**[Cite as *State v. Wagers*, 2010-Ohio-2311.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2009-06-018 |
| | : | O P I N I O N |
| - vs - | | 5/24/2010 |
| | : | |
| GENE WAGERS, JR., | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 09-CR-10247

Martin P. Votel, Preble County Prosecuting Attorney, Eric E. Marit, 101 East Main Street, Eaton, Ohio 45320, for plaintiff-appellee

Keith L. O'Korn, 440 Polaris Parkway, Suite 150, Westerville, Ohio 43082, for defendant-appellant

**POWELL, J.**

**{¶1}** Defendant-appellant, Gene Wagers, Jr., appeals his conviction and sentence from the Preble County Court of Common Pleas for multiple sexual offenses.

**{¶2}** During the period between June 12, 2001, and June 11, 2005, appellant sexually abused his biological daughter, J.W., who was six years old when the abuse began. The abuse ended when J.W. went to live with her aunt, Delora Mullins ("Aunt Dotty"), who

lived in Scioto County. After J.W. told Aunt Dotty about the abuse in July 2005, Aunt Dotty contacted Scioto County Children's Services, and children's services notified the Preble County Sheriff's Office of the abuse. The sheriff's office, however, did not investigate the case until November 2008.

**{¶3}** On March 2, 2009, appellant was indicted on four counts of rape, pursuant to R.C. 2907.02(A)(1)(b), one count of rape, pursuant to R.C. 2907.02(A)(2), four counts of sexual battery, pursuant to R.C. 2907.03(A)(5), and one count of disseminating harmful material to juveniles pursuant to R.C. 2907.31(A)(3). The first nine counts in the indictment also contained a sexually violent predator (SVP) specification.

**{¶4}** Following a trial, a Preble County jury found appellant guilty on all counts in the indictment. Additionally, the jury made the finding that J.W. was under the age of ten at the time the offenses occurred. Finally, the jury convicted appellant on all SVP specifications contained in the indictment. At the sentencing hearing, the trial court merged the sexual battery and rape counts and sentenced appellant to five concurrent terms of life imprisonment without parole. The court also sentenced appellant to 18 months in prison for the disseminating harmful materials conviction and classified him as a tier III sex offender under Ohio's Adam Walsh Act. From his conviction and sentence, appellant timely appeals, asserting eight assignments of error.

**{¶5}** Assignment of Error No. 1:

**{¶6}** "APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION BY STRUCTURAL AND CONSTITUTIONAL ERROR THAT OCCURRED WHEN HE WAS CONVICTED UPON AN INSUFFICIENT AND DEFECTIVE INDICTMENT THAT INCLUDED CARBON COPY COUNTS WITH FOUR YEAR OFFENSE DATE RANGES, IMPROPER SEXUALLY

VIOLENT PREDATOR SPECIFICATIONS AND NO SPECIFIC UNDER 10-YEAR OLD [sic] VICTIM OFFENDER SPECIFICATIONS. THE INDICTMENT ALSO VIOLATED R.C. §2971.01 AS IT EXISTED DURING THE ALLEGED OFFENSE RANGE."

**{¶7}** Appellant argues the indictment was defective, and because of the alleged deficiencies, he was denied due process and a fair trial. The record reflects, however, that appellant failed to challenge the sufficiency of this indictment at any time before or during his trial. Where a defendant fails to object to the form of the indictment prior to trial, as required by Crim.R. 12(C), he waives all but plain error. *State v. Carnes*, Brown App. No. CA2005-01-001, 2006-Ohio-2134, ¶21; *State v. Persinger*, Morrow App. No. 08-CA-14, 2009-Ohio-5849, ¶21.

**{¶8}** Crim.R. 52 governs harmless and plain error, stating that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Ohio law recognizes that plain error does not exist unless, but for the error, the outcome of the trial would have been different. *State v. Cox*, Butler App. No. CA2005-12-513, 2006-Ohio-6075, at ¶21, citing *State v. Haney,* Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶50. Further, "notice of plain error is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id.

**{¶9}** For ease of discussion, we will separately address each of appellant's issues regarding the indictment.

*"Carbon copy" indictment*

**{¶10}** Appellant first argues the indictment was defective because it contained five carbon copy rape counts and four carbon copy sexual battery counts that alleged sexual abuse upon J.W. during a four-year time period ranging from June 12, 2001 – June 11, 2005. Appellant asserts the carbon copy counts violated his due process rights, as he was not

effectively put on notice of and could not defend against the individual charges against him.

**{¶11}** In general, an indictment is constitutionally adequate if it (1) "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend," and (2) "enables him to plea an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States* (1974), 418 U.S. 87, 117, 94 S.Ct. 2887. "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'" Id., quoting *United States v. Carll* (1882), 105 U.S. 611, 612.

**{¶12}** Appellant relies upon *Valentine v. Konteh* (C.A.6, 2005), 395 F.3d 626, to support his argument that his constitutional due process rights were violated when he was convicted of five counts of rape and four counts of sexual battery. In *Valentine*, the defendant was convicted of 20 counts of rape of a child and 20 counts of felonious sexual penetration, and the counts of each crime were identically worded. The appellate court ruled that the identical indictments violated the Constitution because there were no distinctions made at any time before or during trial to differentiate one incident of sexual abuse from another in order to match each charge with a specific incident. The failure to do this violated the ordinary rules of notice, jury unanimity, double jeopardy, and sufficiency of the evidence. The court also noted that the prosecution could cure such identical indictments by delineating the factual bases for each count either before or during the trial, so that the judge, defendant, and jury could distinguish one count from another.

**{¶13}** In the case at bar, the indictment contained five counts of rape, identically worded to one another, and four counts of sexual battery, also identically worded. Prior to and during trial, however, the state adequately differentiated between the counts of rape and sexual battery that involved J.W. such that appellant's due process rights were not violated.

**{¶14}** Appellant requested a bill of particulars, which the state filed with the court on March 11, 2009. The bill of particulars contained a detailed basis for each of the counts contained in the indictment. Furthermore, the state provided appellant with discovery containing the taped forensic/medical interview with J.W., wherein she discussed the offenses described in the bill of particulars. Finally, J.W. testified at trial where she clearly described each incident as set forth in the bill of particulars.

**{¶15}** If, as alleged, the bill of particulars was insufficient to clarify the indictment, appellant could have requested amendment by the state. His failure to do so precludes him from establishing prejudice. *State v. Bennett*, Brown App. No. CA2004-09-028, 2005-Ohio-5898, ¶34 (reversed on other grounds). Thus, appellant's constitutional right to due process was not violated. See *State v. Bell*, 176 Ohio App.3d 378, 2008-Ohio-2578, ¶106-111; *State v. Rice*, Cuyahoga App. No. 82547, 2005-Ohio-3393, ¶24; *State v. Kring*, Franklin App. No. 07AP-610, 2008-Ohio-3290, ¶52;

*Time of the alleged offenses*

**{¶16}** Appellant also argues for the first time on appeal that the indictment was defective because it did not "sufficiently specify the time of the alleged offenses."

**{¶17}** Specificity as to the time and date of an offense is ordinarily not required in an indictment. *State v. Collinsworth*, Brown App. No. CA2003-10-012, 2004-Ohio-5902, ¶22, citing *State v. Sellards* (1985), 17 Ohio St.3d 169, 171. See, also, *Tesca v. State* (1923), 108 Ohio St. 287 (holding exact date and time are immaterial unless exactness of time is an essential element of offense). An indictment is sufficient if it states that the offense occurred at some time prior to the filing of the indictment. R.C. 2941.03; *Sellards* at ¶171.

**{¶18}** In addition, where the crimes alleged in the indictment constitute sexual offenses against children, indictments need not state with specificity the dates of alleged abuse, so long as the state establishes that the offense was committed within the time frame

alleged. *Persinger* at ¶31 (citations omitted). Not only are the specific dates and times not elements of these crimes, but the exact times and dates of the alleged offenses cannot always be determined, as many child victims are unable to remember exact dates over extended periods of time. Id.; *Bennett* at ¶31.

**{¶19}** We recognize that an exception to this general rule exists when the failure to allege a specific date results in material detriment to a defendant's ability to fairly defend himself, as would be the case where an accused asserts an alibi. *State v. Mundy* (1994), 99 Ohio App.3d 275; *Bell* at ¶96.

**{¶20}** In the case at bar, however, appellant does not assert an alibi, instead claiming that such abuse never occurred. Because the dates and times are not essential elements of the charging statutes as provided in the indictment, and because the failure to allege specific dates did not prejudice appellant's ability to defend himself, appellant's argument is without merit. See *Collinsworth* at ¶22; *Persinger* at ¶34; *Bell* at ¶98-99; *Carnes* at ¶24.

*"10-year-old victim specification"*

**{¶21}** Appellant next argues that the indictment was defective because it "did not contain a specific ten-year old [sic] victim specification, which can lead to the imposition of a sentence of life imprisonment without parole pursuant to R.C. 2971.03(A)(2)." Notably, appellant fails to cite to any case law or statute for the proposition that the state must include a specification in the indictment providing the victim is under ten years of age. App.R. 16(A)(7).

**{¶22}** If a person is found guilty of R.C. 2907.02(A)(1)(b), i.e. that he has engaged in sexual conduct with a person under 13 years of age, then he is guilty of a first-degree felony. Under R.C. 2907.02(B), the penalty from the finding of guilt is raised to a mandatory life sentence if either the offender used force or threats of force, or if the victim was under ten years of age. Thus, the fact that the victim was under ten years of age is not required to

prove guilt under R.C. 2907.02(A)(1)(b); it is only a finding that would enhance the penalty thereof. A fact or specification that does not elevate the degree of a crime but merely enhances the penalty is not required to be included in the indictment. See *State v. Allen* (1987), 29 Ohio St.3d 53; *State v. Fairbanks*, 172 Ohio App.3d 766, 2007-Ohio-4117, ¶21; *State v. Baer*, Harrison App. No. 07 HA 8, 2009-Ohio-3248.

**{¶23}** As discussed below, an offender cannot be specified as a sexually violent predator unless the SVP specification is charged in the indictment or count in the indictment. R.C. 2941.148. In fact, the Revised Code precludes the application of all the specifications contained in R.C. 2941.14 through 2941.1416, unless these specifications are properly included in an indictment. The General Assembly did not include such a mandate in R.C. 2907.02(B). The legislature is presumed to have considered and included all of the situations in which a specification is required to be charged in the indictment. See *State v. David* (1988), 38 Ohio St.3d 361, 374, citing *State v. Penix* (1987), 32 Ohio St.3d 369, 376 (Holmes, J., dissenting). Thus, under the doctrine inclusio unius est exclusio alterius, we will not apply such a requirement to this penalty enhancement for a victim who was under ten years of age, as provided in R.C. 2907.02(B).

**{¶24}** Moreover, the indictment contained the range of dates of the offenses and the victim's date of birth, and therefore put appellant on notice that the victim was under the age of ten. Accordingly, appellant's argument is wholly without merit.

*Sexually Violent Predator ("SVP") specifications*

**{¶25}** Appellant also argues the indictment should not have contained any SVP specifications under R.C. 2941.148 and R.C. 2971.01(H)(1) because "these statutes existed up to April 29, 2005, which is at the end of the offense date range in the indictment." Appellant also asserts the state and the trial court were "under the mistaken impression that the current version of these statutes should apply to [appellant's] case."

**{¶26}** It has long been recognized that "any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with the crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto." *Dobbert v. Florida* (1977), 432 U.S. 282, 292, 97 S.Ct. 2290. Likewise, a statute that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past" violates the Ohio Constitution's ban on retroactive laws. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 106 (reversed on other grounds); *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, ¶10.

**{¶27}** An SVP specification must be charged in an "indictment, count in the indictment, or information charging the sexually violent offense or charging the designated homicide, assault, or kidnapping offense." R.C. 2941.148(A).

**{¶28}** Prior to April 29, 2005, R.C. 2971(H)(1), defined a sexually violent predator as "a person who *has been convicted of* or *pleaded guilty to* committing, on or after January 1, 1997, a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses." (Emphasis added.)

**{¶29}** In *State v. Smith,* 104 Ohio St.3d 106, 2004-Ohio-6238, the Ohio Supreme Court considered the definition in the context of an offender whose prior convictions were committed prior to January 1, 1997, but whose indictment contained an SVP specification based on the conduct in the underlying offense contained in the same indictment. The court held that a "conviction of a sexually violent offense cannot support the specification that the offender is a sexually violent predator as defined in R.C. 2971.01(H)(1) if the conduct leading to the conviction and the sexually-violent-predator specification are charged in the same indictment." Id. at syllabus. The court also noted that had the General Assembly intended

that a conviction on a sexually violent offense to be sufficient to prove an SVP alleged in the same indictment, it would have used language like "a sexually violent predator is a person who *'committed'* a sexually violent offense." Id. at ¶27. (Emphasis in original.)

**{¶30}** Four months after the court's holding in *Smith*, the legislature amended the statute, effective April 29, 2005. R.C. 2971.01(H)(1) now states that a "[s]exually violent predator" is "a person who, on or after January 1, 1997, *commits* a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses." (Emphasis added.) Notably, in the opening paragraph of the statutory changes in H.B. 473, the legislature stated that the purpose of the change to R.C. 2971.01(H)(1) was "to clarify that the Sexually Violent Predator Sentencing Law does not require that an offender have a prior conviction of a sexually violent offense in order to be sentenced under that law." 2004 Ohio Laws File 163 (Am. Sub. H.B. 473).

**{¶31}** The Ninth District compared the versions of the statute pre- and post-*Smith* and found that under the current version, a person need only have committed a sexually violent offense after January 1, 1997, and such finding can be made based on the conviction(s) of the underlying offense(s) contained in the indictment. *State v. Hardges*, Summit App. No. 24175, 2008-Ohio-5567.

**{¶32}** As stated, appellant was charged with offenses that occurred between June 12, 2001, and June 11, 2005. Appellant has no prior convictions for sexually violent offenses, aside from his convictions in the case at bar. Therefore, under the previous version of the statute, the specifications would have been improperly included in the indictment. Under the current version of R.C. 2971.01(H)(1), however, the SVP specifications would have been properly included, and a determination by the court or jury would mandate a term of life imprisonment without parole. R.C. 2971.03.

**{¶33}** The record in this case provides evidence that appellant did commit a sexually

violent offense after the April 29, 2005 effective date of the amended statute. Thus, the application of the current version of the statute would not violate the constitutional ban on ex post facto laws.

**{¶34}** Stephanie Eichorn, appellant's ex-wife and J.W.'s mother, testified that the family moved to 53 North Main Street, Camden, Ohio, sometime in 2004, when J.W. was nine years old. J.W. lived at that house until she went to live with her aunt on May 19, 2005. During the interview with a social worker at Nationwide Children's Hospital in Columbus, Ohio, J.W. stated that appellant sexually abused her every other day while living at 53 North Main. Although this evidence lacks specific dates, it stands to reason that appellant committed a sexually violent offense against his biological daughter after April 29, 2005.

**{¶35}** Moreover, appellant was on notice that the current version of the statute applies to his case. A main purpose of the Ex Post Facto Clause is to give a defendant fair notice that such punishment is possible under the law. *Carmell v. Texas* (2000), 529 U.S. 513, 120 S.Ct. 1620. The indictment in this case provided appellant with notice that his conduct is subject to the revised version of R.C. 2971.01, as the stated offense range ended June 11, 2005. In addition, the bill of particulars included the evidence from J.W.'s interview that indicated the sexual abuse took place every other day at the house on 53 North Main Street. Accordingly, we find appellant's argument unpersuasive.

**{¶36}** Assignment of Error No. 2:

**{¶37}** "APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL UNDER ARTICLE I, SECTIONS 5 AND 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION BY STRUCTURAL AND CONSTITUTIONAL ERROR THAT OCCURRED WHEN HE WAS TRIED SIMULTANEOUSLY ON SEX OFFENSES AND ON SEXUALLY VIOLENT PREDATOR SPECIFICATIONS. THE COURT ALSO VIOLATED R.C. §2971.02."

**{¶38}** Appellant argues in his second assignment of error that the trial court erred in failing to bifurcate the SVP specifications and the findings of guilt.

**{¶39}** R.C. 2971.02 sets forth the proper procedure in determining whether an individual is a sexually violent predator. Pursuant to R.C. 2971.02, "[i]f the defendant does not elect to have the court determine the specification, the defendant shall be tried before the jury on the charge of the offense, and following a verdict of guilty on the charge of the offense, the defendant shall be tried before the jury on the sexually violent predator specification."

**{¶40}** As the state concedes, the trial court erred in failing to bifurcate the guilt and specification phases of the trial. *State v. Bruce*, Cuyahoga App. No. 92016, 2009-Ohio-6214. Appellant, however, failed to raise the issue at trial, and has again waived all but plain error. See id.

**{¶41}** Appellant contends that the failure to bifurcate the guilt and specification phases resulted in structural error. He argues that "[i]n making a simultaneous SVP specification finding, the jury was asked to consider whether [appellant] was likely to commit future violent sex offenses and the consequences of a conviction. [Citation omitted.] Conglomerating the jury's determination of guilt as to the offense with the [SVP] specification improperly allowed the jury to consider future crimes that could occur if they did not convict [appellant]. This dual, simultaneous role tainted the jury and violated [appellant's] rights to an impartial jury, fair trial and due process, and prejudiced him to such a degree to mandate a new trial as structural error."

**{¶42}** A review of the record reveals that the trial court, on numerous occasions, made it clear to the jury that it was to consider the SVP specification only if, and subsequent to, a finding of guilt on the underlying offense. A jury is presumed to follow the instructions given to it by a judge. *Parker v. Randolph* (1979), 442 U.S. 62, 99 S.Ct. 2132 (reversed on

other grounds); *State v. Henderson* (1988), 39 Ohio St.3d 24, 33 (reversed on other grounds). There is no evidence indicating that the jury disregarded the trial court's charge and made a simultaneous finding as appellant suggests.

**{¶43}** Furthermore, based on the overwhelming evidence in support of the jury's verdict, as thoroughly discussed in appellant's fifth assignment of error, the error was harmless in this case. See *Bruce* at ¶69; *State v. Clark*, Mahoning App. No. 04 MA 246, 2007-Ohio-1114, at ¶109. We therefore overrule appellant's second assignment of error.

**{¶44}** Assignment of Error No. 3:

**{¶45}** "THE TRIAL COURT ERRED IN ADMITTING AND PLAYING THE INTERVIEW OF THE ALLEGED VICTIM WITH THE CHILD ASSESSMENT CENTER AND ADMITTING THE CHILD ASSESSMENT CENTER REPORT IN VIOLATION OF THE OHIO RULES OF EVIDENCE RELATING TO AUTHENTICATION AND HEARSAY AND THE CONFRONTATION CLAUSES OF THE OHIO AND FEDERAL CONSTITUTIONS."

**{¶46}** In his third assignment of error, appellant argues the trial court erred in admitting the written report and DVD of a social worker's interview of J.W. at the Center for Child and Family Advocacy (CCFA), a child advocacy unit within Nationwide Children's Hospital in Columbus, Ohio that specializes in diagnosing, treating, and caring for abused children. Appellant contends the recorded interview was not properly authenticated by Dr. McPherson, the physician who examined J.W. at Children's Hospital, and the statements contained in the records were not made for the purpose of medical diagnosis or treatment as an exception to the hearsay rule. Finally, appellant contends the admission of the out-of-court statements made by J.W. during her interview constituted a violation of the Confrontation Clause of the Ohio and United States Constitutions.

**{¶47}** The admissibility of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. Absent

an abuse of discretion, an appellate court will not disturb a trial court's ruling as to the admissibility of evidence. *State v. Martin* (1985), 19 Ohio St.3d 122, 129. Given the nature of appellant's arguments, we will separately address each of his issues with the admissibility of this evidence.

*Evid.R. 901*

**{¶48}** First, appellant argues the written report and DVD of J.W.'s interview with the CCFA was inadmissible at trial because it was not properly authenticated pursuant to Evid.R. 901. We note that appellant did not raise this objection at trial. Evid.R. 103(A)(1) requires that a party must timely object and state the specific ground of objection. In this case, it is clear that counsel for appellant objected to the written report and recording of the interview because they constituted inadmissible hearsay and because they violated the Confrontation Clause. Counsel, however, failed to object after the testimony of Dr. McPherson, who authenticated the records and DVD at trial, on the basis that such authentication was insufficient. Therefore, as to this issue, appellant has waived all but plain error. Evid.R.103(A), (D); Crim.R. 52(D).

**{¶49}** Evid.R. 901 requires the authentication of evidence and states that "testimony that a matter is what it is claimed to be" is sufficient to authenticate it. Evid.R. 901(B)(1). In this case, the testimony of Dr. McPherson was sufficient to authenticate the evidence. The evidence contained Dr. McPherson's electronic signature and stated that he observed the interview and completed a physical evaluation of J.W. At trial he testified that he has evaluated over 1,400 children who have alleged sexual abuse, and for that reason, he did not specifically remember evaluating J.W. in 2006. He did, however, state that the written record of the interview and the DVD were included in J.W.'s medical records, which were attached to a letter of certification signed by the custodian of records for Children's Hospital. The written record of the interview and the DVD both contained J.W.'s patient identification

number that matched the medical records. Dr. McPherson also testified that he reviewed the written record of the interview and the DVD and that both contained identical information. Accordingly, there was no error, plain or otherwise, in the authentication of the medical records, which contained the written record and DVD recording of the interview with J.W.

*Evid.R. 803(4)*

**{¶50}** Appellant also argues the statements contained in the written report and DVD of the interview made by J.W. to the social worker were not made for the purpose of medical diagnosis or treatment to qualify as a hearsay exception under Evid.R. 803(4). Appellant asserts that J.W. did not go to the CCFA with the motivation to seek diagnosis or treatment, but was simply directed there by her aunt.

**{¶51}** Pursuant to Evid.R. 802, hearsay is not admissible unless the statement comes under some exception to the hearsay rule. Evid.R. 803(4) allows, as an exception to the hearsay rule, the admission of statements made in order to further medical treatment or diagnosis. The rule provides that the following are not excluded by the hearsay rule: "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." A fundamental assumption underlying the medical-treatment exception is that this particular hearsay is reliable. *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, ¶39.

**{¶52}** A child's statements made to a social worker and other medical personnel regarding the sexual abuse he or she experienced are admissible under the Evid.R. 803(4) exception when made for the purposes of medical diagnosis and treatment. *Muttart*, at paragraph one of the syllabus; *State v. Alkire*, Madison App. No. CA2008-09-023, 2009-Ohio-2813, ¶38; *State v. Walker*, Hamilton App. No. C-060910, 2007-Ohio-6337, ¶39.

**{¶53}** Although appellant argues that J.W.'s statements are unreliable because she

lacked the motivation to seek medical treatment, but was instead directed to the center by her aunt, the Ohio Supreme Court has found this argument unconvincing. In *State v. Dever*, 64 Ohio St.3d 401, 1992-Ohio-41, the court found that under Evid.R. 803(4), statements made by a child who was directed to treatment by an adult are not necessarily untrustworthy for that reason alone. Id. at 409-410. "Once the child is at the doctor's office, the probability of understanding the significance of the visit and the motivation for diagnosis and treatment will normally be present." Id. at 410. Furthermore, Evid.R. 803(4) allows the admission of hearsay statements made for the purpose of *diagnosis*, and therefore, such statements fall under the exception if they are "reasonably relied on by a physician in treatment or diagnosis." Id. at 444-445 (emphasis in original). After an examination of the surrounding circumstances casts little doubt on the motivation of the child, it is permissible to assume the factors underlying Evid.R. 803(4) are present. Id. at 412.

**{¶54}** In *Muttart*, the Ohio Supreme Court considered various factors when determining the purpose of the child's statements in this context. These factors included: (1) whether the child was questioned in a leading or suggestive manner; (2) whether there is a motive to fabricate, such as a pending legal proceeding or "bitter custody battle;" (3) whether the child understood the need to tell the physician the truth; (4) whether the age of the particular child making the statements suggests the absence or presence of an ability to fabricate; and (5) whether the child was consistent in her declarations. Id. at ¶49 (citations omitted); *Alkire* at ¶38.

**{¶55}** In this case, we have examined the surrounding circumstances and considered the factors discussed above. There is nothing in the record to cast doubt on J.W.'s motivation in giving those statements to the social worker during her interview. The questions asked by the trained social worker were in no way leading or suggestive, the record indicates absolutely no motive to fabricate the story, J.W. appeared to understand the

need to tell the truth and was consistent in her declarations. Moreover, J.W. testified in court, and appellant had the opportunity to cross-examine her during the trial. *Walker* at ¶34.

**{¶56}** Appellant also asserts that the state failed to establish the statements were made for purposes of medical diagnosis and treatment. As Dr. McPherson testified, the interview done at a respected facility like the CCFA was conducted for the purposes of diagnosing sexual abuse in a child and treating the child in terms of both their physical and mental health. See *Alkire* at ¶39; *State v. Jordan*, Franklin App. No. 06AP-96, 2006-Ohio-6224, ¶20.

**{¶57}** Accordingly, the trial court did not abuse its discretion in admitting the statements contained in the written record and DVD of J.W.'s interview with the social worker at the CCFA as a hearsay exception pursuant to Evid.R. 803(4).

*Confrontation Clause*

**{¶58}** Appellant also argues the trial court erred in admitting the statements made by J.W. during her interview because the admission of the evidence violated his constitutional right to confront J.W.

**{¶59}** Pursuant to *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, regardless of its admissibility under the rules of evidence, a testimonial, out-of-court statement offered against an accused to establish the truth of the matter asserted may only be admitted where the declarant is unavailable and where the accused has a prior opportunity to cross-examine the witness. *Crawford* further states that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." Id. at 59, fn. 9 (citation omitted). See, also, *Jordan* at ¶24.

**{¶60}** Although appellant ultimately chose not to fully cross-examine J.W. at trial on the subject of these prior, out-of-court statements to the social worker, J.W. did testify, and

appellant had the opportunity for cross-examination. Id. at ¶25. Therefore, the statements were not admitted in violation of the Confrontation Clause. Id.

**{¶61}** Moreover, even if appellant had not had the opportunity to confront and cross-examine J.W. about the out-of-court statements, this court has held that the admittance of the hearsay statements do not violate a defendant's right to confront his accusers. *Alkire* at ¶43. The statements at issue were not testimonial, as they were not made in the context of in-court testimony, nor were they elicited as part of the police investigation or in a sworn statement with the intention of preserving the statements for trial. *Muttart* at ¶61. As the Ohio Supreme Court held in *Muttart*, "statements made to medical personnel for purposes of diagnosis and treatment are not inadmissible under *Crawford*, because they are not even remotely related to the evils that the Confrontation Clause was designed to avoid." Id. at ¶63. Therefore, appellant's argument is wholly without merit, and his third assignment is overruled.

**{¶62}** Assignment of Error No. 4:

**{¶63}** "THE COURT ABUSED ITS DISCRETION AND ERRED WHEN IT REFUSED TO GRANT A MISTRIAL AFTER THE STATE'S WITNESSES REPEATEDLY TESTIFIED THAT APPELLANT HAD PREVIOUSLY BEEN IN JAIL AND COMMITTED ILLEGAL ACTIVITIES IN VIOLATION OF OHIO EVIDENCE RULES 404, 608 AND 609 AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION."

**{¶64}** Appellant argues the trial court erred when it refused to grant a mistrial after two witnesses, J.W. and her mother, Ms. Eichorn, testified that appellant was in jail and that he engaged in illegal activity. The record indicates, however, that appellant's request for a mistrial during the trial was based solely on the two references made to appellant being in jail. Therefore, to the extent that appellant is arguing that Ms. Eichorn's testimony stating that he engaged in illegal activity warrants a mistrial, he has waived all but plain error. See

Crim.R. 52.

**{¶65}** The decision to grant or deny a mistrial rests within the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173, 349-350. The trial court enjoys broad discretion in admitting or excluding evidence. Id. at 350. An appellate court will not disturb the exercise of that discretion absent a showing that the accused has suffered material prejudice. Id.; *State v. Thornton*, Clermont App. No. CA2008-10-092, 2009-Ohio-3685, ¶11.

**{¶66}** Although appellant argues that he was denied the right to remain silent and the right to a fair trial, he makes no showing as to how he has suffered material prejudice as a result of the testimony. The trial court recognized that both statements violated the order in limine, which stated that all witnesses should refrain from mentioning that appellant was in prison and that if either side intended to offer the evidence, a bench conference would be held and a ruling made concerning the proposed evidence. As the trial court indicated, however, and the record reveals, the statements by J.W. and her mother stating that appellant was in jail were inadvertent and insignificant. Both witnesses "blurted out" the statements, and there were no prior opportunities for a bench conference.

**{¶67}** Moreover, the trial court offered appellant a limiting instruction to presumably cure the defect. Trial counsel for appellant opted not to accept the instruction, as he chose not to highlight the issue. A curative instruction is an appropriate remedy, rather than a mistrial, for inadvertent answers given by a witness to an otherwise innocent question. *State v. Mobley*, Montgomery App. No. 18878, 2002-Ohio-1792, 2002 WL 506626, at *2. See, also, *Thornton* at ¶13. Accordingly, we find the trial court did not abuse its discretion in denying a request for a mistrial.

**{¶68}** In addition, we find no error, plain or otherwise, in the refusing to grant a mistrial based on Ms. Eichorn's two statements that appellant engaged in illegal activity. Trial counsel for appellant objected to both questions by the state and answers given by Ms.

Eichorn. The trial court sustained such objections and later gave the jury instructions to disregard any stricken answers and questions that were sustained. Further, a jury is presumed to follow curative instructions given by the trial court, and therefore, a trial court sustaining an objection and giving a curative instruction has been held to be enough to cure the taint from an improper statement. *State v. Garner*, 74 Ohio St.3d 49, 59, 1995-Ohio-168; *Mobley* at *2. Therefore, appellant's fourth assignment of error is without merit.

**{¶69}** Assignment of Error No. 5:

**{¶70}** "APPELLANT'S CONVICTIONS WERE BOTH AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WERE NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1, 10 & 16 OF THE OHIO CONSTITUTION."

**{¶71}** Next, appellant argues his convictions were against the manifest weight of the evidence and were not supported by sufficient evidence. Whether the evidence presented is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. An appellate court, in reviewing the sufficiency of the evidence supporting a criminal conviction, examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Carroll,* Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶117. After examining the evidence in a light most favorable to the prosecution, the appellate court must determine if "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id.

**{¶72}** Unlike a sufficiency of the evidence challenge, a manifest weight challenge concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other. *Carroll* at ¶118. An appellate court

considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses. *State v. Good,* Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25, citing *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶39. Under a manifest weight challenge, the question is whether, in resolving conflicts in the evidence the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *Good* at ¶25.

**{¶73}** Appellant first argues the evidence was insufficient to support the SVP specifications. We have previously addressed and resolved this issue in appellant's first and second assignments of error.

**{¶74}** Next, appellant argues there was insufficient evidence of "sexual conduct" to support convictions of rape and sexual battery, pursuant to R.C. 2907.01. Specifically, appellant argues the testimony of J.W., wherein she described that appellant stuck "his dick in her butt" and "put his hands in her crotch," were not sufficient. R.C. 2907.01(A) defines "sexual conduct" as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." Appellant cites no authority for his proposition, and it is unclear as to why appellant argues the above two acts, as described by J.W., who testified as a 13-year-old and who was between the ages of six and ten when the acts occurred, do not constitute the insertion, however slight of any part of the body into the vaginal or anal cavity of another. Appellant's assertion is wholly without merit.

**{¶75}** Appellant also claims his convictions were against the manifest weight of the evidence because the only evidence that supported the verdict were J.W.'s allegations of

abuse that occurred several years prior to her testimony. Appellant contends that the remainder of the testimony "supported the defense."

**{¶76}** At trial, J.W. testified that she was six years old and living in a house at 47½ North Main Street in Camden, Ohio, when appellant, her biological father, first sexually abused her. She stated that appellant told her brother to go take a bath and "not come out until he told him to." Then, appellant took J.W. into his bedroom and "stuck his dick in [J.W.'s] butt." J.W. was on her stomach when it happened. Appellant stopped when someone knocked on the front door or rang the doorbell. J.W. testified that her mother was in the hospital "getting ready to have [her sister]." She also testified that she felt a lot of pain from "her butt" after the incident. J.W. stated that this was the only time she remembered being abused in that house.

**{¶77}** J.W. then testified that while she was living in a trailer with her family, she fell out of her bed once and her nose started bleeding. Appellant kept her home from school that day, and took her in his bedroom, laid her on the bed, and "stuck his finger in her crotch." She remembers being eight years old at the time because she was in the second grade. Her mom was at work at the time. She remembered feeling a lot of pain, that his fingers were pushing, and that it was not the first time it had happened. She testified that she bled afterwards and went to the bathroom and wiped away the blood.

**{¶78}** J.W. also remembered the day before her birthday, when her mom was out shopping and her brother and sister were in bed, appellant was laying on the couch and told her to "come in there and put a cover up." He then "stuck his dick in [her] butt." She said she felt a lot of pain, and afterward, she "went to [her] bedroom and got a new pair of underwear" because "there was white stuff in [her] panties." J.W. stated that she did not remember any other incident in that house.

**{¶79}** J.W. then testified about events that occurred while she and her family were

living at 53 North Main Street in Camden, Ohio, a house located across from the police station. She testified that she was sleeping upstairs in her brother's room, and appellant "came upstairs with baby oil and a rag." She stated that her father put baby oil on the rag and "rubbed it on [her] crotch." When asked to clarify, she stated that her "crotch" is her "vagina." She testified that appellant then "tried to stick his dick in [her] crotch." She stated that "it was painful, and it wouldn't fit." She knew it was his "dick" because "it was bigger. It was big and his fingers weren't." She said appellant "tried to shove it in," but "it wouldn't fit, so he went back downstairs." J.W. then had to "clean up" her "privates" because "there was white stuff on [her]."

**{¶80}** She recalled another time she was abused while living at 53 North Main. She was watching "Malcom in the Middle" on television with her family when appellant told her to "get him a pop." When her little sister ran in and got it instead, appellant said J.W. was in trouble. He took her into the bedroom and he told her to "get down on [her] knees." He made her "suck his dick," and he "stuck his fingers in [her] crotch." She was "moving [her] mouth up and down" – the way appellant told her to do it – while he "had his hand down there." She also testified that she was made to "suck his dick" every other time he "made [her] have sex with him." By "sex," she meant "every time he put his dick in my butt." She testified that nothing happened this particular time, as opposed to other occasions, where "white stuff" went "into [her] mouth." Also, at this same location, appellant told J.W. to "keep this our little secret."

**{¶81}** J.W. also remembered a time when appellant made her watch a "bad movie" with him in the living room while her mother was sleeping. She testified that she watched appellant's two friends having sex, and while watching the movie, appellant made her "suck his dick." She remembered it being dark outside.

**{¶82}** J.W. testified that she remembered her dad using a vibrator on her – he "put it

on [her] crotch," but "he didn't put it in."

**{¶83}** Also while living at 53 North Main, appellant touched her "crotch area" with "his tongue." J.W. testified that it was "wet" and "he just licked." She recalled that this incident happened in appellant's bedroom and she was nine years old.

**{¶84}** J.W. testified that she started her menstrual cycle when she was in the fifth grade – during class – but told her mother once that she started her period when she was nine, following an incident with appellant, who made her bleed "for a week." J.W. testified that her mother wanted J.W. to "pee in a cup for her," and J.W. had to tell her mother that she was bleeding. She then recalled the incident that caused the bleeding, wherein appellant took her into his bedroom, laid her on the bed, and "stuck his dick in [her] crotch."

**{¶85}** J.W. testified that she went to live with her aunt "when she was almost ten." Shortly thereafter, her aunt "kind of tricked [J.W.] into telling her" about the sexual abuse.

**{¶86}** J.W.'s testimony was consistent with the DVD recording and written report of her interview with the social worker with the CCFA at Children's Hospital, which was done in July 2006, one year after J.W. confided in her aunt. In addition to the specific examples provided above, J.W. provided numerous details regarding other instances of continuous and regular sexual abuse by her father. J.W. stated that appellant abused her every other night while they were living at 53 North Main.

**{¶87}** Dr. McPherson, the doctor who observed the interview and conducted the physical examination of J.W., testified that J.W.'s advanced sexual knowledge, considering her age, and her description of what happened to her body when the abuse occurred was consistent with a child who has experienced sexual abuse. In addition, he opined that some of her reported behavior issues and her delay in disclosing the abuse were all normal for children who have been sexually abused by a parental figure.

**{¶88}** Appellant asserts that because Dr. McPherson, in the physical examination of

J.W., found no physical injuries as a result of any abuse, his conviction was against the manifest weight of the evidence. During his testimony, however, Dr. McPherson explained that in over 1,400 children that he has examined, he has found physical findings of abuse in only ten percent of those children. He explained that many children do not exhibit physical evidence of abuse because their bodies heal very quickly after the abuse. Finally, Dr. McPherson, in his report, medically concluded that J.W. suffered abuse and he recommended treatment of counseling and further testing.

**{¶89}** J.W.'s testimony was also consistent with the testimony of her Aunt Dotty, and her mother, Ms. Eichorn. Both Aunt Dotty and Ms. Eichorn stated that J.W. and her siblings went to live with Aunt Dotty on May 19, 2005, just before J.W.'s tenth birthday. Aunt Dotty also corroborated J.W.'s testimony as to how and when J.W. confided in her regarding the abuse. Aunt Dotty said she received a phone call from J.W.'s mother, who suspected the abuse, approximately a month after the children went to live with her, and Aunt Dotty told J.W. that she "already knew," at which time J.W. confided in her. Aunt Dotty thereafter contacted Children's Services in Scioto County and started the process of treatment for J.W.

**{¶90}** Ms. Eichorn also corroborated details of J.W.'s testimony – that she was in the hospital with high blood pressure issues before the birth of her youngest daughter, that J.W. told her at age nine that she had started her period, but that it was an isolated incident, that she kept vibrators in her dresser drawer, and that she and appellant had pornographic videos in their possession while living at 53 North Main, which included a video depicting appellant's friends engaging in sexual activity.

**{¶91}** Appellant urges this court to assume that because J.W. lied about her age on a MySpace page created years after she first reported the abuse, she lied about the abuse, and that because she was unable to remember the names of some of her teachers she had during the timeframe of her abuse, her testimony was "simply unbelievable." In reviewing the

record, in weighing the evidence and all reasonable inferences, in considering the credibility of the witnesses, and in resolving any conflicts in evidence, we find the jury clearly did not lose its way in convicting appellant of five counts of rape, four counts of sexual battery, and one count of disseminating harmful material to juveniles. See *Carnes*, 2006-Ohio-2134, ¶58. Appellant's fifth assignment of error is therefore without merit.

**{¶92}** Assignment of Error No. 6:

**{¶93}** "THE COURT ERRED IN SENTENCING APPELLANT UNDER R.C. §2971.03."

**{¶94}** Appellant argues the trial court erred in sentencing him under R.C. 2971.03 because he was "improperly convicted of SVP specifications" and because the court "failed to follow [R.C. 2971.02] and its procedure for determining guilt on SVP specifications." We have already addressed and resolved the issues about which appellant complains in his first and second assignments of error.

**{¶95}** R.C. 2971.03(A) sets forth mandates for a person who is convicted of or pleads guilty to a violent sex offense and who also is convicted of or pleads guilty to a SVP specification that was included in the indictment. Pursuant to R.C. 2971.03(A)(2), "if the offense for which the sentence is being imposed is * * * an offense * * * for which a term of life imprisonment may be imposed, [the court] shall impose upon the offender a term of life imprisonment without parole." Therefore, we find the court did not err in sentencing appellant to five terms of life imprisonment without the possibility of parole. Appellant's sixth assignment of error is overruled.

**{¶96}** Assignment of Error No. 7:

**{¶97}** "TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10, 16 OF THE OHIO CONSTITUTION."

**{¶98}** Appellant claims his trial counsel performed deficiently, prejudiced his case,

and affected the outcome of the proceedings. In making this argument, appellant provides a laundry list of reasons why trial counsel was ineffective.

**{¶99}** In order to establish ineffective assistance of counsel, an appellant must satisfy a two-part test. *State v. Bradley* (1989), 42 Ohio St.3d 136, 141. Appellant must show that "counsel's representation fell below an objective standard of reasonableness," and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Sanders*, 94 Ohio St.3d 150, 151, 2002-Ohio-350, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Bradley* at 142, quoting *Strickland* at 694.

**{¶100}** "Judicial scrutiny of counsel's performance is to be highly deferential and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel." *State v. Sallie*, 81 Ohio St.3d 673, 674, 1998-Ohio-343, quoting *State v. Carter,* 72 Ohio St.3d 545, 558, 1995-Ohio-104. To establish ineffective assistance of counsel, "the appellant must overcome the strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id.

**{¶101}** First, appellant argues that trial counsel failed to object and did not move to dismiss the indictment and SVP specifications. Appellant also asserts that trial counsel should have moved for a bifurcation of the guilt and specification phases of the trial. As previously addressed in appellant's first and second assignments of error, we find no error in the indictment and inclusion of SVP specifications. Also, although the guilt and specification phases of the trial should have been bifurcated, as previously discussed, any resulting error was harmless. Thus, appellant's arguments fail.

**{¶102}** Next, appellant argues that "counsel should have proposed a jury instruction that required the jury to find a specific and different offense for each of the carbon copy

counts of rape." Appellant fails to show how in failing to do so, counsel's performance was deficient and how the outcome of the trial would have been different had trial counsel proposed an unnecessary jury instruction.

**{¶103}** Appellant also argues that trial counsel "used his peremptory strikes on potential jurors that would have been dismissed for cause because they knew law enforcement officials who were to testify against [appellant]." Appellant has failed to cite to any authority for his proposition. Moreover, he has failed to establish that defense counsel was deficient or that he was prejudiced by defense counsel's use of peremptory challenges during voir dire. See *State v. Miller*, Butler App. No. CA2009-04-106, 2010-Ohio-1722, ¶31-38.

**{¶104}** Next, appellant claims counsel was ineffective because he (1) failed to object to Dr. McPherson's qualifications as an expert witness in pediatrics under Evid.R. 702, (2) failed to object to Dr. McPherson's medical opinions not offered to a reasonable degree of medical certainty pursuant to Evid.R. 703 and 704, (3) failed to object to Dr. McPherson's testimony regarding his examination of children who showed no signs of abuse, (4) did not object to the comments made by J.W. and Ms. Eichorn regarding appellant's jail sentence and did not ask for a curative instruction following the testimony, (5) failed to object to the state's "consistent eliciting of hearsay and improper bolstering," including "what J.W. allegedly told her mom," "what witnesses told Detective Miller," "what J.W.'s mother told Ms. Wysong," "what J.W. told Ms. Wysong," "what Aunt Dotty told Ms. Wysong," the "inadmissible double hearsay of what Ms. Eichorn told Aunt Dotty about friends who told Ms. Eichorn about the abuse allegedly endured by J.W.," "what J.W. told Aunt Dotty," "what Ms. Eichorn told Aunt Dotty," "what J.W. told [appellant's] mother, Mossy Wilburn," "what Mossy Wilburn told Aunt Dotty," and "what J.W. told her mom," (6) should have "reiterated his objection to J.W.'s interview and report," (7) did not challenge the admission of facial or body

reactions of witnesses when the underlying specific statement was not entered into evidence, and (8) did not object to testimony by Aunt Dotty that appellant gave no answer and looked at the floor when she confronted him about the abuse. Appellant again fails to cite any authority for the majority of proposed errors listed above. Not only are several of appellant's contentions of alleged errors factually and legally inaccurate, but he also fails to state how he was prejudiced by any of the alleged errors.

**{¶105}** Appellant asserts that trial counsel was also deficient when he failed to enter an objection or assert prosecutorial misconduct for "the state's use of hearsay and bolstering of J.W.," yet appellant fails to explain how the state bolstered J.W.'s testimony or how he was prejudiced by such alleged bolstering.

**{¶106}** Lastly, appellant claims trial counsel was ineffective because he did not enter objections to the court's sentence "and its use of the SVP specification and R.C. 2971.03 and its retroactive application of Ohio's Adam Walsh Act to [appellant]." As previously discussed, the trial court did not err in sentencing appellant; therefore, trial counsel could not have been ineffective for failing to object to the sentence imposed. Also, in *State v. Williams,* Warren App. No. CA2008-02-029, 2008-Ohio-6195, this court held that Senate Bill 10 is not unconstitutionally retroactive. Id. at ¶36.

**{¶107}** Appellant's list of alleged deficiencies in trial counsel's performance is without merit. His seventh assignment of error is overruled.

**{¶108}** Assignment of Error No. 8:

**{¶109}** "THE COMBINED EFFECT OF MULTIPLE TRIAL COURT ERRORS VIOLATED APPELLANT'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."

**{¶110}** Although appellant maintains that the multitude of errors committed by trial

counsel, the state, and the trial court violated his due process rights, we find that appellant has not demonstrated prejudicial error in the court's proceedings. Thus, we overrule his final assignment of error. See *State v. Tapke*, Hamilton App. No. C-060494, 2007-Ohio-5124, ¶100.

**{¶111}** Judgment affirmed.

YOUNG, P.J., and RINGLAND, J., concur.