[Cite as *State v. Carpenter*, 2002-Ohio-2266.]

IN THE COURT OF APPEALS OF ERIE COUNTY

State of Ohio | Court of Appeals No. E-00-033

Appellee | Trial Court No. 99-CR-534

v.

Michael Carpenter | **DECISION AND JUDGMENT ENTRY**

Appellant | Decided: May 10, 2002

* * * *

Kevin J. Baxter, Erie County Prosecuting Attorney and Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Edward S. Wade, Jr., for appellant.

* * * *

RESNICK, M.L., J.

{¶1} Defendant-appellant, Michael Carpenter appeals from his convictions in the Erie County Court of Common Pleas for one count of gross sexual imposition, five counts of sexual battery and six counts of rape. Because we find that appellant was not prejudiced or prevented from having a fair trial, we affirm.

{¶2} The testimony and other evidentiary materials offered at Michael Carpenter's jury trial revealed the following relevant facts. Appellant's only daughter ("victim") was born on January 21, 1981. Her parents, Lisa and Michael Carpenter, were divorced when she was approximately five years old. Initially, the victim lived with her mother and her maternal grandparents in Marietta,

Washington County, Ohio. She did, however, visit her father, who was then living in Augusta, Georgia.

{¶3} According to the victim, her father engaged in sexual conduct, specifically, fellatio and cunnilingus, with her during visitation when she was nine years old. After her father moved back to Marietta, Ohio, he continued to engage in oral sex with his daughter. While she was still under the age of thirteen, approximately eleven or twelve, Michael Carpenter attempted to have vaginal intercourse with the victim. When she resisted, he grabbed her by the throat and "shoved it in anyway."

{¶4} In 1994, Michael Carpenter obtained custody of the victim. He continued engaging in sexual acts with her over the next several years. When he and his daughter moved to Sandusky, Erie County, Ohio, in 1995, he introduced her to sexual "bondage and discipline." She testified that her father tied her to the bed and used a whip to hit her. This practice, as well as the use of handcuffs, among other things, persisted until the victim was eighteen. In addition, Michael Carpenter answered a newspaper advertisement placed by Mike Hanna seeking persons who were interested in sexual bondage and discipline. According to the victim, her father had oral and vaginal sex with her in front of Hanna and her father's girlfriend, Sarah.

{¶5} Mike Hanna corroborated the victim's testimony, stating that he met her and Michael Carpenter in 1997 through an advertisement he placed seeking other people interested in sexual activities involving bondage and discipline. Hanna testified that he observed appellant have vaginal and oral sex with his daughter ten to fifteen times over a two year period. He also maintained that he saw Michael Carpenter use whips, handcuffs and a belt on the victim during that time. Hanna admitted that in return for his testimony against Michael Carpenter, the prosecutor agreed to

recommend probation or community sanctions upon his plea of no contest to the felony charge of conspiracy to commit sexual battery.

{¶6} In approximately April 1999, the victim went to live with her paternal grandmother. She stated that she went back to live with her father sometime in "the middle of summer" because she wanted to be near her younger brother, who was then in the custody of Michael Carpenter. The victim said that her father promised her that he would not have a sexual relationship with her, but that it "started up again" after only one week. Shortly thereafter, the victim moved out of the house. She maintained that her father threatened to kill her if she did anything that would cause the removal of her brother from his care.

{¶7} In November 1999, The victim learned that her brother was going to Marietta to visit with their mother and maternal grandparents for his birthday. Because her father had prevented her from seeing him, the victim went to Marietta so she could visit with her brother. During the visit, she told her mother everything that her father had done to her; she then provided the same information to the Marietta Police Department. She also told the police that certain items could be found in her father's home. These included books, magazines and/or videotapes involving incest and bondage; whips, chains, handcuffs and other bondage devices; marijuana; and marijuana pipes.

{¶8} The Marietta Police contacted the Sandusky Police Department, which, based upon the information furnished by the victim, obtained a search warrant for Michael Carpenter's residence. The search yielded numerous items associated with sexual bondage and discipline, including whips, leather gloves, a leather paddle, handcuffs and other sexual devices. The police also seized books, videotapes, and magazines pertaining to incest or bondage and a marijuana pipe ("bong").

{¶9} The Sandusky Police arrested Michael Carpenter. On December 10, 1999, the Sandusky County Grand Jury indicted him on one count of gross sexual imposition, a violation of

R.C. 2907.05(A)(4), for sexual contact with the victim for the period of 1990 to 1993 (Count One); and one count of rape of a child under thirteen by force or threat of force, a violation of R.C. 2907.02(A)(b)(1), for the period of 1990 to 1993 (Count Two). Although the location of these alleged offenses was initially stated as Erie County, it was later amended to reflect that the alleged offenses occurred in Washington County.

{¶10} The thirteen other counts were alleged to have happened in Erie County for the period of January 1996 through November 1999 and included (1) five counts of rape, violations of R.C. 2907.02(A)(2)(Counts Three, Four, Five, Six, and Seven); (2) five counts of sexual battery, violations of R.C. 2907.03(A)(5) (Counts Eight, Nine, Ten, Eleven, and Twelve); (3) two counts of pandering obscenity involving a minor, violations of R.C. 2907.321(A)(1) (Counts Thirteen and Fourteen); and (4) one count of compelling prostitution, a violation of R.C. 2907.21(A)(5) (Count Fifteen). The last three counts were later dismissed by the prosecution.

{¶11} Michael Carpenter filed a motion to suppress the evidence seized in the search of his residence. He challenged the sufficiency of the affidavit establishing the grounds for the issuance of the search warrant. The trial court denied the motion.

{¶12} After his trial, the jury found Carpenter guilty on the remaining twelve counts of the indictment. The common pleas judge determined that he was a sexual predator. She sentenced him to (1) a term of eighteen months in prison on Count One; (2) a term of life in prison on Count Two; (3) terms of ten years each on Counts Three, Four; Five, Six, and Seven; and (4) terms of two years each on Counts Eight, Nine, Ten, Eleven, and Twelve. The judge further ordered the sentences imposed on Counts One through Seven to be served consecutively and the sentences imposed on Counts Eight through Twelve to be served concurrently with both each other and Counts One through Seven.

{¶13} Michael Carpenter appeals the trial court's judgment and sentence and asserts that the following errors occurred in the proceedings below:

{¶14} "**ASSIGNMENT OF ERROR I**

{¶15} "DEFENDANT-APPELLANT'S CONVICTIONS WERE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶16} "**ASSIGNMENT OF ERROR II**

{¶17} "PROSECUTORIAL MISCONDUCT DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL."

{¶18} "**ASSIGNMENT OF ERROR III**

{¶19} "DEFENDANT-APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶20} "**ASSIGNMENT OF ERROR IV**

{¶21} "THE TRIAL COURT ERRED BY NOT DISMISSING THE TWO COUNTS ALLEGED IN THE INDICTMENT WHICH HAD NOT OCCURRED IN ERIE COUNTY AFTER THE ISSUE OF VENUE WAS PROPERLY RAISED."

{¶22} "**ASSIGNMENT OF ERROR V**

{¶23} "THE TRIAL COURT ERRED BY NOT DISMISSING THE COUNTS OF THE INDICTMENT ALLEGEDLY COMMITTED IN 1990 UNTIL 1995 AFTER THE STATUTE OF LIMITATIONS HAD RUN."

{¶24} "**ASSIGNMENT OF ERROR VI**

{¶25} “THE TRIAL COURT ERRED IN THE ADMISSION OF DEFENDANT'S PRIOR CRIMINAL CONVICTION IN VIOLATION OF EVID.R. 609 AND EVID. [sic] 403."

{¶26} "**ASSIGNMENT OF ERROR VII**

{¶27} “THE TRIAL COURT ERRED IN THE DENIAL OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO AN INVALID SEARCH WARRANT."

{¶28} "**ASSIGNMENT OF ERROR VIII**

{¶29} “THE TRIAL COURT ERRED IN IMPOSING MAXIMUM TERMS ON ALL COUNTS AND CONSECUTIVE PRISON TERMS ON COUNTS."

{¶30} "**ASSIGNMENT OF ERROR IX**

{¶31} “THE TRIAL COURT ERRED IN MAKING A FINDING THAT DEFENDANT WAS A SEXUAL PREDATOR."

{¶32} Because appellant's Assignments of Error Nos. IV, V, and VII deal with purported error occurring in pretrial matters, we shall consider these assignments first.

{¶33} In Assignment of Error No. IV, appellant urges that the trial court erred in failing to dismiss Counts One and Two of the indictment for lack of venue because appellee, the state of Ohio, failed to establish that the offenses charged in those counts happened in Erie County, Ohio.

{¶34} R.C. 2901.12(A) provides that the trial of a criminal case shall be held in a court having jurisdiction over the subject matter and in the territory where the offense or any element of the offense was committed. When, however, an offender commits offenses in different jurisdictions as part of a course of criminal conduct, venue lies for all the offenses in any jurisdiction in which the offender committed one of the offenses or any element thereof ***." *State v. Beuke* (1988), 38 Ohio St.3d 29, paragraph one of the syllabus.

{¶35} R.C. 2901.12(H) provides that, inter alia, the following is prima facie evidence of a course of criminal conduct:

{¶36} "(1) The offenses involved the same victim ***.

{¶37} "(2) The offenses were committed by the offender in the offender's same *** relationship to another.

{¶38} "***

{¶39} "(5) The offenses involved the same or a similar modus operandi."

{¶40} Venue is not a material element of any crime but is a fact that must be proven beyond a reasonable doubt. *State v. Headley* (1983), 6 Ohio St.3d 475, 477.

{¶41} In the present case, the indictment was amended prior to trial as to Counts One and Two to reflect that the offenses charged therein occurred in Washington County, Ohio. The victim's testimony at trial established, beyond a reasonable doubt, that she and her father were living in Marietta, Washington County, when Michael engaged in the claimed sexual contact and rape raised in those first two counts of the indictment. Moreover, her testimony demonstrated that this was a continuous course of criminal conduct involving the same victim with which the offender had the same relationship and that the same or a similar modus operandi was employed. Therefore, the trial court did not err in failing to dismiss Counts One and Two for lack of the proper venue. Accordingly, appellant's Assignment of Error No. IV is found not well-taken.

{¶42} In his Assignment of Error No. V, appellant contends that the common pleas court erred by failing to dismiss Counts One and Two in the indictment because they were barred by the applicable statute of limitations.

{¶43} Counts One and Two alleged that, between the years 1990 through 1993, appellant committed the offense of gross sexual imposition and the offense of the rape of a person under

thirteen years of age. Appellant asserts that the testimony at trial suggests that the sexual abuse was reported to the Marietta Police Department and "Juvenile Court" in 1992. Appellant was not indicted until December 10, 1999. Consequently, appellant claims that Counts One and Two of the indictment are precluded by the six year statute of limitations set forth in R.C. 2901.13(A)(1), as effective prior to July 1, 1996.

{¶44} Former R.C. 2901.13(A)(1) barred the prosecution of all felonies, except aggravated murder and murder, unless they were commenced within six years of the commission of the offense charged. R.C. 2901.13(F) provided, however, that the statute of limitations did not run "during any time that the corpus delicti remains undiscovered." Pursuant to *State v. Hensley* (1991), 59 Ohio St.3d 136, 139-140, the corpus delicti of a crime involving the sexual abuse of a child is discovered when a responsible adult, as listed in R.C. 2151.421, who has a legal duty to report the abuse has knowledge of the act and the criminal nature of the act. A responsible adult includes, among others, a licensed psychologist, a licensed school psychologist, a licensed professional counselor who is acting in his or her official or professional capacity, teachers, day care providers and health care professionals. R.C. 2151.421(A).

{¶45} In the present case, the testimony revealed that Michael Carpenter's girlfriend, who lived with appellant and his daughter for a short time in Marietta, learned from her daughter that Michael took the victim into the bedroom, locked the door and played "loud music." The girlfriend reported this behavior to the authorities. While the record is unclear, it appears that other reports were made, but were found unsubstantiated. The victim did testify that she was questioned by a juvenile judge on one occasion, but she admitted that she denied her father's sexual abuse because she was afraid of him and out of fear of being placed in a foster home. Based on the foregoing, we find that no responsible adult acquired the knowledge of the act and the criminal nature of the act

while acting in his or her professional capacity during the victim's minority. See *State v. Chojnacki* (Dec. 30, 1994), Medina App. No. 2326-M (Child and father denied "suspicions" sexual abuse reported to authorities by physician and nurse acting in their professional capacities). Thus, the corpus delicti of each offense alleged in Counts One and Two of the indictment was not discovered until the victim reported them to the Marietta police in November 1999. Therefore, appellant's Assignment of Error No. V is found not well-taken.

{¶46} Assignment of Error No. VII asks this court to consider whether the trial court erred in denying appellant's motion to suppress the items seized from appellant's residence. Appellant makes the conclusory statement that the affidavit in support of the issuance of the search warrant lacked sufficient probable cause and that the face of the affidavit and warrant show that the searching law enforcement officials failed to act in good faith. Appellant's only assertion supporting this conclusion is that the search warrant indicates that it was executed on November 7, 1999, but that it was signed by the judge on November 8, 1999. Appellant presumes, therefore, that the search was made in violation of the Fourth Amendment to the United States Constitution.

{¶47} There is no transcript of the hearing on the motion to suppress in the record of this case. Upon appeal of an adverse judgment, it is incumbent upon the party appealing the judgment to ensure that the record or whatever portions of the record are necessary for determination of the appeal are filed with the court in which review is sought. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17; App.R. 9(B) and 10(A). The duty of submitting the record falls upon an appellant because it is the appellant who bears the burden of showing error by references to matters in the record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. In the absence of a complete and adequate record, a reviewing court has nothing to pass upon and must presume the

regularity of the proceedings and the presence of sufficient evidence to support the trial court's decision. Id. Accordingly, we must find appellant's Assignment of Error No. VII not well-taken.

{¶48} In his Assignment of Error No. I, appellant contends that his convictions are against the manifest weight of the evidence. He focuses on the credibility of the victim.

{¶49} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶50} While appellant mentions the convictions for sexual offenses that happened after the victim was thirteen, he focuses on her uncorroborated testimony concerning Counts One and Two of the Indictment. Appellant maintains that the victim's testimony related to the charges of gross sexual imposition and the rape that transpired between the years of 1990 and 1993 is not credible. He further argues that her testimony concerning these, as well as the other alleged offenses, is "vague, uncertain, conflicting, fragmentary, and not fitting in a logical pattern."

{¶51} As applicable to the present case, gross sexual imposition is defined as sexual contact with another who is not the spouse of the offender and the victim is a person who is less than thirteen years of age. R.C. 2907.04(A)(4). "Sexual contact" is the touching of any erogenous zone of another, including the thigh, genitals, buttock, pubic region and, if a female, breasts for the purpose of sexually arousing or gratifying either person. R.C. 2907.01(B).

{¶52} "Rape," as charged in the present case, is sexual conduct with another who is not the spouse of the offender and the victim is less than thirteen years of age. R.C. 2907.02(A)(1)(b).

"Sexual conduct" means, among other things, vaginal intercourse, fellatio and cunnilingus and anal sex.

{¶53} Here, the victim testified that her father began touching her breasts, buttocks and vaginal area when she was nine. He quickly commenced to putting his penis in her mouth and licking her "everywhere." She clearly stated that these activities continued between the years of 1990 through 1993 and included the time when her father lived in Marietta. The victim also testified that her father had anal sex with her while living in Marietta, and during the same period engaged in vaginal intercourse with her. We find this testimony credible, sufficient evidence to support the jury's verdict of guilty on Counts One and Two of the indictment.

{¶54} With regard to the remaining charged offenses, we have examined the record of this case and find that both the testimony of the victim and the corroborating testimony of Mike Hanna who actually saw appellant whip/paddle his daughter and engage in various sexual conduct with her is sufficient to sustain a guilty verdict on all of the remaining ten counts. In short, the jury did not lose its way and create a manifest miscarriage of justice by convicting Michael Carpenter. Appellant's Assignment of Error No. I is found not well-taken.

{¶55} Assignment of Error No. II claims that prosecutorial misconduct occurred when the prosecutor brought in facts showing that the victim smoked marijuana and shared her employment earnings with her father, that Michael Hanna received a recommendation of probation by the prosecutor for the offenses arising from his participation/knowledge of Michael Carpenter's relationship with his minor child, that Carpenter was in a "sex club" and "promoted prostitution," that Carpenter was involved in drugs and was into pornography and sexual bondage, that a prior sexual complaint was filed in Marietta, Ohio concerning this matter, and that prosecutor requested and was allowed to cross-examine Carpenter concerning his prior conviction for extortion.

Appellant argues that this misled the jury into believing the prosecution had culpatory evidence of other crimes. In addition, appellant claims that the prosecutor, Mary Ann Barylski, committed prosecutorial misconduct when she asked Linda McClain, appellant's mother, her opinion as to the credibility of Barylski.

{¶56} Generally, the conduct of a prosecutor during trial is not a ground for reversal unless that conduct deprives the defendant of a fair trial. *State v. Martin* (1987), 21 Ohio St.3d 91, 95-96; *State v. Roughton* (1999), 132 Ohio App.3d 268, 286 (Citations omitted.). In determining whether reversal is justified, the prosecutorial misconduct, if any, must be viewed in light of the entire case, *State v. Maurer* (1984), 15 Ohio St.3d 239, 266, and there must be a showing of prejudice to the defendant, *State v. DePew* (1988), 38 Ohio St.3d 275, 284.

{¶57} We shall first address the admission of appellant's prior felony conviction into evidence. Pursuant to Evid.R. 609(A), prior convictions that are either felonies or those offenses involving dishonesty or false statement are admissible into evidence for the purpose of attacking the credibility of a defendant. Nevertheless, evidence of a prior conviction otherwise admissible under Evid.R. 609 is generally not admissible if a period of more than ten years has elapsed since the date of the conviction, release from confinement, termination of probation, shock probation, parole, or shock parole, whichever is the later date. Evid.R. 609(B). An exception to this limitation exists if the proponent provides sufficient advance written notice to the adverse party and the court determines that the probative value of the conviction substantially outweighs its prejudicial effect. Id.

{¶58} In this case, before Michael Carpenter testified in his own defense, the trial court asked whether he had a prior record. Even though appellant objected to the admission of the prior conviction, it was agreed that he was convicted of a felony, attempted extortion, in 1988 and

received a one year prison sentence. Nonetheless, the parties also agreed that the conviction was over ten years old. Despite this, the court, the prosecution and the defense concluded that if extortion was an offense involving dishonesty or a falsity, appellant's conviction was still admissible into evidence. The court determined that attempted extortion is a crime involving dishonesty, and therefore allowed the prosecution to impeach appellant's credibility by asking questions related to this conviction at trial. We find that this was error.

{¶59} Evid.R. 609(B) makes no distinction as to the applicability of the ten year time limitation to felonies and offenses involving dishonesty or false statement. The only exception is in a case where (1) there is written advance notice of the intent to use the conviction; and (2) the court determines that the probative value of the conviction outweighs its prejudicial impact. There was no written advance notice of intent to use appellant's prior conviction in this case. Moreover, the trial court did not balance its probative value against its prejudicial effect.

{¶60} Regardless, we conclude that the prosecutor's introduction of inadmissible evidence was not prosecutorial misconduct because it was harmless error. Crim.R. 52(A). First, the trial court provided an instruction stating that the evidence of the prior conviction could only be used to determine appellant's credibility and the weight to be accorded his testimony. The judge specifically cautioned the jury that this could not be used for any other purpose. Furthermore, error in the admission of evidence is harmless when there is no reasonable probability that the testimony contributed to the defendant's conviction, that is, where the error is harmless beyond a reasonable doubt. *State v. Lytle* (1976), 48 Ohio St.2d 391, 403. Error does not contribute to the defendant's conviction when the remaining, properly admitted evidence, standing alone, constitutes overwhelming proof of the defendant's guilt. *State v. Williams* (1983), 6 Ohio St.3d 281, 290. Here, the testimony of the victim, Mike Hanna, and the other evidence properly admitted at trial, standing

alone, proves appellant's guilt beyond a reasonable doubt. Therefore, the prosecutor's conduct in this instance was not prejudicial to Michael Carpenter.

{¶61} We now turn to the allegedly improper facts elicited by the prosecutor during the course of the trial. In the case under consideration, appellant failed to object to the alleged improprieties thereby waiving all but plain error. Crim.R. 52(B); *State v. Slagle* (1992), 65 Ohio St.3d 597, 604. We will not reverse for plain error unless the appellant established that the outcome of the trial clearly would have been different but for the alleged error. *State v. Waddell* (1996), 75 Ohio St.3d 163, 166.

{¶62} A review of the alleged improprieties as outlined above reveals that they do not rise to the level of plain error. Indeed, as noted in appellee's brief, appellant's trial strategy was to deny all allegations and present himself as a caring father who provided for his daughter and closely supervised her activities. Those facts brought out by the prosecutor during the course of the trial related to the presence of marijuana in the home and The victim's use of that substance, appellant's interest in pornography and incest, his sexual activities involving Mike Hanna and appellant's girlfriend, and the prior report of suspected sexual abuse all challenge the credibility of that defense. With regard to the plea agreement with Hanna, there is no suggestion in the record that the prosecution used this agreement to implicate appellant in the commission of other crimes. Rather, this fact was a tool used by the defense, as it is in many cases, to impeach the credibility of this witness. Moreover, even absent these facts, the overwhelming evidence of appellant's guilt was such that the outcome of the trial would have been the same.

{¶63} Finally, we turn to the allegation that the prosecutor committed prosecutorial misconduct by forcing McClain, appellant's mother, to opine that the prosecutor was lying about the sequence in which a telephone conversation between McClain and the prosecutor occurred.

Appellant cites to three cases holding that a prosecutor engages in misconduct when, in the cross-examination of a witness or defendant, she invades the province of the jury to determine credibility by asking that witness or defendant to provide an opinion of another witness's veracity. See *U.S. v. Richter* (C.A. 2, 1985), 826 F.2d 206; *Freeman v. United States* (D.C. App. 1985), 495 A.2d 1183; and *People v. Corners* (1980), 80 Ill. App.3d 166, 399 N.E.2d 166. Because in the instant case the opinion given did not concern a witness whose credibility must be determined by the trier of fact, *State v. DeHass* (1967), 10 Ohio St.2d 230, the argument raised and cited law are inapplicable to this cause. Thus, this final argument under this assignment is without merit, and appellant's Assignment of Error No. II is found not well-taken.

{¶64} Appellant's Assignment of Error No. III asserts that he was deprived of effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments, United States Constitution, and Section 10, Article I, Ohio Constitution.

{¶65} *Strickland v. Washington* (1984), 466 U.S. 668, provides a two part test for determining ineffective assistance of counsel claims. The criminal defendant must show that (1) counsel's performance was in fact deficient, *i.e.*, not reasonably competent, and (2) such deficiencies prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. at 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. To demonstrate prejudice, an appellant must show that, but for his trial counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. at 694,

{¶66} Michael Carpenter first asserts that trial counsel was deficient in his duty to his client because he failed to call as a witness the Washington County juvenile judge to whom the victim

admittedly lied. According to appellant, this witness could have corroborated his innocence and impeached the victim's testimony.

{¶67} "Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Treesh* (2001), 90 Ohio St.3d 460, 490, citing *State v. Williams* (1991), 74 Ohio App.3d 686, 695. Furthermore, appellant fails to show how this alleged deficiency prejudiced his cause. As stated previously, The victim acknowledged that she lied to the judge concerning the sexual abuse. Additionally, and to the extent that governmental failure to further investigate the reports of sexual abuse suggest appellant's "innocence," these facts were also fully revealed during the course of trial.

{¶68} Appellant next argues that trial counsel's performance was deficient because he allowed his client to testify at trial, thereby exposing him to attack by the prosecution regarding his prior felony conviction. The decision whether to call a defendant as a witness falls within the purview of trial tactics. *State v. Owens* (Jan. 24, 2001), Summit App. No. 19932. While the tactic in this case was not successful, appellant was apprised by the trial court concerning impeachment through the use of the prior felony and still opted to testify. Further, appellant again fails to show prejudice, that is, but for his testimony, there is a reasonable probability that the outcome would have been different. Accordingly, appellant's Assignment of Error No. III is found not well-taken.

{¶69} In his Assignment of Error No. VI, appellant contends that the trial court erred by allowing the prosecution to, without written advance notice, impeach his testimony through the use of a prior felony that was more than ten years old. We have already discussed and disposed of this question in our consideration of Assignment of Error No. II. Therefore, based on that disposition, Carpenter's Assignment of Error No. VI is found not well-taken.

{¶70} Assignment of Error No. VIII contests the trial court's imposition of maximum terms of imprisonment on all counts and consecutive terms of imprisonment on Counts One through Seven.

{¶71} Because appellant failed to include a transcript of the sentencing hearing, we have only the trial court's judgment entry on sentencing before us. Therefore, we are required to attempt resolve the issues raised solely from this document.

{¶72} Appellant first argues that even though the indictment charged him with a "variety of crimes," they are allied offenses of a similar import; therefore, the trial court "may" have erred by failing to order concurrent sentences.

{¶73} R.C. 2941.25 provides: "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." In *State v. Nicholas* (1993), 66 Ohio St.3d 431, 434, the Ohio Supreme Court set forth the following two-step analysis for the purpose of determining whether multiple crimes constitute allied offenses of similar import:

{¶74} "In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses." (Citations omitted.)

{¶75} The *Nicholas* court held that offenses involving distinct forms of sexual activity, specifically, vaginal intercourse, cunnilingus, and digital penetration, constituted a separate crime with a separate animus, and are not allied offenses of similar import. Id. at 435

{¶76} In this case, defendant was convicted of multiple crimes involving different acts of rape (vaginal intercourse, fellatio, cunnilingus, anal intercourse), of gross sexual imposition, and of sexual battery involving different sexual activities between a father and his child on several separate occasions over a period of years. Therefore, the trial court acted properly in not treating these offenses as allied offenses of similar import and in sentencing defendant on each guilty finding.

{¶77} The remainder of this assignment of error is devoted to the court's alleged failure to comply with sentencing guidelines found in R.C. Chapter 2929 in imposing maximum and consecutive sentences.

{¶78} Appellant first asserts that the trial court, at sentencing, failed to deal with the seriousness of the offense and the recidivism factors found in R.C. 2929.12(B) in deciding whether to impose a prison term. He further asserts that the trial court failed to provide the requisite findings and the reasons for those findings, either orally or in writing, for the imposition of maximum and consecutive sentences.

{¶79} Because appellant failed to provide this court with a transcript of the April 28, 2002 sentencing hearing, we cannot properly review the issues raised concerning the lower court's alleged lack of findings and justifications for those findings, on sentencing. We therefore must presume the validity of the sentencing proceedings. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d at 199. Accordingly, appellant's Assignment of Error No. VIII is found not well-taken.

{¶80} In Assignment of Error No. IX, Michael Carpenter urges that the trial judge erred in finding that he was a sexual predator. Appellant apparently contends that the likelihood that he would commit a sexual offense in the future was not demonstrated.

{¶81} A "sexual predator" is someone who has been convicted of a sexually oriented offense "and is likely to engage in the future in one or more sexually oriented offenses." R.C. 2950.01(E). A "sexually oriented offense" includes rape, sexual battery and gross sexual imposition. R.C. 2950.01(D)(1). Consequently, the trial court was required to determine appellant's classification pursuant to R.C. 2950.09(B)(1). Pursuant to this statute, a trial court may designate the offender as a predator, but it may do so only after holding a hearing where the prosecutor and offender have the opportunity to testify and to call and cross-examine witnesses. R.C. 2950.09(B)(1).

{¶82} R.C. 2950.09(B)(2) sets forth a non-exhaustive list of factors that, if relevant, the trial court must consider in determining whether someone is a sexual predator. The standard for determining whether an offender is a sexual predator is by clear and convincing evidence. R.C. 2950.09(B)(3); *State v. Cook* (1998), 83 Ohio St.3d 404, 423-424.

{¶83} In the present case, the trial court expressly states in its judgment entry on sentencing that a hearing was held at which the court took judicial notice of all of the evidence and testimony admitted at trial. The trial judge specifies that her decision is based upon clear and convincing evidence offered at that hearing and that findings supporting her conclusion that Carpenter is a sexual predator are on the record of that hearing. Again, however, appellant failed to provide this court with a transcript of the sexual predator hearing upon which we can conduct review of the issue raised. As a result we must affirm the trial court's judgment on this issue, and appellant's Assignment of Error No. IX is found not well-taken. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d at 199.

{¶84} The judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

Pietrykowski, P.J., and Glasser, J. concur.

Judge George M. Glasser, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.