APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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State v. Bugno, 2022 Ohio LEXIS 1978

Supreme Court of Ohio

September 27, 2022, Decided

2022-0908.
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State v. Bugno.

Notice:

DECISION WITHOUT PUBLISHED OPINION

Prior History:

Mahoning App. No. 20 MA 0030, 2022-Ohio-2008.
State v. Bugno, 2022-Ohio-2008, 2022 Ohio App. LEXIS 1882, 2022 WL 2114587 (Ohio Ct. App., Mahoning County, June 9, 2022)

Judges: Brunner, J., not participating.

Opinion

APPEAL NOT ACCEPTED FOR REVIEW
Brunner, J., not participating.

State v. Bugno, 2022-Ohio-2008

Court of Appeals of Ohio, Seventh Appellate District, Mahoning County

June 9, 2022, Decided

Case No. 20 MA 0030
Reporter
2022-Ohio-2008* | 2022 Ohio App. LEXIS 1882** | 2022 WL 2114587

STATE OF OHIO, Plaintiff-Appellee, v. ALEX BUGNO, Defendant-Appellant.

Subsequent History: Discretionary appeal not allowed by State v. Bugno, 167 Ohio St. 3d 1528, 2022-Ohio-3322, 2022 Ohio LEXIS 1978, 195 N.E.3d 168 (Ohio, Sept. 27, 2022)

Prior History:

[**1] Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio. Case No. 18-CR-425.

OPINION AND JUDGMENT ENTRY

D'Apolito, J.

[*P1] Appellant, Alex Bugno, appeals from the February 6, 2020 judgment of the Mahoning County Court of Common Pleas convicting him for compelling prostitution and pandering obscenity involving a minor following a trial by jury and sentencing him to a total of 17 years in prison and labeling him a Tier II Sex Offender or Child-Victim Offender. On appeal, Appellant raises various arguments, including: that the trial court erred in denying his motions to suppress and sever; that the prosecutor engaged in misconduct; that the court should not have admitted certain testimony; and that Appellee, the State of Ohio, presented insufficient evidence and [**2] that his convictions are against the manifest weight of the evidence. Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

[*P2] On April 19, 2018, Appellant was indicted by the Mahoning County Grand Jury on 34 felony counts involving sex crimes: counts one through six, pandering obscenity involving a minor; counts seven through 20, compelling prostitution; and counts 21 through 34, importuning. Appellant retained counsel, entered a not guilty plea, and waived his right to a speedy trial.

[*P3] A superseding indictment was issued on February 21, 2019 which contained the original 34 counts plus one additional charge: count 35, pandering obscenity involving a minor. Specifically, counts one through six (pandering obscenity involving a minor) and counts 21 through 34 (importuning) were ultimately dismissed. This appeal centers on the charges that proceeded to a trial by jury, namely: counts seven through 20 (compelling prostitution, felonies of the third degree, in violation of R.C. 2907.21(A)(2)(b) and (c)); and count 35 (pandering obscenity involving a minor, a felony of the second degree, in violation of R.C. 2907.321(A)(3)).

[*P4] The criminal conduct alleged in counts seven through 20 stemmed from activity that occurred from [**3] February 1, 2014 through June 21, 2014 in which Appellant allegedly paid two juvenile males, R.O. and M.W., for oral sex. The criminal conduct alleged in count 35 stemmed from activity that occurred between January 10, 2011 through July 10, 2014 in which Appellant allegedly made a pornographic video, found during a search of a computer by State agents, which depicted Appellant performing oral sex on a juvenile male, M.C. The boys were around 15 to 17 years old during the time of the offenses.

[*P5] Appellant, through his retained counsel, entered a not guilty plea to the superseding indictment and again waived his right to a speedy trial. On February 25, 2019, Appellant filed a motion for relief from improper joinder.

[*P6] On March 12, 2019, Appellant filed a motion to suppress evidence seized as a result of search warrants executed at Appellant's business, Bugno Towing, and of a computer found at the business. The State filed a response.

[*P7] A hearing on Appellant's motion to suppress and motion for relief from improper joinder was held on April 18, 2019. The State presented two witnesses: Officer James Rowley, with the Youngstown Police Department ("YPD"); and Special Agent Ed Carlini, with the [**4] Ohio Bureau of Criminal Investigation ("BCI").1Link to the text of the note

[*P8] The trial court overruled Appellant's motion for relief from improper joinder on May 15, 2019. The parties submitted supplemental briefing regarding the motion to suppress on June 3, 2019. On July 1, 2019, the court overruled Appellant's motion to suppress.

[*P9] On December 23, 2019, Appellant filed a renewed motion for relief from improper joinder. The State filed a response. On January 8, 2020, the trial court sustained Appellant's motion for relief from improper joinder. The court ordered that counts one through six shall be severed from counts seven through 35.

[*P10] On January 13, 2020, Appellant filed a motion for relief from improper joinder as to count 35. The State filed an opposition indicating it complied with the rules of criminal procedure and that the defense failed to establish any prejudice. The trial court overruled Appellant's motion.

[*P11] A trial by jury commenced on January 15, 2020.

[*P12] The State presented 35 exhibits and 14 witnesses: Officer James Rowley, Lieutenant Brian Flynn, Officer Anthony Marzullo, and Officer Jacob Short, with YPD; Whitney Voss, a forensic scientist with BCI; Dr. Pradeep

Mathur, a child psychiatrist at Belmont [**5] Pines; Clarice Cowgill and Heather Karl, BCI cyber-crimes unit special agents; Christine Ross, criminal intelligence analyst and forensic artist at BCI; R.O.'s father; R.O.; M.W.; Officer Charles Hillman, with the Boardman Police Department; and Christopher Michael Mullins, a Bugno Towing prior employee.2Link to the text of the note

[*P13] This matter began on June 21, 2014 when Appellant called YPD to report a criminal damaging incident that occurred at his business, Bugno Towing, located at 1101 East Indianola Avenue, Youngstown, Ohio. Three vehicles in Appellant's tow yard had been shot with BB guns. Appellant later reviewed security footage. Appellant determined that R.O. was one of the individuals involved in the BB gun incident. Appellant then called R.O.'s father, who later confronted his son.

[*P14] During that discussion, R.O. was upset and shaking. R.O. revealed to his father that Appellant had been paying him for oral sex. R.O. ran to the second floor of his family's home, grabbed his father's shotgun, and attempted suicide. Fortunately, his father stopped him. R.O. was later taken to Belmont Pines for psychiatric treatment. R.O.'s father was also shown photographs made from a video in which Appellant is seen performing [**6] oral sex on M.C. (State's Exhibit 1).

[*P15] M.W. testified that he grew up with R.O. and M.C. and that they had been friends since childhood. M.W., R.O., and M.C. would spend time at Appellant's Indianola business. In early 2014, M.C. told M.W. that Appellant would pay them money to "pretty much have his way with us." (1/15/2020 Jury Trial T.p., p. 994). M.W. initially rejected the idea.

[*P16] M.W. recounted a specific day where he was at Appellant's Indianola business with M.C. and others. Appellant suggested they go to his other business location,

Bugno Towing, located at 535 North Garland Avenue, Youngstown, Ohio. M.W. agreed. After they arrived, Appellant asked M.W. if he wanted to have some more fun and Appellant gave him pills. M.W. took the pills and "the night ended up taking us [M.W., R.O., and M.C.] getting naked and [Appellant] paying us $500 each to perform sexual acts on us." (Id. at p. 998). This same type of incident occurred multiple times thereafter, i.e., approximately 10 to 15 times between February and June of 2014, and at least once a month during that timeframe. Appellant would sometimes give the boys pills during the sexual abuse.

[*P17] M.W. explained that Appellant would either [**7] call or text the boys in order to set up the sexual encounters. Most of the incidents took place at the Indianola business location because "[i]t was easy to hide what was going on" due to the layout of the building. (Id. at p. 1005). During one incident, Appellant told M.W. that the sexual encounter was going to be livestreamed on the internet and that he would pay him more because of that. In addition to paying the boys to perform oral sex on them, Appellant would also pay them to do other things, as he "like[d] to be peed on, or to be slapped around." (Id. at p. 1009).

[*P18] M.W. also discussed the night in which he was part of the group that vandalized Appellant's business. Not realizing that the vandalism had occurred, Appellant called M.W. and other boys to come to his shop. M.W., R.O., and another juvenile male, B.L., went to Appellant's shop and performed sex acts. The boys returned to R.O.'s house where they spent the night. The next morning, R.O.'s father heard about the vandalism and R.O. told him about the sexual abuse that had been taking place. M.W. indicated that R.O. attempted suicide. M.W. then left R.O.'s house and went home to inform his parents with regard to what had [**8] been happening with Appellant.

[*P19] Thereafter, M.W. made a Facebook post denying that any sexual abuse had occurred. M.W. made the post

because the sexual abuse information was being spread among the public by M.C. M.W. did not tell the truth in the Facebook post because he felt ashamed and embarrassed. M.W. was adamant, however, that the sexual abuse did in fact occur.

[*P20] According to R.O., he began spending time at Bugno Towing when he was about 10 years old because it was close to his house and his father had worked there. Like M.W., R.O. recalled M.C. bringing up the potential to perform sex acts for Appellant for money during February 2014 when he was around 15 years old. R.O. told the same version of events as M.W. regarding Appellant's sexual abuse, i.e., how Appellant would set up the incidents via phone calls or text messages; Appellant would tell the boys to take their clothes off so he could perform oral sex on them; Appellant paid each boy $500; Appellant paid extra for video recordings; the sexual abuse was recorded at least 10 times; Appellant would give the boys pills prior to the sexual incidents; and these incidents reoccurred at least once per month from February to June [**9] of 2014.

[*P21] Officer Rowley testified that Appellant had called YPD regarding the criminal damaging incident at his business. A few days later, R.O.'s father called YPD reporting that Appellant had sexually abused his son. Officer Rowley later interviewed R.O. at Belmont Pines where he had been taken for treatment after the sexual abuse was discovered and after he had attempted suicide. R.O. informed Officer Rowley of another victim, M.W., during the initial interview. M.W. was also interviewed and reported being a victim of Appellant's sexual abuse. Officer Rowley determined that the incidents occurred at Bugno Towing and contacted BCI for further assistance.

[*P22] Search warrants were subsequently obtained for Appellant's businesses. The searches resulted in the seizure of a number of electronic devices and pills. A subsequent search of the electronics revealed a video of Appellant

performing oral sex on M.C. which was played for the jury. (State's Exhibit 1). The pills were sent to BCI for testing. Some of the pills were revealed to contain morphine, oxycodone, hydrocodone, and opioids. Phone records were also examined in the investigation. Between January and June of 2014, Appellant had [**10] contacted R.O. 569 times and M.W. 445 times.

[*P23] Dr. Mathur treated R.O. at Belmont Pines following his suicide attempt. Dr. Mathur testified R.O. was upset about the sexual abuse caused by Appellant. Dr. Mathur referred the abuse to Children's Services. The referral included the fact that Appellant was the individual who sexually abused R.O.

[*P24] At the conclusion of the State's case, Appellant moved for an acquittal pursuant to Crim.R. 29, which was overruled by the trial court.

[*P25] Appellant presented 25 exhibits and 11 witnesses: Richard Brooks Douglass, an attorney who took business trips with Appellant; Rodney DeRicco, a friend of Appellant's; Melissa Dunlap, Arthur Richards, Kathleen DePizzo, Skyler Hergenrader, Beth Proffitt, and David Pratt, Bugno Towing prior employees; Robert Maclarren, who lived at Bugno Towing; Christopher Michael Bugno, Appellant's father; and Martha Heffron, who has known Appellant since he was a baby.

[*P26] Appellant's witnesses who had worked for him testified they never observed any improper sexual activity regarding Appellant and the boys. Attorney Douglass testified he and Appellant were out of the country during various times from February to June of 2014.

[*P27] At the conclusion [**11] of all of the evidence, Appellant renewed the Crim.R. 29 motion for acquittal, which was overruled by the trial court.

[*P28] The jury found Appellant guilty on all counts of compelling prostitution and on one count of pandering obscenity involving a minor as charged in the superseding indictment.

[*P29] On January 31, 2020, Appellant filed a motion for new trial and a renewed motion for judgment of acquittal. The trial court overruled both motions.

[*P30] On February 6, 2020, the trial court sentenced Appellant to a term of three years on each of the compelling prostitution charges and five years on the pandering obscenity involving a minor charge. The court ordered that the sentences in counts 7, 13, 14, 20, and 35 be served consecutively to one another but concurrently with the remaining counts 8, 9, 10, 11, 12, 15, 16, 17, 18, and 19 for a total term of 17 years in prison. The court labeled Appellant a Tier II Sex Offender or Child-Victim Offender and noti fied him that post-release control is mandatory for five years.

[*P31] Appellant, through appointed counsel, filed a timely appeal and raises six assignments of error.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS AS IT RELATED [**12] TO THE SEARCH AND SEIZURE OF ITEMS AT THE E. INDIANOLA ADDRESS AND THE COMPUTER AS THE SEARCH WARRANTS WERE FATALLY DEFECTIVE AS EACH FAILED TO AUTHORIZE THE SEIZURE OF ANY ITEM AND EACH FAILED TO COMPLY WITH THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION.

[*P32] In his first assignment of error, Appellant argues

that the search warrants were fatally defective.3Link to the text of the note Appellant alleges the trial court erred in denying his motion to suppress regarding the search of the East Indianola address and the subsequent search and seizure of the laptop computer which was found and taken from that address.

HN1 A trial court's decision to deny a motion to suppress involves a mixed question of law and fact: legal questions are reviewed de novo, but factual issues are rarely disturbed as the trial court is the fact-finder at the suppression hearing and occupies the best position to evaluate witness credibility. State v. Roberts, 110 Ohio St. 3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 100. In other words, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence; upon accepting the facts as true, the appellate court independently determines, without deferring to the trial court's conclusion, whether the facts satisfy the applicable legal [**13] standard. State v. Burnside, 100 Ohio St. 3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8.

HN2 The Fourth Amendment imposes a reasonableness standard on the exercise of discretion by government officials. State v. Mays, 119 Ohio St. 3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, ¶ 12, citing Delaware v. Prouse, 440 U.S. 648, 653-654, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1990). The permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Id. citing Prouse at 654, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660.

The Fourth Amendment to the United States Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the

persons or things to be seized." Ohio Constitution, Article I, Section 14, is nearly identical to its federal counterpart. State v. Kinney, 83 Ohio St.3d 85, 87, 1998-Ohio-425, 698 N.E.2d 49 (1998).

HN3 For a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant. See Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). This requires a two-step analysis: First, there must be probable cause. If probable cause exists, then a search warrant must be obtained unless an exception to the warrant requirement applies. If the state fails to satisfy either step, the evidence seized in the unreasonable search must be suppressed. Mapp v. Ohio, 367 U.S. 643, 657, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 86 Ohio Law Abs. 513 (1961).

Probable cause exists when a reasonably prudent person [**14] would believe that there is a fair probability that the place to be searched contains evidence of a crime. Illinois v. Gates, 462 U.S. 213, 246, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). However, "(f)inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the (probable-cause) decision." Id. at 235, 103 S.Ct. 2317. "The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." Maryland v. Pringle, 540 U.S. 366, 370-71, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003). "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt, (* * *) and that the belief of guilt must be particularized with respect to the person to be searched or seized (* * *)." Id., citing Ybarra v. Illinois, 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979).

State v. Smith, 7th Dist. Columbiana No. 20 CO 0022, 2021-Ohio-3330, ¶ 30-34.

[Thus,] HN4 [p]ursuant to the Fourth Amendment, only warrants "particularly describing the place to be searched and the person or things to be seized" may issue. "The manifest purpose of this particularity requirement was to prevent general searches. (* * *) (T)he requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." Maryland v. Garrison, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987).

State v. Wallace, 7th Dist. Mahoning Nos. 11 MA 137-145, 149-155, 146, 147, 148, 2012-Ohio-6270, ¶ 32, 986 N.E.2d 498.

In determining whether a search warrant [**15] satisfies the Fourth Amendment's particularity requirement, reviewing courts employ a standard of practical accuracy rather than technical precision. United States v. Otero (C.A.10, 2009), 563 F.3d 1127, 1132. "(A) search warrant is not to be assessed in a hypertechnical manner (and need not satisfy the) '(t)echnical requirements of elaborate specificity once exacted under common law pleadings.'" United States v. Srivastava (C.A.4, 2008), 540 F .3d 277, 289, quoting United States v. Ventresca, 380 U.S. 102, 108, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965). A search warrant will be held sufficiently particular when it enables a searcher to reasonably ascertain and identify the things authorized to be seized. United States v. Riccardi (C.A.10, 2005), 405 F.3d 852, 862. "The common theme of all descriptions of the particularity standard is that the warrant must allow the executing officer to distinguish between items that may and may not be seized." United States v. Leary (C.A.10, 1988), 846 F.2d 592, 600, fn. 12.

State v. Gonzales, 3rd Dist. Seneca Nos. 13-13-31 and 13-13-32, 2014-Ohio-557, ¶ 32.

[*P33] HN5 The United States Supreme Court made clear

its position on search warrants incorporating other documents, including affidavits:4Link to the text of the note

We do not say that the Fourth Amendment prohibits a warrant from cross-referencing other documents. Indeed, most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant. See, e.g., United States v. McGrew, 122 F.3d 847, 849-850 (C.A.9 1997); United States v. Williamson, 1 F.3d 1134, 1136, n. 1 (C.A.10 1993); United States v. Blakeney, 942 F.2d 1001, 1025-1026 (C.A.6 1991); United States v. Maxwell, 920 F.2d 1028, 1031, 287 U.S. App. D.C. 234 (C.A.D.C.1990); United States v. Curry, 911 F.2d 72, 76-77 (C.A.8 1990); United States v. Roche, 614 F.2d 6, 8 (C.A.1 1980). * * *

Groh, supra, at 557-58.

[*P34] HN6 Since Groh, the idea that a search warrant [**16] can cross-reference other documents, including affidavits, has been routinely upheld:

As a general rule, a supporting affidavit or document may be read together with (and considered part of) a warrant that otherwise lacks sufficient particularity "if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." Groh, 540 U.S. at 557-58, 124 S.Ct. 1284.

United States v. Hurwitz, 459 F.3d 463, 470-471 (4th Cir.2006); see also State v. Craw, 3rd Dist. Mercer No. 10-17-09, 2018-Ohio-1769; State v. Johnson, 2nd Dist. Greene No. 2019-CA-64, 2020-Ohio-4159.

[*P35] Appellant claims the warrant to search his Indianola business violated the Fourth Amendment because it did not include a "command to seize" section. Appellant is correct

that the warrant alone does not contain any description of property to be seized. However, Appellant ignores the relevant case law and the affidavit of Special Agent Ed Carlini incorporated into the warrant by reference.

[*P36] Specifically, the warrant states in part: "Based on my [the issuing judge's] review of affidavit(s) having been made before me by Special Agent Ed Carlini, Ohio Bureau of Criminal Investigation (BCI), incorporated herein by reference and attached thereto as exhibit (1)[.]" (East Indianola Warrant, Exhibit A).

[*P37] Additionally, the affidavit states in part:

"[T]his Affiant reasonably believes Alex Bugno does in fact possess electronic media including, [**17] but not limited to, computer(s), removable computer media, camera(s), printer(s), phone system(s), recording device(s), website(s), IP addresses, and/or information stored therein, located at 1101 East Indianola Avenue, Youngstown, Ohio 44502, Mahoning County, Ohio. This Affiant reasonably believes that said electronic media is utilized to further the interests of the enterprise and may contain videos and images of unlawful sexual conduct with a minor, importuning, compelling prostitution, pandering sexually oriented matter involving a minor, corrupting another with drugs and/or permitting drug abuse. As a result, this Affiant respectfully requests that any and all electronic media be seized and subsequently searched as an instrumentality and/or proceeds of said enterprise. Further, this Affiant believes that any information contained therein, including but not limited to, any and all hard drives, removable media, discs, CDs, DVDs, e-mail (opened or unopened), or anything having to do with said computer(s), printer(s), fax machine(s), phone system(s), website(s), shredder(s) and/or information stored therein, be seized and subsequently searched.

(Affidavit of Special Agent Ed Carlini [**18] for Search of Indianola Property, p. 4-5, Part 1, "Electronic Media,"

attached to Warrant to Search Indianola Property).

[*P38] Thus, although the warrant alone does not contain a command to seize any specific property, the affidavit attached to the warrant does state with particularity the property to be seized. The warrant incorporates the affidavit which was attached to the warrant and with the officers at the time of the search.

[*P39] Appellant also claims that even if the search of the property was correct, the search of the laptop itself should have been suppressed due to a lack of specificity in the warrant. As addressed, however, Appellant's claim disregards the warrant's incorporation of the supporting affidavit. In addition, regarding the laptop, we determine that the laptop warrant specifically does request the ability to search and seize that item, namely:

> An HP Pavillion DV9700 Laptop, Model #KR269AV, S/N CNF8241JZK. Authorization is requested by searching officers to seize, search, listen to, read, review, copy, operate, and/or maintain the above-described property and to convert it to human-readable form as necessary. All of which is evidence in the following criminal offenses: O.R.C. 2907.04 Unlawful [**19] Sexual Conduct with a Minor; 2907.07 Importuning; 2907.31 Disseminating Matter Harmful to Juveniles; 2907.322 Pandering Sexually Oriented Matter Involving a Minor.

(HP Pavillion DV9700 Laptop Warrant, Exhibit G).

[*P40] The laptop warrant was not facially invalid due to a lack of particularity. HN7 In State v. Castagnola, 145 Ohio St.3d 1, 2015-Ohio-1565, 46 N.E.3d 638, the Supreme Court of Ohio held:

> [T]he particularity requirement of the Fourth Amendment applies to the search of a computer and requires a search warrant to particularly describe the items believed to be

contained on the computer with as much specificity as the affiant's knowledge and the circumstances of the case allow and that the search be conducted in a manner that restricts the search for the items identified.

Id. at ¶ 106.

[*P41] In Castagnola, the Supreme Court of Ohio reversed because the warrant was a blanket search of "records and documents stored on the computer" with no further explanation. Id. at ¶ 82. Here, there was much more explanation as the warrant only allowed a search for evidence relating to certain sex offenses involving juveniles. (HP Pavillion DV9700 Laptop Warrant, Exhibit G). Thus, the laptop warrant was not facially invalid due to a lack of particularity. See Castagnola. Accordingly, the trial court properly denied [**20] Appellant's motion to suppress.

[*P42] Even assuming arguendo that the search of the laptop was somehow invalid, the trial court properly held that the exclusionary rule did not apply. See State v. Wilmoth, 22 Ohio St. 3d 251, 22 Ohio B. 427, 490 N.E.2d 1236, paragraph one of the syllabus (1986) ("HN8 The exclusionary rule should not be applied to suppress evidence obtained by police officers acting in objectively reasonable, good faith reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid.")

[*P43] HN9 The Supreme Court of Ohio in Castagnola explained the test to be applied when an officer/state agent is alleged to have searched and/or seized pursuant to a warrant that lacks particularity:

Suppression remains an appropriate remedy (1) when an officer relies on a warrant that is based on an affidavit "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'" and (2) when a warrant is "so facially deficient—i.e., in failing to particularize the place to be searched or the things to be

seized—that the executing officers cannot reasonably presume it to be valid."

Castagnola, supra, at ¶ 98.

[*P44] We disagree that the warrant was facially deficient. Nevertheless, the trial court properly held that the warrant was not lacking in indicia of probable cause, [**21] that the foregoing test in Castagnola was not met, and that exclusion could not follow.5Link to the text of the note The record reveals the affiant was correct as the search of the laptop revealed numerous instances of child pornography and a video of Appellant engaging in a sex act with a juvenile.

[*P45] Appellant's first assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SEVER COUNT 35, PANDERING OBSCENITY, FROM COUNTS 7 THROUGH 20, COMPELLING PROSTITUTION, AS JOINDER OF THESE OFFENSES AT TRIAL AS THE IMPROPER JOINDER COUNTS PREJUDICED APPELLANT'S RIGHT TO A FAIR TRIAL.

[*P46] In his second assignment of error, Appellant contends the trial court abused its discretion in denying his motion to sever count 35 from counts seven through 20.

HN10 Crim.R. 14 provides that a trial court shall order separate trials if a defendant is prejudiced by joinder. Joinder to avoid multiple trials is favored by the courts for several reasons, among these: to conserve judicial resources, including time and expense; reduce the chance of conflicting results in successive trials before different juries and reduce inconvenience to the witnesses. State v. Clifford (1999), 135

Ohio App.3d 207, 211, 733 N.E.2d 621. To prevail on a claim that the trial court erred in consolidating [**22] charges for trial, the defendant must demonstrate affirmatively: (1) that his rights were prejudiced, (2) that at the time that the trial court ruled on the motion to consolidate, he provided the court with sufficient information in order to weigh the considerations favoring joinder against the defendant's right to a fair trial, and (3) that given the information provided, the court abused its discretion in consolidating the charges for trial. State v. Schaim (1992), 65 Ohio St.3d 51, 59, 1992-Ohio-31, 600 N.E.2d 661; State v. Torres (1981), 66 Ohio St.2d 340, 421 N.E.2d 1288, syllabus of the court.

HN11 A defendant has the burden of affirmatively showing that his rights were prejudiced by joinder. State v. Clifford, supra, 211, citing State v. Torres, supra. To determine whether such prejudice would occur, the trial court must determine whether evidence of the other crimes would be admissible even if the counts were severed and, if not, whether the evidence of each crime is simple and distinct. State v. Schaim, supra, 59. Absent a clear showing of abuse of discretion, a trial court's decision regarding joinder will not be disturbed. State v. Clifford, supra, 211. The term "abuse of discretion" connotes more than an error of law or of judgment; it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. State v. Adams (1980), 62 Ohio St.2d 151, 158, 404 N.E.2d 144.

State v. Linde, 7th Dist. Belmont, 2001-Ohio-3284, 2001 WL 649162, *1-2 (2001).

[*P47] As stated, Appellant's trial encompassed two groups of charges: (1) counts seven through [**23] 20 each alleged compelling prostitution in violation of R.C. 2907.21(A)(2)(b) and (c) involving R.O. and M.W.; and (2) count 35 alleged pandering obscenity involving a minor in violation of R.C. 2907.321(A)(3) involving M.C. Count 35 involved a single, separate victim from counts seven through 20. It is difficult

to see how the evidence would be confused by the jury as it was both simple and distinct. See Evid.R. 404(B); State v. Dew, 7th Dist. Mahoning No. 08 MA 62, 2009-Ohio-6537, ¶ 95. The evidence was admissible relative to both groups of charges, i.e., as it showed that it was the same type of sexual conduct and proved Appellant's motive for committing sex offenses (sexual gratification based on sexual contact). See State v. Gawron, 7th Dist. Belmont No. 20 BE 0009, 2021-Ohio-3634, ¶ 43-48. Thus, the trial court did not abuse its discretion in denying severance.

[*P48] Appellant's second assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 3

THE PROSECUTOR ENGAGED IN PROSECUTORIAL MISCONDUCT DURING TRIAL AND CLOSING ARGUMENTS, THUS DEPRIVING APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT ERRED BY ALLOWING EVIDENCE DURING THE STATE'S CASE-IN-CHIEF REGARDING THE APPELLANT'S PRE-ARREST SILENCE AND ABUSED ITS DISCRETION IN FAILING TO GRANT A MISTRIAL BASED ON THE ADMISSION OF THAT EVIDENCE.

[*P49] In his third assignment of error, Appellant alleges [**24] the prosecutor engaged in misconduct during trial and closing arguments. In his fourth assignment of error, Appellant takes issue with a single reference to pre-arrest silence. Because his assignments are interrelated, we will address them together.

"HN12 The right to remain silent is conferred by the

United States and the Ohio Constitutions." State v. Graber, 5th Dist. Stark No. 2002CA00014, 2003-Ohio-137, ¶ 78, 95 N.E.3d 631. "The privilege against self-incrimination 'is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will."'" Id., quoting Miranda v. Arizona, 384 U.S. 436, 460, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966), quoting Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 12 L. Ed. 2d 653, (1964). See also State v. Plott, 3d Dist. Seneca No. 13-15-39, 2017-Ohio-38, ¶ 86, 80 N.E.3d 1108, citing Doyle v. Ohio, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L. Ed. 2d 91 (1976). "This rule enforces one of the underlying policies of the Fifth Amendment, which is to avoid having the jury assume that a defendant's silence equates with guilt." State v. Perez, 3d Dist. Defiance No. 4-03-49, 2004-Ohio-4007, ¶ 10, citing State v. Leach, 102 Ohio St.3d 135, 2004-Ohio-2147, ¶ 30, 807 N.E.2d 335, citing Murphy v. Waterfront Comm. of New York Harbor, 378 U.S. 52, 55, 84 S.Ct. 1594, 12 L. Ed. 2d 678 (1964). "However, the introduction of evidence regarding a defendant's decision to remain silent does not constitute reversible error if, based on the whole record, the evidence was harmless beyond any reasonable doubt." State v. Zimmerman, 18 Ohio St.3d 43, 45, 18 Ohio B. 79, 479 N.E.2d 862 (1985).

State v. Chavez, 3rd Dist. Seneca Nos. 13-19-05, 13-19-06, 13-19-07, 2020-Ohio-426, ¶ 50.

[*P50] Regarding pre-arrest silence, Appellant stresses that he did not take the stand in his own defense, thereby preserving his Fifth Amendment right to silence. Appellant takes issue with a small portion of the State's direct examination of Officer Rowley. [**25] Specifically, the prosecutor asked Officer Rowley if Appellant offered a statement to him. Officer Rowley indicated that he had nothing in his notes that revealed any statement. Appellant believes the State improperly commented on his right to silence. Appellant moved for a mistrial which was overruled by the trial court.

[*P51] Because this was a single, isolated statement without any suggestion that the jury should infer guilt from it, any error was harmless. See State v. Treesh, 90 Ohio St.3d 460, 480, 2001-Ohio-4, 739 N.E.2d 749 (2001) ("A single comment by a police officer as to a suspect's silence without any suggestion that the jury infer guilt from the silence constitutes harmless error.")

[*P52] HN13 Appellant also claims the prosecutor engaged in misconduct during closing arguments.

When reviewing a claim of prosecutorial misconduct in closing arguments, the reviewing court evaluates whether remarks were improper and, if so, whether they prejudicially affected the defendant's substantial rights. State v. Lott, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990). The prosecution is afforded wide latitude in summation. Id. Contested statements made during closing arguments are not viewed in isolation but are read in context of the entire argument and the entire case. State v. Treesh, 90 Ohio St.3d 460, 466, 2001-Ohio-4, 739 N.E.2d 749 (2001); State v. Rahman, 23 Ohio St.3d 146, 154, 23 Ohio B. 315, 492 N.E.2d 401 (1986) (also noting if the Court were to find "every remark made by counsel [**26] outside of the testimony were grounds for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced of counsel are occasionally carried away by this temptation").

State v. Hymes, 7th Dist. Mahoning No. 19 MA 0130, 2021-Ohio-3439, ¶ 82.

[*P53] Appellant claims the State referred to him as a "predator" and denigrated defense counsel during closing arguments by saying the defense was "throwing darts" and was "smoke and mirrors." (1/15/2020 Jury Trial T.p., p. 1761, 1767, 1782). These comments, however, have been made before from prosecutors during closing arguments in

other trials and have not constituted prosecutorial misconduct. See Hymes, supra, at ¶ 85; State v. Burns, 5th Dist. Stark No. 2010CA00279, 2011-Ohio-815, ¶ 24-35. The same applies here. Even assuming arguendo that the statements were improper, they did not saturate the trial with emotion or impact Appellant's substantial rights as there was ample evidence of his guilt, as addressed. See State v. Keenan, 66 Ohio St.3d 402, 409, 613 N.E.2d 203 (1993).

[*P54] Appellant's third and fourth assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 5

THE TRIAL COURT ERRED BY ALLOWING TESTIMONY AS TO A NUMBER OF PILLS AND LIQUID DRUGS FOUND AT BUGNO TOWING AND NOT CONNECTED TO THE APPELLANT OR THE CHARGES AGAINST HIM.

[*P55] In his fifth assignment of error, Appellant contends the jury [**27] should not have heard the testimony of BCI Agent Voss regarding controlled substances that were found during the search of Appellant's business. Appellant maintains the evidence and testimony relating to these drugs constituted impermissible other acts evidence and was prejudicial.

[*P56] "'HN14 [T]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court.'" State v. Palmer, 7th Dist. Mahoning No. 19 MA 0108, 2021-Ohio-4639, ¶ 55, quoting State v. Sage, 31 Ohio St.3d 173, 31 Ohio B. 375, 510 N.E.2d 343 (1987), paragraph two of the syllabus. "'Relevant evidence' means 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 would be without the evidence." Evid.R. 401.

[*P57] As stated, both R.O. and M.W. testified that Appellant gave them pills on occasion before sexually abusing them. Because pills, like the ones described by each victim, were found at Appellant's business, where the abuse occurred, the evidence was clearly relevant. Evid.R. 401; see, e.g., State v. Wallace, 7th Dist. Mahoning No. 19 MA 0093, 2021-Ohio-3303, ¶ 33. Because the evidence was admissible, the trial court did not abuse its discretion in allowing the relevant testimony.

[*P58] Appellant's fifth assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 6

THE JURY'S VERDICT OF GUILTY AS TO THE PANDERING OBSCENITY INVOLVING [**28] A MINOR WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND VERDICTS OF GUILTY AS TO ALL COUNTS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

[*P59] In his sixth assignment of error, Appellant calls into question the sufficiency and weight of the evidence adduced at trial. Specifically, Appellant contends that the State did not present sufficient evidence to support his conviction for pandering obscenity involving a minor. Appellant further contends his convictions for compelling prostitution and pandering obscenity involving a minor are against the manifest weight of the evidence.

HN15 "When a court reviews a record for sufficiency, '(t)he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' State v. Maxwell, 139 Ohio St. 3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146,

quoting State v. Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

In determining whether a criminal conviction is against the manifest weight of the evidence, an Appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of [**29] fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. State v. Thompkins, 78 Ohio St.3d 380, 387, 1997- Ohio 52, 678 N.E.2d 541 (1997); State v. Hunter, 131 Ohio St. 3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 119.* * *

The weight to be given to the evidence and the credibility of the witnesses are nonetheless issues for the trier of fact. State v. DeHass, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." Davis v. Flickinger, 77 Ohio St.3d 415, 418, 1997- Ohio 260, 674 N.E.2d 1159 (1997).

State v. T.D.J., 7th Dist. Mahoning No. 16 MA 0104, 2018-Ohio-2766, ¶ 46-48.

[*P60] "'HN16 (C)ircumstantial evidence and direct evidence inherently possess the same probative value.'" State v. Biros, 78 Ohio St.3d 426, 447, 1997-Ohio-204, 678 N.E.2d 891 (1997), quoting Jenks, supra, paragraph one of the syllabus.

[*P61] For the reasons addressed below, we determine the judgment is not against the manifest weight of the evidence and further conclude it is supported by sufficient evidence.

[*P62] Appellant takes issue with the guilty finding for

pandering obscenity involving a minor, a felony of the second degree, in violation of R.C. 2907.321(A)(3), which states: "(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following: * * * (3) Create, direct, or produce an obscene performance that has a minor or impaired person as one of its participants[.]"

[*P63] R.C. 2907.01(K) defines "Performance" to mean "any motion picture, preview, [**30] trailer, play, show, skit, dance, or other exhibition performed before an audience."

[*P64] The term "audience" is not defined by the Revised Code. Appellant claims the State did not present any evidence as to the "audience" portion of the statutory definition and, therefore, his conviction for pandering obscenity involving a minor must fail. We disagree.

[*P65] As stated, Appellant made video recordings which revealed him engaging in sex acts with juvenile boys. Appellant paid his victims extra to be filmed. The State's witnesses indicated that Appellant intended to livestream the sexual abuse on the internet. The video played for the jury shows Appellant, inter alia, engaging in masturbation in front of a minor victim, M.C. (State's Exhibit 1). HN17 Engaging in masturbation in front of a juvenile is sufficient to satisfy the "performance" element of R.C. Chapter 2907 offenses. See State v. Lang, 8th Dist. Cuyahoga No. 89553, 2008-Ohio-4226, ¶ 13; State v. Schmidt, 10th Dist. Franklin No. 08AP-348, 2009-Ohio-1548, ¶ 34.

[*P66] Thus, Appellant's argument relative to an "audience," a subpart of the R.C. 2907.01(K) "Performance" definition, fails. See also State v. Edmiston, 8th Dist. Cuyahoga No. 93397, 2010-Ohio-3413, ¶ 27 ("The definition of 'performance' under R.C. 2907.01[(K)] includes the notion of people acting with the expectation that they are being watched by an audience.") It is reasonable to believe that

M.C. thought that he was, or would later be, [**31] watched by an audience, i.e., either by other people or by Appellant himself at a later time.

[*P67] Pursuant to Jenks, supra, there is sufficient evidence upon which the jury could reasonably conclude beyond a reasonable doubt that the elements of pandering obscenity involving a minor were proven. Thus, the trial court did not err in overruling Appellant's Crim.R. 29 motion.

[*P68] Also, Appellant claims there are discrepancies in the testimony of R.O. and M.W. Appellant further claims that his witnesses' testimony revealed that he was sometimes out of town during the overall timeframe of the alleged sexual abuse. We note, however, that any discrepancies were resolved by the jury and the jury chose to believe the State's witnesses. DeHass, supra, at paragraph one of the syllabus. Based on the evidence presented, as previously stated, the jury did not clearly lose its way in finding Appellant guilty of compelling prostitution and pandering obscenity involving a minor. Thompkins, supra, at 387.

[*P69] Appellant's sixth assignment of error is without merit.

CONCLUSION

[*P70] For the foregoing reasons, Appellant's assignments of error are not well-taken. The February 6, 2020 judgment of the Mahoning County Court of Common Pleas convicting Appellant for compelling prostitution [**32] and pandering obscenity involving a minor following a trial by jury and sentencing him to a total of 17 years in prison and labeling him a Tier II Sex Offender or Child-Victim Offender is affirmed.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.
Footnotes

1Link to the location of the note in the document

On appeal, regarding the motion to suppress, Appellant only takes issue with the search warrants themselves.

2Link to the location of the note in the document

M.C. did not testify at trial.

3Link to the location of the note in the document

Four search warrants were issued in this case and all were discussed at the suppression hearing. Subsequent to that hearing, the defense withdrew its motion relative to two of the warrants (Clingan Road and Garland Avenue properties). As such, the trial court was only asked to decide the issues relative to the search of the East Indianola address and the subsequent search of the laptop computer taken from that location.

4Link to the location of the note in the document

Appellant's position that other documents cannot be referenced by and/or incorporated into a search warrant is misplaced as he relies on case law that pre-dates Groh v. Ramirez, 540 U.S. 551, 124 S.Ct. 1284, 157 L. Ed. 2d 1068 (2004).

5Link to the location of the note in the document

Appellant's reliance on State v. Dibble, 159 Ohio St.3d 322, 2020-Ohio-546, 150 N.E.3d 912, is misplaced because the issue in that case deals with a lack of probable cause in obtaining a warrant. The issue in the case at bar deals with the execution of the warrant. There is ample probable cause here to support the timely warrant.