[Cite as *State v. Bell*, 2009-Ohio-2335.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-05-044
	:	O P I N I O N
- vs -		5/18/2009
	:	
JAYSEN W. BELL,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2006-CR-00867

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 N. Third Street, Batavia, OH 45103-3033, for plaintiff-appellee

Michael K. Allen & Associates, Michael K. Allen, 810 Sycamore Street, 4th Floor, Cincinnati, OH 45202, for defendant-appellant

YOUNG, J.

{¶1} Defendant-appellant, Jaysen W. Bell, appeals from the Clermont County Court of Common Pleas decision denying his motion to suppress, as well as his conviction for one count of sexual battery and three counts of sexual imposition. We affirm the decision of the trial court.

{¶2} In June of 2006, T.T., a 15-year-old foster child, informed police that appellant,

his former foster parent, frequently entered his bedroom and "masturbated" him during his placement at appellant's home. T.T. also informed police that appellant attempted to perform fellatio on him in a local church parking lot. After T.T.'s revelation, T.W., a 14-year-old foster child who was residing with appellant at that time, was removed from appellant's care. T.W., after being placed in the care of another foster family, then informed police that appellant had also engaged in inappropriate sexual behavior towards him and that appellant continued to contact him via telephone, through on-line conversations, and by e-mail.

{¶3} Following the police investigation, appellant was arrested and charged with one count of rape, three counts of sexual battery, and three counts of sexual imposition stemming from the alleged inappropriate sexual behavior involving the two foster children, T.T. and T.W., between July of 2003 and June of 2006.

{¶4} At the conclusion of the four-day jury trial, appellant was found guilty of one count of sexual battery, as well as the three counts of sexual imposition. Appellant was then classified as a Tier III Sex Offender/Child Victim Offender Registrant ("Tier III Sex Offender") and sentenced to serve a total of five years in prison. Appellant now appeals his conviction, raising nine assignments of error. For ease of discussion, appellant's assignments of error will be addressed out of order.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY ADMITTING EVIDENCE THAT WAS OBTAINED FROM COMPUTERS SEIZED FROM DEFENDANT-APPELLANT'S HOME PURSUANT TO A SEARCH WARRANT."[1]

{¶7} In his first assignment of error, appellant argues the trial court erred in denying

his motion to suppress evidence seized from his home, which included a number of computers and their contents. Specifically, appellant claims the trial court erred in denying his motion to suppress because, according to appellant, the search of his home was incident to an invalid search warrant. This argument lacks merit.

{¶8} Appellate review of a trial court's decision to grant or deny a motion to suppress is a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 332. An appeals court must accept a trial court's factual determinations from the suppression hearing "so long as they are supported by competent and credible evidence." Id. A reviewing court, when examining the affidavit in support of the search warrant, is only required to ensure that the issuing judge had a "substantial basis" for concluding that probable cause existed. *State v. Dunihue,* 161 Ohio App.3d 731, 733-734, 2005-Ohio-3223, ¶6, citing *State v. George* (1989), 45 Ohio St.3d 325, paragraph two of the syllabus. In turn, a judge properly issues a search warrant if the totality of the circumstances establish a "fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates* (1983), 462 U.S. 213, 238, 103 S.Ct. 2317.

{¶9} A police officer establishes probable cause for a search warrant through an affidavit. *State v. Messer*, Clermont App. No. CA2008-04-039, 2009-Ohio-929, ¶13; Crim.R. 41(C). "To successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either intentionally, or with the reckless disregard for the truth." *State v. Rogers*, Butler App. No. CA2006-03-055, 2007-Ohio-1890, ¶46, citing *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶31; *State v. Waddy* (1992), 63 Ohio St.3d 424, 441. Omissions count as false statements if "designed to mislead, or * * * made in reckless disregard of

1. Appellant also argues under his first assignment of error that the evidence obtained from a laptop computer seized from his home was not admissible. This argument, which essentially deals with the authentication of the

whether they would mislead, the magistrate." *Rogers* at ¶46; *Waddy* at 441, quoting *United States v. Colkley* (C.A.4, 1990), 899 F.2d 297, 301. However, a search warrant is still valid even though it is based on an affidavit containing false statements or omissions, unless, after including the omissions, "the affidavit's remaining content is insufficient to establish probable cause." *State v. Sells*, Miami App. No. 2005-CA-8, 2006-Ohio-1859, ¶11, citing *Waddy* at 441; *State v. Underwood*, Scioto App. No. 03CA2930, 2005-Ohio-2309, ¶29-32.

{¶10} On appeal, appellant argues the affidavit submitted in support of the search warrant made multiple material omissions that, if included within the affidavit, would negate probable cause. Specifically, appellant claims the submitted affidavit "contains serious misstatements and material omissions" made by the affiant, Officer Jeff Wood, a 17-year veteran with the Amelia Police Department, "purposely or with reckless indifference to the truth." According to appellant, if the issuing judge had known about the omissions and "contradictory misstatements" found in Officer Wood's affidavit, it is "unlikely" the search warrant would have been issued. In support of this argument, appellant identifies six "critical" omissions from the affidavit which included, among other things, the victims' inconsistent and contradictory statements regarding the explicit details of appellant's alleged sexual misconduct, as well as T.T.'s previous, albeit false, claims of sexual abuse at the hands of his brother.

{¶11} Based on our review of the record, however, and even after including the alleged "critical" omissions to the submitted affidavit, we find the contents of Officer Wood's affidavit sufficient to establish probable cause to support the issuance of the search warrant. See, e.g., *State v. Berry*, Cuyahoga App. No. 87493, 2007-Ohio-278, ¶39. Here, the affidavit indicates appellant inappropriately touched T.T., one of his former foster children, while the pair was in the minor's bedroom, as well as in a local church parking lot. In addition, the

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evidence obtained from the laptop hard drive, will be addressed in appellant's second assignment of error.

affidavit contains information indicating appellant frequently engaged in inappropriate touching of T.W., yet another one of his former foster children, in relatively the same manner, and that appellant, even after T.W. was removed from his foster care, continued to make contact with the boy by telephone, and through on-line conversations and e-mail.

{¶12} While it may be true that the teenage victims provided Officer Wood with inconsistent and contradictory information regarding the explicit details of appellant's alleged sex acts, we find that the omission of these discrepancies, as well as a recitation of T.T.'s prior, albeit false, allegations of sexual abuse, does not invalidate the issuing judge's finding sufficient probable cause to issue the search warrant for appellant's home. See *Rogers*, 2007-Ohio-1890, ¶44, 47; *State v. Schmitz* (Mar. 1, 1996), Sandusky App. No. S-95-031, 1996 WL 139496 at *4. Therefore, we find no error in the trial court's decision denying appellant's motion to suppress evidence obtained pursuant to the disputed search warrant. See *State v. Bell*, 142 Ohio Misc.2d 72, 2007-Ohio-2629, ¶37-38. Accordingly, appellant's first assignment of error is overruled.[2]

{¶13} Assignment of Error No. 2:

{¶14} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY ADMITTING RECORDS OF PURPORTED E-MAILS AND WEB CHATS THAT WERE NEVER PROPERLY AUTHENTICATED."

{¶15} In his second assignment of error, appellant argues the trial court erred by admitting evidence obtained from a laptop hard drive, as well as admitting on-line

2. We take this opportunity to note that the police have the affirmative obligation to ensure that affidavits submitted in support of an application for a search warrant do not contain false or misleading information. *State v. Alexander*, 151 Ohio App.3d 590, 2003-Ohio-760, ¶48. That being said, we believe it would have been a better practice for Officer Wood to include the teenage victims' inconsistent statements, as well as disclosing T.T.'s prior false allegations of sexual misconduct, within his affidavit at the time he applied for the search warrant as such information is inextricably related to the issue of credibility. See *State v. Stropkaj*, Montgomery App. No. 18712, 2001-Ohio-1837, 2001 WL 1468905 at *6. However, despite our concerns regarding Officer Wood's arguably improper actions, his failure to include such information did not invalidate the issuing judge's finding sufficient probable cause to issue the search warrant for appellant's home under these circumstances.

conversations and e-mail messages that took place through MySpace.com ("MySpace"). We disagree.

{¶16} The admissibility of relevant evidence rests within the sound discretion of the trial court. *State v. Hart*, Warren App. No. CA2008-06-079, 2009-Ohio-997, ¶10, citing *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. Absent an abuse of discretion, as well as a showing that the appellant suffered material prejudice, an appellate court will not disturb a trial court's ruling as to the admissibility of evidence. *State v. Pringle,* Butler App. Nos. CA2007-08-193, CA2007-09-238, 2008-Ohio-5421, ¶17, citing *State v. Martin* (1985), 19 Ohio St.3d 122, 129. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶130. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pringle* at ¶17, citing *State v. Yeager,* Summit App. No. 21510, 2005-Ohio-4932, ¶29.

{¶17} The requirement of authentication or identification as a condition precedent to admissibility is satisfied by introducing "evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A); *State v. Bettis*, Butler App. No. CA2004-02-034, 2005-Ohio-2917, ¶26. However, the "sufficient to support a finding standard" is not rigorous, and the threshold of admissibility articulated in it is low. *State v. Steele*, Butler App. No. CA2003-11-276, 2005-Ohio-943, ¶115, citing *State v. Easter* (1991), 75 Ohio App.3d 22, 25. In fact, the evidence establishing authenticity need only be sufficient to afford a rational basis for a jury to decide that the evidence is what its proponent claims it to be, and "conclusive evidence as to authenticity and identification need not be presented to justify allowing evidence to reach the jury." *Steele*, citing *State ex rel. Montgomery v. Villa*, (1995), 191 Ohio App.3d 478, 484-85.

{¶18} Initially, appellant argues the trial court erred in admitting evidence obtained from a laptop hard drive seized from his home because it was not properly authenticated. In support of this argument, appellant claims the laptop was turned on after it was seized, and therefore, the computer "would have altered five or six hundred files on the hard disc." As a result, the state did not meet "its burden of showing this evidence was not altered."

{¶19} Even if it is within the realm of possibility that data obtained from the laptop hard drive seized from appellant's home *could* have been altered simply by turning on the machine,[3] the record does not contain any evidence indicating such data was, in fact, altered. Furthermore, the record indicates appellant's trial counsel expressly approved of, and then agreed to, the admission of evidence obtained from the laptop at trial. In fact, appellant's trial counsel interrupted the prosecution's direct examination of David Ausdenmoore, a police specialist with the Cincinnati Police Department, Regional Electronics and Computer Investigations Unit, while he testified about the disputed evidence obtained from the laptop hard drive. Thereafter, during a sidebar conference, appellant's trial counsel stated the following:

{¶20} Appellant's Trial Counsel: "This is going to take forever. Why don't you just offer these. He'll authenticate them that he got them off of the [laptop hard drive] and they're accurate printouts, you know, so you can admit them?

{¶21} Prosecuting Attorney: "Okay. You'll allow them to be admitted?

{¶22} Appellant's Trial Counsel: "Yeah."

{¶23} In addition to the above noted comments, appellant's trial counsel, while discussing the admissibility of the state's exhibits at the close of appellant's case, stated the

3. Appellant claims the data obtained from the laptop's hard drive was altered because, according to the testimony of David Ausdenmoore, the state's computer forensics expert: "[d]ata is fragile, and it can be altered – the Microsoft operating system alters data on the fly. Just turning on the computer can change five or six hundred files on a hard disc." See, also, *State v. Rivas*, Slip Opinion No. 2009-Ohio-1354, ¶17.

following:

{¶24} Prosecuting Attorney: "Okay. State's Exhibit's 24 through 40 are items that were pulled off of computer – the hard drive of [the laptop], or the imaged hard drive of [the laptop]. * * *.

{¶25} "* * *

{¶26} Appellant's Trial Counsel: "And the – exhibit's [sic.] that he's just described through 41 that were printed off of [the laptop hard drive] * * * are admissible and I cross-examined extensively and they – they're admissible.

{¶27} The Court: "Okay."

{¶28} As the record clearly indicates, appellant's trial counsel participated in and acquiesced to the admission of the evidence obtained from the laptop hard drive. Under the invited error doctrine, which is applied when defense counsel is "actively responsible" for the trial court's alleged error, a litigant is not entitled to "take advantage of an error which he himself invited or induced" the court to make. *State ex rel. Kline v. Carroll,* 96 Ohio St.3d 404, 2002-Ohio-4849, ¶27; *State v. Williams*, Butler App. No. CA2006-03-067, 2007-Ohio-2699, ¶27. As a result, we find that any error the trial court may have made in its decision to admit such evidence at trial was induced by appellant himself, and therefore, not reversible under the invited error doctrine. See *State v. Thomas*, Butler App. No. CA2006-03-041, 2006-Ohio-7029, ¶43.

{¶29} Next, appellant argues that the trial court erred by admitting printouts of the alleged on-line conversations and e-mail messages between T.W., one of the teenage victims, and appellant "that took place through MySpace" because the disputed documents were never properly authenticated. In support of this argument, appellant apparently claims the printouts of the disputed on-line conversations and e-mails were "business records" under Evid.R. 803(6), and therefore, not admissible because they "were never properly

authenticated by anyone from MySpace." However, based on our review of the record, and contrary to appellant's claim, the printouts of the alleged on-line conversations and e-mails between T.W. and appellant are not "business records" under Evid.R. 803(6) as they are not "records of [the] regularly conducted activity" of Fox Interactive Media, Co., the immediate owner and operator of MySpace.

{¶30} Furthermore, and as noted previously, the requirement of authentication or identification as a condition precedent to admissibility is satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). To establish the documents are what the proponent claims them to be, namely computer printouts of conversations between the victim and appellant, the "proponent need not prove beyond any doubt that the evidence is what it purports to be." *State v. Aliff* (Apr. 12, 2000), Lawrence App. No. 99CA8, 2000 WL 378370 at *9. Instead, the proponent must only demonstrate a "reasonable likelihood" that the evidence is authentic. Id. Such evidence may be supplied by the testimony of a witness with knowledge. Evid.R. 901(B)(1); *State v. Brantley*, Butler App. No. CA2006-08-093, 2008-Ohio-281, ¶34.

{¶31} In this case, T.W. testified on direct examination, as well as during his lengthy cross-examination, that the disputed documents were, in fact, computer printouts of the alleged on-line conversations and e-mails between him and, who he believed to be, appellant. T.W. also testified as to how he was able to retrieve and print these documents by logging into his MySpace account and clicking on the "messages button." The trial court, in its decision to admit the computer printouts, found the documents were properly authenticated and that any concern regarding the documents, i.e. whether they were fabricated by T.W., merely went to the weight the jury could give to the evidence. We find no error in this conclusion. As a result, the trial court did not err, let alone abuse its discretion, in admitting the computer printouts of the alleged on-line conversations and e-mails because

they were properly authenticated by a witness with knowledge as required by Evid.R. 901 prior to their admission at trial. See *Bettis*, 2005-Ohio-2917 at ¶29; see, also *Brantley* at ¶35-36.

{¶32} Finally, appellant argues the trial court erred in admitting the alleged on-line conversations and e-mails because the documents contained inadmissible hearsay evidence, were not relevant, and that "[t]heir probative value, if any, was substantially outweighed by the danger of unfair prejudice." However, besides making these bare assertions, appellant does not cite to anything in the record, nor does he provide this court with any legal authority to support his arguments. As we have stated in the past, this court may overrule or disregard an assignment of error because of "the lack of briefing" on the assignment of error. *State v. Sheets*, Clermont App. No. CA2006-04-032, 2007-Ohio-1799, ¶35, citing *Hawley v. Ritley* (1988), 35 Ohio St.3d 157. "An appellate court is not a performing bear, required to dance to each and every tune played on appeal," as "[i]t is not the duty of [this court] to search the record for evidence to support an appellant's argument[s] as to any alleged error." *State v. Gulley,* Clermont App. No. CA2005-07-066, 2006-Ohio-2023, ¶28, citing *State v. Watson* (1998), 126 Ohio App.3d 316, 321; App.R. 16(A)(7). Accordingly, appellant's second assignment of error is overruled.

{¶33} Assignment of Error No. 3:

{¶34} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY DENYING HIS MOTION TO EXCLUDE THE TAPED TELEPHONE CONVERSATION PURPORTEDLY MADE BETWEEN DEFENDANT-APPELLANT AND ALLEGED VICTIM, AND BY ADMITTING THE TAPED CONVERSATION INTO EVIDENCE."

{¶35} In his third assignment of error, appellant argues the trial court erred in denying his motion to exclude evidence of a taped telephone conversation between T.W. and appellant. We disagree.

{¶36} As noted previously, the admissibility of relevant evidence rests within the sound discretion of the trial court. *Hart*, 2009-Ohio-997 at ¶10. Absent an abuse of discretion, as well as a showing that the appellant suffered material prejudice, an appellate court will not disturb a trial court's ruling as to the admissibility of evidence. *Pringle,* 2008-Ohio-5421 at ¶17.

{¶37} Initially, appellant argues that the trial court erred by denying his motion to exclude evidence of the taped telephone conversation because the state, by taping the conversation, violated his Sixth Amendment right to counsel. This argument lacks merit.

{¶38} A criminal defendant is guaranteed the right to counsel by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. *State v. Constable*, Clermont App. No. CA2006-12-107, 2007-Ohio-6570, ¶25. However, a defendant's right to counsel only attaches to "critical stages" of a criminal prosecution that might jeopardize a defendant's right to a fair trial. Id., citing *United States v. Wade* (1967), 388 U.S. 218, 224, 87 S.Ct. 1926. When defining a "critical stage," the United States Supreme Court in *Wade* stated: "in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the [s]tate at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." Id. at 226-227; *State v. Monroe*, Scioto App. No. 05CA3042, 2007-Ohio-1492, ¶19. In further explaining the Sixth Amendment right to counsel, the Supreme Court in *Kirby v. Illinois* (1972), 406 U.S. 682, 92 S.Ct. 1877, stated that the right attaches "only at or after the initiation of adversary judicial criminal proceedings-whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Id. at 689-690.

{¶39} In this case, appellant, who had previously instructed the police not to contact him outside the knowledge and presence of his attorneys, had not yet been arrested or

detained, let alone been formally charged with any crime, at the time T.W. placed the telephone call. The trial court, in its decision denying appellant's motion to exclude the taped phone conversation, determined appellant's Sixth Amendment right to counsel had not attached because the state had yet to initiate any criminal proceedings against him at the time the call was made. See *State v. Bell*, 145 Ohio Misc.2d 55, 2008-Ohio-592, ¶14. We find no error with the trial court's decision. Therefore, appellant's first argument is overruled.

{¶40} Next, appellant argues the trial court erred by denying his motion to exclude the taped conversation because its admission into evidence violated his Fourth Amendment right to be free from unreasonable searches and seizures. We disagree.

{¶41} Pursuant to R.C. 2933.52(B), the interception of a wire, oral, or electronic communication is generally illegal except when "one of the parties to the communication has given prior consent to the interception." R.C. 2933.52(B)(3). As a result, the consent exception found in R.C. 2933.52(B)(3) allows for a "controlled" telephone call, such as the case here, if the police obtain the consent of one of the parties prior to the communication. *State v. Stalnaker*, Lake App. No. 2004-L-100, 2005-Ohio-7042, ¶38. In addition, the Ohio Supreme Court has held, "neither the federal constitution nor state law requires the suppression of evidence obtained by the warrantless recording of a telephone conversation between a consenting police informant and a non-consenting defendant." Id. quoting *State v. Geraldo* (1981), 68 Ohio St.2d 120, syllabus.

{¶42} In this case, T.W., one of the parties to the communication, cooperated with the police in placing the disputed controlled telephone call to appellant at his home. The police then monitored, recorded, and transcribed the conversation between T.W. and appellant. Here, there is no indication, and appellant does not argue, that the police made any threats or coerced T.W. in order to obtain his consent. See *Stalnaker* at ¶39-45. As a result, the admission of the taped telephone call into evidence did not violate R.C.

2933.52(B) or appellant's Fourth Amendment rights, and therefore, the trial court did not err, or abuse its discretion, by admitting the taped telephone call between T.W. and appellant into evidence. See *Bell*, 2008-Ohio-592 at ¶19-20. Accordingly, appellant's third assignment of error is overruled.

{¶43} Assignment of Error No. 6:

{¶44} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY NOT PERMITTING HIM TO ADMIT EVIDENCE OF HIS POLYGRAPH EXAMINATION."

{¶45} In his sixth assignment of error, appellant argues the trial court erred in its decision to exclude the favorable results of two polygraph examinations. Specifically, appellant claims that his "right to present evidence in his defense overrides the rule barring polygraph results." This argument lacks merit.

{¶46} The Ohio Supreme Court has "not adopted the unrestrained use of polygraph results at trial, and polygraphs themselves remain controversial." *In re D.S.,* 111 Ohio St.3d 361, 2006-Ohio-5851, ¶13. Moreover, as this court recently stated in *State v. Barton*, Warren App. No. CA2005-03-036, 2007-Ohio-1099, the results of a polygraph examination are generally "inadmissible since such tests have not attained scientific or judicial acceptance as an accurate and reliable means of ascertaining truth or deception." Id. at ¶98, citing *State v. Souel* (1978), 53 Ohio St.2d 123.

{¶47} Furthermore, a trial court cannot admit the results of a polygraph test into evidence simply at an accused's request. *State v. Fulton*, Clermont App. No. CA2002-10-085, 2003-Ohio-5432, ¶17, citing *State v. Levert* (1979), 58 Ohio St.2d 213, 215. Instead, polygraph test results are only admissible if both the prosecution and defense jointly stipulate that the accused will take a polygraph test and that the results will be admissible. Id.; *Souel* at syllabus; *In re D.S.* at ¶13; *State v. Homer*, Warren App. No. CA2003-12-117, 2006-Ohio-

1432, ¶8; *State v. Fuller*, Madison App. No. CA2006-11-047, 2008-Ohio-20, ¶9. However, even when there is a stipulation between the parties to that effect, the polygraph test results are still only admissible if the trial court, in its sound discretion, decides to accept such evidence, and then for corroboration or impeachment purposes only. *Souel* at syllabus; *In re D.S.* at ¶13; but, see, *State v. Sharma*, 143 Ohio Misc.2d 27, 2007-Ohio-5404 (polygraph test results sufficiently reliable to permit their admission at trial).

{¶48} In finding the results of the polygraph tests inadmissible, the trial court specifically relied on the well-established case law in Ohio:

{¶49} "In the present case, the prosecution did not stipulate to the admissibility of the polygraph results that defendant seeks to offer into evidence before the tests were performed. Consistent with *Souel* and its progeny, which continue to state the law of Ohio, the results of defendant's polygraph tests are inadmissible at trial." *Bell*, 2008-Ohio-592 at ¶42.

{¶50} Based on our review of the record, we find no error in the trial court's decision to exclude the results of the two polygraph examinations because the parties did not jointly stipulate to the admissibility of the polygraph test results before the tests were performed. As a result, the trial court did not err in prohibiting appellant from introducing the polygraph test results at trial. See, e.g., *State v. Fulton*, Clermont App. No. CA2002-10-085, 2003-Ohio-5432, ¶12-19. Accordingly, appellant's sixth assignment of error is overruled.

{¶51} Assignment of Error No. 7:

{¶52} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT AS THE JURY'S VERDICT WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL."

{¶53} Assignment of Error No. 8:

{¶54} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-

APPELLANT AS HIS CONVICTIONS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶55} In his seventh and eighth assignments of error, appellant argues the state provided insufficient evidence to support his conviction, and that his conviction was against the manifest weight of the evidence. In support of this claim, appellant essentially argues his conviction for sexual battery, as well as for three counts of sexual imposition, was in error because the required elements were not supported by credible testimony or evidence. We disagree.

{¶56} Whether the evidence presented is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. An appellate court, in reviewing the sufficiency of the evidence supporting a criminal conviction, examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Carroll,* Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶117. After examining the evidence in a light most favorable to the prosecution, the appellate court must determine if "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. Proof beyond a reasonable doubt is "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs." R.C. 2901.05(D).

{¶57} Unlike a sufficiency of the evidence challenge, a manifest weight challenge concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other. *Carroll* at ¶118. An appellate court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses. *State v. Good,* Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25, citing *Hancock,* 2006-Ohio-160 at ¶39. Under a manifest weight challenge, the

question is 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. *Good* at ¶25.

{¶58} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Wilson,* Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶35. Therefore, a determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency. Id.

Sexual Battery: R.C. 2907.03(A)(5)

{¶59} Initially, appellant essentially claims his conviction for sexual battery was not supported by the manifest weight of the evidence because T.W.'s testimony was not credible. To support this claim, appellant highlights T.W.'s testimony indicating he "lied to teachers, his foster parents, and other authority figures," as well as his inconsistent and contradictory statements provided at trial.

{¶60} Sexual battery in violation of R.C. 2907.03(A)(5), a third-degree felony, prohibits a person from engaging in sexual conduct with another "when * * * [t]he offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person." Sexual conduct, defined by R.C. 2907.01(A), includes, among other things, "anal intercourse, fellatio, and cunnilingus between persons regardless of sex * * *."

{¶61} In this case, T.W. testified that appellant, his former foster parent, would enter his bedroom at night when he was "almost asleep" and "massage" him by rubbing his legs and upper body until he had an erection. T.W. then testified that the "massages" would "slowly escalate" until appellant would put the boy's penis in his mouth. T.W. also testified that he initially lied to police about appellant's alleged inappropriate sex acts because he

believed, albeit mistakenly, that he would ultimately be returned to appellant's foster care.

{¶62} While there may be a question as to T.W.'s credibility, "the weight to be given the evidence, and the credibility of witnesses are primarily for the trier of facts." *Pringle*, 2008-Ohio-5421 at ¶28, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. As a result, we defer to the jury's decision finding T.W.'s testimony credible, even after being subject to a lengthy cross-examination, because the jury was "best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *State v. Smith*, Fayette App. No. CA2006-08-030, 2009-Ohio-197, ¶79.

{¶63} After reviewing the record, and in light of the foregoing, we cannot say that the jury clearly lost its way in finding T.W.'s testimony to be competent, credible and reliable. In turn, because we cannot say appellant's conviction of sexual battery created such a manifest miscarriage of justice that his conviction must be reversed, we find no reason to disturb the jury's finding of guilt.

Sexual Imposition: R.C. 2907.06(A)(4)

{¶64} Appellant also claims his conviction for three counts of sexual imposition was against the manifest weight of the evidence because the testimony of T.W., as well as T.T., was not credible, and "there was no evidence other than the testimony of the alleged victims." This argument lacks merit.

{¶65} Sexual imposition in violation of R.C. 2907.06(A)(4), a third-degree misdemeanor, prohibits a person from having sexual contact with another where the "other person * * * is thirteen years of age or older but less than sixteen years of age * * *." Sexual contact, as defined by R.C. 2907.01(B), includes, among other things, "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region * * * for the purpose of sexually arousing or gratifying either person."

{¶66} In this case, T.T. testified that appellant would enter his bedroom at night and "massage" him. T.T. further testified that as these "massages" continued that appellant "would go down further until [he] got an erection and then he would begin to masturbate [him]." T.T. also testified that appellant, on at least one occasion, "put his mouth on [his] penis * * *." Furthermore, and as stated previously, T.W. testified that appellant would give him a "massage" by rubbing "around his legs, and around [his] upper body until [he] got an erection * * *." T.W. also testified that appellant would "jack [him] off," and then "he would start putting it in his mouth."

{¶67} Despite this testimony, appellant nonetheless contends that his conviction for sexual imposition was against the manifest weight of the evidence. In support of this argument, appellant calls our attention to R.C. 2907.06(B), which requires some corroboration of the alleged victim's testimony in order for a defendant to be convicted of sexual imposition. *State v. Birkman* (1993), 86 Ohio App.3d 784, 789.

{¶68} In *State v. Economo,* 76 Ohio St.3d 56, 58, 1996-Ohio-426, the Ohio Supreme Court determined the type of evidence that satisfies the corroboration requirement of R.C. 2907.06(B) in order for a defendant to be convicted of sexual imposition. In so holding, the court concluded that R.C. 2907.06(B) "does not mandate proof of the facts which are the very substance of the crime charged," nor does the corroborating evidence need to be independently sufficient to convict the accused, or even go to every essential element of the crime. *State v. Menke*, Butler App. No. CA2002-01-021, 2003-Ohio-77, ¶25; *Economo* at 59-60. Instead, slight circumstances or evidence that tends to support the victim's testimony is satisfactory. *Economo* at 60. Therefore, corroborating evidence is not an element of the offense of sexual imposition, but merely an ancillary evidential requirement. Id. at 60-62.

{¶69} Relying exclusively on R.C. 2907.06(B), appellant argues that there was no corroborating evidence presented to support his conviction for sexual imposition, and

therefore, because "there was no evidence other than the testimony of the alleged victims," his conviction must be vacated. However, while we recognize that the testimony of several alleged victims to separate, albeit factually similar, incidents will not serve as corroboration, we find that the state presented other sufficient corroborating evidence to support appellant's conviction. See, e.g., *State v. Gardner* (Apr. 24, 1985), Hamilton App. No. C-840522, 1985 WL 6764 at *3.

{¶70} Here, the corroborating evidence consisted of Officer Wood's testimony that T.T. discussed with him the specific allegations of sexual abuse, as well as other testimony indicating T.T. discussed the same allegations with a social worker at the Cincinnati Children's Hospital Mayerson Center. In addition, corroborating evidence was presented indicating T.T. lived with appellant as a foster child during the time in question, and that the pair was found in the local church parking lot after their car became stuck in the mud on the same day T.T. claimed appellant attempted to perform fellatio upon him. Furthermore, there was testimony from R.W., T.W.'s sister, that she saw appellant frequently enter T.W.'s bedroom at night and that, after entering the boy's room, appellant would shut the door behind him. There was also evidence presented that appellant engaged in on-line conversations and e-mails with T.W. discussing the "donkey game," which, as T.W. explained, was a code word for sex. Moreover, the jury heard testimony from Jessica Bell, appellant's wife, indicating appellant had, in fact, massaged their foster children, but that the massages were nothing more than "injuries that were being massaged."

{¶71} Based on our review of the record, we find this testimony provides sufficient corroborating evidence necessary to satisfy R.C. 2907.06(B), even though the testimony may not have been "independently sufficient to convict" appellant of sexual imposition, since the statute merely requires "[s]light circumstances or evidence" that tend to support the teenage victims allegations. *State v. Gesell*, Butler App. No. CA2005-08-367, 2006-Ohio-3621, ¶30

(finding sufficient corroborating evidence of sexual imposition even though testifying witness did not see any physical contact occur). As a result, and in light of the foregoing, we cannot say that the jury clearly lost its way in finding the evidence presented by the state supported appellant's conviction for sexual imposition. Therefore, because we cannot say appellant's conviction created such a manifest miscarriage of justice that his conviction must be reversed, we find no reason to disturb the jury's finding of guilt.

{¶72} As we have already determined appellant's convictions for sexual battery and sexual imposition were not against the manifest weight of the evidence, we necessarily conclude there was sufficient evidence to support the guilty verdicts in this case. *Hart*, 2009-Ohio-197 at ¶38. Accordingly, appellant's seventh and eighth assignments of error are overruled.

{¶73} Assignment of Error No. 4:

{¶74} "DEFENDANT-APPELLANT WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION."

{¶75} In his fourth assignment of error, appellant argues his conviction must be reversed because he received ineffective assistance of counsel at trial. This argument lacks merit.

{¶76} In order to successfully establish a claim of ineffective assistance of counsel, an appellant must satisfy both prongs of the two-part showing required in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. First, an appellant must show that his trial counsel's performance was deficient; and second, that the deficient performance prejudiced the defense to the point of depriving the appellant of a fair trial. *State v. Cox,* Butler App. No. CA2005-12-513, 2006-Ohio-6075, ¶ 29, citing *Strickland*.

{¶77} In order to establish the first prong, an appellant must show that his counsel's representation "fell below an objective standard of reasonableness." *Strickland* at 688. However, attorneys are given a "heavy measure of deference" in their decision making and there exists a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. In order to establish the second prong, an appellant must show "a reasonable probability that, but for counsel's actions, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Smith*, 2009-Ohio-197 at ¶48. The failure to make an adequate showing on either the "performance" or "prejudice" prongs of the *Strickland* standard is fatal to an appellant's claim. *Strickland* at 697.

{¶78} Appellant argues that his trial counsel was ineffective because his trial counsel engaged in "*trial tactics* that [gave] the undeniable impression to the jury that the defense is being deceptive and cannot be trusted" when he made a "bizarre and ill-advised attempt" to demonstrate the ease in which one could alter on-line conversations and e-mails. (Emphasis added.) However, while we may agree with appellant that the attempted demonstration was nothing short of a "debacle," even *debatable trial tactics* do not constitute ineffective assistance of counsel. *Strickland* at 689; *State v. Darrah*, Warren App. No. CA2006-09-109, 2008-Ohio-6762, ¶93.

{¶79} In addition, appellant has not established that, but for his trial counsel's unprofessional errors, he would have been acquitted of the charges filed against him. As noted previously, the state presented extensive evidence, including testimony from both T.T. and T.W., the alleged teenage victims, describing the explicit sex acts appellant performed upon them. As a result, and in light of the evidence presented to support his conviction for sexual battery and sexual imposition, appellant has not demonstrated that he would have been acquitted of the charges absent his trial counsel's failed demonstration. Accordingly,

appellant's fourth assignment of error is overruled.

{¶80} Assignment of Error No. 5:

{¶81} "THE TRIAL COURT ERRED WHEN IT ALLOWED THE PROSECUTING ATTORNEY TO ENGAGE IN INSTANCES OF PROSECUTORIAL MISCONDUCT."

{¶82} In his fifth assignment of error, appellant argues the prosecutor engaged in prosecutorial misconduct by making prejudicial statements during his closing argument that denied him a fair trial. This argument lacks merit.

{¶83} The prosecution is entitled to a degree of latitude in its closing remarks. *State v. Cobb,* Butler App. No. CA2007-06-153, 2008-Ohio-5210, ¶115, citing *State v. Smith* (1984), 14 Ohio St.3d 13. Prosecutorial misconduct will only be found where the prosecution's remarks made during closing argument were improper and those remarks prejudicially affected the substantial rights of the defendant. *Smith*, 2009-Ohio-197 at ¶35, citing *State v. Elmore,* 111 Ohio St.3d 515, 2006-Ohio-6207, ¶62. Statements that may "inflame the passions and prejudice of the jury" are deemed improper because they wrongly "invite the jury to judge the case upon standards or grounds other than" those upon which it is obligated to decide the case, namely, the law and the evidence. *State v. Cunningham*, 178 Ohio App.3d 558, 2008-Ohio-5164, ¶27, citing *State v. Draughn* (1992), 76 Ohio App.3d 664, 671. However, isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning. *State v. Hill,* 75 Ohio St.3d 195, 204, 1996-Ohio-222.

{¶84} Furthermore, prosecutorial misconduct is not grounds for reversal unless the defendant has been denied a fair trial due to the prosecutor's prejudicial remarks. *State v. Murphy,* Butler App. No. CA2007-03-073, 2008-Ohio-3382, ¶9, citing *State v. Maurer* (1984), 15 Ohio St.3d 239, 266. A reviewing court "will not deem a trial unfair if, in the context of the entire trial, it appears beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments." *State v. Smith,* Butler App. No.

CA2007-05-133, 2008-Ohio-2499, ¶9.

{¶85} Initially, it should be noted that the jury was instructed that the statements made during opening and closing arguments were not evidence. See *State v. Myers,* Fayette App. No. CA2005-12-035, 2007-Ohio-915, ¶28. Therefore, we must presume that the jury followed the trial court's instructions. Id., citing S*tate v. Manns,* 169 Ohio App.3d 687, 2006-Ohio-5802.

{¶86} Appellant directs this court to review several statements made by the prosecutor during his closing argument. Specifically, appellant cites the following comments:

{¶87} "It's time for you to decide whether [T.T. and T.W. are] going to get justice. Or whether they're going to be dumped right back into that pile they have lived in their entire life."

{¶88} "That's where they've thrown the state's case under the bus by bringing in four character witnesses, one that got stricken and then two relatives."

{¶89} "And most importantly as his expert told me on cross examination I've got his MySpace pages. I did word searches on them. Now, if there was nothing on those MySpace pages which they obtained, you think they would have brought those in here and showed it to you? Look they're not on the real ones either. That's where they would be. They had them. You didn't see them."

{¶90} At trial, appellant's counsel made no objection to the prosecutor's alleged improper statements. Therefore, because appellant failed to object at trial, our review is limited to plain error. See *State v. Olvera-Guillen*, Butler App. No. CA2007-05-118, 2008-Ohio-5416, ¶36.

{¶91} Plain error exists where there is an obvious deviation from a legal rule which affected the defendant's substantial rights, or influenced the outcome of the proceeding. Id., citing *State v. Barnes,* 94 Ohio St.3d 21, 27, 2002-Ohio-68. An error does not rise to the

level of a plain error unless, but for the error, the outcome of the trial would have been different. *State v. Baldev*, Butler App. No. CA2004-05-106, 2005-Ohio-2369, ¶12; *State v. Krull,* 154 Ohio App.3d 219, 2003-Ohio-4611, ¶38. "Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Baldev* at ¶12, citing *Long*, 53 Ohio St.2d at 95. "Prosecutorial misconduct rises to the level of plain error if it is clear the defendant would not have been convicted in the absence of the improper comments." *State v. Tumbleson* (1995), 105 Ohio App.3d 693, 700.

{¶92} Based on our review of the record, and while the prosecutor's comments were arguably improper, the record contains ample evidence in support of appellant's conviction, which included, among other things, testimony from both T.T. and T.W. describing appellant's alleged sexually explicit acts. As a result, while we do not condone the prosecutor's actions, we find these statements did not dictate the outcome of the case. Therefore, because the prosecutor's alleged improper statements did not deny appellant a fair trial, we find no plain error.

{¶93} Additionally, appellant argues that the prosecutor engaged in misconduct during closing argument when he commented on his trial counsel's failed attempt to demonstrate the apparent ease in which on-line conversations and e-mails can be fabricated. In turn, appellant essentially argues the prosecutor's statements attacked the credibility of his defense counsel so that "[n]o jury would have trusted the defense."

{¶94} Appellant, although he does not cite this court to a particular comment, apparently takes exception to the following statement made during the state's rebuttal closing argument:

{¶95} "I ask you to think had I not objected what your view of the evidence have been? What would your view of the evidence have been? Had I not objected and you walked out of this courtroom at the end of the day --."

{¶96} However, appellant's trial counsel, during his own closing argument, stated the following:

{¶97} "I broke the rules during this case. I got carried away and tried to do a demonstration by putting words into the mouth of the state's -- you know, guy with the badge -- by putting words in his mouth.

{¶98} "I apologized to the Judge, because this is his court. And I shouldn't have done that. I should have gone to him first, and I should have said, Judge, you know, hey, I want to do this -- I want to do this demonstration. I want to catch this guy and put words in his mouth. And they said, hey, buddy, cut -- huh-uh -- huh-uh. How do you defend yourself when you're in a system with rules that ties you and the prosecution down to a very narrow -- very narrow road?"

{¶99} Here, appellant's counsel opened the door to a response by the prosecution when he commented on, and then apologized for, his previous acts and failed demonstration. See, e.g., *State v. Stone*, Warren App. No. CA2007-11-132, 2008-Ohio-5671, ¶30. As a result, when the prosecution made the disputed statement implicating the veracity of appellant's trial counsel, he was merely responding to appellant's own prior explanation and apology. Again, while we do not condone the prosecutor's statement, we find no prosecutorial misconduct that deprived appellant of a fair trial. See *State v. Brown* (1988), 38 Ohio St.3d 305, 317 (prosecutor's comment that defense counsel "talked out of both sides of the mouth," and that counsel's theory of the case was "baloney" was not improper). Accordingly, appellant's fifth assignment of error is overruled.

{¶100} Assignment of Error No. 9:

{¶101} "THE TRIAL COURT'S CLASSIFICATION OF [APPELLANT] AS A TIER III OFFENDER VIOLATED HIS CONSTITUTIONAL RIGHTS."

{¶102} In his ninth assignment of error, appellant argues the trial court erred in

classifying him as a Tier III Sex Offender under Senate Bill 10, also known as the Adam Walsh Act. In his assignment of error, appellant argues that Senate Bill 10 violates several constitutional rights. Specifically, appellant asserts that the application of Senate Bill 10 violates the Ex Post Facto Clause of the United States Constitution; violates his due process rights guaranteed by the Fourteenth Amendment of the United States Constitution, and Section 16, Article I of the Ohio Constitution; violates the separation of powers doctrine inherent in the Ohio Constitution; violates the Eighth Amendment of the United States Constitution and Section 9, Article I of the Ohio Constitution's prohibition against cruel and unusual punishment; and amounts to double jeopardy in violation of the Fifth Amendment of the United States Constitution and Section 10, Article I of the Ohio Constitution. These arguments lack merit.

{¶103} As an initial matter, and although appellant's remaining arguments all deal with the constitutionality of Senate Bill 10, the record indicates that he never raised these constitutional arguments in the trial court. In turn, appellant's remaining arguments are waived and "need not be heard for the first time on appeal." *State v. Williams*, Warren App. No. CA2008-02-029, 2008-Ohio-6195, ¶6, quoting *State v. Awan* (1996), 22 Ohio St.3d 120, syllabus. However, despite appellant's waiver, we have discretion to address appellant's constitutional arguments under a plain error analysis. *Williams*, citing *In re M.D.* (1988), 38 Ohio St.3d 149, 151; *In re A.R.*, Warren App. No. CA2008-03-036, 2008-Ohio-6566, ¶32. Therefore, even though appellant failed to raise his constitutional arguments below, we choose to exercise our discretion and address his claims on appeal.

{¶104} This court recently addressed appellant's constitutional arguments in *State v. Williams*, 2008-Ohio-6195, in which we determined Senate Bill 10 does not violate the Ex Post Facto Clause, the separation of powers doctrine, the prohibition of cruel and unusual punishment, or the Double Jeopardy Clause of the United States and Ohio State

Constitutions. Id. at ¶75, 102, 106, 111. In addition, Senate Bill 10 does not violate appellant's due process rights. Id. at ¶49, 60, 66, 72, 74; *In re S.R.P.*, Butler App. No. CA2007-11-027, 2009-Ohio-11, ¶31; *Sewell v. State*, Hamilton App. No. C-080503, 2009-Ohio-872, ¶32; *Holcomb v. State*, Logan App. Nos. 8-08-23, 8-08-24, 8-08-25, 8-08-26, 2009-Ohio-782, ¶14. As a result, appellant's constitutional arguments lack merit, and therefore, are overruled.

{¶105} Judgment affirmed

BRESSLER, P.J., and POWELL, J., concur.

[Cite as *State v. Bell*, 2009-Ohio-2335.]