[Cite as *State v. Boerio*, 2009-Ohio-5181.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-08-1182

Appellee — Trial Court No. CR07-3434

v.

Dale Boerio — **DECISION AND JUDGMENT**

Appellant — Decided: September 30, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

George J. Conklin, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Dale Boerio, appeals from the judgment of the Lucas County Court of Common Pleas finding him guilty of two counts of rape and two counts of sexual imposition. For the reasons set forth below, we affirm in part and reverse in part.

{¶ 2} Appellant was indicted on November 20, 2007, on two counts of first degree felony rape, violations of R.C. 2907.02(B), and two counts of third degree felony gross sexual imposition, violations of R.C. 2907.05(A)(4) and (B). The February 25, 2008 trial on the matter resulted in a hung jury. The second trial commenced on April 14, 2008, and appellant was found guilty on all counts. He was sentenced to two consecutive life terms in prison for rape and two consecutive five year terms for gross sexual imposition. Appellant now appeals setting forth the following assignments of error:

{¶ 3} "I. The trial court conducted a deficient pre-trial competence examination of the alleged victim and committed and abuse of discretion allowing the witness to testify at trial.

{¶ 4} "II. The court erred by failing to grant the motion in limine and by allowing the trial testimony of Dr. Randall Schlievert, MD.

{¶ 5} "III. The trial court erred in allowing evidence of other acts.

{¶ 6} "IV. The trial court failed to grant appellant's pre-trial motion to suppress statements in violation of the fifth, sixth and fourteenth amendments to the United States Constitution and article I, §§10 and 16 of the Ohio Constitution.

{¶ 7} "V. The appellant's convictions are against the manifest weight of the evidence.

{¶ 8} "VI. The state failed to prove all essential elements of the offenses.

{¶ 9} "VII. Comments made by the prosecuting attorney in his closing argument amounted to prosecutorial misconduct and violated the appellant's fifth amendment rights as guaranteed by the United States Constitution.

{¶ 10} "VIII. The cumulative effect of the errors committed by the trial court violated the appellant's right to a fair trial.

{¶ 11} "IX. The trial court erred in imposing maximum sentences, consecutive sentences, and identifying the appellant as a sexual offender under the state's classification scheme.

{¶ 12} "X. The indictment charging the appellant is defective and fails to state the adequate mens rea."

{¶ 13} In his first assignment of error, appellant contends that the court erred in finding the victim in this case competent to testify. The victim in this case was a child under ten years of age at the time of appellant's first trial. The trial court, therefore, held a competency hearing and deemed the child competent to testify. At the time of appellant's second trial, the trial at issue in this appeal, the child was ten years old.

{¶ 14} We note that the determination of whether a child is competent to testify rests within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *State v. Clark*, 71 Ohio St.3d 466, 469, 1994-Ohio-43. An "abuse of discretion" is more than an error of law or of judgment, the term connotes that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 15} Evid.R. 601 provides: "Every person is competent to be a witness except: (A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."

{¶ 16} As the victim in this case was ten years of age at the time of appellant's second trial, he was presumed competent to testify. Moreover, we note that appellant did not seek a competency hearing before appellant's second trial. Appellant's first assignment of error is found not well-taken.

{¶ 17} In his second assignment of error, appellant contends that the court erred in denying his motion in limine. Specifically, appellant sought to prevent the testimony of the state's witness, Dr. Randall Schlievert. In his motion in limine, appellant argued that Dr. Schlievert's testimony, along with his written report, would not aid the state's case and would, in fact, impermissibly bolster the victim's credibility.

{¶ 18} A motion in limine is a request "that the court limit or exclude use of evidence which the movant believes to be improper, and is made in advance of the actual presentation of the evidence to the trier of fact, usually prior to trial. The motion asks the court to exclude the evidence unless and until the court is first shown that the material is relevant and proper." *State v. Winston* (1991), 71 Ohio App.3d 154, 158. Thus, because a trial court's decision on a motion in limine is a ruling to exclude or admit evidence, our standard of review on appeal is whether the trial court committed an abuse of discretion that amounted to prejudicial error. *State v. Graham* (1979), 58 Ohio St.2d 350.

{¶ 19} Pediatrician, Dr. Schlievert, testified that he specializes in abused children. He testified that after examining the victim in this case, he found no evidence of anal penetration of the victim or that the victim was physically injured. Appellant objected to Dr. Schlievert's testimony that, based on his years of experience in treating abused children, it is not uncommon for there to be a lack of physical evidence of anal penetration when anal penetration is alleged. He described a recent case he had been involved in where the perpetrator confessed to anally raping a victim multiple times, yet, the victim exhibited no outward signs of the trauma. Dr. Schlievert testified that the tissues involved tend to heal quickly.

{¶ 20} In *State v. Boston* (1989), 46 Ohio St.3d 108, the Supreme Court of Ohio held that in cases involving alleged child abuse, experts may not testify as to their opinion concerning the veracity of the statements of a child victim, but may offer their opinion as to whether the child was abused, and may provide other testimony which would assist the jury in reaching a verdict. *Boston* at 128. In *State v. Stowers* (1998), 81 Ohio St.3d 260, the court clarified its earlier holding, stating that *Boston* "does not proscribe testimony which is additional support for the truth of the facts testified to by the child, or which assists the factfinder in assessing the child's veracity." (Emphasis in original.) Id., 263. The expert's testimony in *Stowers* included an explanation of behaviors often seen in children that have been sexually assaulted, including recantation of accusations and delayed disclosure. Id.

{¶ 21} Here, Dr. Schlievert's testimony in this case was admissible as an aid to the jury in understanding the case. He did not offer an opinion as to whether or not the victim had been sexually abused. Finding that the court did not abuse its discretion in denying appellant's motion in limine, appellant's second assignment of error is found not well-taken.

{¶ 22} In his third assignment of error, appellant contends that the court erred in admitting other acts evidence.

{¶ 23} Generally, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Evid.R. 404(B). However, such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Id.

{¶ 24} In *State v. Schaim* (1992), 65 Ohio St.3d 51, the Ohio Supreme Court recognized the limited admissibility of "other acts" evidence in sex offense cases. "The legislature has recognized the problems raised by the admission of other acts evidence in prosecutions for sexual offenses, and has carefully limited the circumstances in which evidence of the defendant's other sexual activity is admissible. The forcible rape statute and the gross sexual imposition statute both contain subsections that address the admissibility of evidence of other sexual activity by either the victim or the defendant." Id. at 59.

{¶ 25} "[E]vidence of other acts of a defendant is admissible only when it 'tends to show' one of the matters enumerated in the statute and only when it is relevant to proof of the guilt of the defendant of the offense in question." *State v. Curry* (1975), 43 Ohio St.2d 66, 69. Specifically, "other acts" evidence can only be offered to prove the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Id. See, also, *State v. Price* (1992), 80 Ohio App.3d 35, 40-41.

{¶ 26} Nevertheless, the admission of such evidence lies within the broad discretion of the trial court and should not be overturned absent an abuse of discretion that has created material prejudice. *State v. Conway,* 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 62, citing, *State v. Issa* (2001), 93 Ohio St.3d 49, 64.

{¶ 27} Appellant objects to the testimony admitted regarding other sexual acts he allegedly engaged in with the victim. The victim testified that appellant sexually fondled him on more than one occasion and that appellant engaged in oral sex with him. The victim's friend testified that the victim told her that appellant had engaged in oral sex with him. Dr. Schlievert's report, admitted into evidence, also contained allegations that appellant had engaged in oral sex with the victim and that appellant had once placed duct tape over the victim's mouth to silence him while he was engaging in sexual activity with the victim. We conclude that the trial court did not abuse its discretion in admitting the above evidence. Appellant was on trial for engaging in sexual activity with a victim less than ten years of age. At the very least, the above evidence was probative of appellant's

identity and his past sexual history with the victim. Appellant's third assignment of error is found not well-taken.

{¶ 28} In his fourth assignment of error, appellant contends that the court erred in denying his motion to suppress certain statements he made while he was in the custody of law enforcement.

{¶ 29} In reviewing a motion to suppress "an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." *State v. Montoya* (Mar. 6, 1998), 6th Dist. No. L-97-1226, citing *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. "[T]he appellate court must then independently determine as a matter of law, without deferring to the trial court's conclusions, whether the facts meet the applicable legal standard." Id., citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488.

{¶ 30} A suppression hearing commenced on January 22, 2008. Detective Cathy Stooksbury of the Lucas County Sheriff's Department testified that in October 2007, she was assigned a case involving the sexual assault of a juvenile, later identified as the victim in this case. Appellant was named as a suspect. Detective Stooksbury contacted appellant and asked him to come to the sheriff's substation for an interview.

{¶ 31} Because appellant did not have a ride to the station, the sheriff's office arranged a ride for him. Sergeant William Talbott, of the Lucas County Sheriff's Department, drove to the residence where appellant was staying. Appellant was still in bed and Sergeant Talbott waited in the residence while appellant got ready. When

appellant appeared, Sergeant Talbott testified that he did not search appellant or handcuff him. The two got into Sergeant Talbott's car and they rode to the station.

{¶ 32} At the station, Detective Stooksbury testified that she invited appellant into a room and gave him a chair. She asked him if he knew why she wanted to talk to him and appellant indicated he did. She testified that she told him "[y]ou don't have to talk to me, you can leave anytime you wish." Stooksbury testified that appellant acknowledged he understood. Stooksbury then proceeded to interview appellant. She testified that she never placed appellant under arrest, placed him in handcuffs or limited his freedom in any way. He was never read his Miranda warnings. Stooksbury did, however, close the door to the interview room but she explained that this was for purposes of privacy. At the end of the interview, Stooksbury thanked appellant for coming in and someone from the station then drove appellant home.

{¶ 33} Appellant contends that any statements he made to Stooksbury should be suppressed because prior to the interview, he was not advised of his rights pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

{¶ 34} Only a 'custodial interrogation' triggers the requirement to provide *Miranda* warnings. *State v. Mason* (1998), 82 Ohio St.3d 144, 153, see, also, *State v. Gumm* (1995), 73 Ohio St.3d 413, 429; *State v. Luke*, 3d Dist. No. 1-06-103, 2007-Ohio-5906, ¶ 10. "Custodial interrogation" has been defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda*, supra, at 444.

{¶ 35} "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'" *Stansbury v. California* (1994), 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293, quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275. To determine whether a custodial interrogation has occurred, a court must decide how a reasonable man in the suspect's position would have understood his situation. *Mason*, supra, at 154, quoting *Berkemer v. McCarty* (1984), 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317.

{¶ 36} In this case, appellant agreed to meet voluntarily with Stooksbury, he was told he was free to leave and he was not physically restrained. Appellant never asked for an attorney and he never attempted to leave the station until the interview was finished. Applying these facts to the applicable law, we conclude that a reasonable man in appellant's position would have understood that, during the interview, there was no formal arrest or restraint on his freedom of movement of the degree associated with a formal arrest. See *Stansbury*, supra, at 322. Accordingly, we find that appellant was not subject to custodial interrogation during his interview with Stooksbury and, therefore, his motion to suppress was properly denied. Appellant's fourth assignment of error is found not well-taken.

{¶ 37} Appellant's fifth and sixth assignments of error will be addressed together. Appellant contends that his convictions were against the manifest weight of the evidence and that there was insufficient evidence to support his convictions.

{¶ 38} A verdict or finding may be overturned on appeal if it is either against the manifest weight of the evidence or because there is an insufficiency of evidence. In the former, the appeals court acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. In the latter, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. Id. at 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. Id. at 390; *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. See, also, *State v. Eley* (1978), 56 Ohio St.2d 169; *State v. Barns* (1986), 25 Ohio St.3d 203.

{¶ 39} Appellant was convicted on two counts of rape in violation of R.C. 2907.02(A)(1)(b). The relevant elements are as follows:

{¶ 40} "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:

{¶ 41} "* * *

{¶ 42} "[T]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

{¶ 43} Appellant was also convicted on two counts of gross sexual imposition in violation of R.C. 2907.05(A)(4). The elements are as follows:

{¶ 44} "No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

{¶ 45} "* * *

{¶ 46} "(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person."

{¶ 47} The above acts were allegedly committed during the month of August 2007.

{¶ 48} In front of a jury, the ten-year-old victim in this case testified that he lived with his aunt, his cousin and his aunt's boyfriend, J.J. Sometimes, J.J.'s brother, appellant, would spend the night with the family. The victim testified that appellant also babysat for him. The victim testified that he initially liked appellant because appellant

would play with him. All that changed, according to the victim, when appellant began "doing some gay stuff." He explained that by "gay stuff" he meant "nasty stuff that men do to girls." The victim testified that more than once, appellant had anal sex with him and that more than once, appellant touched his penis. He also testified that appellant engaged in oral sex with him.

{¶ 49} Twelve-year-old, A.R. testified that she is a friend of the victim. In early October 2007, A.R. testified that the victim told her that appellant had oral sex with him and made him touch appellant's penis. A.R. then reported this information to her mother, S.B., who relayed it to the victim's aunt.

{¶ 50} The victim's aunt testified that appellant would come to her home during August 2007, to babysit her daughter and her nephew, the victim in this case. In September 2007, she noticed that her nephew did not seem to like appellant as much as he used to. Based on a conversation she had with S.B. in October 2007, she notified the police and informed him that her nephew may have been sexually abused.

{¶ 51} Detective Stooksbury testified that when she interviewed appellant at the substation in October 2007, appellant told her that he sometimes babysat and spent the night at the victim's house. He told Detective Stooksbury that one night, he woke up to find the victim fondling his penis. Appellant told Stooksbury that he got angry at the victim and told him what he did was wrong. According to appellant, the victim did not seem to like appellant after the incident.

{¶ 52} As this court has consistently affirmed, the trier of fact is vested with the discretion to weigh and evaluate the credibility of evidence in reaching its determination. Based on the testimony summarized above and the law, this court cannot say that the jury clearly lost its way or created a manifest miscarriage of justice by finding appellant guilty of the charges of rape and gross sexual imposition. Furthermore, we find that the state presented sufficient evidence from which, when viewed in a light most favorable to the state, a rational trier of fact could have found appellant guilty beyond a reasonable doubt of rape and gross sexual imposition. Appellant's fifth and sixth assignments of error are found not well-taken.

{¶ 53} In his seventh assignment of error, appellant contends that the prosecutor was guilty of prosecutorial misconduct when presenting his closing arguments. Appellant contends that the prosecutor inappropriately commented on appellant's decision to invoke his Fifth Amendment right to remain silent when he stated that appellant needed to explain why the victim "turned against him" all of a sudden.

{¶ 54} In analyzing claims of prosecutorial misconduct, the test is "whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Jones* (2000), 90 Ohio St.3d 403. "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" Id., quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78. Where it is clear beyond a reasonable doubt that a jury would have found the defendant guilty even absent

the alleged misconduct, the defendant has not been prejudiced, and his conviction will not be reversed. See *State v. Loza* (1994), 71 Ohio St.3d 61, 78.

{¶ 55} Generally, prosecutors are entitled to considerable latitude in closing argument. *State v. Ballew* (1996), 76 Ohio St.3d 244, 255. In closing argument, a prosecutor may comment freely on "what the evidence has shown and what reasonable inferences may be drawn therefrom." *State v. Lott* (1990), 51 Ohio St.3d 160, 165.

{¶ 56} We find no error in the prosecutor's comments as two witnesses testified that the victim suddenly became unfriendly to appellant around the time of the crimes. The prosecutor was merely commenting on evidence that the jury had already heard. Appellant's seventh assignment of error is found not well-taken.

{¶ 57} In his eighth assignment of error, appellant contends that the errors he alleges were committed in his first seven assignments of error are cumulative and merit reversal. Having found in appellant's first seven assignments of error that no errors were committed, appellant's eighth assignment of error is found not well-taken.

{¶ 58} In his ninth assignment of error, appellant contends that the court erred in sentencing him to maximum, consecutive sentences. First, appellant contends that the trial court failed to consider mitigating circumstances such as appellant's lack of a felony record. Second, appellant contends that rape and gross sexual imposition are allied offenses of similar import requiring the court to merge his sentences for rape and gross sexual imposition, rather than order them served consecutively.

{¶ 59} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus, the Supreme Court of Ohio, in striking down parts of Ohio's sentencing scheme, held that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Thus, an appellate court reviews felony sentences for an abuse of discretion. Id. When applying an abuse of discretion standard, an appellate court may not generally substitute its judgment for that of the trial court. See *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶ 60} Appellant in this case was convicted of two first-degree felonies and two third-degree felonies. Pursuant to R.C. 2907.02(B), the punishment for violating R.C. 2907.02(A)(1)(b), rape, shall be a prison term or term of life imprisonment. Pursuant to 2929.14(A)(2), the prison term for a third degree felony, such as gross sexual imposition in violation of R.C. 2907.05(A)(4), shall be one, two, three, four, or five years.

{¶ 61} As appellant's sentence of two consecutive life terms and two consecutive five year terms was within applicable statutory parameters, appellant's argument is without merit.

{¶ 62} As for appellant's argument that gross sexual imposition and rape are allied offenses of similar import, R.C. 2941.25 provides:

{¶ 63} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶ 64} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 65} For merger to apply under R.C. 2941.25, appellant must demonstrate that his conduct constituted allied offenses of similar import, and that the offenses were not committed separately or with a separate animus.

{¶ 66} The test for determining whether multiple offenses are allied offenses of similar import was established in *State v. Logan* (1979), 60 Ohio St.2d 126, 129, where the court stated, "in order for two crimes to constitute allied offenses of similar import, there must be a recognized similarity between the elements of the crimes committed. The offenses and their elements must correspond to such a degree that commission of the one offense will result in the commission of the other."

{¶ 67} Gross sexual imposition is a lesser included offense of rape. *State v. Johnson* (1988), 36 Ohio St.3d 224, paragraph one of the syllabus. Consequently, a defendant may not be convicted of both gross sexual imposition and rape when the counts arise out of the same conduct. *State v. Foust*, 105 Ohio St.3d 137,162, 2004-Ohio-7006.

However, where the evidence shows the acts of gross sexual imposition were separate and distinct from the acts of rape, the defendant may be convicted of each. Id.

{¶ 68} Here, the evidence shows that the acts of gross sexual imposition were separate and distinct from the acts of rape. The victim testified that more than once, appellant had anal sex with him. The victim also told of separate incidences where appellant touched the victim's penis, appellant had the victim touch his penis and instances where appellant engaged in oral sex with appellant. These examples constitute conduct separate and distinct from rape. Under these facts, gross sexual imposition and rape are not allied offenses of similar import.

{¶ 69} Next, appellant challenges the application of R.C. 2950.11 to his sentence.

{¶ 70} In 2007, the Ohio General Assembly enacted a revision of R.C. Chapter 2950 and related statutes. Am.Sub.S.B. No. 10 (Ohio's Adam Walsh Act). The act eliminated the prior sex offender classifications, substituting a three-tier classification based on the offense committed. Appellant in this case was designated a tier III sex offender. A tier III sex offender is required to register with the local sheriff every 90 days for life and may be subject to community notification every 90 days for life. R.C. 2950.06(B)(3); *State v. Gooding*, 5th Dist. No. 08 CA 5, 2008-Ohio-5954, ¶ 8. In turn, the sheriff must notify certain individuals in the community with the sexual offender's personal information. See R.C. 2950.11(A)-(F).

{¶ 71} Prior to sentencing, appellant filed two motions. In his first motion, appellant urged the court below to sentence him under former R.C. Chapter 2950. He

argued that S.B. 10 was unconstitutional because it violated: (1) Section 28, Article II, Ohio Constitution, which prohibits the enactment of retroactive laws; (2) Section 32, Article II, Ohio Constitution, which provides for the separation of the powers of the three branches of government; and (3) the Ex Post Facto Clause found in Section 10, Article I, United States Constitution. The trial court denied appellant's motion. We too reject appellant's constitutional arguments as this court has already rejected these same challenges to the statute. See *State v. Stockman*, 6th Dist. No. L-08-1077, 2009-Ohio-266, *State v. Bodyke*, 6th Dist. Nos. H-07-040, H-07-041, H-07-042, 2008-Ohio-6387 and *Montgomery v. Leffler*, 6th Dist. No. H-08-011, 2008-Ohio-6397.

{¶ 72} In his second presentence motion, appellant asked to be excluded from the requirement of community notification pursuant to the version of R.C. 2950.11 in effect prior to January 1, 2008. In support, appellant cited R.C. 2950.11(F)(2) which provides:

{¶ 73} "[T]he notification provisions of this section do not apply to a person described in division (F)(1)(a), (b), or (c) of this section if a court finds at a hearing after considering the factors described in this division that the person would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment. In making the determination of whether a person would have been subject to the notification provisions under prior law as described in this division, the court shall consider the following factors:

{¶ 74} "(a) The offender's or delinquent child's age;

{¶ 75} "(b) The offender's or delinquent child's prior criminal or delinquency record regarding all offenses, including, but not limited to, all sexual offenses;

{¶ 76} "(c) The age of the victim of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made;

{¶ 77} "(d) Whether the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made involved multiple victims;

{¶ 78} "(e) Whether the offender or delinquent child used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;

{¶ 79} "(f) If the offender or delinquent child previously has been convicted of or pleaded guilty to, or been adjudicated a delinquent child for committing an act that if committed by an adult would be, a criminal offense, whether the offender or delinquent child completed any sentence or dispositional order imposed for the prior offense or act and, if the prior offense or act was a sex offense or a sexually oriented offense, whether the offender or delinquent child participated in available programs for sexual offenders;

{¶ 80} "(g) Any mental illness or mental disability of the offender or delinquent child;

{¶ 81} "(h) The nature of the offender's or delinquent child's sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;

{¶ 82} "(i) Whether the offender or delinquent child, during the commission of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made, displayed cruelty or made one or more threats of cruelty;

{¶ 83} "(j) Whether the offender or delinquent child would have been a habitual sex offender or a habitual child victim offender under the definitions of those terms set forth in section 2950.01 of the Revised Code as that section existed prior to the effective date of this amendment;

{¶ 84} "(k) Any additional behavioral characteristics that contribute to the offender's or delinquent child's conduct."

{¶ 85} This court has held:

{¶ 86} "[W]e find that R.C. 2950.11(F)(2) requires the sentencing court to hold a hearing prior to determining the necessity of community notification and to consider those factors in R.C. 2950.11(F)(2)(a)-(k) in ascertaining whether a person would have been subject to the community notification provisions of R.C. 2950.11 under the version of that section that existed immediately prior to the effective date of S.B. 10." *State v. Stockman*, supra. See, also, *Gildersleeve v. State*, 8th Dist. Nos. 91515, 91519, 91521, 91532, 2009-Ohio-2031 (we find that R.C. 2950.11(F)(2) does require the sentencing court to hold an individualized hearing in every case where community notification is at issue, and consider the required factors prior to determining whether the offender should be relieved of community notification).

{¶ 87} In this case, the trial court summarily denied appellant's motion for exclusion, right before he was sentenced. There was no hearing regarding the R.C. 2950.11(F)(2) factors, nor is there any evidence suggesting that the court considered those factors. Accordingly, we find that the court erred in denying his motion pursuant to R.C. 2950.11(F)(2). Appellant's ninth assignment of error is found not well-taken in part and well-taken in part.

{¶ 88} In his tenth and final assignment of error, appellant contends that his indictment was defective as it did not include the appropriate mens rea. In support, appellant cites *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (*Colon I*), and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 (*Colon II*). In *Colon I*, the Ohio Supreme Court addressed the issue of whether an indictment is fatally flawed when it fails to set forth a required mens rea for a particular crime. In that case, the Ohio Supreme Court determined that an indictment for the crime of robbery, which failed to include the mens rea of recklessness as to the infliction of, or attempt to inflict, or threat to inflict, physical harm, was structurally deficient. Id., ¶ 27. On reconsideration, the Ohio Supreme Court clarified that the structural-error analysis for defective indictments is "appropriate only in rare cases * * * in which multiple errors at trial follow the defective indictment." *Colon II*, ¶ 8. This court has already determined that *Colon* applies only to cases in which a defendant has been indicted for the offense of robbery in violation of R.C. 2911.02(A)(2). *State v. Horner*, 6th Dist. No. L-07-1224, 2008-Ohio-6169, ¶ 20. As

appellant was not so indicted in this case, we conclude that *Colon I* and *Colon II* do not apply.

{¶ 89} Moreover, not every criminal charge requires a certain mental state for a conviction to stand. The Ohio Supreme Court has held that a culpable mental state "of the offender is a part of every criminal offense in Ohio, except those that plainly impose strict liability." *Colon I,* ¶ 11. Ohio courts have held that a particular mental state is not required for engaging in the acts that constitute "sexual conduct" pursuant to R.C. 2907.02(A)(1), rape, or gross sexual imposition involving children under the age of 13. *State v. O'Dell*, 2d Dist. No. 22691, 2009-Ohio-1040, State v. Dunlap, 8th Dist. No. 91165, 2009-Ohio-134; *State v. Aiken* (June 10, 1993), 8th Dist. No. 64627. Appellant's tenth assignment of error is found not well-taken.

{¶ 90} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed in part and reversed in part. Appellant's convictions are affirmed and this cause is remanded for resentencing pursuant to R.C. 2950.11(F)(2). Appellant and appellee are ordered to each pay one-half of the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J.
CONCUR. _____
JUDGE