[Cite as *State v. Gawron*, 2021-Ohio-3634.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOHN (NMN) GAWRON, III,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 BE 0009

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 18 CR 232

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. J. Kevin Flanagan, Belmont County Prosecutor*, Atty. Daniel P. Fry,* Assistant. Prosecuting Attorney, 147-A W. Main Street, St. Clairsville, Ohio 43950 for Plaintiff-Appellee and

Atty. Edward A. Czopur, DeGenova & Yarwood, Ltd., 42 North Phelps St. Youngstown, Ohio 44503 for Defendant-Appellant.

Dated: September 24, 2021

Robb, J.

{¶1} Defendant-Appellant John Gawron, III appeals from his convictions in Belmont County Common Pleas Court for one count of pandering sexually oriented matter involving a minor, one count of rape, and ten counts of illegal use of a minor in nudity. Multiple issues are raised in this case. First, Appellant contends his right to a fair trial was deprived when the jury pool saw him in the courthouse in shackles. Next, Appellant argues the trial court erred when it denied his motion to suppress his second interview. His third argument is that two witnesses were allowed to reference the 1,060 pictures/images found on the computer, those pictures/images were in some capacity before the jury and were impermissible other acts evidence. Fourth, he argues the trial court erred in allowing the jury to have ear buds to listen to video evidence during deliberations. He asserts this permitted the jury to enhance the audio and act as an investigator. Next, he contends there was insufficient evidence of illegal use and pandering and that those convictions were against the manifest weight of the evidence. Specifically, he focuses on the fact that the state did not prove beyond a reasonable doubt the depictions were of real children and not virtual children. He admits trial counsel did not raise this issue at trial and alternatively argues trial counsel was ineffective for failing to raise the issue. Next, he contends there is insufficient evidence for the rape conviction. Lastly, he asserts cumulative error. Finding no merit, the convictions are affirmed.

Statement of Case and Facts

{¶2} On October 1, 2018 the Ohio Internet Crimes Against Children Task Force (ICAC) notified Detective Sergeant Douglas Cruse of the Belmont County Sherriff's Office that someone in Belmont County was sharing a file that was known to be child pornography. The file was being shared on the platform Tumblr through an IP address assigned to Wesley Burdge. The screen name sharing the file was 972rubberchicken and this screen name was associated with Appellant.

{¶3} A search warrant was obtained to search the residence associated with the IP address, which was the home of Wesley Burdge, his wife Tabitha Gallagher, and their

minor two children. Appellant was living in this residence with the above at that time. On October 11, 2018, when the search warrant was executed, Burdge and the children were home, however, Appellant was not. The police were informed Appellant was at work. The police seized a laptop computer, external hard drives, and other electronics from the home. Burdge was not arrested at that time.

{¶4} The police while waiting nearby for Appellant to return to the residence began looking at the laptop and discovered child pornography. This laptop was owned and used by Burdge. The police returned to the residence, but Burdge had left with the children; he had picked up his wife from work and they fled.

{¶5} Appellant was arrested and interviewed later that day focusing on a laptop they believed to be owned by him. They found multiple instances of child pornography on the laptop. During the interview, Appellant indicated the laptop was used by himself and Burdge and that the images were put on there by Burdge.

{¶6} The following day, October 12, 2018, Appellant was charged with pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(2). Complaint from Belmont County Court Western Division. Appellant was arraigned that same day, a preliminary hearing was set for October 16, 2018, a public defender was appointed, and he was held in lieu of bond. 10/12/18 J.E. from Belmont County Court Western Division.

{¶7} On November 2, 2018, Burdge, Gallagher, and their children were discovered in a hotel in Washington, Pennsylvania. Gallagher at that time revealed a video to the arresting officers of one of her children and Appellant. The video does not explicitly show any sex act, but it shows Appellant moving the child's head towards his lap. The bottom two thirds of Appellant are not shown in the video.

{¶8} This video led to a second interview with Appellant, which occurred on November 5, 2018. This interview occurred after counsel had been appointed for the sexual pandering charge. It is undisputed counsel was not notified of the second interview and the Appellant did not initiate the second interview. In the second interview, Appellant admits he was naked in the video and there was sexual conduct; Appellant had the child perform fellatio on him.

{¶9} On November 8, 2018, Appellant was indicted by the Belmont County Grand Jury for pandering in violation of R.C. 2907.322(A)(1) and rape in violation of R.C.

2907.02(A)(1)(b) (victim was less than 13 years of age). A supplemental indictment was issued on January 9, 2020. This indictment added 10 counts of illegal use of minors in nudity-oriented material or performance in violation of R.C. 2907.323(A)(3)(B), all fifth-degree felonies.

{¶10} Prior to the supplemental indictment, Appellant sought to suppress the second interview, the November 5, 2018 interview regarding the rape of the minor child. 8/1/19 Defendant's Motion to Suppress. A hearing was held on the motion prior to the state responding; the trial court permitted the state to file a response by September 23, 2019 and Appellant a reply by October 7, 2019. 9/9/19 Motion to Suppress Hearing; 9/10/19 J.E. Following the motion in opposition to the motion to suppress, the trial court denied the motion to suppress indicating an offense specific appointment does not bar questioning concerning a second uncharged offense. 10/9/19 State Response to Motion to Suppress; 10/25/19 J.E. Motion to suppress overruled.

{¶11} The jury trial began on March 10, 2020. Appellant was found guilty of all 12 charges. 3/13/20 J.E. The sentencing hearing occurred on March 20, 2020. He was sentenced to 8 years for pandering, 25 years to life for rape of a minor under 13 years of age, and 12 months for each illegal use of a minor in nudity oriented material or performance. All sentences were ordered to be served consecutive to each other for an aggregate minimum term of 43 years and a maximum term of life. Appellant received 5 years mandatory postrelease control and was classified as a Tier III Sex Offender. 3/20/20 J.E.

{¶12} Appellant filed a timely appeal from his convictions. 4/1/20 Notice of Appeal. Appellant raises 11 assignments of error. Some assignments of error will be addressed out of order due to commonality of law governing the assignments and to reduce repetition of law.

Venire Viewed Appellant in Shackles

First Assignment of Error

"Appellant was denied his right to a fair trial and due process of law pursuant to both the Ohio State Constitution, and United States Constitution when the trial court refused to bring in a new jury venire after the first was tainted by having seen Appellant in shackles."

{¶13} It is undisputed Appellant was escorted down the hallway of the courthouse in front of the jury pool while shackled (hands and feet). Trial Tr. 8-9. The trial court was informed of this incident and a hearing was held on the matter. Trial Tr. 8-21. The trial court offered to give a curative instruction. Trial Tr. 18, 20. Counsel for Appellant indicated that it could not be cured in that manner; the pool was polluted. Trial Tr. 18-19. Counsel requested an entire new pool, which the trial court considered to be a motion for mistrial and denied it. Trial Tr. 19, 21. The court noted that the situation was created by Appellant and also indicated that if counsel wanted to address the issue during voir dire it could. Trial Tr. 21. It does not appear counsel for either party addressed the issue during voir dire.

{¶14} On appeal, Appellant asserts the incident was not brief or inadvertent. The deputies knew the jury pool would be in the courthouse, yet they still brought Appellant in shackled. Therefore, prejudice must be inferred and since the trial court neither dismissed the entire venire nor issued a curative instruction, prejudice must be presumed and the convictions must be reversed.

{¶15} The state disagrees of Appellant's assessment of the situation. It contends Appellant created the situation resulting in him remaining shackled in the jury pool's presence. Specifically, he was reluctant to attend trial and the deputies were afraid he was a flight risk. Furthermore, the trial court offered to give a curative instruction. Appellant declined that request and insisted on the dismissal of the entire venire.

{¶16} We have previously explained a criminal defendant has the right to be free from shackles in the presence of jurors during trial absent unusual circumstances. *State v. Creech*, 2014-Ohio-4004, 18 N.E.3d 523, ¶ 42 (7th Dist.), citing *Deck v. Missouri,* 544 U.S. 622, 125 S.Ct. 2007 (2005) and *Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057 (1970). However, "[t]he inadvertent sighting by jurors of a handcuffed accused outside of the courtroom does not create a per se mistrial." *Id.* at ¶ 43, citing *State v. Linkous,* 5th Dist. Licking No. 08CA51, 2009-Ohio-1896, ¶ 67. If there is an inadvertent sighting, the accused must present evidence that the jury was tainted by the sighting, i.e., prejudice. at ¶ 43. Prejudice has been deemed to be slight when the sighting is brief, inadvertent, and outside the courtroom. *Id.* at ¶ 44 (citations to numerous cases holding as such).

{¶17} In our previous cases addressing this issue, we have explained that when the viewing occurs during transportation the prejudice is slight and is overcome by a curative instruction. *Id*. at ¶ 44; *State v. Peyatt*, 2019-Ohio-3585, 142 N.E.3d 1190, ¶ 37-42 (7th Dist.). It is normal and a necessary practice to handcuff defendants during transportation to prevent escape and possible injury to others if an escape is attempted; the jury is aware of this practice. *Peyatt* at ¶ 39; citing *Creech*, quoting *State v. Morris,* 4th Dist. Athens No. 1097 (Feb. 18, 1982), quoting *U.S. v. Leach*, 429 F.2d 956 (8th Cir.1970).

{¶18} Here, the evidence indicates the viewing was during transportation and the cause for Appellant to remain shackled in the hallway was due to his own actions. At the hearing, Deputy Tim Newhart, a deputy from the Belmont County Sheriff's Department with approximately 27 years of experience, testified. Trial Tr. 11-16. He explained that while Appellant was at the jail he informed the deputies he was refusing to go to court. Trial Tr. 11. They informed him he had to go to court. Trial Tr. 11. Although Appellant finally got dressed, he took a long time and gave the deputies the impression he did not want to be there. Trial Tr. 11-12. Deputy Newhart explained the normal policy is an offender is unshackled once they get on the elevator, but that was not done in this case because in the deputies' minds Appellant did not want to be there and they were fearful he might run. Trial Tr. 12. Deputy Newhart admitted Appellant did not resist being cuffed, he did not attempt to run while at the jail, he did not use expletives, and he did not assault the deputies. Trial Tr. 12-14. However, he explained Appellant was adamant that he did not want to go to court. Trial Tr. 13. The court observed that it seemed that they were later than normal arriving at the courthouse. Trial Tr. 16. Deputy Newhart explained they were about nine minutes late due to having to talk Appellant into coming and Appellant taking 10 to 15 minutes to get dressed. Trial Tr. 16.

{¶19} Thus, given the actions of Appellant, we conclude the prejudice was slight and a curative instruction would have overcome any prejudice resulting from the jury pool viewing him in shackles; this situation is akin to *Creech* and *Peyatt* where a curative instruction would have negated any prejudice. Admittedly, the trial court did not give a curative instruction. However, it did offer to give a curative instruction. Trial Tr. 18-19. Appellant's counsel declined the offer and instead insisted the entire jury pool be

dismissed. Trial Tr. 18-20. The trial court did not err in refusing to dismiss the entire pool for the reasons expressed above. Furthermore, the decision to decline the curative instruction resulted in any error in failing to give the instruction being invited.

{¶20} This assignment of error lacks merit.

Suppression Second Interview

Second Assignment of Error

"The trial court erred in refusing to suppress the second interview of Appellant which was conducted after counsel was appointed, and without counsel being present."

{¶21} Appellant was arrested and interviewed on October 11, 2018 after his residence was searched and images of child pornography were discovered on a laptop he used. The following day, October 12, 2018, Appellant was charged with pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(2). He was arraigned that same day, a preliminary hearing was set for October 16, 2018, a public defender was appointed, and he was held in lieu of bond. On November 2, 2018, Gallagher gave the police a video of one of her children and Appellant. The video did not explicitly show any sex act, but it did show Appellant moving the child's head towards his lap. As a result of the video, the police interviewed Appellant again on November 5, 2018 (second interview). This interview occurred after counsel had been appointed on the sexual pandering charge. It is undisputed counsel was not notified of the second interview and the Appellant did not initiate the second interview.

{¶22} In the second interview, Appellant admits sexual conduct between himself and the child. Prior to trial, Appellant moved to suppress statements made at the second interview. A hearing was held on the motion. The trial court denied the motion indicating the right to counsel is offense specific and law enforcement was not barred from questioning Appellant on the rape, which was an uncharged offense at the time of the second interview. 10/25/19 J.E.

{¶23} Both Appellant and the state focus their arguments on the United States Supreme Court decision in *Texas v. Cobb*, 532 U.S. 162, 121 S.Ct. 1335 (2001). Appellant contends the state and the trial court's reliance on *Cobb* is misplaced because it is inapplicable and has been narrowed in application. He contends *Cobb* is distinguishable because counsel in *Cobb* knew and consented to the interrogation. Also,

he asserts the offenses here are not two different offenses because the proof offered by the state for pandering and rape overlap. Lastly, he contends *Cobb* was a 5-4 decision. If this court agrees with the trial court that the majority in *Cobb* allows the second interrogation, he asks this court to denounce the majority and side with the dissent.

{¶24} The state asserts *Cobb* is controlling and not distinguishable. It contends that at the time of the second interview Appellant had not been charged with rape. He was not being investigated for rape until early November (after he was charged with pandering) when Gallagher gave the officers the video. Therefore, the second interview was conducted properly and the denial of the motion to suppress was correct.

{¶25} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. At a suppression hearing, "the trial court is best able to decide facts and evaluate the credibility of witnesses." *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, ¶ 41. The trial court's findings of fact, if supported by competent, credible evidence, are to be accepted and a reviewing court must make an independent determination as to whether they satisfy the relevant legal standard. *Id.*

{¶26} The Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees that an accused in a criminal case shall enjoy the right to have the assistance of counsel for his defense. *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S.Ct. 2204 (1991). That right to counsel attaches once adversarial judicial criminal proceedings have commenced against the accused. *Kirby v. Illinois*, 406 U.S. 682, 688, 92 S.Ct. 1877 (1971). The Ohio Supreme Court has stated that "an accused's Sixth Amendment right is offense specific." *State v. Hill,* 73 Ohio St.3d 433, 653 N.E.2d 271 (1995). Appointment of counsel with respect to one offense does not bar police questioning as to a second, uncharged offense." *Id.* at 446. *See, also, Cobb*, 532 U.S. 162. The Sixth Amendment right to counsel cannot be invoked once for all future prosecutions. *Cobb.*

{¶27} Here, the timeline set forth above is undisputed. The first interview occurred on October 11, 2018 after his residence was searched and images of child pornography were discovered on a laptop he used. He was charged the following day with pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(2). Appellant

was given his *Miranda* rights and waived them for the first interview. 9/9/19 Suppression Tr. 4. During the first interview there were general questions about sex abuse, but no admissions. 9/9/19 Suppression Tr. 13. Appellant was then arraigned and appointed a public defender. On November 2, 2018, Gallagher gave the police the video of one of her children and Appellant. Three days later, the second interview occurred and the questioning specifically concerned whether Appellant raped the victim. This interview occurred after counsel was appointed on the sexual pandering charge, counsel was not notified of the second interview, Appellant did not initiate the second interview, and he was given and waived his *Miranda* rights. 9/9/19 Suppression Tr. 23, 34.

{¶28} This case is akin to *Cobb*. In that case, the United States Supreme Court declined to exclude the defendant's confession that he killed a neighbor and her daughter while burglarizing their home. Originally, Cobb had confessed to the burglary and denied knowledge of the woman and child's disappearance. *Cobb*, 532 U.S. at 165. He was indicted on the burglary charge and counsel was appointed to represent him. *Id*. He was then interviewed two more times with the knowledge and permission of counsel about the disappearances. *Id*. While he was out on bond awaiting trial on the burglary charge, he confessed to his father that he killed the woman and child. *Id*. His father notified the police and Cobb was interviewed again without his attorney being present. *Id*. He waived his *Miranda* rights and confessed to killing the woman and child during the commission of the burglary. *Id*. at 165-166. That confession was admitted at trial and he was convicted. *Id*. The United States Supreme Court reversed the judgment of the Texas Court of Criminal Appeals that reversed the convictions for the reason that the confession should have been excluded on Sixth Amendment grounds.

{¶29} The Supreme Court followed its previous ruling in *McNeil* that the Sixth Amendment right to counsel is "offense specific," and declined to broaden the scope of Sixth Amendment protection beyond pending crimes to other uncharged offenses that may be factually related. *Cobb,* at 168-169. However, it did recognize that "offense" is not limited to the four corners of the indictment:

> Although it is clear that the Sixth Amendment right to counsel attaches only to charged offenses, we have recognized in other contexts that the definition of an "offense" is not necessarily limited to the four corners of a charging

> instrument. In *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), we explained that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.,* at 304, 52 S.Ct. 180. We have since applied the *Blockburger* test to delineate the scope of the Fifth Amendment's Double Jeopardy Clause, which prevents multiple or successive prosecutions for the "same offence." See, *e.g., Brown v. Ohio,* 432 U.S. 161, 164–166, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). We see no constitutional difference between the meaning of the term "offense" in the contexts of double jeopardy and of the right to counsel. Accordingly, we hold that when the Sixth Amendment right to counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test.

Cobb, 532 U.S. at 172–73 (declining to use the inextricably intertwined or closely related to test).

{¶30} As defined, pandering sexually oriented matter involving a minor and rape are not the same offense under the *Blockburger* test. Pandering sexually oriented matter involving a minor as defined by R.C. 2907.322(A)(1), provides that, "No person, with knowledge of the character of the material or performance involved, shall * * * [c]reate, record, photograph, film, develop, reproduce, or publish any material that shows a minor * * * engaging in sexual activity, masturbation, or bestiality." First-degree rape defined by R.C. 2907.02(A)(1)(b), provides, "No person shall engage in sexual conduct with another who is not the spouse of the offender * * * [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person." Each requires proof of a fact the other does not.

{¶31} Appellant does assert the cases are distinguishable because counsel for Cobb had previously consented to Cobb being interviewed on the disappearances of the woman and child. Here, counsel did not consent or know about the second interview. While counsel's assertion of the facts are true, the United States Supreme Court did not focus on that fact and instead focused on offenses under *Blockburger*. Considering the

facts of each case (*Cobb* and the case at hand), they are more similar than distinguishable.

{¶32} Admittedly, the dissent in *Cobb* sets forth a "closely related to" or "inextricably intertwined with" test that it insists is the better test to follow. The *Cobb* dissent explained while this test lacks precision for police officers and requires trial courts to specify its meaning as it is applied to individual cases, it is a better test. *Cobb*, 532 U.S. at 186-187 (Breyer, J., dissenting) (Indicating many lower courts have defined "offense" in the Sixth Amendment context to encompass such closely related acts noting the Third, Fourth, Fifth, Sixth, and Ninth Circuits as well as state courts in Massachusetts and Pennsylvania) and citing *Taylor v. State,* 726 So.2d 841, 845 (Fla.App.1999); *People v. Clankie,* 124 Ill.2d 456, 462–466, 125 Ill.Dec. 290, 530 N.E.2d 448, 451–453 (1988); *State v. Tucker,* 137 N.J. 259, 277–278, 645 A.2d 111, 120–121 (1994).). The dissent explained that the courts that have used this "closely related to" test have found the offenses closely related where they involved the same victim, set of acts, evidence, or motivation, but unrelated where time, location, or factual circumstances significantly separated the one from the other. *Id*. citing *Taylor v. State,* 726 So.2d 841, 845 (Fla.App.1999) (related charges of stolen property charges and burglary); *State v. Tucker,* 137 N.J. 259, 278, 645 A.2d 111, 121 (1994) (related charges of burglary, robbery, and murder of home's occupant); *In re Pack,* 420 Pa.Super. 347, 355–356, 616 A.2d 1006, 1010 (1992) (related charges of burglary, receiving stolen property, and theft); *Commonwealth v. Rainwater,* 425 Mass. 540, 547–549, and n. 7, 681 N.E.2d 1218, 1224, and n. 7 (1997) (unrelated where vehicle theft charge and earlier vehicle thefts in same area); *Whittlesey v. State,* 340 Md. 30, 56–57, 665 A.2d 223, 236 (1995) (unrelated charges of murder and making false statements charges); *People v. Dotson,* 214 Ill.App.3d 637, 646, 158 Ill.Dec. 349, 574 N.E.2d 143, 149 (unrelated murder and weapons charges).

{¶33} Given the dissents explanation of "closely related to" and "inextricably intertwined with," it is clear that these two offenses would not qualify as being "closely related to" or "inextricably intertwined with" each other. The victim of the rape is not the victim of the child pornography; the victim of the rape does not appear in any of the child pornography pictures. The evidence of rape (video) is not the same evidence to prove

the child pornography charges (images on the computer). Also, there is little suggestion the set of acts or motivation are intertwined; the motivation of owning child pornography does not necessarily equate to the motivation to rape.

{¶34} Regardless, the inextricably intertwined or closely related to tests were not adopted by the majority in *Cobb.* *Cobb*, 532 U.S. at 173 (explaining "[t]he dissent seems to presuppose that officers will possess complete knowledge of the circumstances surrounding an incident, such that the officers will be able to tailor their investigation to avoid addressing factually related offenses. Such an assumption, however, ignores the reality that police often are not yet aware of the exact sequence and scope of events they are investigating—indeed, that is why police must investigate in the first place. Deterred by the possibility of violating the Sixth Amendment, police likely would refrain from questioning certain defendants altogether."). Furthermore, the Ohio Supreme Court has not adopted the "closely related to" or "inextricably intertwined with" tests to define "offense" in the Sixth Amendment context. Although, Appellant asks this court to denounce the *Cobb* majority and side with the dissent, as an inferior court until there is guidance from the Ohio Supreme Court as to the application to the Ohio Constitution or a reversal or clarification from the United States Supreme Court we shall follow the holding in *Cobb*.

{¶35} Consequently, for the above reasons, this assignment of error is meritless.

Other Acts Evidence

Third Assignment of Error

"Appellant was denied his right to a fair trial, pursuant to both the Ohio State Constitution, and United States Constitution, when the trial court allowed testimony and production of 'thousands' of alleged images of child pornography that were not charged in violation of both Evid.R. 403 and 404."

{¶36} Two witnesses for the state testified at trial that over a thousand images of alleged child pornography were found on the computer used by Appellant. Ian Wallace, the computer forensic specialist from the Ohio Bureau of Criminal Investigation, testified there were over 1,000 images. Trial Tr. 353. Detective Sergeant Cruse testified there were 1,060 pictures/images. Trial Tr. 480. Appellant was only charged with 10 counts of

illegal use of a minor in nudity and 1 count of pandering. Despite Appellant's objection, the state discussed the images and even displayed some of them to the jury.

{¶37} Appellant contends this other acts evidence resulted in undue prejudice and the state cannot meet any of the three prongs of the test for allowing admission; the Ohio Supreme Court set forth the test in *Williams*. Appellant argues the other images are not relevant under Evid.R. 401 as to whether he possessed the 10 images he was charged with or to whether he pandered the one image. He asserts there is no permissible purpose under Evid.R. 404(B) allowing the presentation of this evidence. Lastly, the prejudice outweighs the probative value.

{¶38} The state disagrees and contends the other acts evidence was relevant. It was not used to prove the character of the accused to show he acted in conformity therewith, and the probative value substantially outweighed the danger of unfair prejudice. It appears to contend the other acts forms a part of the immediate background of the alleged acts which forms the foundations of the crimes charged in the indictment and are inextricably related to the crime. It asserts the images are related to Appellant's addiction to child pornography and his own statements indicated he utilized the photographs to masturbate in the privacy of his own room.

{¶39} A review of the transcript reveals both Detective Cruse and the computer specialist from BCI testified that 1,060 pictures and/or videos were found on the computer. Defense counsel objected to the testimony indicating that when there are only 10 counts of illegal use, it is improper to show over 1,000. Counsel acknowledged while Ohio allows this, the number is excessive. Trial Tr. 355-356. The state countered asserting it is allowable, but that it would just utilize the photographs/videos related to the counts. Trial Tr. 356. While the record is not perfectly clear that only the images related to the counts were the focus, it does appear they were the major focus. It appears the images not related to the counts were scrolled through and therefore, were displayed to some extent to the jury.

{¶40} Courts are precluded as a matter of law from admitting improper character evidence under Evid.R. 404(B), but courts do have discretion to allow other acts evidence that is admissible for a permissible purpose. *State v. Graham*, ___ Ohio St.3d ___, 2020-

Ohio-6700, ¶ 72. Thus, pursuant to *Graham*, the admission of other acts evidence is reviewed under a mixed standard of review.

{¶41} The Ohio Supreme Court in *Williams* set forth a three-part analysis for determining the admissibility of other acts evidence. To be admissible, (1) the evidence must be relevant (Evid.R. 401), (2) the evidence cannot be presented to prove a person's character to show conduct in conformity therewith but must instead be presented for a legitimate other purpose (Evid.R. 404(B)), and (3) the probative value of the evidence cannot be substantially outweighed by the danger of unfair prejudice (Evid.R. 403). *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20. *See, also, Graham*, 2020-Ohio-6700.

{¶42} Evid.R. 404(A) is a general prohibition on using evidence of a person's character to prove that he acted "in conformity therewith on a particular occasion." Thus, evidence that an accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit a crime or that he acted in conformity with bad character. *State v. Morgan*, 12th Dist. Butler Nos. CA2013-08-146 and CA2013-08-147, 2014-Ohio-2472, ¶ 40. However, Evid.R. 404(B) provides evidence of other crimes may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Therefore, pursuant to Evid.R. 404(B), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that a person acted in conformity therewith on a particular occasion. *State v. Hart*, 12th Dist. Warren No. CA2008-06-079, 2009-Ohio-997, ¶ 11. Such evidence, however, is permitted for other purposes, including proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident. *State v. Thomas*, 12th Dist. Butler No. CA2012-11-223, 2013-Ohio-4327, ¶ 22.

{¶43} That said, appellate courts have explained:

> Evid.R. 404(B) only applies to limit the admission of so-called "other acts" evidence that is "extrinsic" to the crime charged. *State v. Stallworth*, 11th Dist. Lake No. 2013-L-122, 2014-Ohio-4297, ¶ 37. In other words, "Evid.R. 404(B) does not apply when the acts are intrinsic as opposed to extrinsic, i.e., the acts are part of the events in question or form part of the immediate

> background of the alleged act which forms the basis for the crime charged." *State v. Wainscott*, 12th Dist. Clermont No. CA2015-07-056, 2016-Ohio-1153, ¶ 19, citing *State v. Crew*, 2d Dist. Clark No. 2009 CA 45, 2010-Ohio-3110, ¶ 99. Thus, "evidence of other crimes or wrongs may be admitted when such acts are so inextricably intertwined with the crime as charged that proof of one involves the other, explains the circumstances thereof, or tends logically to prove any element of the crime charged." *Id.*

State v. Smith, 12th Dist. Clermont No. CA2019-10-075, 2020-Ohio-4008, ¶ 51, *appeal not allowed,* 161 Ohio St.3d 1450, 2021-Ohio-534, 163 N.E.3d 581. *See, also, State v. Stallworth*, 11th Dist. Lake No. 2013-L-122, 2014-Ohio-4297, ¶ 37-41.

{¶44} In the *Smith* case, the Twelfth Appellate District explained that the alleged other acts evidence was intrinsic, not extrinsic and therefore admissible:

> Although Smith characterizes the evidence as "other acts" evidence, the record reflects that the evidence that Smith sexually abused H.H. at the Travel Inn and solicited nude photographs from her were part and parcel of the underlying case. Though the state chose to proceed on only four counts, H.H. testified about many more instances of sexual abuse that could have been pursued. As noted earlier, Smith's offenses were part of a course of conduct related to the grooming and sexual abuse of H.H. Evidence of his abuse and manner of abuse was relevant and admissible in this case.

Id. at ¶ 52.

{¶45} In numerous instances other districts have concluded the admission or reference to a large number of pictures of pornography or other acts of sexual abuse was not a violation of the prohibition against other acts evidence:

> In *State v. Blankenburg*, 197 Ohio App.3d 201, 2012-Ohio-1289 (12th Dist.), appellant was convicted of numerous offenses, including four counts of corruption of a minor, six counts of gross sexual imposition, and three counts of pandering sexually oriented matter involving a minor. *Id.* at ¶ 3. At trial, the state presented evidence that a large number of the photographs

> or negatives removed from appellant's house contained images "appearing to feature the clothed buttocks or clothed groin region of teenage boys, or of shirtless teenage boys, most of whom were athletes." *Id.* at ¶ 74. In affirming the convictions, the Twelfth District Court of Appeals applied the *Williams* analysis and held the trial court did not abuse its discretion in admitting the photographs and related testimony under Evid.R. 404(B) because the evidence was relevant when offered to prove appellant's motive for committing sex offenses, the trial court had given the jury the appropriate limiting instructions, and the danger of unfair prejudice did not outweigh the relevance of the evidence when offered to prove motive. *Id.* at ¶ 81-89.
>
> In *State v. King*, 5th Dist. No. CT05-0017, 2006-Ohio-226, the Fifth District Court of Appeals held the trial court did not abuse its discretion in a prosecution for pandering obscenity involving a minor by admitting evidence of defendant's prior convictions for illegal use of a minor in nudity-oriented material and pandering sexually oriented material involving a minor. *Id.* at ¶ 21. The Fifth District determined such evidence was admissible under Evid.R. 404(B) because the identity of the sender of obscene material was in question and the prior convictions demonstrated identity through use of a common scheme or plan, and because the trial court gave the jury an appropriate limiting instruction. *Id.* at ¶ 21-26. Similarly, in *State v. Gillingham*, 2d Dist. No. 20671, 2006-Ohio-5758, the court held that joinder of a charge of gross sexual imposition with other charges was proper because evidence of pornographic video images involving children, which formed the basis of charges of pandering obscenity involving a minor, was admissible under Evid.R. 404(B) to prove that defendant's motive was sexual gratification based on sexual contact. *Id.* at ¶ 32.

State v. Hicks, 10th Dist. Franklin No. 18AP-883, 2020-Ohio-548, ¶ 18-19.

{¶46} Similarly, the Fifth Appellate District allowed the admission of child pornography photos that were not charged. *State v. Eichorn,* 5th Dist. Morrow No. 02 CA

953, 2003–Ohio–3415. In *Eichorn*, defendant was charged with raping his granddaughter, as well as two counts of gross sexual imposition, five counts of disseminating matter harmful to juveniles, twenty counts of pandering obscenity involving a minor, seven counts of pandering sexually oriented material involving a minor and twenty counts of illegal use of a minor in nudity-oriented material. *Id*. The appellate court held, as to the sex offense charges, the computer evidence would be admissible to show appellant's motive, intent, scheme or plan in committing the sexual abuse against the victims. *Id*. at ¶ 33. "This is based upon the fact that the exhibits admitted into evidence clearly established they were gathered and viewed by someone interested in child pornography." *Id*.

{¶47} The Third Appellate District utilized that reasoning in *Voorhis* to allow the introduction of the 1,700 child pornography images. *State v. Voorhis*, 3d Dist. Logan No. 8-07-23, 2008-Ohio-3224, ¶ 71-74. It reasoned that, "the child pornography found on VanVoorhis computer was similar in nature to the sexual acts he committed with Justin Williams. All of the 1,700 images, except two, exclusively involved men and boys engaged in both oral and anal intercourse. This was the same type of sexual conduct VanVoorhis performed with Justin." *Id*. at ¶ 73.

{¶48} Considering all of the above, the "other acts" of over 1,000 photographs of child pornography establishes they were gathered and viewed by someone interested in child pornography. Appellant admitted he used the photographs to masturbate; these images were used for sexual gratification. The images were part of the course of conduct.

{¶49} Consequently, for those reasons the use of the uncharged images (which appears to be relatively minor use) does not constituted impermissible other acts evidence. This assignment of error is meritless.

Jury Separate Investigation

Fourth Assignment of Error

"Appellant was denied his right to a fair trial, pursuant to both the Ohio State Constitution, and United States Constitution, when the trial court allowed the jury to enhance the audio of a state's exhibit beyond that which was presented at trial."

{¶50} During the deliberations, the jury asked for a pair of earbuds. Trial Tr. 621. Specifically, one juror said, "Well, if we had a pair of earbuds, rather than going through

the speakers on the TV, we may be able to hear it better." Trial Tr. 621. The jurors asked for this when they were listening to the video of the Appellant and the child rape victim. Trial Tr. 621. The state did not object to the request, however Appellant did. Trial Tr. 621-622. Appellant asserted the earbuds would be equivalent to an enhancement of an already existing exhibit. Trial Tr. 622-623. The trial court overruled the objection and permitted the use of the earbuds explaining that the earbuds were not enhancing the sound. Tr. 623.

{¶51} Appellant argues that ruling is incorrect. He contends the earbuds enhanced the sound and/or constituted a separate investigation by the jury, both of which are not allowed. He cites the Eighth Appellate District decision *Pudelski* and a New York state decision to support his position.

{¶52} The state counters, asserting earbuds are not sound enhancements and are not a separate investigation. It explained that the audio heard through the earbuds is the same audio from the TV.

{¶53} The parties are correct that there is no Ohio case law directly on point; no Ohio case addresses whether earbuds constitute an enhancement. The case cited by Appellant, *Pedulski*, is probably the closest case on point. *State v. Pudelski*, 8th Dist. Cuyahoga No. 85989, 2006-Ohio-811. In a postconviction petition, Pudelski argued the trial court erred when it did not allow the jury to use a microscope to view tissue sample slides of the victim that had been marked and admitted into evidence. *Id*. at ¶ 33. The trial court found no merit with the postconviction petition and the appellate court affirmed that ruling. The facts of that case indicate the jurors submitted two written requests for use of a microscope. *Id*. at ¶34-36. In the second request the jurors indicated that one of them is a trained certified microbiologist. *Id*. at ¶ 36. The trial court denied the request indicating "the jury is the jury," "not an expert." *Id*. at ¶ 38. The appellate court indicated these facts demonstrate the trial court's legitimate concern about the jury taking an investigatory role, which it is not permitted to do. *Id*. at ¶ 39, 44. It reasoned:

> Allowing the jurors to conduct an independent investigation in the jury room with a "trained and certified microbiologist" could have so tainted the expert's testimony and prejudiced the role of the jury that the trial court's decision to preclude the use of a microscope was not error.

> Pudelski's reliance on *State v. Crimi* (1995), 106 Ohio App.3d 13, 665 N.E.2d 230, for the proposition that the jury should have been provided a microscope is unpersuasive. *Crimi* involved a jury request to review the videotape of a police chase. Images of a police chase are well within the understanding of a lay person acting as a juror. Reviewing videotape images is in stark contrast to conducting scientific investigations involving autopsy slides in the jury room.

Id. at ¶ 46-47.

{¶54} *Pudelski* is instructive in this situation. However, it does not support Appellant's conclusion that use of earbuds constitutes an independent investigation and/or an enhancement. Earbuds and microscopes are distinctively different in their capacity to enhance. A microscope gives a person the ability to see or see more clearly what the naked eye cannot see or cannot clearly see. Simple earbuds, conversely, are merely another speaker to hear audio. There are devices that have the capability to isolate and amplify one person's voice or omit background noise from the audio. However, simple earbuds do not have those capabilities and there is nothing in this record to suggest that the earbuds the jurors were given had those capabilities. The earbuds are similar to a juror needing glasses in some situations, but not in others. For instance, a far-sighted juror would not need to use glasses to see an exhibit projected during the trial. However, in jury deliberations a juror may need to use glasses to view the paper exhibit. Use of glasses in that scenario is clearly allowable.

{¶55} Furthermore, unlike *Pudelski*, there was no expert testimony on this video. The review of the video at issue is more akin to the *Crimi* analysis the *Pudelski* court utilized in reaching its decision; review of a video without an enhancing device is in "stark contrast to conducting scientific investigations involving autopsy slides in a jury room."

{¶56} Appellant does cite an appellate court case from New York where a video was inaudible and during jury deliberations an enhanced audio was requested and provided which eliminated background noise. *People v. Morgan*, 145 A.D.2d 442, 535 N.Y.S.2d 97 (1988). Due to that error and other errors, the arson conviction was vacated and the matter remanded for a new trial. *Id*. This case, however, is distinguishable because it was admittedly an enhanced audio recording removing background noise that

was provided to the jury during deliberations that was not provided to them during the trial. As explained above, earbuds do not constitute an enhancement when they do not have the capability to isolate a voice and/or remove background noise.

{¶57} It is the province of the jury to weigh the credibility of each party's witnesses and evidence presented at trial. Use of earbuds to view a videotape are not an independent investigation by the jury that is not permitted. Nothing in the record indicates these earbuds enhanced the audio. Rather, the earbuds were just a different but equivalent mechanism to the TV's speakers, similar to our example above of eye glasses.

{¶58} This assignment of error is meritless.

Standard of Review Insufficient Evidence –
Assignments of Error Five, Six, Eight, and Nine

{¶59} Assignments of error five, six, eight and nine all raise sufficiency of the evidence arguments.

{¶60} Whether the evidence is legally sufficient to sustain a conviction is a question of law dealing with adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). An appellate court does not weigh the evidence or evaluate witness credibility in a sufficiency review. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79, 82. Rather, the question is whether the evidence, if believed, is sufficient to prove the elements of the offense. *Id*.

{¶61} A reviewing court will not reverse a conviction on the grounds of insufficient evidence unless it determines no rational juror could have found the elements of the offense proven beyond a reasonable doubt after viewing the evidence in the light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). Rational inferences to be drawn from the evidence are also evaluated in the light most favorable to the state. *State v. Filiaggi*, 86 Ohio St.3d 230, 247, 714 N.E.2d 867 (1999). *See also Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (using reasonable inferences to ascertain both the basic and the ultimate facts in evaluating the due process requirement of sufficient evidence).

{¶62} With that standard in mind, we review the fifth, eighth, ninth and sixth assignments of error, in that order.

Pandering

Fifth and Eighth Assignments of Error

"There was insufficient evidence to sustain the conviction for pandering."

"The conviction for pandering was based on insufficient evidence as the state failed to prove that Appellant possessed and/or transmitted said images."

{¶63} In these assignments of error, Appellant asserts the state failed to present sufficient evidence as to multiple elements of pandering. He contends the state did not present evidence pandering occurred on the date listed in the indictment, October 11, 2018. He also asserts Exhibits 10 and 11, the images he allegedly pandered, were images of clothed prepubescent boys and the ICAC described this image as "borderline." Thus, the image does not meet definition to constitute pandering. He also asserts the state failed to produce evidence Appellant possessed or transmitted the images. He contends the evidence at most constitutes viewing, not possession.

{¶64} The state responds asserting the evidence presented established Appellant had downloaded the images (Exhibits 10 and 11) onto his computer. This constitutes possession. It contends that the jury in looking at the images could determine whether or not the image constituted child pornography, which it did.

{¶65} Appellant was convicted of pandering sexually oriented matter involving a minor as defined by R.C. 2907.322(A)(1), which states:

> (A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:
> (1) Create, record, photograph, film, develop, reproduce, or publish any material that shows a minor or impaired person participating or engaging in sexual activity, masturbation, or bestiality.

R.C. 2907.322(A)(1).

{¶66} The analysis will begin with the argument that there was no evidence Appellant transmitted Exhibits 10 or 11 on October 11, 2018. The indictment indicates pandering occurred "on or about the 11th day of October, 2018."

{¶67} The Eighth Appellate District has explained:

> The state is not required to prove the exact date of the offense, only that it occurred "on or about" a certain date or within a certain time period. "It has long been held that 'in a criminal charge the exact date and time are immaterial unless in the nature of the offense exactness of time is essential. It is sufficient to prove the alleged offense at or about the time charged.'" *State v. Mathis*, 8th Dist. Cuyahoga No. 83311, 2004-Ohio-2982, ¶ 18, quoting *Tesca v. State*, 108 Ohio St. 287, 140 N.E. 629 (1923), paragraph one of the syllabus; *see also State v. Sellards*, 17 Ohio St.3d 169, 478 N.E.2d 781 (1985).

In re D.H., 8th Dist. Cuyahoga No. 109284, 2020-Ohio-5003, ¶ 21.

{¶68} Detective Sergeant Cruse from the Belmont County Sheriff's Department works for the Internet Crimes Against Children task force (ICAC). Trial Tr. 440-441. This task force is associated with the FBI out of Columbus, and they investigate people's sharing of child pornography on file sharing sites or other means within the internet. Trial Tr. 441. He testified he received an email from the ICAC sending him a case; the site Tumblr had reported to the National Center for Missing and Exploited Children that inappropriate material was being shared on their site. Trial Tr. 452. The IP address was tied to Wesley Burdge, but the username name for Tumblr was Appellant's, which was verified through his email address. Trial Tr. 452. Appellant admitted that the username sharing the pictures was his username. Trial Tr. 453, 457.

{¶69} The images that were being shared (State's Exhibit 10 and 11) had an assigned hash value. Trial Tr. 456-457. The BCI expert testified that a hash value is very specific to a file and typically two files won't have the same hash value. Trial Tr. 348. The National Center for Missing and Exploited Children has a database of hash files of known child pornography. Trial Tr. 348.

{¶70} Due to the information that there was sharing of a file containing a hash value known by the National Center for Missing and Exploited Children to be child pornography, a search warrant was obtained and executed on October 11, 2018. Appellant admitted to downloading Exhibit 10 and 11, which are part of the pandering charge.

{¶71} While there was no testimony Appellant transmitted the images on October 11, 2018, the above information does present sufficient evidence that images were downloaded and shared by Appellant on or about October 11, 2018. Therefore, there was sufficient evidence of those elements of pandering.

{¶72} Appellant's other argument is that the images in Exhibit 10 and 11 which constituted pandering were according to the ICAC "borderline" images of child pornography. On cross-examination, Detective Cruse was asked about the case comments from an ICAC employee who is the head of the Cuyahoga County Prosecutor's Office. Trial Tr. 528-530. The comments were, "Images are of clothed prepubescent males. They are borderline." Trial Tr. 531. Appellant contends these images as borderline do not constitute pornography.

{¶73} This same argument was made to the trial court in a Crim.R. 29 motion at the close of the state's case in chief:

> [Defense Counsel]: * * * Your Honor, the State has offered, by their own witness, Exhibits 10 and 11 only to support that charge. That charge requires that the character of the material or performance, be it either still or video file, depict the minor in either sexual activity, masturbation or bestiality. State's Exhibits 10 and 11 do none of that, Your Honor. As the Court is aware, they are still photographs depicting two apparently minor-age children. That, through ICAC's own documentation, states it's just borderline. And that's borderline to the issue of being pornography, not to the issue of being in violation of R.C. 2907.322(A)(1).
>
> Your Honor, we would say that the State has offered absolutely no evidence to support this charge, no evidence that comports with the terminology of this code sections, and as thus, Count I needs to be dismissed.
>
> * * *
>
> [The State]: Your Honor, the State would stand by the ICAC photo, Exhibit 10 and 11. The Court believes that it meets the statutory requirements, so be it, the State understands. The State would, however, ask that those

exhibits still be admitted into evidence, simply because that is what got the ball rolling and the jury will need to understand that. So, with that being said, there's nothing else.

The Court: As far as the defendant's motion goes, the Court cannot strongly disagree; however, when I read the charge in Count I, it includes "with knowledge of the character of the material or performance involved did create, record, photograph, film, develop," and the puzzling matter for the Court is the word "reproduce or publish any material that shows a minor participating or engaging in sexual activity." The testimony from Detective Cruse, I think, clearly establishes any evidence for the jury to decide whether by downloading these materials, as testified by Detective Cruse, Mr. Gawron violated that statute.

[Defense Counsel]: Your Honor, I would hold that the only items that the State has said with any degree of certainty that Mr. Gawron downloaded were Items 10 and 11. Been no proof that he downloaded the other. His testimony – or, I'm sorry, his statement was that he looked at them. But he never procured them. Based upon the ICAC documentation and Defense Exhibit A, Mr. Gawron downloaded those two images. Those – State's own admission, those are the only things they are using for this count.

The Court: That's not true. The testimony from Detective Cruse was those two pictures are addressed to Count I. He didn't say that was the exclusive evidence or the only basis for the charge in Count I.

[Defense Counsel]: We would hold that that is what he meant, Your Honor, and we would ask the Court to reconsider. Understanding that it won't –

The Court: I can't speak for what he meant. That's for the jury to decide.

Trial Tr. 558-561.

{¶74} This reasoning is sound. Detective Cruse testified that when Appellant was interviewed they were looking on the computer and there were dozens of pictures

depicting child pornography. Trial Tr. 465. It was for the jury to decide if the images were borderline. The evidence indicated that the images had a hash value and hash values are often assigned by the National Center for Missing and Exploited Children to pictures that are child pornography. The jury saw the images and it was able to determine if the state's evidence included more than just Exhibits 10 and 11. Furthermore, when viewing the evidence the pictures could be determined to be child pornography.

{¶75} Therefore, viewing the evidence in the light most favorable to the prosecutions, there was sufficient evidence of pandering. These assignments of error (five and eight) are meritless.

Rape

Ninth Assignment of Error

"The rape conviction was based on insufficient evidence as the state failed to prove that there was any 'sexual conduct' between Appellant and the alleged victim."

{¶76} Appellant contends there was insufficient evidence of the sexual conduct element of rape. He contends there was no testimony of sexual conduct and the admitted video did not explicitly show sexual conduct.

{¶77} The state counters admitting the video did not explicitly show sexual conduct, but it did show Appellant forcing the child's head towards his crotch. There was also evidence Appellant admitted to being attracted to child pornography and he admitted to utilizing child pornography to masturbate. This could lead the jury to reasonably conclude sexual conduct did occur on the video.

{¶78} Appellant was charged with first-degree rape as defined by R.C. 2907.02(A)(1)(b), which states:

> (A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:
>
> * * *
>
> (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

R.C. 2907.02(A)(1)(b).

{¶79} Sexual conduct is defined as vaginal intercourse, anal intercourse, fellatio, and cunnilingus. R.C. 2907.01(A).

{¶80} The state may use direct evidence, circumstantial evidence, or both, in order to establish the elements of a crime. *State v. Maldonado*, 8th Dist. Cuyahoga No. 108907, 2021-Ohio-1724, ¶ 19, citing *State v. Durr*, 58 Ohio St.3d 86, 568 N.E.2d 674 (1991). Circumstantial evidence is "proof of facts or circumstances by direct evidence from which the trier of fact may reasonably infer other related or connected facts that naturally or logically follow." *State v. Seals*, 8th Dist. Cuyahoga No. 101081, 2015-Ohio-517, ¶ 32. As explained above, rational inferences to be drawn from the evidence are also evaluated in the light most favorable to the state. *State v. Filiaggi*, 86 Ohio St.3d 230, 247, 714 N.E.2d 867 (1999).

{¶81} The evidence of rape is the video Gallagher turned over to the police and Appellant's statements in the second interview. The video Gallagher gave to the police was played for the jury. Trial Tr. 427-430. The video shows Appellant in a chair and pushing the victim's head toward Appellant's lap. The video does not specifically show sexual conduct. Given the movements the video shows, sexual conduct (fellatio) could be inferred. Furthermore, Gallagher testified that her initial response when her husband showed her the video was "Why didn't you call the police?" Trial Tr. 430. Burdge, her husband, responded, "We needed the money for rent." Trial Tr. 430. Her reaction to seeing the video insinuates that sexual conduct was occurring and his response to her questioning suggests sexual conduct was occurring for rent money. Furthermore, during the second interview, Appellant confessed to the sexual conduct. A recording of the interview was played for the jury. Trial Tr. 510-511.

{¶82} Considering the direct evidence and the inferences that can be drawn, this court concludes there was sufficient evidence of sexual conduct. This assignment of error is meritless.

Pandering and Illegal Use – Virtual versus Real Children

Sixth Assignment of Error

"There was insufficient evidence to sustain the conviction for pandering, and each of the convictions for illegal use of a minor in nudity-oriented material."

{¶83} This assignment of error addresses illegal use and pandering convictions. Appellant contends the state did not present sufficient evidence that the pictures used as evidence of those crimes were pictures of real children rather than virtually created children.

{¶84} The state counters arguing the jury was capable of making its own determination of whether the children depicted were real or virtual without the testimony of an expert. Furthermore, the state asserts the issue of whether the children were real or virtual was not raised at trial; there was no challenge by Appellant at trial that the images were pictures of virtual children.

{¶85} Pandering is defined above. Illegal use of a minor in nudity-oriented material or performance is defined in R.C. 2907.323(A)(3) as follows:

> (A) No person shall do any of the following:
>
> * * *
>
> (3) Possess or view any material or performance that shows a minor or impaired person who is not the person's child or ward in a state of nudity, unless one of the following applies:
>
> (a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material or performance.
>
> (b) The person knows that the minor's or impaired person's parents, guardian, or custodian has consented in writing to the photographing or use of the minor or impaired person in a state of nudity and to the manner in which the material or performance is used or transferred.

R.C. 2907.323(A)(3).

{¶86} The focus in this assignment of error is on whether there was sufficient evidence presented that the depictions were of real children, not virtual children. The United States Supreme Court has held virtual child pornography that does not use any real children in its creation or production is a form of protected speech under the First Amendment. *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 32, citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389 (2002). In applying *Ashcroft*, the Ohio Supreme Court held the state must prove beyond a reasonable doubt that a real child is depicted to support a conviction for possession of child pornography under R.C. 2907.322 (pandering) and 2907.323 (illegal use). *State v. Lee*, 7th Dist. Carroll No. 20 CA 0941, 2021-Ohio-1158, ¶ 21, citing *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, 872 N.E.2d 894, paragraph three of the syllabus. In *Tooley,* the Ohio Supreme Court addressed a sufficiency of the evidence argument regarding whether the depictions were of real children versus virtual children. *Tooley* at ¶ 49-55. It explained that in most cases meeting the burden will only require presentation of the images themselves, not expert witnesses. *Id*. at ¶ 49. This is especially the case when the depictions are not challenged on the basis of whether an actual child is involved. *Id*. (stating, "The Eleventh District's conclusion that experts cannot distinguish between actual and virtual child pornography and that "asking a jury to make a determination merely by looking at the image is patently unfair to the defendant" is not supported by the record here."). The Ohio Supreme Court explained the United States Supreme Court precedent in *Ashcroft* does not "lay down 'the absolute requirement that, absent direct evidence of identity, expert testimony is required to prove that the prohibited images are of real, not virtual, children.'" *Id*. at ¶ 51, quoting *United States v. Kimler*, 335 F.3d 1132, 1142 (C.A.10, 2003). *See, also*, *United States v. Farrelly*, 389 F.3d 649, 653–654 (C.A.6, 2004); *United States v. Slanina*, 359 F.3d 356, 357 (C.A.5, 2004); *United States v. Deaton*, 328 F.3d 454, 455 (C.A.8, 2003). Juries are capable of distinguishing between real and virtual images without expert assistance. *Id*. at ¶ 52 citing *Farrelly,* 389 F.3d at 654; *Slanina,* 359 F.3d at 357; *Kimler,* 335 F.3d at 1142; *Deaton,* 328 F.3d at 455.

{¶87} Tooley presented expert testimony that simulated and actual child pornography are indistinguishable. *Id*. at ¶ 53. However, his expert never viewed the images at issue and expressed no opinion as to their content. *Id*. The Ohio Supreme

Court also recognized that the United States Supreme Court in *Ashcroft* rejected the government's claim that virtual images are indistinguishable from real ones. *Id*. citing *Ashcroft*, 535 U.S. at 254. The *Tooley* court concluded the fact-finder, in that case the trial judge, was capable of reviewing the evidence to determine whether the state met its burden of showing that the images depicted real children. *Id*. at ¶ 54. The Ohio Supreme Court also noted that it viewed the images supporting the convictions and concluded real children were involved. *Id*. Thus, it concluded the state presented sufficient evidence to support Tooley's convictions. *Id*. at ¶ 55.

{¶88} Appellate courts, using the above analysis, have also concluded depictions were of real children, not virtual children. *State v. Hurst*, 181 Ohio App.3d 454, 2009-Ohio-983, 909 N.E.2d 653, ¶ 60-64 (5th Dist.) (Images were submitted to the jury, a forensic computer expert from BCI testified that she did not find any indication that the photographs were of virtual as opposed to real children, and the appellate court viewed them and concluded real children were involved.); *State v. Bates*, 5th Dist. Guernsey No. 08 CA 15, 2009-Ohio-275, ¶ 58-67 (No challenge to State's position that the images were of actual minor children, not virtual children. Appellate court held that expert testimony was not required; juries are capable of distinguishing between real and virtual images.). *See, also*, *State v. Rubin*, 8th Dist. Cuyahoga No. 106333, 2018-Ohio-3052, ¶ 63-66 (Rubin argues the trial court should have instructed the jury that it had to find the images were of real children, not virtual images shown to the jury. Neither defendant nor his expert claimed the images were not of real children. Appellate court declined to find plain error.).

{¶89} In the facts before this court, Appellant did not challenge the images on the basis that they were depictions of virtual children versus real children. The images were shown to the jury. As the *Tooley* court noted the fact finder is capable of reviewing the evidence to determine whether the state met its burden of showing the images depicted real children. Furthermore, we reviewed the images and they do appear to depict real children. Given those facts and when viewing the evidence in the light most favorable to the prosecution, this court concludes the state presented sufficient evidence the depictions were of real children. This assignment of error is meritless.

Ineffective Assistance of Counsel – Real versus Virtual Children

Seventh Assignment of Error

"Assuming, arguendo, that the issue of real versus virtual child is not an element of the offenses of pandering and/or illegal use, trial counsel was ineffective for not challenging the nature of the images."

{¶90} In conjunction with the sixth assignment of error, Appellant asserts counsel was ineffective for failing to challenge the images constituting pandering and illegal use on the basis that they were depictions of virtual children and thus did not legally constitute child pornography. He claims since the state offered no proof of real versus virtual images, trial counsel was ineffective for failing to raise the issue.

{¶91} The state asserts counsel's performance was not deficient; the pictures depicted real children. It also claims there was no prejudice even if counsel's performance was deficient because the outcome of the trial would not have been different. The jury had multiple photographs and videos to review at trial. The jury was capable of determining real versus virtual and it did.

{¶92} A claim of ineffective assistance of counsel requires a showing of both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). If the performance was not deficient, then there is no need to review for prejudice and vice versa. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000). In evaluating an alleged deficiency in performance, our review is highly deferential to counsel's decisions as there is a strong presumption counsel's conduct was within the wide range of reasonable professional assistance. *State v. Bradley*, 42 Ohio St.3d 136, 142-143, 538 N.E.2d 373 (1989) (there are "countless ways to provide effective assistance in any given case"), citing *Strickland*, 466 U.S. at 689. A court should not second-guess the strategic decisions of counsel. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). The prejudice prong requires a lawyer's errors must be so serious that there is a reasonable probability the result of the proceedings would have been different. *Id*.

{¶93} There is no case law on the issue of whether trial counsel was ineffective for failing to call into question whether the depictions were of real or virtual children. Cited above is the *Rubin* case from the Eighth Appellate District where the question before the

court was whether the trial court's failure to provide an instruction on real versus virtual children constituted plain error. *State v. Rubin*, 8th Dist. Cuyahoga No. 106333, 2018-Ohio-3052, ¶ 63-66. The appellate court found it did not. *Id*. In holding as such, the court noted the jury was capable of determining if the images were of real children and the jury viewed the images. *Id*. at ¶ 65-66.

{¶94} That reasoning is applicable here for the deficient performance prong of the ineffective assistance of counsel. The jury was capable of determining if the images were real. Furthermore, this court has viewed the images and they appear to depict real children. Accordingly, we cannot find counsel's performance was deficient. Failure to raise a meritless argument does not constitute deficient performance, nor does it result in prejudice. See *State v. Hogan,* 7th Dist. No. 06 MA 152, 2007–Ohio–3334, at ¶ 10 ("Trial counsel's failure to raise meritless arguments does not prejudice the defense."). Tactical or strategic trial decisions do not generally constitute ineffective assistance. *State v. Frazier*, 61 Ohio St.3d 247, 255, 574 N.E.2d 483 (1991). Rather, the errors complained of must amount to a substantial violation of counsel's essential duties to his client. *Bradley,* 42 Ohio St.3d at 141-142.

{¶95} This assignment of error is meritless.

Manifest Weight of the Evidence – Pandering and Illegal Use

Tenth Assignment of Error

"The convictions for pandering and illegal use were each against the manifest weight of the evidence."

{¶96} Appellant incorporates his sufficiency arguments for pandering and illegal use and asserts those arguments also establish that the convictions of those crimes were against the manifest weight of the evidence.

{¶97} The state counters arguing the testimony and evidence indicate the jury did not clearly lose its way when it convicted Appellant of the crimes.

{¶98} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other" and involves the persuasive effect of the evidence in inducing belief.*Thompkins*, 78 Ohio St.3d at 387 (but is not a question of mathematics). A weight of the evidence review

considers whether the state met its burden of persuasion, as opposed to the burden of production involved in a sufficiency review. *See id.* at 390 (Cook, J., concurring).

{¶99} When a defendant claims a conviction is contrary to the manifest weight of the evidence, the appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. The weight to be given the evidence is primarily for the trier of the facts. *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

{¶100} In regards to the pandering conviction, the analysis regarding the sufficiency of that evidence is applicable here. The jury viewed the images and could determine whether they constituted child pornography and whether the images were of real or virtual children. Furthermore, when viewing this evidence we cannot find that the jury clearly lost its way.

{¶101} Similarly, for legal use, the jury viewed the images and could determine whether the images were of real or virtual children. The evidence also indicated that the images were associated with Appellant's Tumblr account and he admitted to viewing the images and masturbating to them. This evidence indicates possession. The jury clearly did not lose its way.

{¶102} For the reasons expressed above and for the reasons stated in the sufficiency of the evidence analysis, this assignment of error is meritless.

Cumulative Error

Eleventh Assignment of Error

"The cumulative effect of the errors above, even if each is not alone reason for reversal, combined, in any manner, deprived Appellant of a fair trial and due process of law as contemplated by both the Ohio and United States Constitution."

{¶103} Appellant contends even if the above errors are considered harmless, under the cumulative error doctrine the convictions must be reversed because the

cumulative effect of the errors at trial deprived him of a fair trial. The state counters citing the above ten assignments and asserting there were no errors, even harmless ones. Therefore, the cumulative error doctrine is inapplicable.

{¶104} Under the doctrine of cumulative error, "a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial-court error does not individually constitute cause for reversal." *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 223.

{¶105} As the above analysis under the other assignments of error demonstrates, there were no errors. Thus, the doctrine of cumulative error is not applicable in the present case. This assignment of error lacks merit.

Conclusion

{¶106} All assignments of error lack merit. The convictions are affirmed.

Donofrio, P J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.