waived "all statutory time limitations with respect to this case."

{¶9} Subsequent to a phone conference with the trial court and all attorneys involved, the State filed a Motion to Amend Indictment, which the trial court granted on May 24, 2007. The amended indictment identified the rape offenses as special first degree felonies in violation of R.C. 2907.02(A)(1)(b), moved the description of the victims' ages to a separate "specification" section, and included a specification that the offense was committed with force or threats of force.

{¶10} The trial commenced on September 24, 2007. During voir dire of the jury, counsel for Baer made a *Batson* challenge regarding the State's third peremptive challenge, which the court overruled. For the State's case in chief, the following witnesses testified: AB; SB; Karen Roberts, a nurse who saw the girls on June 27, 2006 and contacted Carrothers; Dr. David Shaffer, a Harrison Community Hospital ER physician who saw the girls on June 27, 2006; Pam Hivnor, a sexual assault nurse examiner who examined AB on June 28, 2006; Lucinda Fay Hill, a sexual assault nurse examiner who examined SB on June 28, 2006; Dr. Michelle Dayton, an emergency physician who oversaw the June 28, 2006 examinations; Margaret DeLillo-Storey, a professional clinical counselor who performed counseling sessions with AB and SB from March, 2007 up to the time of trial; Demitrius Carrothers, the child abuse and neglect investigator who interviewed the girls on June 27 and 28; Sarah Book, a licensed professional counselor who performed counseling sessions with AB and SB from approximately July, 2006 to January, 2007; Gwen Wheeler, maternal grandmother of AB and SB; and Christina Baer, wife of Baer and mother of AB and SB.

{¶11} Baer stipulated to the admission of the video-taped interview performed by Carrothers. Baer also entered a joint motion to admit the counseling notes of DeLillo-Storey and Sara Book, and stipulated to the admission of Carrothers' written investigative report. At the close of the State's case, Baer made a Rule 29 motion for acquittal for failure to meet the burden of proof, which the court overruled.

{¶12} For Baer's case in chief, the following witnesses testified: Steve Duke, an acquaintance of Baer and Christina; Garry Brown, the mother of a girl who may have had

a relationship with Baer; Harold Burton, who lived with the Baers in June of 2006, and Jessica Baer, a daughter of Baer from another marriage.

{¶13} At the end of trial, the trial court granted an additional amendment to the indictment to clarify the identity of the victims for each offense. Baer renewed his motion for acquittal, which the trial court denied. The jury returned a verdict of guilty on all six counts against Baer. The trial court held a sentencing hearing on October 19, 2007. In its October 31, 2007 Judgment Entry, the court merged the sexual battery and gross sexual imposition charges with the rape charges, and imposed two life sentences with parole eligibility after ten years, to be served consecutively.

{¶14} Baer retained alternative counsel, who filed a Notice of Appeal on November 8, 2007. A supplemental statement pursuant to App.R. 9 was filed with this court describing an unrecorded sidebar conversation that occurred during Baer's *Batson* challenge. For clarity of analysis, we will address Baer's seven assignments of error out of the order they were presented to the court.

Plain Error in Amended Indictment

{¶15} In his second of seven assignments of error, Baer argues:

{¶16} "The trial court committed plain error by allowing the indictment to be amended to involve force which added an element elevating the charge to a life count rape without proper consideration by the grand jury and allowing the "specification" of rape of a child younger than ten years of age."

{¶17} Baer claims that the indictment as amended increased the penalty for the rape charges and included two new substantive specifications: force, and that the victims were under ten years of age. Baer further claims that the penalty for the rape charges was erroneously enhanced due to the correction of the rape charge as a special first degree felony rather than a first degree felony.

{¶18} Baer correctly limits his argument to a plain error analysis, as he did not object to the amendment of the indictment at trial. An appellate court does not have to resolve an alleged error if it was never brought to the attention of the trial court "at a time when such error could have been avoided or corrected by the trial court." *State v. Carter*, 89 Ohio St.3d 593, 598, 2000-Ohio-172, 734 N.E.2d 345. In the absence of objection,

this court may only examine the court's actions for plain error. Id. Plain error should be used "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d. 1240. A claim of plain error does not stand unless, but for the error, the outcome of the trial would have been different: "[t]he test for plain error is stringent. A party claiming plain error must show that (1) an error occurred, (2) the error was obvious, and (3) the error affected the outcome of the trial. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, at ¶378.

{¶19} Pursuant to Crim.R. 7(D), the court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, with respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. What exactly constitutes a change in the identity of a crime is somewhat unclear, but a change does occur when the amended indictment contains different elements requiring independent proof, or increases the severity of the charged offense. *State v. Fairbanks*, 172 Ohio App.3d 766, 2007-Ohio-4117, 876 N.E.2d 1293, at ¶19, 21.

{¶20} The rape charges in the original July 7, 2006 indictment against Baer were cited as being in violation of R.C. 2907.02(A)(1)(b), which prohibits sexual conduct with a person under the age of thirteen. R.C. 2907.02 is generally a first degree felony, and was listed as such in the indictment. However, R.C. 2907.02(B) further specifies that an offender under (A)(1)(b) who engages in sexual conduct with a person under the age of ten or who uses force or threats of force "shall be imprisoned for life." Within the indictment's two rape counts, the victims were described as being under the age of ten.

{¶21} At Baer's request, the State filed a Bill of Particulars on October 4, 2006 which stated that Baer was charged with rape in violation of R.C. 2907.02(A)(2), prohibiting sexual conduct with another person "when the offender purposely compels the other person to submit by force or threat of force." The bill of particulars identified the offense as a special first degree felony. The description of the charges included specifics as to the sexual conduct involved, the age of the victims, and the threats of force involved.

{¶22} Subsequent to a phone conference with the trial court and all attorneys involved, the State filed a Motion to Amend Indictment pursuant to Crim.R. 7(D), which the trial court granted on May 24, 2007. The amended indictment identified the rape offenses as special first degree felonies in violation of R.C. 2907.02(A)(1)(b), moved the description of the victims' ages to a separate "specification" section, and included a specification that the offense was committed with force or threats of force. The trial court stated that the amended indictment did not change the nature or elements of the indictment, that Baer had sufficient notice of the offense, and that the amendment corrected a clerical error. Baer did not object to the amendment at any stage. The trial court granted an additional amendment at the end of trial to clarify the identity of the victims for each offense.

{¶23} The amendments relating to the age of the victims and the type of felony were clarifications or corrections of clerical errors at most. Moreover they could not be considered a change in the name or identity of the charged offense, because the age of the victims and the statute subsection involved were explicitly indicated in the original indictment. Thus there was no error involved in these changes.

{¶24} Similarly, the addition of the "force" specification to Baer's indictment was not erroneous, or was harmless error at best. If a person is found guilty of R.C. 2907.02(A)(1)(b), i.e. that he has engaged in sexual conduct with a person under thirteen years of age, then he is guilty of a first degree felony. Under 2907.02(B), the penalty from the finding of guilt may be raised to a mandatory life sentence *either* if the offender used force or threats of force, *or* if the victim was under ten years of age. Thus force is not an element required to prove guilt under R.C. 2907.02(A)(1)(b); it is only a specification which may enhance the penalty thereof. A specification that only enhances the penalty is not required to be included in the indictment. *State v. Bowen* (Dec. 8, 1999), 7th Dist. No. 96-CO-68, at *8, citing *State v. Allen* (1987), 29 Ohio St.3d 53, 29 OBR 436, 506 N.E.2d 199.

{¶25} Moreover, Baer's offense had already been elevated to the life sentence level due to the age of the victims. Even if the State had left out the force specification, not proved the element of force, and not received a finding of force by the jury, the trial

court still would have been statutorily required to sentence Baer to a life term subsequent to a jury finding of guilty. Therefore the alleged error would not have affected the outcome of Baer's trial.

{¶26} The trial court therefore did not commit any error by allowing the foregoing amendments in Baer's indictment, and any potential error would have been harmless beyond a reasonable doubt. Because the trial court did not err, let alone commit plain error, Baer's second assignment of error is meritless.

Speedy Trial Violation

{¶27} In his first assignment of error, Baer argues:

{¶28} "The indictment for the allegations of life rape should have been dismissed pursuant to a speedy trial violation."

{¶29} Baer asserts that the amended indictment had the effect of bringing new charges upon Baer, renewing Baer's previously waived right to a speedy trial. Baer again correctly limits his argument to a plain error analysis, as he has waived the issue through his failure to object at any point during trial.

{¶30} A defendant in a felony case has the right to be brought to trial within two hundred seventy days after arrest. R.C. 2945.71(C)(2); Ohio Constitution Art. I §10. When a defendant waives his right to a speedy trial, such waiver must be done knowingly, voluntarily, and intelligently. *State v. Adams* (1989), 43 Ohio St.3d 67, 69, 538 N.E.2d 1025. When the State issues a subsequent indictment, or when the State amends an indictment so as to bring additional charges against the accused, any previous speedy trial waiver by the defendant does not apply. Id. at syllabus. However, when the State amends an indictment but does not change the name or identity of the offense charged, any prior speedy trial waiver by the defendant continues to apply. *State v. Campbell,* 150 Ohio App.3d 90, 2002-Ohio-6064, 779 N.E.2d 811, at ¶24, affirmed by *State v. Campbell,* 100 Ohio St.3d 361, 2003-Ohio-6804, 800 N.E.2d 356.

{¶31} As discussed supra, the trial court did not erroneously amend the indictment against Baer, and the changes that were made did not constitute changes in the name or identity of the crime. The specifications complained of did not have the effect of placing an additional burden on Baer's liberty, and thus were not the equivalent of new charges.

Given the foregoing, Baer's speedy trial waiver applied to the entirety of his court proceedings. Baer's first assignment of error is meritless.

Violation of Confrontation Right

{¶32} In his third assignment of error, Baer argues:

{¶33} "The defendant's right to confront witnesses was violated by the inclusion of testimony of counselors and children services workers [in] contravention of the 6th Amendment and the 14th Amendment."

{¶34} Baer asserts that the testimony of Carrothers, Delilo-Storey and Book, as well as the video-taped interviews of AB and SB should have been excluded from evidence. Baer argues that the statements were hearsay, not within the medical diagnosis exception, and violative of Baer's right to confrontation.

{¶35} Before addressing the merits of this argument, we again note that Baer's failure to object to any of this evidence waives all but plain error. More importantly, Baer has invited the error to which he now objects. The record reflects that Baer stipulated to the admission of the video tape. Baer also entered a joint motion to admit the counseling notes of DeLillo-Storey and Sara Book, and stipulated to the admission of Carrothers' written investigative report. During opening statements for the case, counsel for Baer indicated that the testimony of the children and of the counselors would demonstrate inconsistencies and evidence of coaching. Counsel also indicated in opening statements that the testimony of Carrothers and others would demonstrate that the case against Baer was insubstantial.

{¶36} Baer expressly allowed the evidence and testimony in order to point out the weakness and inconsistencies in the State's case. We must therefore conclude that Baer "invited any error and may not take advantage of an error which he himself invited or induced." *State v. Davis*, 116 Ohio St. 3d 404, 2008-Ohio-2, 880 N.E.2d 31, at ¶86. Baer's third assignment of error has been completely waived, and is thus meritless.

Ineffective Assistance of Counsel

{¶37} In his fourth assignment of error, Baer argues:

{¶38} "William Baer was denied effective assistance of counsel by trial counsel's failure to object to evidence being admitted and on failing to object and preserve error, [thus] violating [the] 6th amendment."

{¶39} To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) his counsel's performance was deficient, and (2) such deficient performance prejudiced the defense so as to deprive him of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Both prongs of this test need not be analyzed if a claim can be resolved under only one of them. See *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52. Thus, if a claim can be resolved because appellant has not shown prejudice, that course of action should be followed. See *State v. Loza* (1994), 71 Ohio St.3d 61, 83, 641 N.E.2d 1082, overruled on other grounds.

{¶40} A properly licensed attorney is presumed to execute his duties in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 17 OBR 219, 477 N.E.2d 1128. In order for a court to conclude counsel was ineffective, the defendant must overcome the presumption that, under the circumstances, the allegedly ineffective action might be considered sound trial strategy. *Strickland* at 698.

{¶41} Ineffectiveness is demonstrated by showing that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 524 N.E.2d 476. The defendant must demonstrate more than vague speculations of prejudice to show counsel was ineffective. *State v. Otte*, 74 Ohio St.3d 555, 566, 1996-Ohio-108, 660 N.E.2d 711. To establish prejudice, a defendant must show there is a reasonable possibility that, but for counsel's errors, the result of the proceeding would have been different. *Strickland* at 694. A reasonable possibility must be a probability sufficient to undermine confidence in the outcome of the case. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. The defendant bears the burden of proof in demonstrating ineffective assistance of counsel. *Smith*, supra.

{¶42} Baer's ineffective assistance of counsel claim is based on his trial counsel's failure to object to the use of the counselors' testimony, the amendment of Baer's

indictment, and the speedy trial issue which arose from the amended indictment. Based on the analysis of the first three assignments of error, the actions to which counsel failed to object were free of error, or cases of harmless error at most. Consequently, Baer cannot demonstrate that he suffered any prejudice from his trial counsel's failure to object. Similarly, because the actions to which counsel failed to object were free of error, lodging objections thereto would have been unsuccessful or even perceived as frivolous. The conduct of Baer's trial counsel fell well within the presumption of trial strategy.

{¶43} Based on the record, we cannot conclude that trial counsel was deficient or that counsel's failure to object to the alleged errors deprived Baer of a fair trial. Baer's argument thus fails on both prongs of the *Strickland v. Washington* test. Baer has failed to show that his trial counsel was ineffective, and his fourth assignment of error is meritless.

Insufficient Evidence

{¶44} In his sixth assignment of error, Baer argues:

{¶45} "There was insufficient evidence presented to convict the appellant of the crimes charged."

{¶46} In reviewing a challenge of insufficient evidence, "the inquiry is, after viewing the evidence in the light most favorable to the prosecution, whether any reasonable 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, 273, 574 N.E.2d 492, superseded by state constitutional amendment on other grounds. The court does not examine the credibility of the witnesses, nor does it weigh the evidence in this process. *State v. Goff* (1998), 82 Ohio St.3d 123, 139, 1998-Ohio-369, 694 N.E.2d 916. Sufficiency of the evidence is a test of adequacy, used to "determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541 (internal citations omitted). This is a burden of production, not of persuasion. *Thompkins* at 390.

{¶47} Baer states that the evidence for his case is legally insufficient because the statements made by the two victims in trial contradicted previous statements the victims made to medical personnel, the Children's Services worker, and counselors. Additionally,

Baer asserts that the children's mother, social worker, and counselors all lead or coached the children to say what they did. The only element specific to an offense that Baer discusses is "penetration," which he asserts was not established by credible evidence. In Baer's own recountal of the facts, he notes the points at which both victims described the act of penetration, and again relies on conflicting testimony as a basis for this argument.

{¶48} If there are inconsistencies in the testimony, the task of assessing witness credibility belongs to the trier of fact, and not to the reviewing appellate court. *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, at ¶132. While Baer's arguments would be relevant in a manifest weight argument, this court must resolve conflicting testimony in favor of the prosecution in a sufficiency analysis. In such resolution, the testimony, which asserted all of the elements of the crimes charged, is taken to be true. Thus Baer has not demonstrated any insufficiencies in the evidence, and the sixth assignment of error is rejected.

Batson Challenge

{¶49} In his seventh assignment of error, Baer argues:

{¶50} "The prosecution preemptively challenging a black prospective juror because of race violated the accused's due process rights under the 14th Amendment and Article I § 16 of the Ohio Constitution."

{¶51} Baer asserts that the State excluded the only African American member of the jury venire without providing a valid and race-neutral reason, in contravention of the Supreme Court's decision in *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69.

{¶52} A prosecutor violates the Equal Protection Clause of the United States Constitution when she uses peremptory challenges to purposefully exclude members of a minority group because of their minority status. *Batson* at 85-86; *State v. Bryan,* 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433. Courts analyze a *Batson* claim in three steps: 1) the opponent of the peremptory strike must make a prima facie case of racial discrimination; 2) the party making the peremptory challenge must present a racially neutral explanation for the challenge; and, 3) the trial court must decide whether the opponent has proved a purposeful racial discrimination. *Batson* at 96-98; *State v.*

Herring, 94 Ohio St.3d 246, 255-56, 2002-Ohio-796, 762 N.E.2d 940. The parties in the case sub judice argued this issue with the assumption that Baer made a prima facie case of racial discrimination.

{¶53} When a trial court evaluates the attorney's explanation, "a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law." *Hernandez v. New York* (1991), 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395. Appellate courts review *Batson* determinations with great deference, and a trial court's findings of no discriminatory intent will not be reversed unless clearly erroneous. *Hernandez* at 365; *Bryan* at ¶ 106.

{¶54} A race-neutral explanation for a peremptory challenge is simply "an explanation based on something other than the race of the juror." *Hernandez v. New York* (1991), 500 U.S. 352, 360, 111 S. Ct. 1859, 114 L.Ed.2d 3953. "[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." *Batson* at 97. The explanation must relate to the particular case being tried and be both clear and reasonably specific. *Batson* at 98, footnote 20. Although some relevancy is required of the explanation, it does not need to be "'persuasive, or even plausible': so long as the reason is not inherently discriminatory, it suffices." *Rice v. Collins* (2006), 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824, quoting *Purkett v. Elem* (1995), 514 U.S. 765, 767-768, 115 S.Ct. 1769, 131 L.Ed.2d 834. See also, *Hernandez* at 360 ("Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.").

{¶55} In the case sub judice, the parties did not dispute that Baer established a prima facie case of racial discrimination, as the juror in question was the only African American in the jury venire. The State questioned the juror, Mr. Jones, as follows:

{¶56} "Q: Have you or one of your family members been accused of a crime?

{¶57} "A: My son years ago had an affair with a girl and had a child.

{¶58} "Q: What kind of case was that?

{¶59} "A: It never came up to --

{¶60} "Q: So it never came to court.

{¶61} "A: No.

{¶62} "Q: So there was an allegation made but that matter was not brought to court. And because there was an allegation made against your son and we have a case where allegations have been made against Mr. Baer would that -- could you put that past history with your son out of your mind and listen only to what is said here at the witness stand?

{¶63} "A: Yes.

{¶64} "Q: And you could put that past incident with your son out of your mind and not bring it into your decision making?

{¶65} "A: Yes.

{¶66} * *

{¶67} "Q: The subject matter of this case obviously is offensive to some people. Because we're dealing with offensive subject matter would you be able to listen to this case or is the matter so offensive that you would tend to tune out what is being said?

{¶68} "A: I find it offensive, very offensive. I really am not sure if I could (inaudible).

{¶69} "Q: * * * And in this case, you know, the allegations are that there was sexual conduct and sexual contact by Mr. Baer with his two young children. Do you think you could listen to that evidence or will that evidence be of such a nature that it will be difficult for you to listen to that to the fact where you might zone out on it instead of listening to all (inaudible). Does that make sense?

{¶70} "A: It'd be difficult.

{¶71} "Q: * * * It's going to be difficult for us all to deal with this case, difficult for everyone in this room including the Defendant to listen to the evidence. But as a juror it's your job to listen to the evidence and be able to listen to all the evidence and make a decision. Now, because this matter is about sexual abuse do you think you can sit here and listen to evidence about sexual abuse?

{¶72} "A: Yes.

{¶73} "Q: And if you can listen to it then you can be fair and impartial.

{¶74} "A: Yes.

{¶75} The State later exercised its third peremptory challenge to excuse Mr. Jones. Baer raised the *Batson* challenge in a sidebar conference with the judge, which was not transcribed. Because the sidebar conversation was not recorded, the trial court entered an Appellate Rule 9 Statement of Record as to what transpired during the discussion. The trial court "noted that some of Mr. Jones' responses demonstrated his doubts about serving as a juror in this case."

{¶76} The record indicates that the State provided a race-neutral reason for excusing Mr. Jones from the jury, and that the statements by Mr. Jones support the State's reason for excusing him. Mr. Jones stated that he could be fair and impartial in the case, but also indicated that it would be difficult to hear the case and stated “I find it offensive, very offensive. I really am not sure if I could (inaudible).” Mr. Jones also answered affirmatively, albeit vaguely, to questions about family members being accused of crimes. A prospective juror’s equivocal answers or expressions of uncertainty about impartiality or matters pertinent to the case are sufficiently race-neutral reasons for exercising a peremptory challenge. *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, at ¶65 (prospective juror had uncertain position on the death penalty); *State v. Franklin*, 7th Dist. No. 06-MA-79, 2008-Ohio-2264, at ¶70-92 (prospective juror’s attentiveness and understanding of burden of proof was uncertain); *State v. Person*, 174 Ohio App.3d 287, 2007-Ohio-6869, 881 N.E.2d 924, at ¶33 (prospective juror made a disdainful facial expression during the State’s questions).

{¶77} Baer did not demonstrate that the State's reason for the peremptory challenge was “so at odds with the evidence that pretext is the fair conclusion.” *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, at ¶66. The trial court was in the best position to evaluate the exchange between the attorneys and the jury venire, and was in the best position to discern whether the State's reason for peremptory challenge was pretextual. “Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation. These circumstances mean that appellate courts will, and must, grant the trial courts considerable leeway in applying *Batson.*” *Rice v. Collins* at 343. (Breyer, J., concurring).

{¶78} The trial court completed the *Batson* analysis appropriately and determined that the State had valid race-neutral reasons for excluding Mr. Jones. The trial court's ruling on the *Batson* challenge was not clearly erroneous. Given the foregoing, Baer's seventh assignment of error is meritless.

Cumulative Prejudicial Error at Trial

{¶79} In his fifth assignment of error, Baer argues:

{¶80} "The overall effect of the error at the trial phase rose to the level of prejudicial error mandating a reversal."

{¶81} Baer asserts that the errors at trial, including a conviction based on insufficient evidence, rejection of Baer's *Batson* challenge, and his trial counsel's failure to address the hearsay testimony, amended indictment, and renewal of speedy trial right, had a cumulative prejudicial effect on Baer to the extent that he was denied his constitutional right to a fair trial.

{¶82} Under the doctrine of cumulative error, a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of the errors does not individually constitute cause for reversal. *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168, 656 N.E.2d 623. However, the doctrine of cumulative error is inapplicable when the alleged errors are found to be harmless or nonexistent. Id.; *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, at ¶48. Additionally, an allegation of cumulative error lacks substance where it is raised without further analysis: "it is not enough simply to intone the phrase 'cumulative error.'" *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, at ¶197. And finally, given that a number of the above errors were waived for failure to object, the plain error doctrine is still applicable to this cumulative error analysis. *State v. Young*, 7th Dist. No. 07 MA 120, 2008-Ohio-5046, at ¶66.

{¶83} Based on our analysis of the other six assignments of error in this appeal, all claimed errors are either harmless or not erroneous. Moreover, Baer's argument lacks substance: he lists or incorporates the other six assignments of error, and gives no analysis or explanation as to why or how the errors have had a prejudicial cumulative effect. For this reason alone, Baer's argument must fail.

{¶84} As this case does not involve multiple instances of error, and because Baer has failed to provide any analysis in his claim, his fifth assignment of error is meritless.

Conclusion

{¶85} The trial court properly allowed the indictment against Baer to be amended, and Baer's speedy trial waiver applied to the entirety of his proceedings. Baer explicitly agreed to the admission of evidence from the investigator and counselors of the victims. Trial counsel's failure to object to the preceding issues was well within the realm of trial strategy. The State presented evidence which, if believed, satisfied all elements of the crimes charged against Baer. The court's overruling of Baer's *Batson* challenge was completed subsequent to the proper analysis. Finally, given that the above claims did not involve errors by the trial court, their cumulative effect was not of prejudicial error. Baer's assignments of error are meritless. Accordingly, the judgment of the trial court is affirmed.

Vukovich, P.J., concurs.

Waite, J., concurs.