[Cite as *State v. Robinson*, 2010-Ohio-4713.]

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

State of Ohio — Court of Appeals No. L-09-1001

Appellee — Trial Court No. CR0200802496

v.

Stephen Robinson — **DECISION AND JUDGMENT**

Appellant — Decided: September 30, 2010

* * * * *

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

Deborah Kovac Rump, for appellant.

* * * * *

COSME, J.

{¶ 1} Appellant, Stephen Robinson, appeals from a judgment of the Lucas County Court of Common Pleas convicting him of rape and sexual battery against his two stepdaughters after a jury found him guilty of these offenses. For the foregoing reasons, we affirm.

I. BACKGROUND

{¶ 2} Appellant was indicted on June 27, 2008, of five sex-related offenses involving his two stepdaughters, L.C. and L.M. Appellant was charged with two counts of rape, in violation of R.C. 2907.02(A)(1)(b) and (B), and three counts of sexual battery, in violation of R.C. 2907.03(A)(5) and (B). The first count of rape and the third and fourth counts of sexual battery involved appellant's older stepdaughter, L.C. The second count of rape and fifth count of sexual battery involved appellant's younger stepdaughter, L.M.

{¶ 3} L.C. was born October 3, 1990, and L.M. was born January 13, 1992. On December 2, 2002, appellant moved into Mrs. Robinson's residence in Toledo, Ohio. Mrs. Robinson and appellant were married five days later on December 7, 2002. They separated several years later, sometime in April 2006. Mrs. Robinson testified she was unaware that anything inappropriate had taken place between her daughters and appellant.

{¶ 4} L.C. testified that beginning when she was 12 years old, appellant sexually abused her until she became pregnant at age 16. According to L.C., when she told appellant she was pregnant with his child, he instructed her to get an abortion. L.C. refused to get an abortion. She did not tell her mother she was pregnant. Instead, appellant informed L.C.'s mother of the pregnancy, but claimed that L.C.'s friend had gotten L.C. pregnant. Later, however, L.C. wrote in a letter to her mother that appellant was the father.

{¶ 5} The next day Mrs. Robinson took both daughters with her to the police department to make a report. On the way, L.C.'s younger sister, L.M. revealed that she had also been raped by appellant. L.M. testified that she had been sexually abused by appellant nearly every day since she was 12 years old, unless she had her period.

{¶ 6} The indictment alleges that appellant committed the offense of rape and two offenses of sexual battery against L.C. The indictment alleges that the rape offense occurred during the period from October 3, 2002 through October 2, 2003. The two offenses of sexual battery are alleged to have occurred during the period from October 3, 2002 through October 2, 2003, and October 3, 2004 through June 30, 2007.

{¶ 7} At trial, L.C. testified that her feelings for appellant changed within a month after he moved into Mrs. Robinson's house because he touched her on her breasts and vagina. This allegation constitutes the basis of the first sexual battery charge (Count 3). As to the rape charge (Count 1), L.C. testified that she awoke from sleep to find appellant on top of her and that he put his penis in her vagina. She testified that she was 12 years old at the time appellant raped her. As to the second sexual battery charge (Count 4), L.C. testified that appellant had vaginal and anal intercourse with her when she was 12, 13, 14, 15, and 16 years old. L.C. testified that "[t]he first it was only like maybe twice a week, but then it got more like four times a week." L.C. testified that it always happened at her house.

{¶ 8} As to L.M., the indictment alleges that appellant committed the offenses of rape and sexual battery. The indictment alleges that the rape occurred during the period

from December 1, 2004 through January 12, 2005, and the sexual battery occurred during the period from January 13, 2005 through April 30, 2006.

{¶ 9} As to the rape charge (Count 2), L.M. testified that in December 2004, appellant led her into her mother's bedroom, sat down with her, pulled her pants and panties down and then inserted his penis into her vagina. As to the sexual battery charge (Count 5), L.M. testified that she could not remember details of any other times she was sexually abused by appellant, stating "I can't tell you about any other time because it happened too much I can't remember." According to L.M., "[i]t happened every time I was not on my period, so basically every day until my period came." She testified that the sexual abuse stopped when she began her sophomore year at Libbey High School, just before she turned 16 years old. L.M. also testified that the sexual abuse occurred at her house, appellant's cousin's house on Elizabeth Street, and at a motel. She testified that appellant would often make her drink alcohol and get her drunk.

{¶ 10} Prior to trial, appellant moved to sever the counts set forth in the indictment, arguing that he would be unfairly prejudiced if the counts involving the two sisters were tried together. Appellant argued that his admission and the scientific evidence (D.N.A.) establishing that appellant had impregnated L.C. could not be ignored by the jury, and that the jury would simply conclude that if appellant had intercourse with L.C., appellant must have had intercourse with L.M. The trial court disagreed.

{¶ 11} The jury found appellant guilty of all counts, except Count 2, the charge of rape against L.M. The trial court sentenced appellant to ten years in prison as to Count 1;

five years in prison as to Count 3; five years in prison as to Count 4; and five years in prison as to Count 5. The counts were ordered to be served consecutively for a total prison term of 25 years.

II. SEPARATE TRIALS NOT REQUIRED

{¶ 12} In his first assignment of error, appellant maintains that:

{¶ 13} "The trial court erred by not granting Robinson's motion to try the cases separately. This violated Robinson's right to a fair trial."

{¶ 14} At the pretrial hearing, appellant sought to have separate trials so that his admission of impregnating L.C. would not prejudice a jury deciding on the rape and sexual battery charges related to L.M. Appellant claims that "[L.C. and L.M.] were unaware of the other's allegations." However, the testimony of L.C., L.M., and their mother also makes clear that the sisters were aware of at least some of the elements of the other's allegations beginning on the day the mother took them to file charges on behalf of L.C. Appellant suggests that because the sexual abuse was not alleged to have happened to the sisters jointly, that it would even be advantageous for the sisters if the trials were separated and the evidence of one were not admissible in the trial related to the other, because the "stepdaughters would *not* have to testify at two trials."

{¶ 15} Appellant claims that the joinder of cases resulted in prejudice and a violation of his rights to a fair trial.

{¶ 16} We disagree.

{¶ 17} Pursuant to Crim.R 8(A), "[t]wo or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character * * *." Generally, joinder of offenses is liberally permitted in order to conserve judicial resources, prevent incongruous results in successive trials, or to diminish inconvenience to witnesses. *State v. Torres* (1981), 66 Ohio St.2d 340, 343. Thus, "[t]he law generally favors joinder of multiple offenses in a single trial." *State v. Lott* (1990), 51 Ohio St.3d 160, 163, citing *State v. Torres*, 66 Ohio St.2d at 343. See *State v. Schaim* (1992), 65 Ohio St.3d 51, 58; *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶ 49.

{¶ 18} Crim.R. 13 further permits a court to "order two or more indictments * * * to be tried together, if the offenses * * * could have been joined in a single indictment * * *." Consequently, joinder is appropriate where the evidence is interlocking and the jury is capable of segregating the proof required for each offense. *State v. Czajka* (1995), 101 Ohio App.3d 564, 577-578.

{¶ 19} However, pursuant to Crim.R. 14, it may be necessary to require separate trials to prevent prejudice. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, ¶ 29. "'Notwithstanding the policy in favor of joinder, an accused may move to sever counts of an indictment on the grounds that he or she is prejudiced by the joinder of multiple offenses. See Crim.R. 14. An appellate court will reverse a trial court's decision to deny severance only if the trial court has abused its discretion.'" *LaMar*, 2002-Ohio-2128, ¶ 49, quoting *Lott*, 51 Ohio St.3d at 163.

{¶ 20} Crim.R. 14 reads, in pertinent part:

{¶ 21} "If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires."

{¶ 22} When a defendant claims that joinder is improper, he must affirmatively show that his rights have been prejudiced. *Torres*, 66 Ohio St.2d at syllabus. See Crim.R. 14; *State v. Roberts* (1980), 62 Ohio St.2d 170, 175. The defendant "must furnish the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial, and he must demonstrate that the court abused its discretion in refusing to separate the charges for trial." *Torres*, 66 Ohio St.2d at syllabus. See *Lott*, 51 Ohio St.3d at 163.

{¶ 23} The state may negate the defendant's claim of prejudice by demonstrating either of the following: (1) that the evidence to be introduced relative to one offense would be admissible in the trial on the other, severed offense, pursuant to Evid.R. 404(B); or (2) regardless of the admissibility of such evidence, the evidence relating to each charge is simple and direct. *State v. Franklin* (1991), 62 Ohio St.3d 118, 122. The former is generally referred to as the "other acts test," while the latter is known as the "joinder test." *Lott*, 51 Ohio St.3d at 163.

{¶ 24} A claim of prejudice depends on whether the advantages of joinder and avoidance of multiple trials are outweighed by the right of a defendant to be tried fairly on each charge. *Torres*, 66 Ohio St.2d at 343. Accordingly, the state can use two methods to defeat a claim of prejudice under Crim.R. 14. When the state shows that the evidence of each crime is simple and direct, it is not required to meet the stricter "other acts" admissibility test. See *Lott* (1990), 51 Ohio St.3d at 163-164; *State v. Hicks*, 6th Dist. Nos. L-04-1021, L-04-1022, 2005-Ohio-6848, ¶ 30, 41.

A. Other Acts

{¶ 25} The admissibility of other-acts evidence is carefully limited, particularly in prosecutions for sexual offenses. See *State v. Decker* (1993), 88 Ohio App.3d 544, 548. See *State v. Curry* (1975), 43 Ohio St.2d 66. In discussing the dangers associated with admitting evidence of "other acts" in a case where the offenses included several counts of rape and gross sexual imposition, the Supreme Court of Ohio in *State v. Schaim* (1992), 65 Ohio St.3d 51, 59, stated:

{¶ 26} "The admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment. * * * This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature, as is certainly true in this case. The legislature has recognized the problems raised by the admission of other acts evidence in prosecutions for sexual

offenses, and has carefully limited the circumstances in which evidence of the defendant's other sexual activity is admissible." See *State v. Reineke* (1914), 89 Ohio St. 390, syllabus ("sexual crimes * * * including incest, * * * if not too remote, [is] admissible for the purpose of showing the adulterous or incestuous disposition of the defendant toward the prosecutrix and the illicit and continuous sexual relations existing between them.")

{¶ 27} The rape statute contains a subsection that limits the admissibility of evidence of other sexual activity by the defendant. R.C. 2907.02(D) provides:

{¶ 28} "Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value."

{¶ 29} R.C. 2945.59 provides:

{¶ 30} "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior

to subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

{¶ 31} Similarly, Evid.R. 404(B) provides:

{¶ 32} "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

{¶ 33} Because R.C. 2945.59 and Evid.R. 404(B) codify an exception to the common law with respect to evidence of other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict. *State v. Burson* (1974), 38 Ohio St.2d 157, 158-159; *State v. DeMarco* (1987), 31 Ohio St.3d 191, 194.

{¶ 34} However, this strict standard must be considered contemporaneously with the fact that the trial court "occupies a 'superior vantage' in determining the admissibility of evidence." *State v. McAdory*, 9th Dist. No. 21454, 2004-Ohio-1234, ¶ 14, citing *State v. Ali* (Sept. 9, 1998), 9th Dist. No. 18841.

{¶ 35} The rule and statute contemplate acts which may or may not be similar to the crime at issue. If the other act does in fact "tend to show" by substantial proof any of those things enumerated, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, then evidence of the other act may be admissible. *State v. Flonnory* (1972), 31 Ohio St.2d 124, 126. The issue of identity,

although not listed in R.C. 2945.59, has been held to be included within the concept of scheme, plan, or system. *State v. Curry*, 43 Ohio St.2d 66, 73; Evid.R. 404(B) (Staff Note).

{¶ 36} The Supreme Court of Ohio has articulated two requirements for the admission of other acts evidence. *State v. Broom* (1988), 40 Ohio St.3d 277, 282-283. First, substantial evidence must prove that the other acts were committed by the defendant as opposed to another person. Id. Second, the other acts evidence must fall within one of the theories of admissibility enumerated in Evid.R. 404(B). Id. See *State v. Lowe* (1994), 69 Ohio St.3d 527, 530.

{¶ 37} Proof of one of the purposes set forth in Evid.R. 404(B) must go to an issue which is material in proving the defendant's guilt for the crime at issue. *State v. DePina* (1984), 21 Ohio App.3d 91, 92, citing *State v. Burson* (1974), 38 Ohio St.2d 157, 158. In this case, appellant disputes that he raped or sexually abused L.M. Appellant's admission, however, that he fathered L.C.'s child, coupled with his request that she get an abortion and the results of the paternity test showing that he is the father of L.C.'s baby, is substantial evidence that he committed sexual battery against L.C. The state proposes that this proof of appellant's sexual battery against L.C. would be admissible in L.M.'s trial because it is an act that tends to show the existence of a "scheme, plan, or system" that resulted in the rape and sexual battery of L.M.

{¶ 38} Evidence of other acts is admissible where it is "'inextricably related to the alleged criminal act.'" *Lowe*, 69 Ohio St.3d at 531, quoting *Curry*, 43 Ohio St.2d at 73.

Where evidence of other acts establishes a modus operandi, a "unique, identifiable plan of criminal activity[,]" it is applicable to the crime with which defendant is charged. *Lowe*, 69 Ohio St.3d at 531, quoting *State v. Jamison* (1990), 49 Ohio St.3d 182, syllabus. A certain modus operandi provides a "behavioral fingerprint which, when compared to the behavioral fingerprints associated with the crime in question, can be used to identify the defendant as the perpetrator." *Lowe* at 531.

{¶ 39} The two pieces of prejudicial evidence cited by appellant are his admission to fathering L.C.'s child and L.C.'s testimony that he suggested she seek an abortion. Beyond the prejudicial nature of this evidence, however, appellant does not identify or argue any reasons why that evidence related to L.C. would not be admissible under R.C. 2945.59 in a separate trial on the charges related to L.M.

{¶ 40} The state proposes that "the testimony of each sister-victim would have been admissible in the trial involving the other, since the evidence would have established that appellant was engaging in a common scheme or plan." We find the evidence supports the state's position. Appellant held the same position of authority in the lives of L.C. and L.M. and thus had the same opportunity for the alleged repeated multiple sexual assaults against each. Appellant began the abuse of both at the age of 12, when they entered adolescence. The abuse of both occurred in the family home and later took place in other locations.

{¶ 41} In this case, the evidence of the sexual battery against L.C. clearly demonstrates a unique, identifiable plan of criminal activity that is applicable to appellant

with respect to the allegation of rape and sexual battery of L.M. See *Lowe*, 69 Ohio St.3d at 531, quoting *Jamison*, 49 Ohio St.3d at syllabus. Particularly, this evidence indicates a "fingerprint" which consists of taking advantage of a position of trust, with vulnerable young girls who have reached adolescence, isolating them, and having sexual conduct with them. The fact patterns presented by the sexual battery of L.C. and L.M. are similar, and establish a peculiar and unique pattern of activity which tends to identify appellant as the perpetrator of the incident in the instant case. See *State v. DePina* (1984), 21 Ohio App.3d 91, 92.

{¶ 42} In *State v. Frost*, 6th Dist. Nos. L-06-1142, L-06-1143, 2007-Ohio-3469, ¶ 33, this court held that evidence establishing that the defendant was the perpetrator of "other acts" was sufficient to show that "the defendant had engaged in sexual conduct with his minor victim on numerous occasions over a ten-month period."

{¶ 43} Similarly, in *State v. Barnhart*, 6th Dist. No. H-02-046, 2003-Ohio-4859, ¶ 24, this court observed that "[i]n each case, * * * appellant is alleged to have initiated some type of sexual or erotic activity with a sleeping victim. This is a clear and distinct pattern, much like the backrubs that preceded Schaim's sexual activity. Consequently, each of these episodes would be admissible in a separate trial for each charge to show a 'scheme, plan, or system' in doing the act charged."

{¶ 44} In *Barnhart*, this court reasoned that such a pattern is "material in the gross sexual imposition cases because appellant is challenging the credibility of his accusers.

Evidence of a common method of operation presented by witnesses who do not know each other would undermine such a challenge." Id.

{¶ 45} The joinder of the two charges allowed the jury to hear evidence of other acts that would have been admissible at separate trials. We conclude that the evidence of other acts and the corresponding convictions introduced by the state in their case-in-chief was properly admitted as probative of the factors articulated in R.C. 2945.59 and Evid.R. 404(B). Because we conclude that the trial court properly admitted the evidence of other acts, we also find that the trial court's admission of this evidence was not arbitrary, unreasonable and unconscionable, and does not demonstrate "perversity of will, passion, prejudice, partiality, or moral delinquency." *State v. McDory*, 9th Dist. No. 21454, 2003-Ohio-6816, ¶ 11, quoting *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. Thus, we find that the trial court did not abuse its discretion when it admitted the other acts evidence.

B. "Joinder" or "Simple and Direct"

{¶ 46} In *State v. Lott* (1990), 51 Ohio St.3d 160, 163, the Supreme Court of Ohio held that under "the 'joinder' test, the state is not required to meet the stricter 'other acts' admissibility test, but is merely required to show that evidence of each crime joined at trial is simple and direct." See *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, ¶ 30. Appellant is not prejudiced if the evidence of each crime is so "simple and distinct" that a jury could segregate it from the other charges. *Schaim*, 65 Ohio St.3d at 62.

{¶ 47} In *State v. Mills* (1992), 62 Ohio St.3d 357, 362, the Supreme Court of Ohio explained:

{¶ 48} "The joinder test requires that the evidence of the joined offenses be simple and direct, so that a jury is capable of segregating the proof required for each offense. The rule seeks to prevent juries from combining the evidence to convict of both crimes, instead of carefully considering the proof offered for each separate offense."

{¶ 49} Appellant does not argue that evidence of each crime is so complex that a jury could not segregate it from the other charges. Instead, appellant contends that the offenses in this case are highly inflammatory in nature and that he was prejudiced by the trial court's refusal to grant severance. We have already found joinder of the cases appropriate due to the admissibility of "other acts" evidence. Although the state must only demonstrate one means to justify joinder, because appellant raises both issues, we consider this alternative argument.

{¶ 50} In this case, we find the evidence involving appellant to be straightforward and easily separable. There are two victims, two distinct offenses and five charges. There was no confusion in the record, no overlap in testimony, and the prosecutor did not switch attention between the two victims' allegations against the defendant, or otherwise make it more difficult to keep the offenses or charges separate.

{¶ 51} In *State v. Lewis*, 6th Dist. Nos. L-09-1224, L-09-1225, 2010-Ohio-4202, ¶ 33, this court observed that "Ohio appellate courts routinely find no prejudicial joinder where the evidence is presented in an orderly fashion as to the separate offenses or

victims without significant overlap or conflation of proof. See *State v. Johnson* (2000), 88 Ohio St.3d 95, 110 (finding joinder test met where testimony was presented separately as to offenses and victims); *State v. Moshos*, 12th Dist. No. CA2009-06-008, 2010-Ohio-735, ¶ 82 (finding no prejudice where the state's witnesses were 'all "victim-specific" in their testimony'); *State v. Schandel*, 7th Dist. No. 07-CA-848, 2008-Ohio-6359, ¶ 24, 25 (finding no prejudice where witnesses testified separately as to joined drug and theft offenses); *State v. Stoutamire*, 11th Dist. No.2007-T-0089, 2008-Ohio-2916, ¶ 55 (no prejudice where 'the state presented witnesses and evidence chronologically according to the dates of the incidents'); *State v. Fitts*, 5th Dist. No.2005CA00092, 2006-Ohio-678, ¶ 94 (finding no prejudice because 'each crime involved separate witnesses and separate evidence'); *State v. Castile*, 6th Dist. No. E-02-012, 2005-Ohio-41, ¶ 64 (finding no prejudice from joint trial of drug-trafficking charges where evidence was 'clearly divided by the dates of the controlled buys and is relatively simple in nature'); *State v. Norman* (1999), 137 Ohio App.3d 184, 197 (no prejudice where 'evidence was presented in such a manner that it was separated and not improperly intertwined')."

{¶ 52} A review of the record presents no significant overlap of evidence, testimony, or commingling of offenses. The only notable overlap of testimony that occurred was when Dr. Schlievert and Detective Kutz both testified briefly and generally on behaviors that suggest child sexual abuse, without commenting specifically on either child while doing so. Because the offenses against each of the girls were similar, their

testimony applied to all of the offenses and it was not necessary to segregate the information about the behavior by victim, offense, or count.

{¶ 53} Appellant does not point to any portion of the record that would suggest confusion, overlap of testimony, commingling of the victims, offenses, or charges. Nor does the presentation of the state's evidence give rise to any difficulty in segregating the evidence, the victims, offenses or charges.

{¶ 54} Additionally, any concern that the jury could not segregate the evidence is not supported by the verdict of acquittal on Count 2, the rape of L.M. Even though the jury told the trial judge that it believed appellant to be guilty of rape, it looked further to the evidence and concluded that while the rape had been committed, it did not occur during the time period charged by the state in the indictment. We emphasize that while the offenses themselves are inflammatory, and the offenses are similar and the sexual conduct is similar, there are two victims and only two different offenses charged.

{¶ 55} We conclude that appellant was not prejudiced by the trial court's refusal to sever the counts for trial because the evidence of "other acts" against each victim would have been admissible in a separate trial related to the charges against the other. Although it must only satisfy one of the requirements for joinder, the state in this case has met both. The trial court did not abuse its discretion in refusing to separate the charges for trial.

{¶ 56} Accordingly, appellant's first assignment of error is not well-taken.

III. *BATSON* CHALLENGE

{¶ 57} In his second assignment of error, appellant maintains that:

{¶ 58} "The trial court erred by overruling Robinson's objection to the state using its peremptory challenge to exclude racial minorities by excusing the African-American member of the venire panel thereby violating his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution."

{¶ 59} Appellant complains that the prosecutor peremptorily excused prospective Juror No. 8 ("Juror No. 8"), an African-American, because of his race. Appellant also claims that the prosecutor "failed to state a racially neutral explanation and the trial court erred by not granting his *Batson* challenge," in violation of his equal-protection rights under *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69.

{¶ 60} We disagree.

{¶ 61} "A court adjudicates a *Batson* claim in three steps." *State v. Murphy* (2001), 91 Ohio St.3d 516, 528. First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination. Second, if the trial court finds this requirement has been met, the proponent of the challenge must provide a racially neutral explanation for the challenge. *Batson*, 476 U.S. at 96-98, 106 S.Ct. 1712, 90 L.Ed.2d 69. However, the "explanation need not rise to the level justifying exercise of a challenge for cause." Id. at 97, 106 S.Ct. 1712, 90 L.Ed.2d 69. Finally, the trial court must decide based on all the circumstances, whether the opponent has proved purposeful racial discrimination. Id. at 98, 106 S.Ct. 1712, 90 L.Ed.2d 69. See *Purkett v. Elem* (1995), 514 U.S. 765, 767-768, 115 S.Ct. 1769, 131 L.Ed.2d 834. A trial court's findings of no discriminatory intent will not be reversed on appeal unless clearly erroneous. *State v.*

Hernandez (1992), 63 Ohio St.3d 577, 583, following *Hernandez v. New York* (1991), 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395.

{¶ 62} Juror No. 8 was peremptorily challenged by the state, and appellant objected. The trial court conducted a sidebar and asked the prosecutor to summarize his reasons for exercising its peremptory. The prosecutor explained that he was uncomfortable with Juror No. 8 because of the similarities between this case and the case in which Juror No. 8's cousin was accused of a similar offense.

{¶ 63} The prosecutor relied on this similar occurrence as a racially neutral reason for the peremptory challenge. The prosecutor noted Juror No. 8's cousin had been accused of a sexual offense, by that cousin's stepdaughter, but Juror No. 8 was of the opinion that his cousin did not do it because "the girl was fast." Upon questioning, Juror No. 8 conceded that he did not know what had happened, had not talked with his cousin, and did not know much about the victim. Juror No. 8 acknowledged that the victim's reputation might have affected his perception of what happened.

{¶ 64} After hearing the prosecutor's explanation, the trial court rejected appellant's *Batson* challenge, finding no prima facie case and no evidence of racial discrimination. At the conclusion of voir dire, the trial court observed that three African-American jurors had been selected for the panel.

{¶ 65} Accordingly, appellant's second assignment of error is not well-taken.

IV. PROSECUTORIAL MISCONDUCT

{¶ 66} In his third assignment of error, appellant maintains that:

{¶ 67} "The prosecutor engaged in misconduct that resulted in Robinson not receiving a fair trial."

{¶ 68} Appellant sets forth two arguments, the substance of which is clarified only by reference to the trial transcript. Appellant first argues that the prosecutor committed misconduct by asking Detective Kutz leading questions designed to bolster the victims' credibility. Next, appellant argues that certain of the prosecutor's remarks during closing were improper and prejudicially affected appellant's substantial rights.

{¶ 69} We disagree.

A. Leading Questions

{¶ 70} Appellant contends that the prosecutor improperly used leading questions to elicit opinion testimony from Detective Kutz regarding the victims' credibility.[1]

{¶ 71} Under Evid.R. 611(C), [l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. However, the trial court has discretion to allow leading questions on direct examination." *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶ 138; *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 190.

{¶ 72} We agree with appellant's implied argument that an expert may not provide opinion testimony regarding the truth of a witness's statements or testimony. *State v. Stowers* (1998), 81 Ohio St.3d 260, 262; *State v. Moreland* (1990), 50 Ohio St.3d 58, 62.

[1]Also in this portion of the trial transcript is an objection that Detective Kutz's testimony was cumulative of Dr. Randall Schlievert's earlier testimony; this issue is addressed in appellant's sixth assignment of error.

Assessing a witness's veracity is within the province of the trier of fact. *State v. Jones* (1996), 114 Ohio App.3d 306, 318. However, in *State v. Stowers*, 81 Ohio St.3d 260, 262-263, the Supreme Court of Ohio stated:

{¶ 73} "*Boston's* syllabus excludes expert testimony offering an opinion as to the truth of a child's statements (e.g., the child does or does not appear to be fantasizing or to have been programmed, or is or is not truthful in accusing a particular person). It does not proscribe testimony which is additional support for the truth of the *facts testified* to by the child, or which assists the fact finder in assessing the child's veracity. (Emphasis in original.)"

{¶ 74} Thus, an expert may provide testimony assisting the trier of fact in assessing a witness's credibility. *Stowers*, 81 Ohio St.3d at 263. In *State v. Thompson* (Dec. 29, 1989), 2d Dist. No 11262, the court found no error in an expert's general testimony about why victims of sexual abuse do not come forward immediately. The court found the testimony proper despite the fact that the victim-witness exhibited some of the same behaviors about which the expert testified, noting that the expert did not provide an opinion about the witness's truthfulness. The court also noted that the expert's testimony "was limited to the general behavior of children who have been abused." Id.

{¶ 75} Similarly, in *Stowers*, the Supreme Court of Ohio found nothing improper in an expert's testimony explaining why children who have been sexually abused often recant their accusations and delay disclosure of the abuse. *Stowers* at 263. The court noted that the expert did not provide an opinion concerning her belief in the child-

witness's statements. Rather, she provided the jury with information to help it make an educated determination and "counterbalanced the trier of fact's natural tendency to assess recantation and delayed disclosure as weighing against the believability and truthfulness of the witness." Id.

{¶ 76} In this case, the prosecutor asked questions of Detective Kutz designed to address the delay in the victims' reporting of the sexual abuse. Although the prosecutor was having difficulty phrasing his questions so as not to be leading or otherwise elicit a response from Detective Kutz that did not allude to the veracity of the victims in this case, a thorough reading of the transcript makes clear that Detective Kutz did not bolster the victims' testimony. Upon questioning, Detective Kutz conceded that "delayed disclosure is a phenomenon which is common in child sexual abuse cases" and went on to testify that the age of the child made it more likely that grooming and conditioning would occur. Detective Kutz never vouched for the specific victims' credibility or indicated that their testimony was truthful. *Stowers*, supra. Detective Kutz did not testify that the victims fit the pattern of an abused victim, nor did he otherwise use delayed disclosure, grooming or conditioning as evidence that the victims were telling the truth. See *State v. Davis* (1989), 64 Ohio App.3d 334, 345.

B. Prosecutor's Remarks during Closing Argument

{¶ 77} Appellant contends that the prosecutor's remarks during closing argument constituted prejudicial conduct sufficient to require reversal of appellant's conviction. Specifically, appellant asserts that the prosecutor mischaracterized appellant's counsel's

opening statement as an admission that appellant was guilty of Count 4, sexual battery, and that the prosecutor attempted to inflame the jury by characterizing appellant's explanation for impregnating L.C. as a "sickness" that happened "just one time" in "a moment of weakness." Finally, appellant complains that the prosecutor vouched for the credibility of the state's witnesses.

{¶ 78} In *State v. Smith* (1984), 14 Ohio St.3d 13, 13-14, the Supreme Court of Ohio held:

{¶ 79} "The prosecution is normally entitled to a certain degree of latitude in its concluding remarks. *State v. Woodards* (1966), 6 Ohio St.2d 14, 26, 215 N.E.2d 568 [35 O.O.2d 8], certiorari denied (1966), 385 U.S. 930, 87 S.Ct. 289, 17 L.Ed.2d 212; *State v. Liberatore* (1982), 69 Ohio St.2d 583, 589, 433 N.E.2d 561 [23 O.O.3d 489]. A prosecutor is at liberty to prosecute with earnestness and vigor, striking hard blows, but may not strike foul ones. *Berger v. United States* (1935), 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314. * * * It is a prosecutor's duty in closing arguments to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury. *United States v. Dorr* (C.A. 5, 1981), 636 F.2d 117."

{¶ 80} "The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant." *Dorr*, 636 F.2d at 120.

{¶ 81} In this case, during closing argument, the prosecutor argued that appellant had admitted he was guilty of Count 4, stating:

{¶ 82} "* * * The defendant admits he is guilty of Count 4. He admitted that to you in opening statement. And you go back there with that verdict form, Count 4, you can all sign guilty. Because that's what he admitted to. Why did he admit that? Because he admits that he is the father of [L.C.]'s baby. All the State has to prove is that the sexual conduct occurred. He's the stepparent, and that it happened in Lucas County, Ohio. He's admitting to that. That he engaged in that type of conduct, vaginal intercourse clearly because he got [L.C.] pregnant. Now, what the defendant is arguing is that he only engaged in this vaginal intercourse with [L.C.] one time and got her pregnant. That all those other times that she was talking about didn't happen."

{¶ 83} The prosecution contends that its remarks were provoked by appellant's counsel's remarks during opening statement, and should therefore be excused. We acknowledge that in its opening statement, appellant's counsel told the jury:

{¶ 84} "MR. GEUDTNER: * * * Ladies and gentlemen, the evidence will indeed show that Stephen Robinson is the father of the baby born in March of this year to his stepdaughter [L.C.]. The baby was conceived in approximately June of 2007 and that makes Stephen Robinson guilty of the offense of sexual battery as charged in Count 4 of the indictment of this case. Stephen acknowledges, and he's authorized me to acknowledge his guilt as to Count 4 of the indictment and he understands that he will have to suffer the consequences that accompany such a felony conviction.

{¶ 85} "However, excuse me, the remaining counts alleged in the indictment, one count of rape and one count of sexual battery as to stepdaughter [L.C.] and one count of

rape and one count of sexual battery as to her sister [L.M.] will be unproven and they are unprovable because they are, in fact, untrue. Stephen Robinson never engaged in any sexual conduct whatsoever with his stepdaughter [L.M.]. And his sexual conduct with [L.C] was limited to the time period approximately nine months prior to the birth of her son."

{¶ 86} Where the prosecutor argues facts not in evidence, it will not constitute misconduct if the remarks are in response or rebuttal to defense counsel's arguments. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶ 66; *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, ¶ 110, 114. Here, the prosecutor was repeating information from appellant's opening argument. We note that opening and closing statements are not evidence and are intended only to advise the jury what counsel expects the evidence to show. *State v. Turner* (1993), 91 Ohio App.3d 153, 157. The jury had been instructed accordingly.

{¶ 87} The prosecutor's comments are not couched in terms of the prosecutor's belief in appellant's guilt, but rather, in response to what appellant's counsel said during opening remarks and the evidence adduced to at trial, including the testimony of Mr. Shawn Weiss, a forensic analyst, who stated that DNA testing had conclusively identified appellant as the biological father of L.C.'s baby.

{¶ 88} We conclude that appellant was not prejudiced by the prosecutor's reference to appellant's counsel's opening remarks. The evidence made clear that appellant was the biological father of L.C.'s baby, and appellant did not dispute that finding at trial.

{¶ 89} Next, appellant complains that the prosecutor's description of appellant's explanation for impregnating L.C. as a "sickness" that happened "just one time" in "a moment of weakness," was improper and designed to inflame the passions of the jury.

{¶ 90} The prosecutor's statement, however, does not go beyond the record. The prosecutor was alluding to comments made by appellant's counsel during opening statement and characterized the evidence in light of the evidence and argument raised by appellant.

{¶ 91} We conclude that the prosecutor's argument represented fair comment and was not improper. See *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶ 202. See, also, *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶ 189.

{¶ 92} Finally, appellant complains that the prosecutor improperly vouched for the credibility of the state's witnesses by arguing that their testimony "dovetailed" with the behaviors described by Dr. Schlievert and Detective Kutz. We have held that in closing argument, a prosecutor may comment freely on "what the evidence has shown and what inferences can be drawn therefrom." *State v. McGlown*, 6th Dist. No. L-07-1163, 2009-Ohio-2160, ¶ 50, quoting *State v. Richey* (1992), 64 Ohio St.3d 353, overruled on other grounds. The prosecutor did not state a personal belief, but rather, commented on the behavioral characteristics of sexually abused children and this comparison is no different than a prosecutor "suggest[ing] that the evidence demonstrates the defendant is lying." *State v. Skipper*, 8th Dist. No. 81963, 2003-Ohio-3531, ¶ 45, citing *State v. Draughn* (1991), 76 Ohio App.3d 664.

{¶ 93} Accordingly, appellant's third assignment of error is not well-taken.

V. MANIFEST WEIGHT OF THE EVIDENCE

{¶ 94} In his fourth assignment of error, appellant contends that:

{¶ 95} "The verdicts are against the manifest weight of the evidence."

{¶ 96} We disagree.

{¶ 97} Appellant argues that his convictions for rape and sexual battery are against the manifest weight of the evidence. In essence, appellant contends the jury should not have believed the testimony of the two victims because any evidence of sexual abuse occurring for the length of time alleged could not have been hidden from others. Appellant specifically complains that L.M.'s testimony that she was sexually abused for a period of years was not believable because someone would have noticed.

{¶ 98} A challenge to the manifest weight of the evidence attacks the credibility of the evidence presented. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-387. In a manifest weight challenge, the reviewing court sits as a "thirteenth juror and makes an independent review of the record." Id. at 387. In performing this function, "[t]he court, reviewing 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 jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

Further, "[o]n the trial of a case, either civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. As such, a jury may believe all, part, or none of the testimony of the witnesses who appear before it. *State v. Green*, 10th Dist. No. 03AP-813, 2004-Ohio-3697, ¶ 24.

{¶ 99} Both victims identified appellant as the perpetrator of the crimes. Neither victim's competency to testify was challenged. There was no indication that they lacked the intellectual capacity to communicate their observations or recollections. They were cross-examined thoroughly and did not waver in any significant manner from their versions of the events. The fact that they did not report the abuse until after appellant disclosed L.C.'s pregnancy does not diminish their credibility.

{¶ 100} Similarly, the fact that no other testimony corroborated the victims' testimony did not render their testimony less credible. The testimony of a person victimized by sexual misconduct need not be corroborated. There is no requirement, statutory or otherwise, that a rape victim's testimony must be corroborated as a condition precedent to conviction. *State v. Sklenar* (1991), 71 Ohio App.3d 444, 447; *State v. Love* (1988), 49 Ohio App.3d 88, 91. It is well settled that the testimony of a rape victim, if believed, is sufficient to support each element of rape. *State v. Lewis* (1990), 70 Ohio App.3d 624, 638. Further, not all rape victims exhibit signs of physical injury. *State v. Van Buskirk* (Sept. 29, 1994), 8th Dist. No. 57800.

{¶ 101} An appellate court may not substitute its judgment for that of the jury on the issue of witness credibility unless it is manifestly clear the jury lost its way. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Based upon the record before us, we cannot conclude the jury lost its way or created a manifest miscarriage of justice in arriving at its verdicts. To the contrary, the weight of the evidence supports the rape and sexual battery convictions.

{¶ 102} Accordingly, appellant's fourth assignment of error is not well-taken.

VI. SUFFICIENCY OF EVIDENCE

{¶ 103} In his fifth assignment of error, appellant argues that:

{¶ 104} "The verdict for Count 1, rape is not supported by sufficient evidence."

{¶ 105} Count 1 alleges that appellant raped L.C. Appellant challenges his conviction on Count 1 as not being supported by sufficient evidence because he was acquitted of Count 2, also a charge of rape, of L.M. Appellant contends:

{¶ 106} "[A]ge was a critical element. The jury apparently rejected the state and entered an acquittal as to Count 2 due to the state's failure to prove [L.M.]'s age. Robinson believes that when the Court fairly reads the testimony of [L.C.] that the state failed to prove beyond a reasonable doubt her age as to Count 1 of the indictment."

{¶ 107} We disagree.

{¶ 108} "Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. In this inquiry, a reviewing court must determine whether the state has met its burden of production at

trial. The court is to assess "not whether the state's evidence is to be believed, but whether, if believed, the evidence against the defendant would support a conviction." Id. at 390. Thus, the court, after viewing the evidence in a light most favorable to the prosecution, must conclude whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Smith* (1997), 80 Ohio St.3d 89, 113, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 109} R.C. 2907.02(A)(1)(b) provides in relevant part that "[n]o person shall engage in sexual conduct with another who is not the spouse of the offender * * * when * * * [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person." "Sexual conduct" is defined as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." R.C. 2907.01(A).

{¶ 110} The indictment alleged that appellant raped L.C. during the period from October 3, 2002 through October 2, 2003. Originally, L.C. testified that she was not sure what year it was that her mother and appellant married, but she testified that her feelings for appellant changed about a month after he moved into the house. L.C. testified that she was 12 years old when she woke up from her sleep to find appellant on top of her

with his penis inside her vagina. Thus, sufficient evidence was elicited on Count 1 to sustain appellant's conviction.

{¶ 111} Appellant argues that there was insufficient evidence to prove that the rape occurred during the time period specified within the indictment. The precise date and time a rape occurs is not an essential element of the crime. See R.C. 2907.02. "Where the exact date and time of an offense are not material elements of a crime [or] essential to the validity of a conviction, the failure to prove such is of no consequence and it is sufficient to prove that the alleged offense occurred at or about the time charged." *State v. Madden* (1984), 15 Ohio App.3d 130, 131. Moreover, "particularly in cases involving sexual misconduct with a child, the precise times and dates of the alleged offense or offenses oftentimes cannot be determined with specificity." *State v. Daniel* (1994), 97 Ohio App.3d 548, 556. This rule has been established because "[i]n many cases involving child sexual abuse, the victims are children of tender years who are simply unable to remember exact dates and times, particularly where the crimes involve a repeated course of conduct over an extended period of time." *State v. Mundy* (1994), 99 Ohio App.3d 275, 296.

{¶ 112} L.C. was 12 years old at the time appellant raped her. It would not be unreasonable for a young child to have difficulty remembering exact dates and times. L.C.'s testimony about certain events, such as her mother's marriage to appellant and appellant's move into the home, coupled with the testimony of Mrs. Robinson regarding the same, allowed the jury to establish with certainty that L.C. was raped during the time

period set forth in the indictment. L.C.'s recollection of the sequence of significant events was supported by both her mother's testimony and her own testimony that she was 12 years old when she was raped.

{¶ 113} Further, it was not unreasonable for the jury to believe that L.C. was unable to remember exact dates and times, especially considering that the same conduct occurred over a four year period of time.

{¶ 114} Viewing the evidence presented by the state in a light most favorable to the prosecution, a rational trier of fact could have found all of the elements of rape of L.C., a child under 13 at the time of the rape, proven beyond a reasonable doubt.

{¶ 115} Accordingly, appellant's fifth assignment of error is not well-taken.

VII. THE TESTIMONY OF DETECTIVE KUTZ WAS NOT CUMULATIVE

{¶ 116} In his sixth assignment of error, appellant maintains that:

{¶ 117} "The trial court erred by permitting the detective to testify as an expert because his testimony was cumulative."

{¶ 118} Appellant complains the Detective Kutz's testimony was cumulative to Dr. Schlievert's testimony and was intended to bolster the credibility of the victims. Appellant asserts that "either Kutz or Schlievert should have testified on the issue of delayed reporting. This is not a complicated issue and did not require repeated testimony for the jury to comprehend that delayed reporting is fairly common."

{¶ 119} We disagree.

{¶ 120} At the outset, we note that appellant's argument is not that Detective Kutz was permitted to testify as an expert, but that he was permitted to testify about behaviors consistent with child sexual abuse, behaviors that Dr. Schlievert had already testified to.

{¶ 121} In *State v. Boston* (1989), 46 Ohio St.3d 108, 126, overruled, in part, on other grounds by *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, ¶ 35, the Supreme Court of Ohio held that in cases involving alleged child abuse, "the use of expert testimony is perfectly proper and such experts are not limited just to persons with scientific or technical knowledge but also include other persons with 'specialized knowledge' gained through experience, training or education." (Emphasis added.)

{¶ 122} *Boston* held that such 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. Id. at 128. In this case, neither Dr. Schlievert nor Detective Kutz offered an opinion as to whether L.C. or L.M. was being truthful when they claimed they had been sexually abused. Nor did they offer the opinion that either L.C. or L.M. was sexually abused.

{¶ 123} As to appellant's allegation that an expert is not needed to assist the jury "in determining a fact issue or understanding the evidence," *State v. Rhodes* (Dec. 14, 2001), 11th Dist. No. 2000-L-089, this court held in *State v. Solether*, 6th Dist. No. WD-07-053, 2008-Ohio-4738, ¶ 65, that "the fact that delayed reporting by sexual assault victims is not uncommon is not within the knowledge of the average juror." In *Solether*,

this court permitted the officer's testimony, concluding that it was based upon "specialized knowledge" and thus, was properly categorized as expert testimony.

{¶ 124} Similarly, in *State v. Frost*, 6th Dist. Nos. L-06-1142, L-06-1143, 2007-Ohio-3469, this court concluded that a detective was qualified as an expert witness in child sexual abuse. Although the defendant had stipulated to the detective's qualifications in the area of sexual assault and sexual abuse investigation, this court held that the detective's testimony "regarding the issues of revictimization, conditioning, and delayed reporting was not plain error." This court further held, "[o]ur determination was based on the fact that the detective possessed a degree of 'specialized knowledge' in the area of child abuse based on training and on-the-job experience which included 21 years as a police officer and six years investigating sex offenses." *Frost*, 2007-Ohio-3469, ¶ 37, quoting *McGlown*, 2009-Ohio-2160, ¶ 39.

{¶ 125} As to whether Detective Kutz's testimony concerning delayed disclosure, grooming or conditioning was cumulative of Dr. Schlievert's testimony, a trial court has discretion to exclude evidence if its probative value is substantially outweighed by consideration of needless presentation of cumulative evidence. Evid.R. 403(B). Absent a clear and prejudicial abuse of discretion, a trial court's determination not to admit evidence shall not be reversed on review. *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 163; *City of Parma v. Manning* (1986), 33 Ohio App.3d 67, 69.

{¶ 126} In *Gandolfo v. State* (1860), 11 Ohio St. 114, 119, the Supreme Court of Ohio described cumulative evidence as evidence "'which merely multiplies witnesses to

any one or more of these facts before investigated, or only adds other circumstances of the same general character.'" Id., quoting *Waller v. Graves*, 20 Conn. 305-311. It noted however, "'that evidence which brings to light some new and independent truth of a different character, although it tend to prove the same proposition or ground of claim before insisted on, is not cumulative within the true meaning of the rule on this subject.'" Id.

{¶ 127} We conclude that the trial court did not abuse the discretion conferred under Evid.R. 403(B) by permitting the testimony of both Dr. Schlievert and Detective Kutz. See *State v. Campbell* (1994), 69 Ohio St.3d 38, 51.

{¶ 128} In light of the fact that Dr. Schlievert and Detective Kutz have "specialized knowledge" gained through different experience, training or education and conducted separate interviews with the victims, we cannot conclude that it was a clear and prejudicial abuse of the trial court's discretion to permit both to testify, albeit briefly, upon the common issues of delayed reporting, grooming, and conditioning. See *State v. Lewis*, 70 Ohio App.3d 624, 638-639.

{¶ 129} Their testimony, which was based upon their interviews, observations of the behavior of the victims, or other indicators tending to show the presence of sexual abuse, including the victims' delayed disclosure of the abuse, provided information to the jury that allowed it to make an "educated determination" regarding the ultimate issues in this case. *State v. Stowers* (1998), 81 Ohio St.3d 260, 263, quoting *State v. Gersin*

(1996), 76 Ohio St.3d 491, 494. See *State v. Schewirey*, 7th Dist. No. 05 MA 155, 2006-Ohio-7054, ¶ 48; *State v. Winterich*, 8th Dist. No. 89581, 2008-Ohio-1813, ¶ 24.

{¶ 130} Accordingly, appellant's sixth assignment of error is not well-taken.

VIII. SENTENCE WAS NOT EXCESSIVE

{¶ 131} In his seventh assignment of error, appellant contends that:

{¶ 132} "The trial court imposed an excessive sentence by relying, at least in part, upon the acquittal count. This resulted in the trial court making improper findings of fact."

{¶ 133} Appellant complains that although he was acquitted of Count 2, the offense of rape as to L.M., the trial court nevertheless determined that he had committed that offense and impermissibly applied that finding in imposing maximum, consecutive sentences upon appellant. Appellant argues that the trial court unlawfully considered facts outside the record of this case when it spoke with the jury members and learned that the jury believed appellant raped L.M., they just could not find that the state had proved that the rape occurred during the time period alleged in the indictment.

{¶ 134} Appellant implies that the trial court's use of this information renders the sentencing void because the court employed the judicial fact-finding provisions of former R.C. 2929.14(B), (C) and (E)(4) (which were severed by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856) when it made specific factual findings prior to imposing maximum sentences and ordered the sentences to be served consecutively.

{¶ 135} We disagree.

{¶ 136} Appellant was sentenced after *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. According to *Foster*, judicial fact-finding is no longer required before a court imposes consecutive prison terms. Instead, judges return to the use of their discretion in sentencing so long as the sentence falls within the statutory sentencing ranges provided by R.C. 2929.14. *State v. Marshall*, 5th Dist. No. 2008 CA 00222, 2009-Ohio-1757, ¶ 40-41.

{¶ 137} In reviewing a felony sentence, appellate courts employ the two-step analysis set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. Appellate courts must "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." Id. at ¶ 26. The applicable statutes to be applied by a trial court include the felony sentencing statutes R.C. 2929.11 and 2929.12, which are not fact-finding statutes, but rather "serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence." Id. at ¶ 17.

{¶ 138} R.C. 2929.11(A) states that:

{¶ 139} "A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime,

rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

{¶ 140} R.C. 2929.12 sets forth a non-exhaustive list of factors that the trial court is required to consider when determining whether the defendant's conduct is more or less serious than conduct normally constituting the offense. In addition, the trial court must consider the likelihood that the offender will commit future crimes.

{¶ 141} In this case, before pronouncing its sentence, the trial court reviewed appellant's juvenile and adult criminal record as well as the presentence report. The trial court noted that "there is only one thing that can protect the community from Mr. Robinson who is a true sexual predator, and that is incarceration." In addition, the trial court stated that it had taken "into consideration that which we must pursuant to statute and rule and that which is articulated under Sentencing Bill 2, but only consider those matters which remain constitutional in Ohio and all other statutes and rules."

{¶ 142} The sentencing entry states that the trial court considered "the record, oral statements, any victim impact statements and presentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12." See, e.g., *State v. Hatfield*, 2d Dist. No. 2006 CA 16, 2006-Ohio-7090, ¶ 9, citing *Schenley v. Kauth* (1953), 160 Ohio St. 109, 111.

{¶ 143} Applying the first prong of the *Kalish* analysis, we do not find the trial court's sentence to be clearly and convincingly contrary to law. We are satisfied that the

trial court gave careful and substantial deliberation to the relevant statutory considerations.

{¶ 144} The second prong of the *Kalish* analysis requires that we determine if the trial court abused its discretion in selecting a sentence within the permissible statutory range. *Kalish* at ¶ 17. *Foster* accords the trial court full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure. The court in *Kalish* held:

{¶ 145} "R.C. 2929.12 explicitly permits trial courts to exercise their discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion." Id.

{¶ 146} Here, the trial court imposed the maximum sentence for each of the counts appellant was convicted of and ordered that the sentences be served consecutively. Appellant's individual prison terms are within the range authorized by the General Assembly and it is not an abuse of discretion to impose maximum, consecutive sentences. See *Foster*, 2006-Ohio-856, paragraph seven of the syllabus. An abuse of discretion is "'more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 147} We are bound to give substantial deference to the General Assembly, which has established a specific range of punishment for every offense and authorized

consecutive sentences for multiple offenses. *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 373-374.

{¶ 148} In *State v. Harmon*, 6th Dist. No. L-05-1078, 2006-Ohio-4642, ¶ 16, this court noted that "[a] trial court's discretion to impose a sentence within the statutory guidelines is very broad and an appellate court cannot hold that a trial court abused its discretion by imposing a severe sentence that is within the limits authorized by the applicable statute." See *Harris v. U.S.* (2002), 536 U.S. 545, 565, 122, S.Ct. 2406, 153 L.Ed.2d 524.

{¶ 149} In this case, the trial court considered appellant's relationship to L.C. and L.M. and stressed that "this wasn't merely an isolated incident. This was a violent period for these two young girls as this defendant perceived them as merely owning them and as property for whatever decision he used them for, whether it was for entertainment or whether it was for sexual assault."

{¶ 150} Because the individual sentences imposed by the court in this case are within the range of penalties authorized by the legislature, it is not grossly disproportionate or shocking to a reasonable person or to the community's sense of justice and does not constitute cruel and unusual punishment. The trial court clearly considered R.C. 2929.12 and concluded that appellant was likely to commit further offenses, and determined that a maximum prison sentence was necessary to protect the public.

{¶ 151} Nothing in the record suggests that the court's imposition of maximum consecutive sentences was unreasonable, arbitrary, or unconscionable, and therefore we

find no abuse of discretion. Accordingly, appellant's seventh assignment of error is not well-taken.

IX. CONCLUSION

{¶ 152} We conclude that the trial court did not err in denying appellant's motion to sever the counts into two trials, one for each victim, L.C. and L.M. The "other act" that appellant complained of as requiring severance because it was overly "prejudicial" is admissible under R.C. 2945.59 and Evid.R. 404(B). Evidence of similar crimes in a prosecution for sexual offenses is admissible where inextricably related, committed during overlapping period of time, and involving a similar system used to commit both the crimes charged and the other acts.

{¶ 153} We also conclude that the trial court did not err in permitting the prosecutor to exercise a peremptory challenge to remove an African-American juror; the state had a race-neutral reason for doing so. Nor did the prosecutor commit misconduct in during trial or in closing. The verdicts were not against the manifest weight of the evidence. The verdict of guilty as to Count 1, the charge of rape, was not against the sufficiency of the evidence. After construing the evidence most strongly in favor of the prosecution, a rational trier of fact could have found appellant guilty of the rape charge.

{¶ 154} As well, it was not an abuse of discretion to allow both Dr. Schlievert and Detective Kutz to testify about behaviors that indicate child sexual abuse. While their testimony overlapped to a certain extent on the behaviors of delayed disclosure, conditioning, and grooming, it was not cumulative. There was no prejudice to appellant.

Finally, the trial court did not abuse its discretion in imposing maximum, consecutive sentences. The trial court's sentences were within the range of punishment authorized by the General Assembly.

{¶ 155} Wherefore, based upon the foregoing, the judgment of the Lucas County Common Pleas Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE