VI

Chinn's First, Second, Third and Fifth Assignments of Error having been partially sustained, the judgment of the trial court is Reversed, and this matter is *Remanded* for the purpose of conducting an evidentiary bearing on the issue of ineffective assistance of counsel as it relates to trial counsel's failure to present expert testimony.

BROGAN J, concurs. GRADY, J., concurring and dissenting. CONCURBV: *GRADY* [In Part]

DI&SENTBY: GRADY [la Put)

DISSENT: GRAOY, *)*., concurring and dissenting:

I agree that the trial court erred when it granted the Stale's motion for summary judgment. The operative facts in the Fulero and Everington affidavits were *dehori* the record in the prior direct appeal. Therefore, an ineffective assistance of counsel claim based on those matters is not subject to the *re* judictita* bar as grounds for relief in an R.C. 2951.23 post-conviction proceeding. *State v. Cole* (1982). 2 Ohio St. 3d 112, 443 N.E.2d 169. Accordingly, we are required by App.R. 12(D) to reverse [*26] and to remand for further proceedings on Chinn's petition.

When a court of appeals reverses for error and remands for further proceedings, "the court of appeals may or may not specify the nature of the further proceedings, and should not do so if the trial court has discretion as to the nature of the further proceedings." Whiteside, Ohio Appellate Practice (1998), Author's Note to AppR. 12(D). Our Final Entry herein merely remands "for further proceedings consistent with the opinion," as in our customary practice.

At page 8 of his opinion, Judge Fain states that "the trial court should have conducted an evidentiary hearing to determine more fully the nature of (he testimony of these two witnesses (Fulero and Everington). as well as the strategical reasoning of trial counsel for not presenting this expert testimony." At page 16, Judge Fain states that "this cate is being remanded for an evidentiary bearing."

At this stage, I would not require the trial court to conduct an evidentiary hearing. The sole basis on which the trial court granted the State's motion for summary judgment was the *res judicata* bar. That decision forestalled any consideration by the court of whether the 1*27] operative facts in the two affidavits demonstrate
substantive grounds for relief, whkh is the next step required of it by R.C. 2953.21. If the tnal court finds that substantive grounds for relief are not shown, whkh it yet has the discretion to find, the court may dismiss without a hearing per R C. 2953 21 (G) We should not mandate a hearing when (he need for one has yet to be found by the trial court, which is the proper agency to find it.

More fundamentally, 1 am not convinced that substantive grounds for relief are demonstrated by the two affidavits. Claims of ineffective assistance of counsel which challenge a defendant's conviction must demonstrate two propositions. First, it must be shown that counsel's performance failed to satisfy prevailing professional norms in some respect. Second, it must be shown that as a result of that defect the defendant was prejudiced to such an extent that, absent the defect, the factfindcr would have had a reasonable doubt respecting guilt. Further, that prejudice must be affirmatively demonstrated *Stricklmd v. Washington* (19*4), 466 *VS.* 668,80 L. Ed. 2d 674, 104 S. Ct. 2052.

The matters related in the Fulero and Everington affidavits (*28J arc admissible pursuant to Evid R. 702 as the testimony of an expert. The purpose for which it is thus offered is to impeach the credibility of the State's three identification witnesses by demonstrating defects in their mental capacity or perception. However, courts are generally reluctant to admit such evidence, and may exclude it per Evid.R. 403. Wcissenberger's Ohio Evidence (1998) Treatise, Section 607.8.

Here, there is no showing that Chinn's trial counsel wmi aware of these pontbie avenues of impeachment. Indeed, his failure to investigate them forms the basis of China's ineffective assistance of counsel claim. Nevertheless, in view of the general reluctance of the courts to admit such evidence, it is difficult to conclude that counsel's failure to investigate the possibility of developing it failed to satisfy some prevailing professional norm.

With respect to the prejudice prong, the two affidavits fail to make the affirmative showing of prejudice that Strickland requires. The doubts that the expert's opinions could cast on the credibility of the State's witnesses would surely undermine the value of their testimony, but not so conclusively as to support a finding that the [*29] jury would then have had a reasonable doubt respecting Chinn's guilt. A more particular showing u required for that.

While Marvin Washington's mental defects *were* particular to bun (he is now dead), the defects in perception that China would hope to show with respect to the testimony of all three witnesses could probably apply to any witness who testifies about what he or she saw. We should not open d* door to collateral attacks on

convictions through post-conviction relief claims which assert that counsel should have investigated the possibility of offering such evidence, absent some more particularized showing that prejudice resulted. *******

1 of 1 DOCUMENT

**STATE OF OHIO, PLAINTIFF-APPELLEE, v. GLEN W. HAYNIE, DEFENDANT-APPELLANT**

**CASE No. 9-86-21**

**Court of Appeals of Ohio. Third Appellate District, Marion County**

**1988 Ohio App. LEXIS 2859**

**June 29,1988, Decided**

**PRIOR HISTORY: (1]**

**CHARACTER OF PROCEEDING: Criminal Appeal from Common Pleas Court.**

**DISPOSITION:**

**Judgment affirmed.**

**LcxisNexis (TM) HEADNOTES - Core Concepts:**

**COUNSEL:**

**MR. GLEN W. HAYNIE, In Propna Persona, Marion, OH for Appellant.**

**MR JIM SLAGLE, Prosecuting Attorney, Marion, OH for Appellee.**

**JUDGES:**

**MILLER, P.J.. COLE and SHAW. JJ., concur**

**OPINION BY: MILLER**

**OPINIONi**

OPINION

***MILLER, P.J*** **This is an appeal by defendant. Glen W. Haynie, from a judgment of conviction and sentence *entered* by the Court of Common Pleas of Marion County.**

**Defendant was indicted on one count of rape and one count of aggravated robbery. At trial the jury returned a guilty verdict on the charge of aggravated robbery, but was unable to reach a verdict on the charge of rape. The state moved to nolle the court of rape and the court granted the motion and dismissed that charge. Defendant was sentenced to fifteen (15) to twenty-five (25) years on the aggravated robbery conviction**

**The charges arose from an incident that occurred on October 2, 1985 when Gloria J. Belt alleged that she was abducted in an alley, taken to a nearby building and raped and robbed. She further alleged that she faded in and out of consciousness between 2:30 a.m. and 5:00 a.m. at which time she awoke and went to the police station to report [*2] the incident**

**After being taken to the hospital, examined and treated, she returned to the police station where she gave police a description of her auailant. Upon being shown two six man photo lineups with defendant picture in each, she was unable to identify defendant as her assailant. She did, however, identify the**

**defendant as her assailant at trial.**

**Defendant was represented by court appointed counsel. On appeal other counsel was appointed to**

represent defendant. Defendant filed a pro sc motion on November 28. 1986 requesting that appellate counsel be removed. This court granted that motion by journal entry dated December 24, 1986. and defendant thereafter represented himself

Defendant sets forth six assignments or error in his appeal.

Assignment of error number one:

*"THE COURT COMMITTED PREJUDICIAL ERROR WHEN IT DENIED DEFENDANTS REQUEST FOR A PRIVATE DETECTIVE TO INVESTIGATE ALL ALLEGATIONS AGAINST DEFENDANT AND LOCATE WITNESSES ON HIS BEHALF "*

By oral motion at a hearing on August 1, 1986, defendant sought to have a private investigator appointed to help in locating and interrogating several witnesses. Defendant specifically wanted to locate a Hazel l-andrum, a Bill 1*3) Davidson. and a Mabel Stovers. He also wanted to locate three unidentified men who had been with the victim earlier cm the evening of the alleged offense. The thai court forthwith dented the motion to the extent defendant sought help in interrogating the witnesses but suggested that he subpoena the witnesses and question them in court. The court also refused to appoint a special investigator at that time and took the motion under advisement, but was assured by the prosecutor that he would assist the defendant in obtaining the names and addresses of the witnesses.

The trial court subsequently denied the motion in its entirety.

R.C. 2929.024 provides that a court may provide investigative services to an indigent defendant charged with aggravated murder for proper representation at trial or sentencing hearing. However, there appears to be no statutory authority for appointment of investigators or experts for defendants charged with other crimes.

In State v. Jenkins (1984), IS Ohio St 3d 164 at page 193. it is stated:

*"The extent to which the provision of expert assistance to an indigent defendant is constitutionally required has not been established. However, in Bntt* [•4] v *North Carolina (1971). 404 U.S 226. at 227. while expressly declining to define the outer limits of the rule, the court reaffirmed the principle established in Griffin* v *Illinois (1956). 351 U.S 12. that* '* • • *the State miat. as a matter of equal protection, provide indigent prisoner* with the basic tolls of an adequate defense or appeal, when those tools are available for a price to other prisoners.' * * •*

Although the Brht case involved the isxue of whether or not an indigent defendant was entitled to a transcript of the proceedings at trial, the principal of the case appears equally applicable herein. The court in Bntt considered two factors in determining whether to grant defendant's request; (1) the value of the evidence and (2) the availability of alternative devices that would provide the same information. Defendant argued at the hearing that these witnesses were necessary for proper defense of his case. He also argued that no other witnesses could provide the testimony sought from these witnesses and that no alternatives to their testimony existed.

Bill Davidson and Mabel Stovers, two of (be three witnesses that defendant had difficulty in locating (*5) testified at trial. The third witness. Hazel Landrum, did not testify at trial.

There was, however, no request for a continuance to locate this witness, no proffer of what testimony would be elicted from the witness, DOT any further objection to the trial court's action in overruling the motion.

Defendant sought to locate the tree male witnesses who were with the complaint earlier in the evening to attempt to prove that she my have had sexual reUuons with one of them that evening explaining the presence of semen as indicated by the rape kit results. These witnesses' testimony, however, became unnecessary to defendant's case as the jury did not return a guilty verdict on that charge and the charge was subsequently dismissed

We conclude tha! defendant was not prejudiced by the trial court's action and that the first assignment of error is not well taken.

Assignment of error number two:

THE COURT COMMITTED PREJUDICIAL ERROR WHEN IT PERMITTED THE SUBMISSION OF THE CIGARETTE BUTT FOUND AT SCENE OF CRIME INTO EVIDENCE.

When the investigating officers arrived at the scene of the crime to investigate, to photograph the area and to

recover any evidence present they discovered a man's *[*6]* wallet, a pan of women's earrings, ind a cigarette butt. Laboratory test* revealed that the cigarette butt was smoked by a "nonsecreter". Both defendant and the victim are "noosecreters" as are twenty percent of the total population. Defendant sought to exclude the evidence of the cigarette bun because of the prejudicial nttttre of it.

**Evjd R. 401 defines relevant evidence as:**

"* • • *evidence having any tendency to make the existence of any fact that is of consequence to the*

*determination of the action more probable or less probable than it \\vuld be without the evidence."*

Evid R. 402 makes all relevant evidence admissible. Evid. R. 403(A) states:

*"(A) Exclusion mandatory Although relevant, evidence* u *not admissible if its probative value is iufatamuilty outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury"*

In O'Brien v. Angley (1980), 63 Ohio St 2d 159, at 163, the Supreme Court stated:

*** * * Thus, when the trial court determines that certain evidence will be admitted or excluded from trial, it is* we// *established that the order or ruling of the court will not be reversed unless there has been u clear and prejudicial* [*7J *abuse of discretion State* v. *Ltme (1976). 49 Ohio St 2d 77, 358 NE 2d /OSI. State v Raylas (1976). 48 Ohio St. 2d 73. 357 NE 2d 1035. Smith* v. *State (1925). 125 Ohio St. 1)7. 180 NE 695: Lima v. Freeman (1971). 27 Ohio App. 2d 72. 272 NE. 2d637."*

In Huffman v. Hair Surgeon, Inc. (1985), 19 Ohio SL 3d 83, the .Supreme Court stated at p. 87:

"* * * *We have repeatedly held that the term "abuse of discretion" connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable Steiner v. Cutter (1940). 137 Ohio St 448 [19 OO I48J; Conner v Conner (1959). 170 Ohio St. 85 [9 OO 2d 480J; Chester Township v Geauga Co Budget Comm (1976). 48 Ohio St. 2d 372 [2 OO. 3d 484].' State* v. *Adams (1980). 62 Ohio St 2d 151. 157-158 [16 OO. 3d 169], Blakemore* v *Blakemore (1983). 5 Ohio St. 3d 217. 219.*

*""[A]n abuse of discretion involves far more than a difference in * * * opinion * * •. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse'* f*8) *in reaching such determination, the result must be to palpably and grossly violative of fact and logic that it evidences not the exercise of will but pen'ersity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias * * *"' State* v. *Jenkins (1984). 15 Ohio Si 3d 164. 222."*

The record reveals no such attitude on the part of the trial court indicating an abuse of discretion and we find no prejudicial error in admitting the cigarette butt into evidence. Appellant's second assignment of error is not well taken.

Assignment of error number three:

*"THE IDENTIFICATION PROCEDURE EMPLOYED BY THE STATE WAS IMPERMISSIVELY SUGGESTIVE. AND PREJUDICIAL TO DEFENDANT"*

At trial, Belt identified the defendant as her assailant Defendant argues that Belt's in-court identification is suspect because she was not able to identify him ar the earlier photo lineup and because her description of the defendant was not consistent with defendant's appearance.

Promptly after the incident the complainant gave the police a description of her assailant which she later stated at trial was wrong. (Tr. 245.)

Shortly after the incident, she [*9] was presented with two different six man photograph line-ups. Defendant's driver's license photograph was contained m one lineup and a polaroid snapshot taken (hat morning was among the photographs in the other lineup. Although Belt was unable to identify her assailant in the photo lineup, she did identify the defendant as her assailant when she saw him in person at trial.

The Supreme Court states in State v Lathan (1972), 30 Ohio St. 2d 92 at 96:

*"The dictates of Wade ( United States v Wade (1967). 388 US 218] and Gilbert [ Gilbert* v. *California (1967), 388 US. 263] do not require the automatic exclusion of an in-court identification so hug as the state can either establish by clear and convincing evidence that the in court identification was based upon an observation of an independent origin other than the pretrial confrontation, or. that the error in its admission was harmless.*

In State v. Jackson (1971), 26 Ohio St. 2d 74, paragraph two of its syllabus provides:

*"In determining whether in-court identification was the product of an improper lineup or was based upon independent recollection and observation of the accused* [*10] *by the witness, the totality of the circumstances surrounding the identification must be considered "*

Considering (he totality of circumstances, we conclude that the complainant had sufficient opportunity to view her assailant during the course of the evening at the bar and during the assault to identify defendant as her assailant. Additionally, substantial credible evidence exists in addition to her identification to link defendant to the robbery. This evidence includes the fact that defendant's wallet was found at the scene of the crime as well as defendant's flight from the area for over six

months after the incident. Flight can be considered as an indication of guilt. See State v. baton (1969), 19 Ohio St. 2d 145.

We conclude that, based on the totality of the circumstances, there was no prejudicial error in the identification procedure.

Appellant's third assignment of error is not well taken.

Assignment of error number four:

*"THE COURT COMMITTED PREJUDICIAL ERROR WHEN IT PERMITTED THE SUBMISSION OF THE SWEA TSHIRT FOUND IN SEARCH OF 691 EAST CHURCH STREET INTO EVIDENCE *

As discussed in assignment of error number two above, relevant evidence will be admitted unless the (*1l] probative value of the evidence is "• * * substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid. R. 403{A).

Captain Arnold and Patrolman James Chklicf obtained a search warrant for 691 East Church Street, the home of defendant's mother and step-father where defendant resided. Pursuant to a description of the clothes which they had received that the assailant was wearing, the officers seized a sweatshirt along with other articles Immediately after seizing the evidence, it was tagged, identified, and placed into a special evidence locker.

Later a tee shirt was found inside the sweatshirt. Defendant contends that the sweatshirt had to have been removed from the evidence locker and the tee shirt placed in the sweatshirt.

There is DO evidence of a break in the chain of custody and the presence of the tee shirt was adequately explained.

We find no prejudicial error in its admission.

Appellant's fourth assignment of error is therefore not well taken.

Assignment of error number five:

*THE COURT COMMITTED PREJUDICIAL ERROR IN LETTING MS. YEZZO"S TESTIMONY. BE WEIGHT AS EVIDENCE."*

One Mtchelk Yezzo wai called to testify [*12] on behalf of the state as a criminalist with the Bureau of Identification and Investigation.

She testified as to her qualifications that she held the degree of Bachelor of Science in Comprehensive Science together with specialized training at the F.B.I, Academy
in basic serology. advanced biochemical techniques, blood stain analysis, hair and fiber analysis and semen analysis.

She further testified that she had analyzed blood on several thousand occasions and had analyzed semen over a thousand times. She then testified as to tests she had performed on material presented to the laboratory by police officers which wa* represented to the laboratory by police officers which was represented to be connected with this case and as to which the officers had testified as to the acquisition and preservation of thai material.

Her testimony was offered without objection as to her qualifications.

This assignment of error is directed principally to inconsistencies in her testimony. As in all instances the weight and credibility of testimony as well as the reconciliation of inconsistencies therein are matters for the trier of fact and do not require u a matter of law that the evidence be excluded [*13]

Here there is the additional fact that most of the testimony came in without objection.

We conclude that the trial court did not commit prejudicial error in permitting the testimony of this witness to be used as evidence against defendant.

The fifth assignment of error is not well taken. Assignment of error number six:

*"THE FINDING OF THE JURY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW IN THAT THE STATE FAILED TO DEMONSTRATE THAT DEFENDANT. WAS THE ASSAILANT OF THE PURPORTED ROBBER " [sicj*

Defendant asserts that the jury relied on circumstantial evidence and inferences in order to find defendant guilty of aggravated robbery.

It is true that where circumstantial evidence alone is relied upon to prove an essential element of a crime such evidence must be consistent only with a theory of guilty and irreconcilable with any reasonable theory of innocence to support a finding of guilt. State v. Kulig (1974). 37 Ohio St. 2d 157. Stale v. Sorgee (1978), 54 Ohio St 2d 464.

Here, however, there was both direct evidence and circumstantial evidence as to all elements of the crime of robbery. The jury's duty was then to determine if all the evidence proved [*14] defendant's guihy beyond a reasonable doubt

In State v Eley (178), 56 Ohio St. 2d 169, the Supreme Court states *in its syllabus:*

*"A reviewing court will not reverse a jury verdict where there in substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt.'*

We conclude that on the record sufficient credible evidence exists upon which a jury could find that defendant was guilty of aggravated robbery.

The sixth assignment of error is not well taken.

Finding no error of the trial court prejudicial to defendant as assigned and argued we affirm the trial court's judgment.

**1 of 1 DOCUMENT**

**State of Ohio, Plaintiff-Appellee, v. Eddie Hickman, Defendant-Appellant.**

**N0.97APA01-79**

**COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY**

**1997 Ohio App. LKXIS 3021**

**Jul> 10,1997. Rendered**

**PRIOR HISTORY: ['!] APPEAL from the Franklin**
County Court of Common Pleas.

**DISPOSITION: Judgment reversed and cause remanded.**

**COUNSEL: Ronald J. CTBrien, Prosecuting Attorney, and Joyce S. Andersen, for appellee.**

**David H Bodiker, Public Defender, and Lori J. Rankin, for appellant.**

**JUDGES: TYACK, P.J. YOUNG and PETREE. JJ., concur.**

**OPINIONBY: TYACK**

**OPINION: (REGULAR CALENDAR)**

**DECISION**

**TYACK. PJ.**

**On May 13. 1995, Eddie Hickman was convicted of two counts of aggravated robbery, two count* of robbery and two counts of kidnapping. He pursued a direct appeal to this court, which affirmed his conviction.**

**Mr. Hickman then filed a petition for post-conviction relief under R.C. 2953.2). In his petition, be alleged that be had been denied effective assistance of counsel at trial because his attorney had not subpoenaed Mr. Hickman's girlfriend as a witness who allegedly would have provided alibi testimony. He also alleged his attorney had been ineffective because he had not utilized an expert to help analyze a surveillance videotape of the**
**one robber and to testify that Mr. Hickman was not the person depicted in the videotape. The trial court dismissed the petition without an evidentiary hearing.**

**Mr. Hickman has appealed [*2] that dismissal, assigning two errors for our consideration:**

"ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN APPLYING THE DOCTRINE OF RES *JUDICATA* TO MR. WCKMAN'S CLAIM FOR RELIEF, THUS VIOLATING MR. HICKMAN'S RIGHTS UNDER THE FIFTH, SIXTH, NINTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 1, 2, 5, 9, 10. 16, AND 20 OF THE OHIO CONSTITUTION.

**"ASSIGNMENT OF ERROR NO 2**

THE TRIAL COURT ERRED WHEN IT DENIED MR. HICKMAN'S PETITION FOR POST-CONVICTION RELIEF WITHOUT CONDUCTING AN EVIDENTIARY HEARING, THUS VIOLATING MR. HICKMAN'S RIGHTS UNDER THE FIFTH, SIXTH, NINTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. ARTICLE I, SECTIONS 1, 2, 9, 10, 16, AND 20 OF THE OHIO CONSTITUTION. AND

OHIO REVISED CODK SECTION 2953.21."

Addressing the first assignment of error, Mr. Hickman alleged ineffective assistance of counsel as an assignment of error in his direct appeal. When (his court overruled that assignment of error on the direct appeal, the issue of ineffective assistance of counsel vvas decided as to all theories present in the record on direct appeal *Res judicata* bars [*3] relitigating the effectiveness of Mr. Hickman's trial counsel based upon matters in the record during the direct appeal. See *State* v *Cole* (1982), 2 Ohio St. 3d 112. 443 N.E.2d 169. However, matters outside the appellate record at the time of the direct appeal were not before the court at the time and, therefore, *«e not considered.

In the second assignment of error, Mr. Hickman alleges that he should have had an opportunity to more fully develop the evidence which he feels should have been presented at his trial Specifically, his girlfriend Shcrri Croy has submitted an affidavit in which she states that she was attending the Ohio State Fair with Mr. Hickman when the one robbery occurred. This testimony could conceivably have supported Mr. Hickman's own testimony at trial to the same effect.

Mr. Hickman has also submitted an affidavit from Jimmy Rea, the chief operating officer of an electronics store who claimed tliat he compared the surveillance videotape to a photograph of Mr. Hickman and that Mr Rea believed Mr. Hickman was not the person depicted in the videotape. We cannot tell from the minimal information in the record whether or not Mr. Rea could qualify as an expert on the subject [*4] of identification based upon surveillance videotapes. Nor can we tell based upon his affidavit whether his opinion should carry any weight. However, we believe Mr. Hickman should have an opportunity to develop at a hearing his evidentiary basis for alleging that his trial counsel was ineffective as a result of the omission alleged. Obviously, the state will have an opportunity to submit evidence to rebut the allegations

As a result, we sustain the two assignments of error. We reverse the dismissal of the petition for post-conviction relief and remand the case for further appropriate proceedings.

*Judgment reversed and cause remanded* YOUNG and PETKEE, JJ., concur.

3 of 3 DOCUMENTS

**STATE OF OHIO, Plaintiff-appellee -vs- GRADY KRZYWKOWSKI, Defendant-appellant**

**NO. 80392**

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY**

**2002 Ohio 4438; 2002 Ohio App. LEXIS 4586**

**August 29,2002, Date of Announcement of**

**Decision**

SUBSEQUENT HISTORY: Appeal denied by Slate v. Krzywkowski. 98 Ohio St 3d 1423, 2003 Ohio 259, 782 N.E.2d 77, 2003 Ohio LEXIS 90 (2003) Reopening denied by State v. Krzywkowski, 2003 Ohio 3003, 2003 Ohio App LEXIS 2695 (Ohio O. App.. Cuyahoga County, June 12, 2003)

PRIOR HISTORY: [•*!] CHARACTER OF PROCEEDING: Criminal appeal from the Court of Common Pleas. Case No. CR-401497.

**DISPOSITION: Trial court's judgment was affirmed LexIsNexis (TM) HEADNOTES - Core Concepts:**

COUNSEL: For Plaintiff-Appellee: WILLIAM D MASON, ESQ., CUYAHOGA COUNTY PROSECUTOR, BY: T. ALLAN REGAS, ESQ., ASST. COUNTY PROSECUTOR, Cleveland, Ohio.

For Defendant-Appellant: MICHAEL T. FISHER, ESQ.. Cleveland, Ohio.

JUDGES: ANN DYKE. JUDGE MICHAEL J. CORRIGAN, PJ., AND JAMES J. SWEENEY, J., CONCUR,

**OPINIONBY: ANN DYKE**

OPINION: JOURNAL ENTRY AND OPINION

ANN DYKE, J.:

[*Pl] Defendant-appellant Grady Krzywkowiki ("defendant") appeals from the judgment of the triall
court which, after a jury trial, found him guilty of four counts of rape and two counts of gross sexual imposition. For the reasons set forth below, we affirm the judgment of the trial court.

I*P2] The grand jury indicted the defendant on eight counts, including three counts of rape of his minor daughter, two counts of rape of his minor son, and one count of rape of his other minor son, al! in violation of R.C. 2907.02; one count of gross sexual imposition of his minor daughter, and one count of gross sexual imposition of his minor son. both in violation of R.C. 2907.05 [»-2J . The defendant pleaded not guilty and the matter proceeded to a jury trial on September 6, 2001.

|*P3] At trial, the prosecution presented testimony of Sharon HarpeL. the foster mother of Kristcn and

Katelyn ("Katie") Krzywkowski. Sharon testified that in July of 2000, the girls were placed in her therapeutic foster home. At the time of placement, Kristen was five years old and Katie was two. Sharon testified that within week* of being placed, Kriften frequently disclosed to Sharon incidents of sexual and physical abuse by her father. Sharon testified that when the girls first moved in, they would eat incessantly and hoard food. She testified that Kristen was temfied of not getting enough food.

[*P4] Sharon testified that on one occasion when the girls were playing together m the playroom, she went into the kitchen. She noticed that it had gotten very quiet in the playroom, which was quite unusual for the girls, who generally did not interact well with one another and regularly fought and screamed while playing together. When Sharon entered the room, she found Kitsten taking her hands and digging into Katie's diaper and private area as Katie wu laying on the floor (**3) with her legs

spread open in a frog-like position. When Sharon questioned Katie about what she was doing to Katie and why she was doing it, Kristen allegedly responded that when her dad would get mad at them, he would take his four fingers and stick them in Katie's private part or poke them in the butt with toys. Kristen further disclosed that on one occasion, her dad tried to put the "hard part of his body" in her private area and that it hurt.

[•PS] Sharon also testified that Krislen had terrible nightmares every night when she first arrived at the home. When Sharon would go in to comfort Kristen, Kristen stated on one occasion that she was afraid her mother and father were in the closet "waiting to get her." Sharon testified that while Kristcn still has nightmares, they are less frequent than they were when she first armed in Sharon's home.

[*P6] Sharon testified that approximately two weeks alter being placed, she took the girls to Cedar Point She recalled an incident at the pool when Kristen, upon hearing music, went up to the bars attached to the pool used to assist people in getting in and out of the pool, and began "humping" the bars and rubbing up against them. *[**4]* Sharon testified that the behavior mirrored that of a professional dancer. When Sharon tried to redirect Kristcn to the pool at that point, Kristen's behavior changed, and she began screaming arid yelling while continuing to hump the bars. Eventually, Kristen calmed down at which point Kristen went into a "trance-like" state. Sharon stated that this type of behavior happened on another occasion on the flagpole in Sharon's front yard.

[*P7] Sharon testified that Kristen exhibited behavior that was sexual in nature when she would bathe Kristen. She stated that Knsten would masturbate every time she took a bath, which was almost daily. Sharon further stated that after Kristen was put to bed for the evening, she would often find Kristen masturbating in bed.

(*P8] Sharon testified that when Kristen first arrived at the home and would go to kiss Sharon, she would open her mouth and attempt to stick her tongue in Sharon's mouth. Kristen told Sharon that that was the manner in which her mother and father wanted her to kiss them. Sharon stated that she had to teach Kristen how to kiss her appropriately. She had to further teach Kristen that it was inappropriate for Kristen to attempt [••5] to fondle Shaion's breasts.

[•P9] Sharon testified that when the girts were in her home, they initially reacted violently toward the dogs and cats in the house. She recounted that on occasion, Kristen actually became mad, picked the cat up and threw it across the kitchen and against the wall.

(•PIO) Sharon testified that she documented Kristen's behavior by taking notes and submitted them to Specialized Alternative for Family and Youth (SAfY), the foster care agency with whom she worked.

[*P11] On cross-examination, Sharon stated that she was testifying from her memory of events that transpired over the last year. She admitted that when the children were brought to her home, she did not observe any physical signs of abuse. She also stated that Kristen made allegations of abuse by her mother and other family members.

[•PI2] After being found competent to testify, the state presented Kristen's testimony. She stated that her father did "bad stuff to her. When questioned further, Kristcn testified that her mom and dad frequently locked her in the attic when she was bad Kristen then stated that she was bad when she didn't listen. Kristen also testified that her [**6] father would stick his four fingers m her butt and poke her after pulling her pants down and undressing her. She stated that the first time, he stuck toys, such as play spoons and forks, in her butt and her "crack." She testified that her father stuck his fingers in her private parts on several occasions She also recounted a story when she witnessed her father take off Katie's diaper and touch Katie's private parts.

[*P13) Krisien stated that her father made her watch a dirty, nasty movie in which the characters stock their tongues in each other mouths with no clothes on. She stated that her father forced her to watch the movie by herself. She further stated that this was a "vampire" movie. Knsten testified that her fiither taught her to stick her tongue in somebody's mouth when she kissed them, but she testified that he never kissed her in that way.

[*P14] When asked what her dad did to her that she didn't like, Kristen responded by testifying that on one occasion when she was bad, her father hit her in the head with a wrench and blood got all over her pillow. Kristen stated that she was told by her father to fabricate a story to tell her mother regarding the incident, [**7) so that her mother would not find out that her father hit her. Kristen also testified that as a punishment her father tied her up at night and wouldn't release her until the morning. Kristen further testified that her father would pull down Aaron's and Ryan's pants and spank them with a belt when they were bad.

[•PI5] Kristen testified that she loved her father, but did not want to live with him again because she did not

want him to do bad things to her again.

[*P16) Elizabeth Alexander, the foster mother of Aaron and Ryan, testified for the state on direct examination that when Ryan first came to her home, he was very hyperactive, did not interact well with family

members, was obsessed with mutilating insects, walked around naked, tortured kittens that were living at the home, and on one occasion tried to suffocate one of the kittens. Elizabeth also testified that Ryan killed the family's guinea pig by taking a long stick and poking it down the guinea pig's mouth. Elizabeth and Ryan buried the guinea pig and put the dead body in the garbage. Later, Elizabeth found that Ryan had gone through the garbage to find the carcass and was playing with it by repeatedly holding [**8] it up in the air and allowing it to hit the concrete.

[*PI7] While in foster care, Ryan pulled his pants down and exposed his penis to another foster child in the home. Eluabcth testified that Ryan was physically aggressive and sometimes exhibited violent behavior, particularly when he was angered.

(•P18) Elizabeth testified regarding other behaviors that Ryan had exhibited when he first arrived at her home. She stated that Ryan was obsessed with food. She also testified that Ryan who very much enjoys drawing and frequently drew pictures of penises and penises ejaculating. Elizabeth testified that Ryan frequently masturbated while bathing and that his genitals were sore from masturbating. Further, she stated that she no longer allowed Ryan to play with toys in the tub because on one occasion, she observed him trying to put a toy in his rectum.

[*P19] Elizabeth testified that while cleaning the kitchen one day, she heard Ryan say to Aaron "let's play spider and fly " A few minutes later, she heard Ryan ask Aaron "does it feel good." At that point, she went to check to see what the boys were doing and found Aaron at the end of the couch on his back with Ryan on top (**9) of him. Ryan had his penis in Aaron's mouth and Ryan was moving back and forth in a sexual manner. After Elizabeth explained that that was inappropriate behavior, she asked Ryan what he was doing. Ryan replied that he was playing spider and fly and went on to explain that this was a game he played with his father. Elizabeth then testified that Ryan'i behavior has improved significantly since he first arrived in her home.

[*P20] Elizabeth testified with regard to Aaron's behavior in the foster home She stated that he, too, exhibited inappropriate behavior, such as running through the house naked, bringing attention to his penis And being extremely abusive with the animals*. Aaron disclosed sexual abuse to Elizabeth and on one occasion stated that his father put his pee in his bun. Aaron further disclosed that his dad peed m his mouth and put his peanuts in his mouth. Elizabeth testified that she suspected the boys were sexually abused based on these behaviors. In particular, she found the boys hiding under a blanket fondling one another. She also noted that when Aaron would hug her, he would try to touch her breasts.

[•P21) On cross-examination, Elizabeth admitted that [** IO) she never found any physical signs of abuse, that many foster children exhibit similar behaviors as the Krzywkowski children and that not all of those foster children had been victims of sexual abuse.

(•P22] After the court determined him to be competent, Aaron testified that he knew he was in court to testify because his father had done bad stuff to him. When asked what his father did to him that he did not like, Aaron initially answered that he "forgot." He later testified that while he was living with his father and they were in the kitchen, bis father put something white in his "private part that poops" and on his nose. Aaron stated that it hurt a lot and he cried a lot when his dad did that. Aaron was unable to answer why his dad put white stuff on his nose and in his butt, stating "I was being good but he just did it." (T. 1367) Aaron also testified that his dad tried to put his private part in Aaron's mouth.

[*P23] Aaron testified that a "papoose" was something that he was tied up in once, while his father put two socks in his mouth. He was unable to state why his father did this to him. Aaron testified that he did play the spider and fly game with his father, which [**11) he did not like. He further testified that he never played the spider and fly game with his brother Ryan.

[*P24) Ryan then testified after being found competent by the trial judge. He stated that he and his father frequently played games together, including video games and "spider and fly." Ryan described the spider and fly game much differently than his foster mother had described it. His description was non-sexual in nature, and he stated that he enjoyed playing the game. He denied that there was another way of playing spider and fly with his dad. He further denied playing spider and fly at Elizabeth's house in the way she had described it

[*P25] Ryan testified that his dad was a good dad and that he loved him very much. While he admitted to being disciplined once by being "papoosed" and being made to stand in the comer on several occasions, in addition to several other corporal punishment techniques testified to, he denied any allegations of sexual abuse by bis

father. Ryan stated that his father never put his perns near Ryan's face, thai his dad never told him to suck his penis and that his dad never made Aaron suck on his penis. Ryan stated that he has never seen (**12] his father's penis, or any of his father's private parts. Ryan then testified that he did see his dad put white stuff on Aaron's nose and in his butt  He testified that this white stuff was medicine He stated that he never witnessed his father doing anything bad to his brother or sisters, and if anyone said his father did anything sexual in nature, they

were lying. Ryan also stated that he would like to live with his father again.

{•P26) Ryan denied ever trying to suffocate or hurt any of the kittens at Elizabeth's house. He further denied mutilating any insects or butterflies, or drawing pictures of penises while living with Elizabeth.

[*P27) The state presented testimony of Dr. David W. Gemmill, an employee of Mercy Children's Hospital in Toledo, where the children were taken for a sexual abuse evaluation. Dr. Gemmill has *specialized in* sexual abuse evaluations and treatment for the last fifteen years of his forty-two years in practicing medicine. He testified in regard to the process that is employed when children are brought in for evaluation. Dr. Gemrrull *e*xplained the children are brought in for an historical evaluation, conducted by either Dr. Gemmill, a nurse practitioner {••13] or a trained social worker In this interview, they collect historical information submitted by the referring agency and glean it from interviews with children and sometimes their caregivers.

[*P28] Dr. Gemmill testified that after historical information is gathered, the next step is to conduct a physical examination to detect any signs of abuse. He described at great length the process for so doing and noted that many times they are unable to detect signs of sexual abuse, unless the abuse happened within a few days prior to the visit. Dr. Gemmill explained that usually children's bodies heal relatively quick.

[*P29] Dr. Gemmill and his staff conducted evaluations and examinations on the K.rzywkowski children. He thereafter prepared two reports, one regarding the girls and one regarding the boys.

{•P30] With regard to the girls, Dr. Gemmill testified that Darla Vogelpohl, a nurse practitioner, took the history of Kristen while Sharon was present. Immediately after the history was taken, Darla met with Dr. Gemmill for a briefing prior to Kristen's medical examination. After conducting a medical examination, Dr. Gemmill noted that be did not detect any abnormalities [**14] that would indicate physical signs of sexual abuse. After reviewing her historical information and conducting a medical examination, Dr. Gemmill opined that there had been inappropriate contact with Knsten which would indicate sexual molestation and physical abuse. He further testified seventy-five percent of *his* diagnosis was based on the history that was given to them.

[*P31] With regard to the evaluations and examinations of the boys, Dr. Gemmill testified that after conducting a physical examination, during which he did not find physical signs of sexual abuse, he opined that there was "inappropriate stuff" going on, probably more physical abuse than sexual abuse.

[*P32] Dr. Gemmill testified that Ryan did not offer much in the way of historical information, nor did Elizabeth, who was present at the time of the interview Dr. Gemmill testified that he conducted the medical examination of Ryan and found follicultitis across his buttocks, which could have been explained by his bed-wetting problem. He further testified that after completing the process with Ryan. there was sufficient information indicating sexual molestation.

[*P33] Dr. Gemmill testified that it is (15] quite common for children to recant allegations of sexual abuse, especially when there is no support coming from the family. He stated that there exists a variety of reasons for a child to recant an earlier allegation of abuse, including when there is little family support or where the child feels as if his "world *is* tumbling down" because of his or her disclosures.

[*P34] On cross-examination, Dr. Gemmill testified that at the time of his evaluations of the children, he did not have access to any previous medical records of any of the children. He stated that since then, he has not seen any other reports, other than one report from a consultant who examined Kristen for an eye condition. Dr. Gemmill admitted on cross-examination that white medicine called Desitin is frequently used to treat a child who has a rash from bed-wetting, which could possibly explain the testimony that the defendant put white stuff in Aaron's buttocks and his note.

[*P35] The state then presented the testimony of Diane Marx, an employee of SAFY at the time the Krzvwkowski children were placed in foster care. She was assigned to monitor the progress of the children la the foster homes. She stated (**16] that certain behaviors of the children were brought to her attention, such as Kristen biting herself, that she was masturbating daily, and that she was having night terrors, and disclosing information indicating that her father had physically and sexually abused her. Upon learning this information, Ms. Marx contacted the county social worker and called the child abux hotline, at which time the children were taken in for an interview with Julie Prettyman, a social worker for the county in the intake department.

[*P36] The state presented the testimony of Julie Prettyman. Ms. Prettytnan stated that her role in the intake

department was to investigate specific allegations of sexual abuse of children and to interview the children to assess a child's needs in terms of safety and whether the child will need medical treatment and/or counseling. She testified that she interviewed Kristen and Aaron to assess the need for safety requirements, to assess the

allegations, and to determine if any follow-up treatment was necessary for them. Ms. Prettyman stated that during the interview, Kristen disclosed instances of abuse to her by her father. She told Ms. Prettyman that he had locked her [**17] in a room, made her sit, stand, squat, clean the walls, and that he had at times penetrated her anus and private part with his fingers. Kristen also told Ms. Prcttyman that her dad made her watch dirty movies that were disgusting, he kissed her inappropriately by putting his tongue in her mouth, and that there were times when she saw her parents have sex. Kristen further disclosed that she had witnessed her dad touching her siblings in the same way that she was touched. She disclosed that she had been penetrated and stated "Dad stuck his private in my butt, in my private, and it hurt and it was red and it was hard and it smelled like poop." (T. 1655) At this time, Ms. Prettyman recommended an immediate evaluation of the children.

[•P37] Ms. Prettyman stated that Aaron did not make any disclosures to her regarding sexual abuse when »he interviewed him. He did, however, make disclosures regarding physical abuse. Ms. Prettyman testified that, after interviewing both children, she noted that sexual abuse was "indicated." nl

nl Cuyahoga County Department of Children and Family Services makes determinations in cases that allegations of sexual and physical abuse are either "substantiated," "unsubstantiated," or "indicated."

[-18]

(*P38) Darla Vogelpohl was called as a state's witness. She testified that, upon taking a history of Kristen, Kristen disclosed several instances of sexual abuse by her father, all of which had been testified to at this point in the trial.

[•P39] The state also presented testimony of expert social worker Cynthia King. Ms. King never interviewed the Krzywkowski children, nor had she ever met them. She testified that there are recognized behavior indicators of children that have been sexually abused, including: bed-wetting, acting out a sexual act with a doll or stuff animal, excessive masturbation, fondling other children, Ma. King also testified that physical sign« of sexual abuse are generally only found in twenty to twenty-five percent of children.

[*P40] Ms. King opined that the behaviors exhibited by the Krzywkowski children were consistent with those behaviors that are indicative of sexual abuse. She testified to specific incidents of sexual abuse that had already been testified to at trial by other witnesses for the state.

[*P41 ] The jury returned a verdict of guilty of four counts of rape and two counts of gross sexual imposition and sentenced him accordingly. [**19] It is from this ruling that the defendant now appeals, asserting eight assignments of error for our review.

(*P42] "I. Prejudicial error was committed by the admission of 'other acts' testimony in violation of R.C. 2945.59, EvkLR. 404 (B), and Mr. Krzywkowski's rights under Article I, Section 16 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution."

[•P43J "II. The misconduct of the prosecutor violated Mr. Krzywkowski's rights to a fair trial guaranteed by the due process provisions of Article 1, Section 16 of the Ohio Constitution, and the Fourteenth Amendment to the United States Constitution."

[*P44J The defendant contends that the trial court erred by allowing witnesses to testify in regard to instances of corporal punishment allegedly committed by the defendant Specifically, he avers that this "other acts" testimony was unrelated to the sexual abuse charges for which he was being tried and was therefore unfairly prejudicial. We disagree.

f*P45) Pursuant to EvidR 404 (B), evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted [**20) in conformity therewith It may, however, be admissible for other purposes, such as to show proof of motive, opportunity, intent preparation, plan, knowledge, identity or absence of mistake or accident. See also R.C. 2945.59; *Stale v. Broom* (1988). 40 Ohio StJd 277, 533 N E.2d 682. Further, other act evidence u admissible if it is relevant to prove an element of the offense. *Stale* v *Smith* (1990). 49 Ohio St3d 137. 140. 551 N.E.2d 190.

(*P46J The admission of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio SUd 173, 31 Ohio B. 375, 510 N.E.2d 343, paragraph two of the syllabus. Therefore,

we will not disturb the trial court's ruling absent an abuse of discretion. The term 'abuse of discretion' connotes more than error of law or judgment; it implies that the courts attitude is unreasonable, arbitrary or unconscionable." *Blakemore* v. *Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N E 2 d 1140 To find an abuse of discretion, this court must find that the trial court committed more than an error of judgment. *State v. Reed* (19%), 110 Ohio App.3d 749, 752, 675 N.E.24 77 {**2lj citing *State v. Sage, supra*

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[*P47) RC 2907.02 (B) provides that "If a person is guilty of rape, the victim was less than thirteen years of age, and the person 'purposely compels the victim to submit by force or threat of force,' the person 'shall be imprisoned for life'."

(*P48) The Supreme Court has stated:

[*P49] "***The force and violence necessary in rape is naturally a relative term, depending upon the age, size and strength of the parties and their relation to each other; at the relation between father and daughter under twelve yean of age. With the filial obligation of obedience to the parent, the same degree of force and violence would not be required upon a person of such tender years, as would be required were the parties more nearly equal in age. size and strength. *** RC 2907.02 (B) requires only that minimal force or threat of force be used in the commission of a rape. *** We also recognize the coercion inherent in parental authority when a father sexually abuses his child.

[*P50] "***Force need not be overt and physically brutal, but can be subtle and psychological *As long* l**22J *as it tan be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established.* •••'(Emphasis added)

(•P51] *Slate* v. *Eskridge* (1988), 38 Ohio St.3d 56, 58-59, 526 N.E.2d 304. We acknowledge that the Court in Eskndge lowered the threshold for proving the element of force in rape when the filial obligation of obedience is present. In keeping with the holding in *Eskridge*, we find that in the case before us, the prosecutor was entitled to elicit testimony regarding physical abuse by the defendant in the household in order to demonstrate that "the children's will was overcome by fear or duress." Id.

[*P52] Kristen testified that she was punished and locked in the attic when she was "bad." When asked by the prosecutor what she did to be bad, she responded that when she was bad she did not listen to her father.

(*P53] The testimony elicited by the children that they had been physically abused when they were "bad" establishes fear of the defendant Thus, this testimony was properly considered by the jury in determining whether the children submitted to the defendant's sexual abuse under a threat (**23) of force. Accord *State v, Schilling* (Feb. 12, 2002), Tuscarawas App. No. 2001 AP 01 0001, 2002 Ohio 775. While the trial court admitted some cumulative testimony with regard to the numerosity of incidents of corporal punishment, we find this error to be harmless.

[•P54] With regard to the defendant's complaint rf alleged prosecutonal msconduct, we note that the conduct of a prosecuting attorney during the course of
trial cannot be made a ground for error unlesss that conduct deprived the defendant of a fair fnal. *State* v. *Papp* (1978), 64 Ohio App 2d 203, 18 Ohio Op 3d 157, 412 N E.2d 401. Having determined that the trial court did not err in allowing other act* testimony, the prosecutor was entitled to refer to such testimony in her closing argument. These assignments of error are overruled.

[*P55) "III. The trial court erred in finding the children competent to testify when the court did not consider the five factors required in *Stale* v *Frazier* (1991), 61 Ohio St.3d 247, 574 N.E.2d483."

l*P56] The defendant avers in his third assignment of error that the trial court conducted bnef and incomplete voir dire examinations of the children [**24] in direct contravention of *State* v. *Frazier* (1991), 61 Ohio St.3d 247. 574 N E.2d 483 and thus erred by finding them competent to testify We disagree.

[*P57] The Supreme Court stated in *State v. Frazier*, supra:

[•P58] "Evid.R. 601 provides that 'every person is competent to be a witness except: (A) *•* children under ten (10) years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly ••*.'

[•P59J "It is the duty of the trial judge to conduct a voir dire examination of a child under ten years of age to determine the child's competency to testify. *Such determination of competency is within the sound discretion of the trial judge*. The trial judge has the opportunity to observe the child's appearance, his or her manner of responding to the questions, general demeanor and any *indicia* of ability to relate the facts accurately and truthfully. Thus, the responsibility of the trial judge is *to* determine through questioning whether the child of tender years is capable of receiving just impressions of facts and events and to accurately [**25] relate them. See *State* v. *Wilson* (1952). 156 Ohio St 525, 46 Ohio Op. 437,103 N.E.2d 552. (Emphasis added.)

[•P60J In the voir dire examination in this case, Kristen stated:

[*P6I] THE COURT: •"It's real important that you answer the questions and tell the truth. And there's a big difference sometimes between telling the truth and not telling the truth. "Do you remember that? Did anybody tell you that?

fP62] THE MINOR; Yes." (T. 1053). [•P63] She further stated:

[•P64] THE COURT: When you don't tell the truth, what does that mean?

**[•P65] "THE MINOR: You lie.**

**[*P66J THE COURT: Yes. You lie. Yes. And we**
need you to tell the truth. Will you do that for us today?

[•P67J THE MINOR: Yes." (T. 1055).

**[*P68] During the examination, Kristen also told die judge how many students were in her class at school and she distinguished among and stated the names of all of her biological and foster brothers and sisters. We find that the trial judge did not abuse her discretion in finding Kristen competent to testify. Further, upon direct examination by the prosecutor, Knisten was able to identify two examples of a lie and noted that if a [**26] person tells a lie, they will get in trouble.**

**[*P69] In the voir dire examination of Aaron, he stated:**

f*P70j THE COURT: Do you know the difference between telling the truth and not telling the truth?

**[•P71J "A. Yes**

[•P72J THE COURT: What happens if you don't tell the truth?

**(*P73) "A: You get in trouble." (T. 1329-1330) f*P74] Aaron further testified:**

**{•P75J THE COURT. •••But if she asks you a question, could you *tell* her what the honest answer is? Got to tell the truth. Will you tell the truth?**

(*P76] 'A: Yes." T. 1332-1333).

**[*P77] (Aaron also told the judge the name of his teacher, that there were girls and boys in his class, and be named the prosecutor. We find that the trial court did not abuse her discretion in finding Aaron competent to testify. Further, upon direct examination by the prosecutor, Aaron identified three examples of a lie and stated that if a person were to tell a lie, that person would get in trouble.**

**|*P78) In the voir dire examination of Ryan stated his age, the names of the people with whom he lived, and the name of the prosecutor. He further stated:**

**(*P79] THE COURT: And what [••27] I need to know from you is whether or not you know the difference between telling the truth and telling a lie.**

(•P80J "A: Okay.

**(*P81) THE COURT: Do you know the difference?**

**l»PS2J "A: Yes.**

(•P83) THE COURT: And if you tell a lie, what happens?

**[•P84] "A: You'll get in trouble.**

[•P85J THE COURT: •••Raise your hand. Say I promise to tell the truth.

**[*P86) "A: I promise to tell the truth.*****

**[*P87) THE COURT. Will you tell the truth even if its uncomfortable for you?**

**[•P88] -A: Yes.**

**[•P89) THE COURT: And you love your dad, right?**

**(•P90) "A: Yes.**

[*P9I) THE COURT: But would you tell the truth even though you loved your dad?

[*P92] "A: Yes. ••*" (T. 1383-1385).

**(*P93] We find that the trial judge did not abuse her discretion in finding Ryan competent to testify Further,**

**upon direct examination by the prosecutor, Ryan identified three examples of a lie and stated that he knew that it was wrong to tell a lie.**

[•P94] While we believe that the trial judge could have conducted more extensive voir dire examinations of the Krzywkowski children, we accord great deference to her judgment that the [**28j children were competent to testify. The trial judge was in the best position to determine whether these children were capable of receiving just impressions of facts and events and to accurately relate them. Their responses during the examinations demonstrated that they possessed an understanding of truth and falsity and appeared to appreciate the responsibility to be truthful. Accord *State v. Frazier*. supra.

[*P95] This assignment of error is without merit [•P96] "IV. The trial court erred by denying defense counsel the right to participate in an examination of witness' statements as provided by Criminal Rule 16 (BXIKg)."

[•P97J The defendant argues in his fourth assignment of error that the trial court erred in finding that notes regarding the foster child's behavior made by the foster mother and given to the foster care agency, did not constitute a "witness statement" as contemplated by CrimR. 16 (B) (IXg) We agree with the trial court.

l*P98] CninR 16 (B)(l)(g) provides:

**[*P99] "Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an *to* camera inspection of the witness'**

[**29] written or recorded statement with the defense attorney tad prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the pnor statement. •*•

[•PI00] "••• Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal." It is well-settled that the appellant has the burden of demonstrating an error by reference to matters made part of the record in the court of appeals. *Knapp v Edwards Laboratories* (1980), 61 Ohio S«.2d 197. 199, 15 Ohio Op. 3d 218, 400 N.E.2d 384. App. R. 9(B). "When portions of the record necessary for determination of an assigned error are absent, the reviewing court has nothing to pass on and has no choice but to presume the validity of the trial court's proceedings." *Meager* v. *Metzger* (Aug. 21, 1989), Crawford App. No. 3-87-39, 1989 Ohio App. LhXIS 3246. Sec also *Hrlton v. Helton* (1994), 102 Ohw App.3d 733. 737, 658 N.E2d 1; *Oitrander* v *Parker Fallis Insulation Co* (1972), 29 Ohw St.2d 72, 58 Ohio Op.2d 117,278N.E.2d363.

[*PI01] In this case, the [**30) notes that Sharon Harpel made after Kristen acted out by exhibiting signs of sexual abuse arc absent from the record. We are unable to review them and therefore presume regularity and affirm the ruling of the trial court thai those notes did not constitute a witness statement as contemplated by Crim.R. 16.

[•P102] Further, while the trial court determined that the notes did not constitute a "witness statement," the court noted that it had already conducted an in camera inspection of the notes and found no inconsistencies with Ms. Harpel's testimony.

[*P103] Lastly, we note our support for the proposition that statements in the "possession, custody or control of the state are discoverable." CriraR. 16 (BKlKa) and (b). *State v. Bumagin* (Oct. 16, 1986). Cuyahoga App. No. 51090, 1986 Ohio App. LfcXIS 8734. We believe that the notes in question were in the possession, custody and control of SAFY, not the state and, as such, agree with the trial court's determination that the notes were not a "witness statement" pursuant to Crim.R. 16 (BXIXg) We therefore overrule this assignment of error.

(•P104) "V. The trial court erred by pernritting the opinion testimony of a medical doctor without permitting [••31] defense counsel the right to examine the medical records relied upon by the witness."

**[•PIO5) The defendant asserts that tbe trial court erred by denying defense counsel the opportunity to** examine medical records allegedly relied upon by Dr. Gemmill, the state's expert witness, in rendering bis expert opinion. Specifically, the defendant argues that Dr. Gemmill relied upon the children's confidential medical records, failed to include that information in his report, and as a result the trial court erred in admitting his testimony. We disagree.

[•P106J Evid. R 705 states:

[•P107] "The expert may testify in terms of opinion or inference and give his reasons Therefore after disclosure of the underlying facts or data. This disclosure may be in response to a hypothetical question or otherwise."

f*PI08) A review of the record indicates that Dr. Gemmill testified on direct examination with regard to Kristen, Aaron and Ryan that upon arrival at the clinic, the children were all taken to be interviewed by either himself or one of his co-workers in order to obtain a history. He testified that this was the standard procedure for evaluating children who were alleged to [**32] be sexually abused. Dr. Gemrmll further testified that seventy-five percent of a diagnosis of whether a child has been sexually abused is on the basis of this history that is taken. Dr. Gemmill clearly stated in his direct testimony that his opinions were based on the medical examination and historical evaluation. In his examination of all three children, he found that there was little or no physical evidence indicating sexual abuse. However, be opined that both Kristen and Ryan had been sexually abused. Dr. Gemmilt further testified that the inappropriate treatment that Aaron suffered WAS more likely physical abuse rather than sexual abuse. Dr. Gemmill did not testify that be relied upon other undiscovered materials or reports in making his determinations, further, the defendant had the opportunity to thoroughly cross-examine Dr. Gemmill regarding his testimony. Therefore, we find the defendant's assignment of error to be without merit

[•P109) "VI. The trial court erred by permitting a social worker to testify regarding the conduct of the Krzywkowski children, when the witness had neither interviewed nor examined the children."

[•110) In his sixth assignment of error, [**33] the defendant avers that the trial court erred in allowing

Licensed Independent Social Worker Cynthia King to testify regarding the conduct of the Krzywkowski children when the information and facts upon which she relied, contained in various reports, was predicted on the work of others. We disagree with this contention.

[•P111) Evid. R. 703 states:

[•P112) The facts or data in the particular case upon which an expert bases an opinion or inference may

be those perceived by him *or* admitted in evidence at the hearing." (Emphasis added.)

[•P1J3J Evid. R. 703 clearly states that an expert witness may base an opinion solely on evidence admitted at trial. The defendant's contention that an expert must essentially personally perceive all of the information upon which be or the relies it illogical. Expert witnesses are often relied upon to give an expert opinion regarding facts and circumstances of which they have no personal knowledge or perception. Instead, they are called upon to opine on facts and circumstances that have been admitted into evidence in a particular case.

[•P114] In this case, Ms. King relied upon evidenced that was admitted into evidence, l**34] specifically the children's behavior. She used the evidence of the children's behavior to opine that such behavior *is* indicative of sexual abuse. For instance, Ms. King stated that the game between Aaron and his brother which Aaron testified lo at trial was sexualized in nature and indicative of sexual abuse. She also determined that other indicators of sexual abuse of the children were present, including, inter alia, mutilation of animals and insects, bed-wetting, and repeated masturbation, all of which had been admitted into evidence during direct testimony by either the children or the foster mothers.

[*P115] The defendant relies on *State v Robinson* (Sept 22, 1994). Franklin App. No. 94 APA02-222. 1994 Ohio App LEXIS 4136 for the support that Ms. King was required to interview the children before testifying and rendering an opinion as to whether the behavior they exhibited was indicative of sexual abase. In *Robinson*, (he appellate court held that the social worker's n2 and medical doctor's expert testimony was admissible because both of them had personally interviewed the children in question. There, the court noted that "where an expert bases his opinion, in whole or in major part, on (acts [**35] or data perceived by him, the requirements of Evid R. 703 are Mtisfied," Id. citing *State* v. *Solomon* (1991), 59 Ohio St.3d 124, 570 N.E.2d 1118. However, despite the defendant's contention as such, these cases do not purport to identify the only manner in which to comply with Evid.R. 703.

n2 The social worker ia that case was also Cynthia King.

[•PI 16] The defendant also misconstrues the holding in *State v Francis* (Jan. 25, 2000), 5th Din Ct App. No98CA13, 2000 Ohio App. LEXIS 190, understanding it to require that an expert witness interview the child before opining. In *State* v. *Francis*, however, the issue was whether under Evid.R. 705, it was proper for the expert social worker n3 to state the underlying facts upon which her opinion was based. We find *State v Francis* inapposite in this particular issue.

n3 The social worker in that case was also Cynthia King.

[••36]

[*P117] The trial court did not abuse its discretion in allowing Ms. King to testify as an expert despite not personally interviewing the children. We therefore overrule this assignment of error.

[*P118] "VII. The trial court erred by permitting the hearsay recitation of information by social workers who's participation in the case consisted of neither treatment nor diagnosis of the declarant children."

[*P119] In his seventh assignment of error, the defendant avers the trial court abused its discretion by improperly permitting Ms. King and Julie Prettyman, a licensed social worker, to recite hearsay evidence to the jury thereby impermissably bolstering the veracity of the state's case. We disagree.

[*P120] Pursuant to Ohio case law and Evid.R. 803(4), statements made by a social worker for the purposes of medical diagnosis or treatment are admissible. *State v Boston* (1989), 46 Ohio St.3d 108, 545 N.E.2d 1220. This exception to the hearsay rule states:

f*P12l] "Statements for purposes of medical diagnosis or treatment and describing medical history or past or present symptoms, pain, or sensation, or in the inception or general character of the cause or (**37) external source thereof insofar as reasonably pertinent to diagnosis or treatment"

(•P122] Therefore, the relevant inquiry is whether the statements are reasonably pertinent to diagnosis or treatment. *State v* Chappell (1994), 97 Ohio App.3d 515, 531, 646 N.E.2d 1191. Accord *State* v. *Jones* (Dec. 23, 1999). Cuyahoga App. No. 75390. 1999 Ohio App. LEXIS 6268; *State v. Miller* (1988) 43 Ohio App 3d 44, 46, 539 N.E 2d 693; *Presley v. Presley* (1990) 71 Ohio App.3d 34. 593 N.E.2d 17.

[*P123] Ms. Prettyman was a social worker from the Cuyahoga County Department of Children and Family Services Intake Department. She testified that her role in interviewing the children was to investigate allegations of sexual abuse and initiate an interview with the children. She further stated the purpose of interviewing the children was "to assess the child's needs in terms of safety and whether or not the child will need treatment of any kind, including medical treatment

•and/or counseling." (T. 1643). Her role was critical in determining how quickly and what type of subsequent treatment was necessary for the children. We find that Ms. Prettyman's role was pertinent to medical treatment [**38] or diagnosis, and thus her testimony falls clearly within the exception to the hearsay rule under Evid.K. 803(4).

[•P124] With regard to Ms. King, there is no dispute that Ms. King's role was not pertinent to diagnosis or treatment. As such, her testimony in that regard constituted hearsay. However, while we find that the trial court erred in admitting the testimony of Ms King, we find this error to be harmless. Her testimony was. at most, cumulative. A review of the transcript reveals that Ms King's statements repeated that which had been testified to by the children, Dr. Gemmill and the foiter mothers We cannot say thai the admission of these hearsay is inconsistent with substantial justice, nor has it affected the substantial rights of the defendant. Therefore, we do not find reversible error and overrule this assignment of error.

[•PI 25] "VIII. Mr. Krzywkowski is entitled to a new trial because the verdicts are against the manifest weight of the evidence."

[*P1 26] In his eighth assignment of error, the defendant contends that the guilty verdicts are against the manifest weight of the evidence. Specifically, the defendant avers that the prosecution failed to (**39) provide any evidence of the date* on which the offenses occurred, and that the evidence that was produced was unfairly prejudicial and therefore should not have been admitted. We disagree.

(*P127) In determining if a conviction is against the manifest weight of the evidence, the appellate court reviews the record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new tnal ordered. *State v. Martin* (1983), 20 Ohio App.3d 172, 20 Ohio B. 215, 485 N.E.2d 717, citing *Tibbs* v. *Florida* (1982), 457 U.S. 31, 72 L Ed. 2d 652, 102 S. CL 2211. The court should consider whether the evidence is credible or incredible, reliable or unreliable, certain or uncertain, conflicting, fragmentary, whether a witness was impeached and whether a witness had an interest in testifying *Siate v Mattison* (1985), 23 Ohio App 3d 10, 23 Ohio B. 43, 490 N.E.2d 926.

(•PI28) Where a judgment is supported by competent, credible evidence going to all [**40] the essential elements of the case, a reviewing court will not reverse die judgment as being against the manifest weight of the evidence. *C E Moms Co* v. *Poley Comtrv. Co* (1978). 54 Ohio St.2d 279, 8 Ohio Op. 3d 261, 376 N.E.2d 578, syllabus. Morcvcr, the weight of the evidence and the credibility of the witnesses arc primarily for the trier of fact to decide. *State v DeHass* (1967), 10 Ohio St.2d 230, 39 Ohio Op 2d 366, 227 N.E.2d 212, paragraph one of the syllabus; see also, *State v. Smith* (2000), 87 Ohio St.3d 424, 2000 Ohio 450. 721 N.E.2d93.

(*P129J In sexual abuse cases involving young children, they are often unable to remember exact dates and times when the offenses occurred, particularly when the offenses involved a repeated course of conduct over a lengthy period of lime. *State v. Barnecut* (1988), 44 Ohio App 3d 149, 542 N.E.2d 353. "Because the precise date and time of the offense of rape are not essential elements of That crime, a certain degree of inexactitude in averring the date of the offense is not necessarily fatal to its prosecution." *Slate v. Mam* (June 28, 2002), Montgomery Cly. App. No. 18903, 2002 Ohk> 3300 [••41] citing *State v. Sellards* (1987), 17 Ohio St3d 169, 17 Ohio B. 410, 478 N.E.2d 781; *State v. Lawrinson* (1990). 49 Ohio St.3d 238, 551 N.E.2d 1261.

[*PI30] In this case, the prosecution established that the children were living with the defendant during the times stated in the indictment.

[*P131] The defendant does not dispute that verdict was against the manifest weight of the evidence presented at trial, rather he argues that the evidence at trial was inadmissible. Having addressed the admissibility of certain testimony in the above assignments of error, we overrule this assignment of error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MICHAEL ("42] J. CORRIGAN, PJ., AND JAMES J. SWEENEY, J.. CONCUR.

ANN DYKE, JUDGE

N.B. This entry is an announcement of the court's decision. See App.R.22(B), 22(D) and 26(A); Loc.App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App. R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcementof decision by the clerk per App.R 22(E). See, also S. Ct. Prac.R.II. Section 2(A)(1).

## AMENDMENT V, UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## AMENDMENT VI, UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shal! have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## AMENDMENT XIV, UNITED STATES CONSTITUTION

Section. I. All persons bom or naturalized in the United Slates and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of taw; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## SECTION 2, ARTICLE I, OHIO CONSTITUTION

### § 2 RIGHT TO ALTER, REFORM, OR ABOLISH GOVERNMENT, AND REPEAL SPECIAL PRIVILEGES.

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

## SECTION 5, ARTICLE I, OHIO CONSTITUTION

### § 5 TRIAL BY JURY; REFORM IN CIVIL JURY SYSTEM.

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed td authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

## SECTION 10, ARTICLE I, OHIO CONSTITUTION

### § 10 TRIAL OF ACCUSED PERSONS AND THEIR RIGHTS; DEPOSITIONS BY STATE AND COMMENT ON FAILURE TO TESTIFY IN CRIMINAL CASES,

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenscs for which the penalty provided is less than imprisonment in the penitenliary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury, and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in hi* behalf, and a speedy public trial by an impartial jury of the county in which the offcnsc is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3,1912.)

## SECTION 16, ARTICLE I, OHIO CONSTITUTION § 16

**REDRESS IN COURTS.**

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

## SECTION 39, ARTICLE II, OHIO CONSTITUTION § 39

**REGULATING EXPERT TESTIMONY IN CRIMINAL TRIALS.**

Laws may be passed for the regulation of the use of expert witnesses and expert testimony in criminal trials and proceedings.

TITLE 29 CRIMES - PROCEDURE
CHAPTER 7. SEX OFFENSES
SEXUAL ASSAULTS



Ohio Code § 2907.02 (2003)

$ 2907.02. Rape

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

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(b) The other person is lets than thirteen years of age. whether or not the offender knows the age of the other person.

(c) Fix other person's ability to resist or consent is substantially in^aired because of a mental or physical condition or because of advanced age. and the offender knows or has reasonable cause to believe tliat the other person's ability to resist or consent is substantially impaired because of a menial or physical condition or because of advanced »ge

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates (his section is guilty of rape, a felony of the first degree. If the offender under division (AX I Xa) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in section 3719.41 of the Revised Code to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in section 2929.14 of the Revised Code that is not (e*s than five years. If die offender under division (AXlXb) of this section purposely compels the victim to submit by force or threat of force or if the victim under division (AX I Kb) of this section is less than ten years of age. whoever violates division (AX 1 Kb) of this section shall be imprisoned for life If the offender under division (AX 1 Xb) of this section previously has been convicted of or pleaded guilty to violating division (AX IXb) of this section or to violating a law of another state or the United States that is substantially similar to division (AX 1 Kb) of this section or if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, whoever violates division (AXlXb) of this section shall be imprisoned for life or life without parole.

(C) A victim need not prove physical resistance to the *offender* in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or (he victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material lo a fact at issue in the case and that its inflammatory or prejudicial nature doc* not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of ih« origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chamber*, which shall be held at or before preliminary hearing *made* not less than three days before trial, or for good cause shown during the trial.

(K) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

(G) It is not a defense to a charge under division (AK2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

TITLE 29. CRIMES - PROCEDURE
CHAPTER 7. SEX OFFENSES
SEXUAL ASSAULTS



Ohio Code $ 290705 (2003)

## § 2907.05. Gross sexual imposition

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

(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the judgment or control of the other person or of one of the other persons by administering any drug, intoxicant or controlled substance to die other person surreptitiously or by force, threat of force, or deception.

(3) The offender knows that the judgment or control of the other person or of one of the other persons is substantially impaired as a result of the influence of any drug or intoxicant administered to the other person with the other person's consent for the purpose of any kind of medical or dental examination, treatment, or surgery.

(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

(5) The ability of the other person to resist or content or the ability of one of the other persons to renut or content is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the ability to resist or consent of the other person or of one of the other persons is substantially impaired because of a mental or physical condition or because of advanced age.

(B) Whoever violates this section is guilty of gross sexual imposition. Except as otherwise provided in this section, a violation of division (AX1), (2), (3), or (5) of this section is a felony of the fourth degree. If the offender under division (AK2) of this section substantially impairs the judgment or control of the other person or one of the other persons by administering any controlled substance described in section 3719.41 of the Revited Code to the person surreptitiously or by force, threat of force or deception, a violation of division (AX2) of this section is a felony of the third degree. A violation of division (AX*) of this section is *a felony* of the third degree.

(C) A victim need not prove physical resistance to the offender in prosecutionj under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves

evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissability of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary bearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissability of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

Ohio Code § 2953.21 (2003)

# $ 2953.21. Petition for postconviction relief

(A) (1) (a) Any person who has been convicted of a criminal offcnse or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to *render* the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant Other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (AXIX«) of mis section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953 81 of the Revised Code 01 under section 2953 82 of the Revised Code been presented at trial, no reasonable fact finder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable fact finder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (AXO of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed m the supreme court. If no appeal is taken, except as otherwise provided in section 2953 23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

**(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except at provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.**

**(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to. a copy of that type of information relative to the petitioner's sentence and copies of that type of infonnation relative to sentences that the same judge imposed upon other persons.**

**(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of the court. The clerk of the court in which the petition is filed immediately shall forward a copy of the petition to the prosecuting attorney of that county.**

**(C) The court shall consider a petition that is timely filed under division (AX2) of this section even if a direct appeal of (he judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds fur relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.**

**(D) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.**

**(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.**

**(F) At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at aay time thereafter**

**(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (E) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and set aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters M rearraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (E) of this section, the appellate court reversing the order granting die petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of**

**the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.**

**(H) Upon the filing *of a* petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.**

(I) (1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel The court

may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that tlie person is not indigent.

(2) The court shall not appoint as counsel under division (1X1 ) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (1X1 ) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an ofTcnse for which the death penalty can be or lias been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (1) of this section docs nul preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to the effective date of this amendment insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.00, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (1X2) of this section.

(J) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.