[Cite as *State v. Freeman*, 2010-Ohio-3714.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92809

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHARLES FREEMAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED
IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-508859 and CR-518221

BEFORE: Sweeney, J., McMonagle, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: August 12, 2010

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Charles Freeman ("defendant"), appeals his conviction and sentence on 19 counts of rape, ten counts of disseminating matter harmful to juveniles, and two counts of gross sexual imposition. For the reasons that follow, we affirm in part, reverse in part, and remand with instructions.

I. Procedural History

{¶ 2} In separate indictments that were consolidated for trial, defendant was accused of the following offenses: 19 counts of rape involving victims

under the age of ten in violation of R.C. 2907.02(A)(1)(b); ten counts of disseminating obscene matter to juveniles in violation of R.C. 2907.31(A)(3); and two counts of gross sexual imposition in violation of R.C. 2907.05(A)(4). It was alleged that the rapes and disseminating offenses occurred between September 2007 and March 2008, and the gross sexual impositions occurred during September 2008.

{¶ 3} The indictment identified the victims of the rape counts as Jane Doe I, d.o.b. July 11, 1998, and Jane Doe II, d.o.b. October 8, 1999. Other than those distinctions (i.e., the Doe designations and dates of birth), the rape counts were identically worded.

{¶ 4} The victims of the gross sexual imposition counts were identified as John Doe I, d.o.b. December 15, 2000, and John Doe II, d.o.b. May 23, 2002. All four Does were identified as the victims of the disseminating charges.

{¶ 5} At trial and over defendant's objection, the court granted the State's motion to amend the indictments to identify Jane Doe I as P.S., the victim of Counts 1, 2, and 3, and Counts 4 through 9 (which originally related to P.S.'s sister, I.S.). Counts 10 through 19 were amended to identify Jane Doe II as I.S. John Doe I was identified as V.S., the victim of the first gross

sexual imposition count, and John Doe II was identified as T.S., the victim of the second gross sexual imposition count.[1]

II. Trial Testimony

{¶ 6} The victims are all siblings and the children of "Maria." At the time of trial, the children ranged in age from six to ten years old, with P.S. being the oldest girl, then her sister, I.S., followed by her brothers V.S. and T.S., respectively. Their father died years earlier, and during the time of the alleged offenses, they resided in a Cleveland home with their mother and defendant.

{¶ 7} The defendant met Maria in September 2007 through his job as a security officer at a grocery store where the family shopped. He began dating Maria and visited her home after work frequently. During his visits, he would often play a video game on Playstation with the family. Each of the four children and Maria testified that the defendant made them play the game while naked in Maria's bedroom. Maria permitted this to occur.[2]

{¶ 8} Maria testified that there were at least two occasions when her daughters were allowed or told to watch as she and defendant engaged in

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[1] In accordance with this Court's policy, the child victims of these sexual offenses shall not be identified by name.

[2] Maria was charged as a codefendant on the counts of disseminating matter harmful to juveniles. She entered a guilty plea prior to defendant's trial and, as part of her plea, testified against him.

sexual intercourse. According to Maria, defendant "wanted to teach them what sex was about and how dangerous it was."

{¶ 9} P.S. and I.S. testified, and Maria admitted, that the defendant required P.S. and I.S. to remove his clothes when he came over after work. According to Maria, defendant felt "it was a good job for the girls to be touching him." She said that the defendant would follow the girls to their bedrooms naked but would not allow her to go inside. Maria did not interfere because defendant "manipulated her," turned her kids against her, and told her he was smarter because he had a college degree.

{¶ 10} P.S. and I.S. testified to numerous sexual assaults committed upon them by defendant. They stated that the assaults occurred in various places in their home, including their bedrooms, the bathroom, and Maria's bedroom. Both girls also testified that defendant threatened them not to tell anyone.

{¶ 11} Further, both brothers, V.S. and T.S., testified that they saw defendant sexually assault their sisters. The brothers also testified that defendant touched the boys' private parts, and that defendant threatened them not to tell anyone.

{¶ 12} Maria denied ever seeing the defendant sexually assault or inappropriately touch any of her children. Although I.S. told her otherwise, Maria said she did not believe her and thought she was "playing." But when P.S. also reported sexual abuse to another relative in March 2008, Maria took

her daughters to the hospital and reported it. The children were then removed from Maria's custody and placed with a paternal aunt, where they remained at the time of trial.

{¶ 13} The investigating detective took a written statement from defendant after a waiver of rights. The statement contains contradictory statements but also contains certain admissions. In particular, defendant stated that he had his mouth on P.S.'s vagina twice, each time in the presence of her mother. He admitted he tried to insert his penis into P.S.'s vagina on one occasion. He admitted he had his mouth on I.S.'s vagina twice, but denied ever trying to insert his penis into I.S.'s vagina. His statement also contained an admission to having sex with Maria in front of P.S. and I.S. on more occasions than five but less than ten occasions.

{¶ 14} A forensic nurse testified about her physical examinations of I.S. and P.S. She reviewed the medical records containing narratives that essentially corroborated the trial testimony of these victims. The exam revealed petechiae in both girls' throats, indicative of something being stuck inside. I.S. also had evidence of a previous vaginal tear.

{¶ 15} A forensic scientist employed by BCI[3] analyzed physical evidence obtained from rape kits conducted on the girls. I.S.'s vaginal samples tested positive for seminal fluid and Amylase (an enzyme indicative of the presence

[3]The Bureau of Criminal Identification and Investigation.

of saliva) was found on both girls' underwear. No semen was detected from P.S.'s rape kit. Later testing could not exclude defendant as a contributor to the DNA profile obtained from I.S.'s underwear. There was not enough DNA from P.S.'s underwear to conduct a similar analysis. Another forensic scientist was unable to make a determination as to the DNA.

{¶ 16} The jury found defendant guilty on all counts, and the trial court sentenced him to serve 19 consecutive life-without-parole terms for the rape convictions, consecutive to ten consecutive 18-month prison terms for the disseminating obscene matter to juveniles convictions, consecutive to two consecutive five-year prison terms for the gross sexual imposition convictions. Defendant now appeals, raising numerous errors for our review, which will be addressed together where appropriate for discussion.

III. Law and Analysis

{¶ 17} In his first and second assignments of error, defendant maintains his due process rights were violated because the gross sexual imposition and rape charges against him omitted the mens rea elements.

{¶ 18} R.C. 2907.05(A)(4), governing gross sexual imposition, provides:

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

{¶ 20} "* * *

{¶ 21} "(4) The other person, or one of the other persons, is less than 13 years of age, whether or not the offender knows the age of that person."

{¶ 22} Defendant argues that strict liability attaches to the portion of the statute regarding victims under 13 years of age, but contends that a mens rea element (recklessly, according to him) is necessary with respect to committing the alleged sexual contact. He relies on the Ohio Supreme Court's decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, clarified by 119 Ohio St.3d 204, 2008-Ohio-3748, 893 N.E.2d 169.

{¶ 23} "[T]he degree of culpability required for * * * the mental state of the offender is a part of every criminal offense in Ohio, except those that plainly impose strict liability." *Colon*, 2008-Ohio-1624, ¶12, citing *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, 803 N.E.2d 770, ¶18. In *State v. Dunlap,* Cuyahoga App. No. 91165, 2009-Ohio-134, ¶5, this Court stated that it "and others, have repeatedly held that R.C. 2907.05, gross sexual imposition involving a victim under the age of 13, is a strict liability offense and requires no precise culpable state of mind. *All that is required is a showing of the proscribed sexual contact*. (Emphasis added.) *State v. Aiken* (June 10, 1993), 8th Dist. No. 64627; *State v. Laws* (Dec. 22, 1998), 10th Dist. No. 98AP-306." See, also, *State v. Crotts*, Cuyahoga App. No. 81477, 2006-Ohio-1099, ¶6, discretionary appeal not allowed, 109 Ohio St.3d 1497, 2006-Ohio-2762, 848 N.E.2d 859.

{¶ 24} We are not persuaded by defendant's argument that without inclusion of a culpable mental state as to the sexual contact element an innocent hug that results in an inadvertent graze against a female's chest could constitute gross sexual imposition. "'Sexual contact' means any touching of an erogenous zone of another, including without limitation, the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, *for the purpose of sexually arousing or gratifying either person*." (Emphasis added.) R.C. 2907.01(B). Thus, an "innocent hug" with an "inadvertent graze" without the "purpose of sexually arousing or gratifying either person" would not constitute sexual contact under the gross sexual imposition statute.[4]

{¶ 25} Defendant's argument relative to the mens rea element of the rape charges is likewise without merit. R.C. 2907.02(A)(1)(b), governing rape, provides:

{¶ 26} "(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

{¶ 27} **"* * ***

[4]"A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A).

{¶ 28} "(b) The other person is less than 13 years of age, whether or not the offender knows the age of the other person."

{¶ 29} Defendant urges us to find that the culpable mental state for committing rape of a child under 13 requires including the recklessness mens rea in the indictment. Specifically, defendant contends that the indictment should provide that the accused recklessly engaged in sexual conduct with a victim under the age of 13. But engaging in sexual conduct with a child under the age of 13 is a strict liability offense. See *State v. Bruce*, Cuyahoga App. No. 92016, 2009-Ohio-6214, ¶90 (an indictment against a defendant for rape under R.C. 2907.02(A)(1)(b) when the victim is less than 13 years old is not defective for failing to specify a mens rea element because the offense is a strict liability one).

{¶ 30} In light of the above, the first and second assignments of error are overruled.

{¶ 31} For his third assignment of error, defendant attacks the sufficiency of his indictment on the grounds that the carbon copy counts of the indictment violated his due process rights.

{¶ 32} In *Russell v. United States* (1962), 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240, the United States Supreme Court set forth the following considerations for determining the validity of an indictment: (1) "whether the indictment contains the elements of the offense intended to be charged"; (2) "whether the indictment sufficiently apprises the defendant of what he must be

prepared to meet"; and (3) "in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." Id. at 763-764.

{¶ 33} In asserting that his due process rights were violated, defendant relies on the Sixth Circuit's decision in *Valentine v. Konteh* (C.A.6, 2005), 395 F.3d 626, for the proposition that "'the multiple, undifferentiated charges in the indictment violated [his] rights to notice and his right to be protected from double jeopardy." Defendant also relies on *State v. Hemphill*, Cuyahoga App. No. 85431, 2005-Ohio-3726,[5] in urging us to vacate some of his convictions for the reason that "the indictment was not pled with sufficient specificity and the evidence against him was insufficient."

{¶ 34} It is defendant's belief that *Valentine* and *Hemphill* require all but two of his rape convictions be vacated.

{¶ 35} The distinct due process components involved in examining the sufficiency of an indictment include notice and double jeopardy. The vast majority of cases from our district that have applied *Valentine* have been resolved under a double jeopardy analysis. E.g., *State v. Hilton*, Cuyahoga

[5]In *Hemphill*, the defendant was charged with multiple carbon copy counts of rape, GSI, and kidnapping. At trial, the State offered the testimony of the child victim. Defendant challenged his multiple convictions maintaining he was convicted of a generic pattern of abuse rather than specific, separately proven offenses. This Court found that the victim gave only a numerical estimate and the evidence was lacking as to any specificity concerning actual numbers or separate incidents; accordingly, all convictions were vacated but two counts of rape and one count of GSI.

App. No. 89220, 2008-Ohio-3010; *State v. Ogle*, Cuyahoga App. No. 87695, 2007-Ohio-5066; *State v. Yaacov*, Cuyahoga App. No. 86674, 2006-Ohio-5321; *Hemphill*, 2005-Ohio-3726. The only case from this Court that has addressed the notice aspect of due process in terms of a carbon copy indictment has rejected it. *State v. Wilson*, Cuyahoga App. No. 92148, 2010-Ohio-550, appeal not allowed, 125 Ohio St.3d 1450, 2010-Ohio-2510.

{¶ 36} To the extent defendant is attempting on appeal to challenge the indictment for insufficiency of notice, he has waived it. Defendant never objected to the sufficiency of the indictment nor otherwise raised the issue of deficient notice before the trial court. He did not file a motion to dismiss on this basis nor did he move for a more specific bill of particulars. Whatever information the State provided in response to his discovery requests, defendant accepted without objection. We can only assume from this record that defendant was sufficiently apprised of the charges against him.

{¶ 37} The State did differentiate the counts at trial, which satisfies the due process concerns in accordance with *Valentine*, which found: "[t]he due process problems in the indictment might have been cured had the trial court insisted that the prosecution delineate the factual bases for the 40 separate incidents either *before or during the trial*." (Emphasis added.) *Valentine*, 395 F.3d at 634; see, also, *Wilson*, 2010-Ohio-550; and *State v. Barrett*, Cuyahoga App. No. 89918, 2008-Ohio-2370.

{¶ 38} From the differentiated counts, we are able to discern some merit to defendant's claim that the evidence was insufficient to support certain of his convictions. See *Yaacov*, 2006-Ohio-5321; *Ogle*, 2007-Ohio-5066, ¶43. Specifically, there was a lack of evidence in this record to support convictions under Counts 12 and 14 through 19, which shall be vacated.

{¶ 39} Finally, we note that defendant also complains under this error that the trial court erred by permitting the amendment of Counts 4-9 of the complaint to change the identity of the victim from I.S. to P.S.[6] In advancing this component of his argument, defendant cites no additional authority beyond what he generally relies upon in challenging the sufficiency of his indictment. The State counters that the amendment was proper and consistent with Crim.R. 7(D) because it did not change either the substance or the identity of the crimes charged. "It is well settled that an amendment to an indictment which changes the name of the victim changes neither the substance nor the identity of the crime charged." *State v. Valenzona*, Cuyahoga App. No. 89099, 2007-Ohio-6892, citing *State v. Owens* (1975), 51 Ohio App.2d 132, 149, 366 N.E.2d 1367, citing *In re Stewart* (1952), 156 Ohio St. 521, 103 N.E.2d 551. See, also, *State v. Henley*, Cuyahoga App. No. 86591, 2006-Ohio-2728; *Cleveland v. Glenn*, 126 Ohio Misc.2d 43,

[6]This is a different objection than claiming his indictment was insufficient for lack of notice discussed previously.

2003-Ohio-6956, 801 N.E.2d 943; *State v. Mader* (Aug. 30, 2001), Cuyahoga App. No. 78200. Because defendant does not contend that the amendments changed either the identity or the substance of the crimes charged and does not cite any authority that would otherwise support a finding of error in this regard, this part of his argument lacks merit.

{¶ 40} Based on the foregoing, we sustain this error in part and overrule it in part. Defendant's convictions on Counts 12 and 14-19 are vacated; convictions on all other counts are affirmed

{¶ 41} For his fourth assigned error, defendant contends that the trial court erred by admitting prejudicial victim impact evidence, allowing the prosecution to bolster the complaining witnesses' claims with prior consistent statements, and by admitting "un-crossexaminable" hearsay statements the complaining witnesses made to a forensic nurse.

{¶ 42} The admission of evidence is within the sound discretion of the trial court, subject to reversal only upon a finding of an abuse of discretion. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶101.

{¶ 43} Defendant first asserts that the trial court erred by admitting testimony of the county social worker as being improper victim-impact evidence. He contends that the admission of this evidence violated his rights to a fair trial and due process and relies on *Payne v. Tennessee* (1991), 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720, and *State v. Fautenberry* (1995), 72 Ohio St.3d 435, 650 N.E.2d 878.

{¶ 44} In *Fautenberry*, the Ohio Supreme Court found that "evidence which depicts both the circumstances surrounding the commission of the murder and also the impact of the murder on the victim's family may be admissible during both the guilt and the sentencing phases." Id. at 440; see, also, *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶98 ("Evidence relating to the facts attendant to the offense is 'clearly admissible' during the guilt phase, even though it might be characterized as victim-impact evidence.")

{¶ 45} Even if victim-impact evidence is admitted in error, this does not constitute reversible error unless the defendant shows there is some reasonable probability that the outcome would have been different. *State v. Sova* (Apr. 9, 1998), Cuyahoga App. Nos. 71923 and 71924.

{¶ 46} Defendant believes the jury was improperly swayed by the following testimony of the social worker: that she became involved with the family in the fall of 2007 because the children were not attending school; that she interviewed all four children individually; that she visited the children in March 2008 and observed that P.S. was "grieving"; that I.S. was "angry"; and that the boys were "angry" and "upset."

{¶ 47} The social worker's testimony about how she became involved with the family was not improper victim-impact testimony but rather explained why she, who did not typically handle sexual abuse allegations, was involved with this matter. She did mention that P.S. was grieving but correlated this to

P.S.'s feelings about her mother. Furthermore, we do not find that the exclusion of the social worker's brief testimony as to her perceptions of the children's emotional state in March 2008 would have had any reasonable probability of altering the outcome of the jury's verdict in this case, particularly in light of the other evidence contained in this record. The defendant's argument concerning this testimony is without merit.

{¶ 48} Next, defendant maintains that the trial court erred by allowing the testimony of another social worker and the forensic nurse, claiming that it was hearsay and improperly bolstered the children's credibility with prior consistent statements. The State contends that the testimony was admissible pursuant to Evid.R. 803(4). The statements at issue were made to a social worker and a nurse following, and as a result of, the sexual abuse allegations.

{¶ 49} This Court has consistently held that a young rape victim's statements to social workers, clinical therapists, and other medical personnel are admissible under Evid.R. 803(4), when made for purposes of medical diagnosis or treatment. *State v. Muttart,* 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.Ed.2d 944; *State v. Arnold*, Slip Op. No. 2010-Ohio-2742; *Presley v. Presley* (1990), 71 Ohio App.3d 34, 593 N.E.2d 17; *State v. Kurpik* (June 27, 2002), Cuyahoga App. No. 80468; *State v. Grider* (Feb. 10, 2000), Cuyahoga App. No. 75720; *State v. Hogan* (June 8, 1995), Cuyahoga App. No. 66956; *State v. Shepherd* (July 1, 1993), Cuyahoga App. No. 62894; *State v. Duke* (Aug. 25, 1988), Cuyahoga App. No. 52604; *State v. Cottrell* (Feb. 19, 1987),

Cuyahoga App. No. 51576; *State v. Negolfka* (Nov. 19, 1987), Cuyahoga App. No. 52905. This is true whether the statements are consistent or inconsistent with the victim's trial testimony. See *State v. Durham,* Cuyahoga App. No. 84132, 2005-Ohio-202. Accordingly, defendant's argument to the contrary lacks merit and the fourth assignment of error is overruled.

{¶ 50} In his fifth assignment of error, defendant contends his counsel's representation fell below the standard of competent representation because his attorney did not cross-examine the children about their failure to allege the abuse sooner.

{¶ 51} The Cuyahoga Department of Children and Family Services assigned a social worker to the family in October 2007 to investigate matters unrelated to this case. The alleged offenses occurred between September 2007 to March 2008 and in September 2008. The defendant maintains his counsel should have attempted to elicit testimony from the child victims that they failed to make any sexual abuse allegations until March 2008 despite opportunity to do so.

{¶ 52} All of the children were asked on direct examination why they did not come forward with their allegations against defendant sooner. Each of them gave a plausible explanation. P.S. said defendant told her not to tell because it was a secret. I.S. said she told her mother, who did nothing about it, which her mother confirmed. I.S. also said the defendant told her she would get a "whooping" if she told. V.S. said he did not say anything because

the defendant told him he would cut off their heads with a sword if they told anyone.[7] Finally, T.S. said he told his mother about what the defendant did to him, but she did nothing. T.S. did not tell anyone else because he was embarrassed.

{¶ 53} It would have been foolish for defense counsel to re-elicit this damning testimony and explanations from the children on cross-examination. Accordingly, the decision not to cross-examine the children about the alleged omissions did not amount to ineffective assistance of counsel, which requires a showing that (1) the performance of defense counsel was seriously flawed and deficient; and (2) the result of appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 54} In light of the above, the fifth assignment of error is overruled.

{¶ 55} For his sixth assigned error, defendant contends the trial court erred by not making statutory findings required by Senate Bill 2, although such provisions were excised by the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. He relies on the United States Supreme Court's decision in *Oregon v. Ice* (2009), 129 U.S. 711, 129 S.Ct. 711, 172 L.Ed.2d 517, for the proposition that the findings were

[7]Defendant did keep a sword in his car, and V.S. said he saw the sword.

excised in error and, therefore, should have been made. We have declined to adopt this position until the Ohio Supreme Court provides otherwise. See, e.g., *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379, at ¶29 (concluding that, in regard to *Ice*, "we decline to depart from the pronouncements in *Foster*, until the Ohio Supreme Court orders otherwise"); see, also, *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, ¶35 ("*Foster* did not prevent the trial court from imposing consecutive sentences; it merely took away a judge's duty to make findings before doing so. The trial court thus had authority to impose consecutive sentences on Elmore").

{¶ 56} The sixth assignment of error is therefore overruled.

{¶ 57} In his final assignment of error, defendant contends that the trial court improperly considered his decision to go to trial as a factor in imposing his sentence.

{¶ 58} There is nothing in the record that would support the defendant's contention that the trial court imposed a sentence within the statutory range as punishment for exercising his right to trial. Defendant relies solely on the fact that the trial court ordered him to serve all of his sentences consecutively. We note that while he was ordered to serve all of his sentences consecutively, in reality, the imposition of concurrent sentences would have the same effective result — a term of life in prison without the possibility of parole.

{¶ 59} In light of the above, the seventh assignment of error is overruled.

IV. Conclusion

{¶ 60} Judgment affirmed in part, reversed in part, and case remanded with instructions to vacate convictions on Counts 12 and 14 through 19, with convictions being affirmed on all other counts consistent with this opinion.

It is ordered that appellant and appellee share equally the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for further proceedings.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

COLLEEN CONWAY COONEY, J., CONCURS;
CHRISTINE T. McMONAGLE, P.J., DISSENTS
IN PART WITH SEPARATE DISSENTING OPINION

CHRISTINE T. McMONAGLE, P.J., DISSENTING IN PART:

Respectfully, I dissent from the majority opinion on the third assignment of error. In this assignment, Freeman attacks the sufficiency of the indictment on the grounds that the carbon-copy counts of the

indictment violated his due process rights under the Fourteenth Amendment. I agree.

Valentine v. Konteh (C.A.6, 2005), 395 F.3d 626, originated in the Eighth District as *State v. Valentine* (July 17, 1997), Cuyahoga App. No. 71301. Michael Valentine was charged in an indictment containing identical and undifferentiated counts, and, like Freeman, was convicted of all counts and sentenced to multiple consecutive life sentences. He first raised the issue of the undifferentiated counts before the Eighth District;[8] the Eighth District held that the law did not require any more in an indictment than a recitation of the statute itself. Specifically, this appellate court said:

"Regarding the state's failure to specify the type of sexual conduct, the Ohio Supreme Court has determined that * * * Crim.R. 7(B) authorizes indictments to utilize the words of the applicable section of the statute. *State v. Murphy* (1992), 65 Ohio St.3d 544, 583. The indictment in this case utilizes the wording of Revised Code Sections 2907.02 and 2907.17, which provided Valentine with statutory notice of the charges against him. Consequently, the state did not deprive him of his rights to due process." *Valentine*, Cuyahoga App. No. 71301. However, this appellate court in

[8]It does not appear from the opinion that this issue was raised before the trial court.

Valentine did dismiss five counts on the issue of insufficient evidence, as does the majority in the instant case.

Valentine attempted to get this issue before the Ohio Supreme Court; they declined jurisdiction, declaring there was "no substantial constitutional question." *State v. Valentine* (1997), 80 Ohio St.3d 1466, 687 N.E.2d 295. However, pursuant to a writ of habeas corpus filed in the United States District Court, Valentine obtained review of the issue. The district court found that the Eighth District's "**application of clearly established federal law was not only incorrect, but unreasonable.**" *Valentine v. Huffman* (2003), 285 F.Supp.2d 1011, 1027. In reaching this conclusion, the district court cited the controlling law contained in *Russell v. United States* (1962), 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240. *Russell* requires that an indictment: (1) contain the elements of the offense charged (not an issue in this case — the indictment did in fact charge each and every essential element of the crime),[9] (2) provide the defendant adequate notice of the charges against which he must defend; (the seminal issue in the case before us), and (3) provide protection against double jeopardy by enabling the defendant to plead

[9]In *State v. Colon*, 118 Ohio St.3d 26, 2009-Ohio-1624, 885 N.E.2d 917, clarified in 119 Ohio St.3d 204, 2008-Ohio-3748, 893 N.E.2d 169, the Ohio Supreme Court held that the omission of an essential element (recklessness) in an indictment is at the very least plain error, and accordingly may be raised at the appellate level for the first time. The majority here suggests that since the defect in the indictment was not raised at the trial level, it was waived for purposes of our appellate review. The very definition of plain error is that it may be raised for the first time on appeal. *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332; *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 448 N.E.2d 452.

an acquittal or conviction to bar future prosecutions for the same offense. Id. See, also, *Isaac v. Grider* (C.A.6, 2000), 211 F.3d 1269.

The United States Supreme Court further stated that "[t]he object of the indictment is to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances. *U.S. v. Cruikshank* (1875), 92 U.S. 542, 558." *Valentine v. Huffman* at 1024.

The United States Supreme Court further noted that under the second mandate of *Russell*, "[u]ndoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the description, with which he is charged." *United States v. Hess* (1888), 124 U.S. 483, 487, 8 S.Ct. 571, 31 L.Ed. 5126; see, also, *Valentine v. Huffman* at 1024-1025. Apropos of this mandate, the district court in *Valentine v. Huffman* discussed how the carbon copy indictments gave no notice to the defendant sufficient to present an alibi (if one was to be established) or an alternative theory to one of guilt (if such was

to be the case), or any other specific defense or defenses. Significantly, however, the district court did not decide *Valentine* on this second mandate.

Valentine was decided on the third mandate of *Russell*, that of double jeopardy. (With some counts dismissed, it is impossible to determine with such carbon copy indictments, which counts were convictions, and which acquittals. See *State v. Ogle*, Cuyahoga App. No. 87695, 2007-Ohio-5066, which under similar facts, reached the same conclusion.) "The Ohio Court of Appeals did not specify which 5 counts were dismissed, nor could it given that the counts were identical and there was no way to distinguish among them." *Valentine v. Huffman* at 1027.

In short, while commenting on the lack of notice, *Valentine* at the district court level was decided on the double jeopardy portion of the due process clause of the Fourteenth Amendment. Valentine was granted his writ of habeas corpus and ordered released. Id. at 1027.

The government appealed to the Sixth Circuit Court of Appeals, which upheld the decision of the district court, but modified the writ to exclude all but one of the carbon copy counts. (A single count cannot be carbon copy.)

In Freeman's case, there are multiple, identical charges. The majority contends that the state did delineate the factual bases for the multiple counts of rape pertaining to I.S. and P.S. during trial, during closing arguments and in

the jury verdict forms.[10] But delineating the differences during trial or at the conclusion of the case certainly does not "apprise the defendant of what he must be prepared to meet." Notice during or at the conclusion of trial is no kind of notice at all.

It is true that counsel argued differentiation of some of the counts in closing arguments, and differentiation of counts was arguably afforded in some of the jury verdict forms; however, this impacts only the third factor discussed in *Russell*, that is, "[i]n case any proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." See, also, *Ogle*, supra.

In-trial or post-trial differentiation is not sufficient to satisfy due process notice. This is not a case where a child is unable to testify to exact dates or times; courts have great tolerance and understanding of that difficulty. This is a case where the available differentiating information, e.g., cunnilingus, vaginal penetration, digital penetration, in the bedroom, in the bathroom, etc., was in fact available, but specifically and purposefully denied the defendant prior to trial.

The state has offered no explanation why such information was not included in the indictment, or at the very least, on a pretrial bill of particulars. A motion for bill of particulars, filed by Freeman on April 9, 2008, requested

[10]I have serious question as to the adequacy of the delineation in the verdict forms; however, that issue has not been raised by Freeman and will not be resolved

"the alleged overt acts attributed to the defendant in the commission of the offense charged in the indictment" and "the overt acts alleged to have been committed by the defendant that support the allegations in the indictment."

The state's response reiterated the carbon-copy indictment, provided no differentiation between the counts, and concluded that "under the laws governing indictments and bills of particular, the prosecuting attorney is not required to disclose through a bill of particulars, the evidentiary matters requested in defendant's [motion for a] bill of particulars."

Freeman filed a second motion for bill of particulars on May 15, 2008, this time requesting "specific facts related to the conduct of the defendant * * *" and stating that "defendant says the indictment is vague, indefinite, uncertain, in general terms and conclusions and that from the indictment, defendant cannot determine the nature and cause of the charges against him; that he is to prepare an intelligent defense thereto, and in order that this defendant may be fairly informed of what the state claims and what crime, if any, he is charged, and so that the defendant will be protected in his constitutional rights, the prosecuting attorney should be required to particularize." Neither the state nor the court responded at all to this request.

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here.

Although Freeman twice requested differentiating information prior to trial, the state did not provide it, and the court did not order it.

The majority in this case concludes that "the State did differentiate the counts at trial, which satisfies the due process concerns with *Valentine*, which found that '**[t]he due process problems in the indictment might have been cured had the trial court insisted that the prosecution delineate the factual bases for the 40 separate incidents either before or during trial**.'" Majority opinion, citing *Valentine v. Konteh* at 634. However, the majority fails to address two matters; the first is that it is unclear whether this quote from *Valentine* is referring to the double jeopardy portion of the due process clause, the notice portion of the due process clause, or both. I *might* concede cure on the double jeopardy attack; I do not concede at all cure on the notice provision.

Secondly, the majority opinion ignores the use of the word "might," and treats the statement as holding that the due process issues *would* have been cured had the trial court insisted that the prosecution delineate the factual bases for the 40 separate incidents "either before or during the trial." The use of the word "might" indicates that the observation is dicta and not holding. "The controversy hinges upon the use of the word, might, which is * * * not direct, positive and dictatorial, but is doubtful, permissive, possible and contingent * * *." *State v. Andrews* (1911), 21 Ohio Dec. 567, 11 Ohio N.P. (N.S.) 605.

Dicta contained in opinions simply expresses the personal view of the writer, and parts of an opinion that are mere dicta ordinarily have no precedential value or effect. *State v. Wilson* (1979), 58 Ohio St.2d 52, 60, 388 N.E.2d 745; *Kemp v. Matthews* (1962), 183 N.E.2d 259, 261, 89 Ohio L. Abs. 524.

Further, there is dicta in *Valentine v. Konteh* saying just the opposite: "As the District Court decided this case on 'Double Jeopardy' grounds, it did not rule on whether the indictment provided Valentine with adequate notice. Yet the court did suggest that it was **'doubtful that the indictment in this case' sufficiently apprises the defendant of what he must be prepared to meet**." (Emphasis added.) Id. at 632. Contrary to the assertion of the majority, I believe that the Sixth Circuit ruling is that carbon-copy indictments violate both the double jeopardy **and** the notice provisions of the due process clause of the Fourteenth Amendment: "For the reasons stated above, we affirm the District Court's ruling that the indictment charging Valentine with multiple, identical and undifferentiated counts violated the constitutional requirements imposed by due process. We agree with the District Court's determination that 'the Ohio Court of Appeals' application of clearly established federal law was not only incorrect, but unreasonable.' **When prosecutors opt to use such carbon-copy indictments, the defendant has neither adequate notice to defend himself, nor sufficient protection from double jeopardy**." (Emphasis added.) Id. at 636.

I likewise dissent from the holding of the majority that "[i]n the only case from this Court that has addressed the notice aspect of due process in terms of a carbon copy indictment has rejected it. *State v. Wilson*, Cuyahoga App. No. 92148, 2010-Ohio-550, appeal not allowed, 125 Ohio St.3d 1450, 2010-Ohio-2510." With due respect to the majority, I do not believe that the Eighth District is free to reject "clearly established United States Supreme Court precedent." *Valentine v. Huffman*, supra. This court did that in *Valentine* on the same issue and was admonished that our "application of clearly established federal law was not only incorrect, but unreasonable." *Valentine v. Konteh*, at 636.

In sum, this case is identical to the *Valentine* matter, save some evidence here of differentiation at trial that *might* impact an analysis on double jeopardy grounds only. In neither matter was there a pretrial bill of particulars differentiating between the counts; here, the state actually resisted differentiating the counts prior to trial.

In *Cruickshank*, *Russell,* and *Valentine*, the United States Supreme Court and the Sixth Circuit Court of Appeals have ruled that facts must be included **in an indictment** in order to differentiate the allegations of one count from another, and that this is a matter of constitutional due process. While *Valentine* may hint in dicta that the error in failing to differentiate counts in an indictment might be harmless if differentiation was afforded in a bill of particulars, or in the case of the double jeopardy issue only, with evidence

during or at the conclusion of trial, the seminal holding in all these cases is that the indictment itself must contain the differentiating language.

In the five years since the Eighth District was told that our application of clearly established federal law was both "incorrect and unreasonable," we continue to affirm convictions based upon carbon-copy indictments. I would follow the clearly established federal law made applicable to us in *Valentine*, and would vacate as follows: all but one count of rape upon P.S., all but one count of rape upon I.S., and all but one count of disseminating matter harmful to juveniles.[11]

[11]It should be noted that Freeman "confessed" to two counts of cunnilingus and one count of vaginal penetration on P.S. and two counts of cunnilingus on I.S. in his statement to police, although he himself does not differentiate the acts. He likewise "confessed" to "more than five but less then ten" counts of disseminating matter harmful to juveniles. While it is tempting to uphold convictions on the counts to which Freeman allegedly "confessed," due to the carbon-copy nature of the counts in the indictment and the finding of the majority that there is insufficient evidence as to certain counts, I am unable to discern which counts those might be.