[Cite as *State v. Ross*, 2010-Ohio-5096.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
Plaintiff-Appellee	:	William B. Hoffman, J.
	:	
-vs-	:	Case No. 2009 CA 00253
	:	
	:	
HENRI ROSS	:	O P I N I O N

Defendant-Appellant

CHARACTER OF PROCEEDING:	Criminal Appeal from Stark County Court of Common Pleas Case No. 2009 CR 0549
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 18, 2010

APPEARANCES:

For Plaintiff-Appellant

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Edwards, P.J.

{¶1} Appellant, Henri Ross, appeals a judgment of the Stark County Common Pleas Court convicting him of two counts of rape (R.C. 2907.02(A)(2)), one count of felonious sexual penetration (R.C. 2907.12(B)), and one count of sexual battery (R.C. 2907.03(A)(5)), and sentencing him to 35-65 years incarceration. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} Appellant married Louise Ross in the 1950's. The couple produced five children, including three daughters: Tori, Veronica and Kellye. Kellye died of cervical cancer in 2001. In 1970, appellant and Louise separated. Appellant become involved with Margaret, and the couple had three daughters: Yanna, Ro and Ashley.

{¶3} Yanna was born in 1978. She lived with her half siblings, her mother Margaret, and appellant in a home on 8th Street in Canton until approximately 1987. In 1987, the family moved to a farm in Canal Fulton. Appellant maintained the home on 8th Street, where he kept dogs.

{¶4} Appellant was domineering and strict with his daughters and with Margaret. He did not allow his daughters to date or to talk to boys. He required everyone in the house, including Margaret, to write daily reports detailing where they went, who they talked to, and what they did. Appellant was a large man and kept firearms in the house.

{¶5} When Yanna was around 13 years old and in the 7th grade, appellant began to have sexual intercourse with her. He told her that he needed to teach her how to be a woman. He told her that he was saving her from being talked about on the

streets as a loose woman by having sex with her himself. Appellant would take Yanna to the house on 8th Street to help him feed the dogs and would have sex with her there or in the car.

{¶6} Yanna would cry and beg appellant to stop, but he told her that tears do nothing but make your face wet. He told Yanna to take the sexual relationship to her grave. The abuse occurred around four times a week, and the only time Yanna was free from being required to have sex with appellant was when she was on her menstrual cycle, and in 1999 when appellant fractured his pelvis in a tractor accident.

{¶7} Yanna became pregnant by appellant at the age of 21 and again at the age of 23 or 24. Appellant never utilized condoms or birth control when engaging in sex with Yanna. Appellant told Yanna it was her fault she became pregnant because she failed to follow his instructions to urinate after having sex with him. On both occasions when Yanna became pregnant, appellant took her to a clinic for an abortion.

{¶8} Ro was born in 1979. When she was 11 or 12 years old, appellant began touching her chest and genitals while she laid in bed, pretending to be asleep. When appellant drove Ro home from school, he would stop in the middle of their driveway and tell her to pull her pants down. He would then touch her vaginal area, telling her he wanted to see if she smelled.

{¶9} When Ro was in high school, around 15 or 16 years of age, appellant engaged in sexual intercourse with her on the sofa. She cried and told appellant to stop. He told her to relax, and that he'd "just put it in a little bit." Tr. 297. Appellant then put his penis in her vagina. He told Ro he was trying to teach her something. One month after Ro turned 18, she left the house for work one night and never returned.

{¶10} Ashley was born in 1986. When she was 11 or 12 years old, appellant began touching her genitals, claiming he was checking to make sure she was clean. While appellant was recovering from his 1999 tractor accident, he would make Ashley remove her pants and lie in bed with him. When he recovered, the sexual contact escalated to sexual intercourse. He made Ashley accompany him to the 8th Street home to feed the dogs, and Ashley knew he would have sex with her there. On Sunday mornings he often told Ashley they were going to church, but he would then stall until it was too late to go to the service. Instead, he would take her to the 8th Street home and have sex with her.

{¶11} Ashley would cry and beg appellant to get off of her, but appellant told Ashley that he was having sex with her for her own good. He told her he was preventing her from looking for sex on the streets and ruining her reputation. He also told Ashley that having sex with him would clear up her acne.

{¶12} In 2006, Ro told her husband of the sexual abuse she experienced with her father. She also spoke to Yanna and her mother. Eventually Ro talked to all her sisters and her two living half-sisters, and they discovered that all five of them had been forced to have sex with appellant.

{¶13} In February of 2009, the sisters made arrangements to meet appellant in the library area of their church to confront him about the sexual abuse they had all endured. A portion of the encounter was captured on videotape. Appellant admitted that he had done everything they accused him of doing and admitted that the sexual relationships were wrong. He claimed that the abuse wasn't about the sex. He told his

daughters that a minister he met had told him that he did the same thing to his daughters.

{¶14} A few weeks after the meeting, Ro went to the Lawrence Twp. Police Department and reported the sexual abuse. Detective Paul Stanley spoke to appellant on the phone. During the phone conversation, appellant admitted to having sex with his daughters and explained that he was teaching them what men would do to them and what they could expect in the world.

{¶15} Following the meeting, appellant wrote his wife Louise a letter in which he explained that he engaged in sex with his daughters to teach them what they could expect in the world and to protect their reputations. He wrote in the letter that he had spoken with people in Canton, Washington, D.C., and North Carolina who had done the same thing and were doing well. He wrote that he had been told that as long as there was no lust involved and he didn't force himself on them, his daughters would eventually understand and some day thank him.

{¶16} Appellant was indicted in April, 2009, with six counts of rape. In July of 2009, a superceding indictment charged appellant with one count of rape with a force specification, two counts of rape, one count of gross sexual imposition, one count of felonious sexual penetration and one count of sexual battery. The original indictment was then dismissed. The charges involved appellant's three youngest daughters: Yanna, Ro and Ashley.

{¶17} The case proceeded to jury trial in the Stark County Common Pleas Court. At trial, appellant's oldest daughter, Tori, testified that appellant began sexually assaulting her when she was 12 or 13 years old. Tori was born in 1955. Tori testified

that appellant made her remove her clothing and inserted his fingers into her vagina to check her personal hygiene. By the time Tori was in middle school, appellant began having sexual intercourse with her. He told Tori he was educating her and preventing her from having the urge to have sex with different men. Appellant continued having sex with Tori until she was 27 years old. Tori became pregnant by appellant on eight occasions. She had four abortions and a live birth where the child survived only one day. Tori has three living children who were fathered by appellant. The State presented DNA evidence at trial to demonstrate that appellant is the father of two of Tori's children.

{¶18} Veronica, who was born in 1964, also testified at trial. She testified that appellant began touching her vaginal area when she was 8 or 9 years old, with the conduct escalating to sexual intercourse when she was 9 or 10 years old. Appellant told Veronica that he was educating her and ensuring that she would maintain a good reputation since men could not talk about having sex with her. He ordered Veronica to take the abuse to her grave. Appellant told Veronica to urinate after having sex to prevent pregnancy. However, Veronica became pregnant by her father on one occasion, and he took her to have an abortion.

{¶19} Appellant testified at trial. On direct examination, he denied having sex with any of his daughters. He blamed Ro for the accusations, claiming she had a grudge against him because he was strict when she was a child, and that she came up with the idea to accuse him of sexual abuse through her work with abused girls at the Multi-County Juvenile Attention Center.

{¶20} However, on cross-examination, appellant admitted to having sex with Yanna, Veronica, Tori and Kellye, but claimed it happened only when they were adults.

He claimed they came to him seeking sex. He continued to deny having sex with Ashley. He admitted that he told the girls to take the matter to their graves.

{¶21} Appellant also admitted on cross-examination to writing in a small notebook which was admitted into evidence at trial. In the notebook, appellant admitted to having sex with his daughters. He claimed the sex was an agreement between himself and each of the girls so they wouldn't be out in the streets, seeking sex and being called "whores." He wrote that he knew it was wrong and explained that it was wrong to each of them before the sex started. He wrote that the idea behind the sexual conduct was so the girls could "digest the desire for sex" with him until they got married. He wrote that he never had lustful feelings, and he thought he was doing the girls a service by keeping them as perfect as possible. He also admitted in the notebook to impregnating Yanna and Veronica, and to taking Yanna to an abortion clinic out of fear that he was the father of her child.

{¶22} The court dismissed the charge of rape with its accompanying force specification in Count One of the indictment, in which the victim was Ashley, on appellant's Crim. R. 29 motion for acquittal. The jury returned a verdict of not guilty on the charge of gross sexual imposition, in which the victim was Ro. The jury convicted appellant of one count of rape of Ashley, one count of felonious sexual penetration of Ro, one count of rape of Yanna, and one count of sexual battery of Yanna. He was sentenced to an aggregate term of incarceration of 35-65 years and classified as a Tier III sex offender. Appellant assigns three errors on appeal:

{¶23} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO INTRODUCE TESTIMONY OF OTHER ALLEGED ACTS BY THE APPELLANT.

{¶24} "II. THE TRIAL COURT ERRED BY ADMITTING PHYSICAL EVIDENCE THAT WAS NOT PROPERLY AUTHENTICATED.

{¶25} "III. THE TRIAL COURT'S FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

I

{¶26} Appellant argues that the court erred in admitting evidence that he sexually abused his daughters, Tori and Veronica, who were not named in the indictment. The State argues that this evidence is admissible as a "behavioral fingerprint" to demonstrate appellant's motive, intent, scheme, system or plan.

{¶27} Evid. R. 404(B) states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In *State v. Broom* (1988), 40 Ohio St.3d 277, 533 N.E.2d 682, the Ohio Supreme Court held that in addition to those reasons listed in the Rule, evidence of other bad acts may be admissible to prove identity. However, because Evid. R. 404(B) and R.C. 2945.59 codify an exception to the common law with respect to evidence of other acts of wrongdoing, they must be construed against admissibility, and

the standard for determining admissibility of such evidence is strict. *Broom*, paragraph one of the syllabus.

{¶28} The admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment. See *State v. Curry* (1975), 43 Ohio St.2d 66, 68, 72 O.O.2d 37, 38, 330 N.E.2d 720, 723. This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature. *State v. Schaim,* 65 Ohio St.3d 51, 60, 1992-Ohio-31, 600 N.E.2d 661,669; *State v. Miley*, Richland App. Nos. 2005-CA-67, 2006-CA-4670; *State v. Clay*, 187 Ohio App.3d 633, 933 N.E.2d 296, 2010-Ohio-2720.

{¶29} Evidence of other acts is admissible if (1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. Carter* (1971), 26 Ohio St.2d 79, 83, 269 N.E.2d 115, 117; *State v. Lowe,* 69 Ohio St.3d 527, 530, 1994-Ohio-345, 634 N.E.2d 616, 619. (Citing *State v. Broom* (1988), 40 Ohio St.3d 277, 282-283, 533 N.E.2d 682, 690-691; Evid.R. 404(B); R.C. 2945.59); *Miley*, supra; *Clay*, supra.

{¶30} In the case at bar, if a crime did in fact occur, no dispute exists that appellant was the perpetrator. In other words, no dispute exists as to identity. *Miley*, supra, 2006-Ohio-4670 at ¶ 73; *Clay*, supra, 2010-Ohio-2720 at ¶45. As the identity of the person who had committed the crime was not an issue at trial, the other acts would not have been properly admitted to prove appellant's scheme, plan, or system in

committing the crimes charged. *Mt. Vernon v. Hayes*, Knox App. No. 09-CA-0007, 2009-Ohio-6819 at ¶26.

{¶31} Additionally, appellant did not claim mistake or accident. Rather, he initially claimed that he never had sexual relations with his daughters, and later admitted to having sex with all of his daughters except Ashley, but claimed they were adults who consented to sex, and he had sex with them to educate them and to keep them from seeking sex elsewhere.

{¶32} The evidence concerning appellant's sexual relationships with Tori and Veronica was inadmissible in the instant case. However, we find that any error in admitting the evidence was harmless.

{¶33} Crim. R. 52(A) defines harmless error:

{¶34} "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."

{¶35} The test for determining whether the admission of inflammatory or otherwise erroneous evidence is harmless requires the reviewing court to look at the whole record, leaving out the disputed evidence, and then to decide whether there is other substantial evidence to support the guilty verdict. *State v. Riffle,* Muskingum App. No. 2007-0013, 2007-Ohio-5299 at ¶ 36-37 (Citing *State v. Davis* (1975), 44 Ohio App.2d 335, 347, 338 N.E.2d 793). Error is harmless beyond a reasonable doubt when the remaining evidence constitutes overwhelming proof of the defendant's guilt. *State v. Williams* (1988), 38 Ohio St.3d 346, 349-350, 528 N.E.2d 910.

{¶36} In the instant case, Yanna, Ashley and Ro all testified that appellant forced them to have sex with him. The evidence demonstrated that appellant was a large,

powerfully-built man who kept firearms in the home, and the family members were afraid of him.

{¶37} Yanna testified that when she was around 13 years old and in the 7th grade, appellant began to have sexual intercourse with her. He told her that he needed to teach her how to be a woman. He told her that he was saving her from being talked about on the streets as a loose woman by having sex with her himself. Yanna testified that appellant would take her to the house on 8th Street to help him feed the dogs and would have sex with her there or in the car.

{¶38} Yanna testified that she would cry and beg appellant to stop, but he told her that tears do nothing but make your face wet. He told Yanna to take the sexual relationship to her grave. The abuse occurred around four times a week, and the only time Yanna was free from being required to have sex with appellant was when she was on her menstrual cycle, and in 1999 when appellant fractured his pelvis in a tractor accident.

{¶39} Yanna further testified that she became pregnant by appellant at the age of 21 and again at the age of 23 or 24. Appellant never utilized condoms or birth control when engaging in sex with Yanna. Appellant told Yanna it was her fault she became pregnant because she failed to follow his instructions to urinate after having sex with him. On both occasions when Yanna became pregnant, appellant took her to a clinic for an abortion.

{¶40} Ro testified that when she was 11 or 12 years old, appellant began touching her chest and genitals when she was laying in bed pretending to be asleep. When appellant drove Ro home from school, he would stop in the middle of their

driveway and tell her to pull her pants down. He would then touch her vaginal area, telling her he wanted to see if she smelled. Ro testified that when she was in high school, around 15 or 16 years of age, appellant engaged in sexual intercourse with her on the sofa. She cried and told appellant to stop. He told her to relax, and that he'd "just put it in a little bit." Tr. 297. Appellant then put his penis in her vagina. He told Ro he was trying to teach her something.

{¶41} Ashley testified that when she was 11 or 12 years old, appellant began touching her genitals, claiming he was checking to make sure she was clean. While appellant was recovering from his 1999 tractor accident, he would make Ashley remove her pants and lie in bed with him. When he recovered, the sexual contact escalated to sexual intercourse. He would make Ashley accompany him to the 8th Street home to feed the dogs, and Ashley knew he would have sex with her there. On Sunday mornings he would tell Ashley they were going to church, but he would then stall until it was too late to go to the service. Instead, he would take her to the 8th Street home and have sex with her.

{¶42} Ashley testified that she would cry and beg appellant to get off of her, but appellant told Ashley that he was having sex with her for her own good. He told her he was preventing her from looking for sex on the streets and ruining her reputation. He also told Ashley that having sex with him would clear up her acne.

{¶43} The videotape of the encounter appellant had with his daughters was admitted into evidence and played for the jury. In the videotape, appellant admitted that he had done everything they accused him of doing and admitted that he was wrong in

having sex with them. He claimed that the abuse wasn't about the sex. He told his daughters that a minister he met had told him he did the same thing to his daughters.

{¶44} Detective Paul Stanley testified that after Ro reported the sexual abuse to the police, Det. Stanley spoke to appellant on the phone. During the phone conversation, appellant admitted to having sex with his daughters and explained that he was teaching them what men would do to them and what they could expect in the world.

{¶45} Following the meeting, appellant wrote his wife Louise a letter, which was admitted into evidence at trial. In this letter he explained that he engaged in sex with his daughters to teach them what they could expect in the world and to protect their reputation. He wrote in the letter that he had spoken with people in Canton, Washington D.C., and North Carolina who had done the same thing and were doing well. He wrote that he had been told that as long as there was no lust involved and he didn't force himself on them, his daughters would eventually understand and some day thank him.

{¶46} At trial, appellant admitted on cross-examination to having sex with Yanna, but claimed it happened only when they were adults. He claimed they came to him seeking sex. He continued to deny having sex with Ashley. He admitted that he told the girls to take the matter to their graves.

{¶47} Appellant also admitted on cross-examination to writing in a small notebook which was admitted into evidence at trial. In the notebook, appellant admitted having sex with his daughters. He claimed the sex was an agreement between himself and each of the girls so they wouldn't be out in the streets, seeking sex and being called "whores." He wrote that he knew it was wrong and explained to the girls that it was

wrong before the sex started. He wrote that the idea behind the sexual conduct was so the girls could "digest the desire for sex" with him until they got married. He wrote that he never had lustful feelings, he thought he was doing the girls a service by keeping them as perfect as possible. He also admitted in the notebook to impregnating Yanna and to taking her to an abortion clinic out of fear that he was the father of her child.

{¶48} Admission of the other acts evidence in this case was harmless beyond a reasonable doubt because the remaining evidence constitutes overwhelming proof of the defendant's guilt. The first assignment of error is overruled.

II

{¶49} In his second assignment of error, appellant argues that the court erred in admitting the DNA sample taken from Tori because there was a break in the chain of custody of the sample. He argues that the officer who collected the sample did not testify, and there is no evidence concerning how the sample made its way to the Stark County Crime Lab.

{¶50} The admission or exclusion of evidence rests within the sound discretion of the trial court, and will not be reversed on appeal absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of syllabus. An abuse of discretion connotes more than an error of law or judgment; it implies the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶51} The chain of custody is part of the authentication or identification process set forth in Evid. R. 901(A), which provides: "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." The state is not required to prove a perfect, unbroken chain of custody. *State v. Bias*, Licking App. No. 02-CA-00044, 2002-Ohio-4539, at ¶11, citing *State v. Keene*, 81 Ohio St.3d 646, 1998-Ohio-342, 693 N.E.2d 246. A break in the chain of custody, if any, goes to the weight or credibility of the evidence, and not its admissibility. Id., citing *State v. Barzacchini* (1994), 96 Ohio App.3d 440, 458, 645 N.E.2d 137.

{¶52} Detective Paul Stanley testified that after learning that appellant had possibly fathered Tori's children, he spoke with Tori who currently lives in North Carolina. She indicated that she was willing to provide an oral swab for DNA testing to determine the paternity of her children. Stanley then enlisted the assistance of a police department in North Carolina.

{¶53} Tori testified that she went to her local police department where an officer took a swab of the inside of her mouth. Det. Stanley identified the envelope he received from a North Carolina police department containing what purported to be Tori's swab, which he turned over to the crime lab for analysis. The envelope, which was admitted into evidence with the swab as State's Exhibit 11, is addressed to Det. Stanley at the Lawrence Twp. Police Department. It reflects that it came from the Hope Mills Police Department and contained a sealed bag with two cotton tipped applicators with possible DNA. Inside the envelope is a smaller sealed envelope containing the swabs and an evidence inventory sheet from the Fayetteville, North Carolina, Police Department. The receipt includes the name of the crime scene technician, the victim's name, and the date and time the evidence was obtained. The sheet further includes a chain of

custody, demonstrating that the swabs were released from the technician to S.G. Gorwill, and finally to Paul Stanley.

{¶54} Appellant objected at trial that the testimony of the technician who took the swab was required to establish chain of custody. The court overruled the motion. The court did not abuse its discretion in overruling the motion. While the evidence of chain of custody is not perfect, there was sufficient evidence presented to support a finding that the swab received by Paul Stanley was in fact the swab of Tori's cheek taken in North Carolina. Any break in the chain of custody went to the weight or credibility of the evidence, not its admissibility.

{¶55} The second assignment of error is overruled.

III

{¶56} In his third assignment of error, appellant argues that his conviction for felonious sexual penetration is against the manifest weight and sufficiency of the evidence. Specifically, he argues that the state failed to prove that the crime occurred before the statute defining the crime of felonious sexual penetration was repealed on July 1, 1996.

{¶57} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in evidence the jury 'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678

N.E.2d 541, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶58} An appellate court's function when reviewing the sufficiency of the evidence is to determine whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶59} Felonious sexual penetration was defined by R.C. 2907.12(A)(2):

{¶60} "No person, without privilege to do so, shall insert any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another when the offender purposely compels the other person to submit by force or threat of force."

{¶61} Appellant was convicted of committing felonious sexual penetration on Ro. Ro was born on September 18, 1979, making her 16 years old when the statute was repealed on July 1, 1996. Ro turned 17 two months after the repeal of the statute.

{¶62} Ro testified that the sexual contact with appellant escalated beyond mere touching when she was 15 or 16. Tr. 290. She later testified that the acts progressed to penetration when she was "16 or so." Tr. 296. She testified that the occasion on which she was laying on the couch and appellant told her he'd put his penis "in a little bit" occurred when she was 16 or 17. Tr. 297-298. She later testified that the occasions when appellant penetrated her vagina with his fingers or penis occurred when she was 15 or 16. Tr. 303.

{¶63} Appellant argues that the testimony regarding Ro's age at the time the incidents occurred was inconsistent. However, as this Court has previously noted, "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Smith*, Licking App. No. 09-CA-42, 2010-Ohio-1232, ¶98, citing *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739. In closing argument, counsel for appellant argued that Ro's testimony was inconsistent concerning whether the acts of penetration occurred when she was 16 or 17, and the state had, therefore, not met its burden of establishing that felonious sexual penetration occurred before the statute was repealed. Counsel argued that Ro turned 17 on September 18, 1996, which is after the statute was repealed. Tr. 652. However, Ro testified that she may have been 15 or 16 when the acts occurred. The jury chose to resolve the inconsistency in her testimony by believing the acts occurred before July 1, 1996. There was evidence presented from which a rational trier of fact could find that the acts were committed before the statute was repealed. Further, the record does not reflect that the jury lost its way in resolving the conflicts in Ro's testimony.

{¶64} The third assignment of error is overruled.

{¶65} The judgment of the Stark County Common Pleas Court is affirmed.

By: Edwards, P.J.

Gwin, J. concurs

Hoffman, J. concurs separately

s/Julie A. Edwards

s/W. Scott Gwin

JUDGES

JAE/r0630

Hoffman, J., concurring

{¶66} I concur in the majority's analysis and disposition of all three of Appellant's assignments of error. I write separately only as to the standard utilized by the majority in its analysis of whether the erroneous admission of the other acts evidence was harmless error.

{¶67} While I agree the error herein was harmless "beyond a reasonable doubt", I do not believe such a heightened standard applies in this case. Unlike the *Williams* case cited by the majority, the error in the case sub judice does not involve a constitutional violation. Because the error herein involved a criminal rule and/or statute, I believe the "substantial rights" test is the proper standard to be applied.

s/William B. Hoffman
HON. WILLIAM B. HOFFMAN

[Cite as *State v. Ross*, 2010-Ohio-5096.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
HENRI ROSS	:	
Defendant-Appellant	:	CASE NO. 2009 CA 00253

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/W. Scott Gwin

s/William B. Hoffman

JUDGES