No. 25-

IN THE

Supreme Court of the United States

TODD JEFFREY ROGERS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns the standard for determining juror bias, a question of constitutional importance that has split federal circuits and state supreme courts. A juror who is actually biased against the criminal defendant cannot sit on the jury. The seating of that biased juror violates the defendant's constitutional right to an impartial jury. A defense attorney who fails to protect that right renders ineffective assistance of counsel.

In this case, a juror expressed several biased opinions during *voir dire*. The juror admitted he would favor the child-accuser, and he presumed the defendant was guilty "because we're here." The prospective juror never disavowed those opinions, and he failed an attempted rehabilitation. According to the lower courts this was not enough to establish bias, and if it was, the juror was rehabilitated. At times during *voir dire* the juror remained silent, or the venire "indicated affirmatively," when the group was asked collectively whether they could follow the law in various respects.

The Question Presented: Whether a prospective juror who admitted bias can be rehabilitated through silence or group answers in response to group questions.

RELATED PROCEEDINGS

This case arises from and is related to the following proceedings:

- The Warren County Court of Common Pleas, Ohio, Case No. 22 CR 39713, State of Ohio v. Todd Jeffery Rogers, Judgment entered on July 26, 2023.

- Warren County, Twelfth District Court of Appeals of Ohio, Case No. CA2023-08-063, State of Ohio v. Todd Jeffery Rogers, Judgment entered on April 29, 2024.

  - *State v. Rogers*, 2024-Ohio-1637, 2024 WL 1848172, 2024 Ohio App. LEXIS 1553 (12th Dist. 2024).

- The Supreme Court of Ohio, Case No. 2024-0872, The State of Ohio, Appellee, v. Rogers, Appellant, Judgment entered on October 22, 2025.

  - *State v. Rogers*, ___ N.E.3d ___, 2025-Ohio-4794, 2025 WL 2967060, 2025 Ohio LEXIS 2078 (Ohio 2025).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Todd Rogers respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio

OPINIONS BELOW

The Supreme Court of Ohio's opinion is not yet reported, but has been reproduced beginning at App. A, 1a. The opinion of the Ohio Twelfth District Court of Appeals is not reported, but has been reproduced beginning at App. B, 28a.

JURISDICTION

The Supreme Court of Ohio issued its opinion on October 22, 2025. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides: "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 shall 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 defence."

The full text of the Fourteenth Amendment to the Constitution of the United States has been reproduced beginning at App.D, 62a.

INTRODUCTION

Circuit courts and state supreme courts are split on whether silence and group answers can provide an assurance of impartiality after a prospective juror has admitted bias. In this case a prospective juror, Juror McCarthy, admitted that he was biased against Defendant-Appellant Todd Rogers during *voir dire.*[1] Early on, Juror McCarthy told the trial court that he would have trouble being fair because the case involved a child-accuser. The trial court asked whether he could set aside his desire to favor the child, listen to the evidence, and be fair. Juror McCarthy responded, "It's a good question. I don't have an answer for you." (Record 21). Later, Mr. Rogers' attorney explained the presumption of innocence and asked Juror McCarthy what his verdict would be right then, knowing about the presumption of innocence. Juror McCarthy admitted that he could not presume Mr. Rogers' innocence, explaining that "we're here," and "people don't wind up here from not doing anything." (*Id.* at 93). Juror McCarthy never disavowed either of those beliefs.

Mr. Rogers' trial counsel neglected to seek that juror's removal. On appeal, Mr. Rogers asserted a claim of ineffective assistance based on that failure. Ohio's Twelfth District Court of Appeals rejected Mr. Rogers' challenge, concluding that the juror was not actually biased against Mr. Rogers. It based this conclusion on the fact that the jurors collectively confirmed that they would follow the law in response to general questions posed to the entire group. The Ohio Supreme Court affirmed, likewise concluding that Mr. Rogers had not established actual bias.

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1. This is a fictitious name that was used in the proceedings below.

The decisions of the Ohio courts violate the fundamental right to an impartial jury, leaving that right woefully under-protected. In Ohio a juror's explicit admission that he favors the accuser, his failed rehabilitation, and his refusal to accept the presumption of innocence is not enough to establish bias. Meanwhile that same juror's silence, alongside the group's collective affirmance that they will follow the law, can provide an assurance of impartiality.

That level of protection is not enough. The right to an impartial jury must be guarded so that every defendant receives a fair trial and society can have confidence in the accuracy of the verdict. The protection of that right is critical in cases such as this one where the defendant has been accused of a heinous crime and faces the possibility of life in prison.

If Mr. Rogers had been arraigned in federal court the results would have been different. Ohio falls within the Sixth Circuit Court of Appeals, and in the Sixth Circuit (1) actual bias has been found on less, and (2) neither silence nor group answers can provide an assurance of impartiality. Indeed, the Sixth Circuit is part of the majority of jurisdictions that do not allow silence or group answers to serve as an assurance of impartiality. That majority includes the Sixth, Seventh, and Eighth Circuits, as well as the State of New York. The State of Ohio has joined the Fifth Circuit and the State of Colorado in the minority. The Ninth Circuit has gone both ways on different occasions.

This Court should accept certiorari to address the growing split of opinions on this important constitutional right.

STATEMENT OF THE CASE

In July 2023, Mr. Rogers stood trial for the alleged rape of his daughter and other related offenses. He faced life in prison if convicted. The State had no physical evidence to support its case. It relied solely on the testimony of the daughter. The timing of the allegations was suspect. Mr. Rogers and his then-wife were on the verge of divorce, and Mrs. Rogers did not want to share custody.[2] At trial, Mr. Rogers maintained his innocence, as he does to this day.

A. *Voir dire* revealed a biased juror.

Mr. Rogers should have received a trial by an impartial jury, but his trial counsel failed to protect that right, and a biased juror sat on the jury that found him guilty. During *voir dire*, Juror McCarthy expressed bias in two related but distinct forms: (1) a biased predisposition to believe the child's testimony over others, and (2) an inability to apply the presumption of innocence. The trial court uncovered the first of these two biases when explaining the nature of the case and asking the prospective jurors whether it might affect their ability to be impartial.

> THE COURT: Okay. What about a child witness, is there anyone—I think we all have a tendency to—you know, smile when we see a

2. Further details on the growing estrangement between Mr. and Mrs. Rogers can be found in the merits brief Mr. Rogers submitted to the Supreme Court of Ohio. That brief is available on the Supreme Court of Ohio's docket at https://www.supremecourt.ohio.gov/clerk/ecms/#/caseinfo/2024/0872.

> child, empathize with children. But the truth of the matter is—you know, a child can send someone to prison for a long, long time.
>
> And you have to—to decide what the truth is in this case. You have to decide whether or not the State has proven the case again in this—beyond a reasonable doubt.
>
> You can't apply sympathy and you can't apply prejudice. It has to be fair when you're evaluating this case. Is there anyone who thinks they would have trouble doing that with a child witness? Yes, sir?
>
> PROSPECTIVE JUROR MCCARTHY: I might have a hard time with it.

(Record 19-20). The trial court pursued the matter further, asking Juror McCarthy whether he could nonetheless follow the instructions given to him and be fair, a question which Juror McCarthy could not answer affirmatively.

> THE COURT: Yeah. Mr. McCarthy, right?
>
> PROSPECTIVE JUROR MCCARTHY: Yes, sir.
>
> THE COURT: Okay. All right. Let's—I appreciate your answer.
>
> PROSPECTIVE JUROR MCCARTHY: Just being honest.

> THE COURT: Yeah. Do you think you can follow the instructions I give to you in this case, knowing I'm having a hard time because this is a child witness and I tend to just want to favor this child? Can you put that aside and listen to the evidence and—and be fair?
>
> PROSPECTIVE JUROR MCCARTHY: It's a good question. I don't have an answer for you.
>
> THE COURT: Yeah, I understand because I—I've done it before since—not all cases are jury trials. I understand what you're saying here. All right. Well, we—I'll leave that to the attorneys to explore.

(*Id.* at 20-21).

After the trial court concluded its questions for the venire, it allowed the State to ask questions. The State did not follow up with Juror McCarthy on the topic of fairness or impartiality. Even so, Juror McCarthy's bias showed itself once again when the State asked whether any jurors would have trouble with a case involving child testimony about rape:

> MR. VIEUX: * * * Are there people who are like hey, that's not my kinda case? Mr. McCarthy, I see you shaking your head. You got—
>
> PROSPECTIVE JUROR MCCARTHY: I might be expressive. I apologize. Just—I'm sure all of us feel the same way. I—

> MR. VIEUX: I told you one of the things I'm trying to do is make you feel uncomfortable so that we get good answers, okay?
>
> PROSPECTIVE JUROR MCCARTHY: Yeah.

(*Id.* at 65-66). Almost prophetically, the State then commented:

> MR. VIEUX: And I don't want to find out tomorrow that what you felt was—you know, hey, I—this is something I don't want to do. I'm not—I really didn't want to sit on this, right?

(*Id.* at 66). McCarthy sat silent, and without receiving a response the State moved on to a different topic.

Mr. Rogers' lawyer then questioned the prospective jurors. Juror McCarthy maintained his biased view. Trial counsel discussed the presumption of innocence with the prospective jurors: "who walked in today, show of hands, and saw Todd Rogers sitting next to me at this table and said, I wonder what he did." (*Id.* at 91). The show of hands indicated that this was a common thought. (*See id.* at 91). Trial counsel then explained that they needed to disregard that prior belief because Mr. Rogers was entitled to the presumption of innocence. (*Id.* at 92). He then questioned individual jurors to make sure they understood. He asked Juror McCarthy directly:

> MR. BABB: * * * So if you had to give us a verdict right now, guilty or not guilty, knowing that there's a presumption of innocence, that he's innocent as he sits here right now, what would your verdict be?

> PROSPECTIVE JUROR MCCARTHY: I'd say it'd be hard for me to say that's he's not guilty. [sic]
>
> MR. BABB: It'd be hard for you to say—
>
> PROSPECTIVE JUROR MCCARTHY: Yeah, because we're here. We're—
>
> MR. BABB: Ahh.
>
> PROSPECTIVE JUROR MCCARTHY: And there's someone here from the police department that's—
>
> MR. BABB: Right.
>
> PROSPECTIVE JUROR MCCARTHY:— that's gonna talk. So, yeah, people don't wind up here from not doing anything.

(*Id.* at 92-93). Trial counsel asked other prospective jurors the same question, and, in contrast to Juror McCarthy, every other person agreed that Mr. Rogers was innocent until proven guilty. (*Id.* at 93-96; 101-105). He then asked whether anyone had any questions and hearing no answer, he moved on. (*Id.* at 105).

Juror McCarthy never disavowed his biases. Periodically, the prospective jurors would respond to group questions as a collective. For example, the Court informed the prospective jurors that they could not apply their own idea of what the law should be and asked if they would follow that instruction. The prospective jurors

"Indicated affirmatively." (*Id.* at 25-26). On another occasion, the State told the prospective jurors they would sit in judgment, specifically called out Juror McCarthy and another juror, and asked them if they could "do the right thing." (*Id.* at 79). The prospective jurors again "Indicated affirmatively." (*Id.*). The State did not explain what it meant by "the right thing," but the "right thing" seemingly meant: "convict."

The group questions did not address the presumption of innocence or biased predispositions. The group questions also came before Juror McCarthy's conversation with trial counsel about the presumption of innocence. (*Id.* at 92-93). At no point after he expressed his biases did Juror McCarthy state that he would set aside his desire to favor the child, or apply the presumption of innocence.

At the conclusion of *voir dire*, Juror McCarthy was selected for the jury. (*See id.* at 250). The trial court did not strike him *sua sponte*, and trial counsel neglected to challenge him for cause. (*See id.* at 134).

Juror McCarthy sat through the case and entered the jury room where he and eleven other individuals weighed only the testimony of the alleged child victim and Mr. Rogers, and then decided Mr. Rogers' fate. After extensive deliberations over the course of two days, Juror McCarthy and his fellow jurors found Mr. Rogers guilty. (*Id.* at 247-250). The trial court sentenced Mr. Rogers to an indefinite sentence of 15 years to life. Mr. Rogers timely appealed.

B. Mr. Rogers appealed his conviction.

In the Ohio Twelfth District Court of Appeals, Mr. Rogers argued that his trial counsel rendered ineffective assistance of counsel by failing to challenge the biased juror. Following the analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the Twelfth District first concluded that if the prospective juror was biased, trial counsel's failure to challenge the juror constituted deficient performance. (App. B, 37a-38a). It then went on to conclude that the juror was not actually biased. It reasoned that the juror's statements of bias during *voir dire* were merely the verbalization of an internal struggle. *Id.* at ¶ 20. It further determined that, in any event, any suggestion of bias was dispelled by occasions in which Juror McCarthy, "as part of the original 13 prospective jurors seated in the jury box," agreed to remain fair and impartial. *Id.* at ¶ 20-21.

Mr. Rogers filed a petition for jurisdiction with the Supreme Court of Ohio, which accepted jurisdiction and affirmed. Applying a totality of the circumstances approach, that court reasoned that Juror McCarthy's statements were insufficient to establish that he was actually biased. (App. A, 21a; 23a). After finding that Juror McCarthy was not biased, the court further found that the Twelfth District had not erred by determining that the group answers rehabilitated Juror McCarthy. (*Id.* at 23a).

REASONS FOR GRANTING THE PETITION

This Court should accept certiorari to resolve a growing split of authorities on whether silence and group answers should be considered when determining whether a juror is biased. The answer impacts every criminal trial by jury, and it can be squarely resolved through this case.

I. The question presented has divided state and federal courts.

The circuit courts and state supreme courts are split on the curative value of jurors' silence and group answers. The issue comes about most often in cases where a juror expressed bias during *voir dire* but never explicitly disavowed that belief, and that juror is nonetheless impaneled. *E.g.*, *People v. Arnold*, 753 N.E.2d 846, 851-852 (N.Y. 2001). In such cases, there are often instances where the trial court or an attorney asked whether the prospective jurors will agree to follow the law in some way, shape, or form. The question may be followed by silence, or by a collective affirmation. Four jurisdictions do not give weight to the silence or group answer, but three jurisdictions do give such answers weight.

The Sixth Circuit decision in *Hughes v. United States* exemplifies the majority approach. *Hughes* involved a 28 U.S.C. *§ 2255 petitioner's* claim that trial counsel rendered ineffective assistance by failing to seek the removal of a biased juror. *Hughes v. United States,* 258 F.3d 453, 456-57 (6th Cir. 2001). The juror in question was close with the local police force and, for that reason, informed the court "I don't think I could be fair." *Id.* at 456. No one followed up with the juror about that statement,

and the juror was empaneled. *Id.* at 458. On review, the Sixth Circuit correctly identified this statement as an "express admission of bias." *Id.* at 460. Indeed, it opined that, "juror bias can *always* be presumed from such unequivocal statements as were made in this case," absent a subsequent assurance of impartiality. *Id.* (Emphasis added).

There, as here, the government argued that the juror's silence in response to generalized questioning on bias showed the juror was unbiased. *Id.* at 461. Specifically, in *Hughes* defense counsel had asked the venire, as a group, whether the defendant's prior conviction and involvement with drugs would affect their ability to be impartial, and whether they would find a police officer to be a more credible witness. *Id.* at 456. These questions had not elicited a response. *Id.* The Sixth Circuit rejected the government's argument, explaining that the venire's silent response "to generalized questioning on the subjects of prior conviction, drug involvement, and police credibility did not, in any way, constitute rehabilitation of, or an assurance by, [the juror] regarding her particular bias[.]" *Id.* at 461. The court held that for a juror to provide an assurance of impartiality, the juror must be able to "'lay aside his impression or opinion and render a verdict based on the evidence presented in Court.'" *Id.* at 459, quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). It concluded that no such assurance had been given there, and it ordered a retrial. *Id.* at 460, 464.

The Seventh and Eighth Circuits, as well as the State of New York, agree with the Sixth Circuit and do not consider silence or group answers sufficient assurance of juror impartiality. *Hughes v. United States,* 258 F.3d

453, 461 (6th Cir. 2001) ("silence in the face of generalized questioning of venirepersons by counsel and the court did not constitute an assurance of impartiality"); *Thompson v. Altheimer & Gray*, 248 F.3d 621, 626 (7th Cir. 2001) (distinguishing individualized questions from group questions when determining juror bias); *Johnson v. Armontrout*, 961 F.2d 748, 753-54 (8th Cir. 1992) ("We cannot say that an ambiguous silence by a large group of venire persons to a general question about bias is sufficient"); *People v. Arnold*, 753 N.E.2d 846, 851-852 (N.Y. 2001) ("the collective acknowledgment by the entire jury panel that they would follow the judge's instructions … was insufficient to constitute an unequivocal declaration of impartiality from Prospective Juror Number 4").

A minority of jurisdictions, including the Fifth Circuit, the State of Colorado, and now the State of Ohio, do consider silence and group answers when determining whether a juror is biased. *Canfield v. Lumpkin*, 998 F.3d 242, 248 (5th Cir. 2021) (a prospective juror "was rehabilitated by her silence"); *People v. Clemens*, 401 P.3d 525, 530 (Co. 2017) ("a prospective juror's silence in response to rehabilitative questioning constitutes evidence that the juror has been rehabilitated"); (App. A, 26a-27a) (adopting a totality of the circumstances approach that includes the consideration of silence and group answers).

The Ninth Circuit has a foot in each camp. *Compare United States v. Martinez-Martinez*, 369 F.3d 1076, 1082-1083 (9th Cir. 2004) (despite a prior response suggesting bias, a prospective juror's subsequent silence in response to a group question was construed as a commitment to follow the law) *with United States v. Kechedzian*, 902 F.3d 1023, 1031 (9th Cir. 2018) (rejecting the government's

argument that a juror's silence in response to a group question about the presumption of innocence and burden of proof cured her bias).

Based on this split, the strength of a criminal defendant's right to an impartial jury varies based on circuit. Not only that, but for the people of Ohio, the strength of that fundamental right under the U.S. Constitution varies depending on whether they are in state or federal court.

II. The majority rule is the better rule.

Under the majority rule, a prospective juror who has expressed bias cannot sit on the jury unless that juror swears to "cast aside her opinion and render a verdict based on the evidence presented in court." *Hughes v. United States*, 258 F.3d 453, 459 (6th Cir. 2001). That rule is straightforward and easy to follow. Indeed, the trial court tried to do just that in this case. After Juror McCarthy expressed a desire to favor the child, the trial court asked him whether he could put those feelings aside, listen to the evidence, and be fair. (Record 20-21). If Juror McCarthy had credibly agreed to put aside his desire to favor the child, Juror McCarthy would have been cured of that bias under the majority rule. In that way, the rule strikes the appropriate balance. It ensures that no jurors can express an unrepudiated bias and still sit on the jury, while allowing for a truly unbiased juror to be easily and unambiguously rehabilitated.

Requiring an individualized assurance of impartiality is not a difficult burden, but it goes a long way in protecting an important right. That right, the right to an impartial

jury, needs protection because it is foundational to our criminal justice system. It safeguards the accuracy of the proceeding by ensuring that the verdict is based on the evidence, and the prosecution has been held to its burden. When the right to an impartial jury has been violated, there can be no guarantee that the defendant is in fact guilty. The loss of that right creates too great a risk that the wrongly accused defendant will be deprived of his liberty based on the hate that others feel towards him or the revulsion that comes with a heinous allegation.

While the majority rule affords a reasonable means of discerning juror bias, the minority rule provides little to no real protection. Silence and group answers similar to what occurred in this case is common. It is hard to imagine any criminal case where a group of prospective jurors gets through *voir dire* without generally agreeing, in some way, that they will follow the law. Indeed, to be seated on the jury, the jurors had to be sworn in, and they swore to decide the case "without bias or prejudice." (Record 192-193). Juror McCarthy's acknowledgement of that oath was far more on point than any of the group answers. If that oath was enough to provide an assurance of impartiality in the face of juror McCarthy's statements, the right to an impartial jury would be practically unappealable. Every empaneled juror must take that oath, and in so doing be cured. Conversely, if that oath was not enough, then the less specific, less reliable, less revealing silence and group answers cannot be enough to assure that the juror is in fact impartial.

The majority rule strikes the appropriate balance, while the minority rule falls short. In accepting certiorari and adopting the majority rule, this Court can ensure

that the right to an impartial jury receives the consistent protection that it deserves.

III. Trial counsel's failure to make a for-cause challenge at trial is not an impediment to this appeal.

This case involves an important constitutional question that has split the circuit and state supreme courts, and that question can be squarely addressed by this Court through this appeal. The fact that trial counsel did not raise a for-cause challenge to Juror McCarthy lengthens the analysis, but it does not change the final destination.

If trial counsel had raised a for-cause challenge to Juror McCarthy, the core question on appeal would be whether Juror McCarthy held an "actual bias." *United States v. Gonzalez*, 214 F.3d 1109, 1111-1112 (9th Cir. 2000). That is the same core question that courts answer when deciding whether trial counsel rendered ineffective assistance by failing to challenge a biased juror. *E.g. Johnson v. Armontrout*, 961 F.2d 748, 754 (8th Cir. 1992); (App. A, 14a). If the juror is actually biased, the seating of that juror creates a structural defect in the trial that is inherently prejudicial. *Johnson v. Armontrout*, 961 F.2d 748, 756 (8th Cir. 1992); *accord Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001). An error of that caliber falls below an objective standard of reasonableness.

This appeal, if accepted, will involve the "actual bias" analysis. Mr. Rogers asks this Court to determine whether silence or group answers have a place within that analysis. He submits that they do not, and that Juror McCarthy's statements showed an actual bias against him.

CONCLUSION

For these reasons, this Court should accept certiorari, address this important constitutional question, and resolve this circuit and state supreme court split.

Respectfully submitted,

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January 20, 2026

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE SUPREME COURT OF OHIO, FILED OCTOBER 22, 2025

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Rogers*, Slip Opinion No. 2025-Ohio-4794.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2025-Ohio-4794

THE STATE OF OHIO, APPELLEE, *v.* ROGERS, APPELLANT.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Rogers*, Slip Opinion No. 2025-Ohio-4794.]

Trials—Jury selection—Voir dire—In determining whether a juror was actually biased, a reviewing court must consider entire record and determine whether it demonstrates that juror was actually

Appendix A

biased against the defendant—Court of appeals did not err by considering group answers to questions addressed to all prospective jurors in determining whether juror was biased—Court of appeals' judgment affirmed.

(No. 2024-0872—Submitted April 2, 2025—
Decided October 22, 2025.)

APPEAL from the Court of Appeals for Warren County,

No. CA2023-08-063, 2024-Ohio-1637.

DEWINE, J., authored the opinion of the court, which Kennedy, C.J., and FISCHER, DETERS, HAWKINS, and SHANAHAN, JJ., joined. BRUNNER, J., dissented.

DEWINE, J.

{¶ 1} A jury found Todd Jeffrey Rogers guilty of multiple sexual offenses against his daughter, including rape. He claims that his attorney provided ineffective assistance of counsel by failing to challenge one of the jurors for cause.

{¶ 2} Because Rogers's trial attorney did not object to the empaneling of the juror, the only way Rogers can now succeed on his claim is by demonstrating that the juror was actually biased against him. Having reviewed the transcript of the jury voir dire, we conclude that Rogers has failed to meet the difficult burden of establishing actual bias. The Twelfth District Court of Appeals reached the same conclusion, so we affirm its judgment.

Appendix A

I. Rogers's Trial and the Voir Dire of Juror McCarthy

{¶ 3} Rogers was charged with, and convicted of, raping and otherwise sexually abusing his daughter when she was between five and nine years old. At issue in this appeal is the selection of the jury that convicted Rogers—in particular, defense counsel's decision not to challenge for cause a juror who we will refer to as Juror McCarthy.

{¶ 4} At trial, Rogers's daughter was expected to testify, and ultimately did testify, that she would routinely go to her father's bed after eating breakfast on Friday mornings, get under the blankets with him, lay on top of him, and he would scratch her back. On some occasions, Rogers would touch her "private part," both over and inside her underwear. On one occasion, Rogers "touched [her] on the inside" of her private part, "mov[ing his finger] around . . . inside." After about three and a half years of this abuse, the daughter told her mother, Rogers's wife, what had been happening. Rogers's wife confronted him with the allegations, but he denied them. Rogers's wife contacted the police, leading to the charges against him.

{¶ 5} This difficult subject matter faced the prospective jurors who walked into the Warren County Court of Common Pleas one summer morning in 2023 for Rogers's trial. Of course, the prospective jurors did not know this when they entered the courtroom.

{¶ 6} The trial judge began jury selection by telling the prospective jurors that they had been called for a criminal case and by identifying Rogers, defense counsel,

the prosecuting attorney, and a police detective who was seated with the prosecutor at the counsel table. The judge then instructed the prospective jurors on the presumption of innocence and the State's burden to prove guilt beyond a reasonable doubt.

{¶ 7} After telling the prospective jurors that Rogers did not have to prove anything in the case and did not need to present witnesses or evidence, the judge noted that some of the prospective jurors looked surprised. The judge explained that while that might seem unusual "in everyday life," in the courtroom, one does not have to prove his innocence. He said that while a person might be arrested or indicted by a grand jury, the trial was the defendant's first real opportunity to have his side fully presented.

{¶ 8} Next, the trial judge discussed the charges against Rogers. He asked the prospective jurors whether any of them would have trouble separating "sympathy" and "prejudice" from "the truth" in a child witness's statements. At this point, Juror McCarthy spoke up and said that, to be honest, he "might have a hard time with it." The following exchange ensued:

> The Court: Do you think you can follow the instructions I give to you in this case, knowing [that you're] having a hard time because this is a child witness and [you] tend to just want to favor this child? Can you put that aside and listen to the evidence—and be fair?

> Juror McCarthy: It's a good question. I don't have an answer for you.

Juror McCarthy's equivocal answer prompted the judge to say that he would "leave that to the attorneys to explore." The judge proceeded to ask several other questions to the jury pool about child witnesses and individually addressed other prospective jurors. After the judge concluded, he allowed the attorneys to voir dire the prospective jurors.

{¶ 9} The prosecutor began by explaining the definition of rape in Ohio and that it encompasses acts beyond forced intercourse. He told the prospective jurors that rape does not require forcible sexual conduct if the victim is under 13 years old and that the insertion of a finger into the vaginal area qualifies as sexual conduct. The prospective jurors agreed to apply Ohio's definition of rape.

{¶ 10} Having explained the elements of rape, the prosecutor asked the prospective jurors, "How do you think the victim of a sexual assault is supposed to react?" Prospective jurors variously answered that they expected a victim to be scared or angry after an assault. The prosecutor asked the prospective jurors whether a child might not immediately report inappropriate sexual conduct. Multiple prospective jurors voiced their belief that a child victim would be less likely than an adult to report having been raped, especially if the child has a close relationship with the abuser or the child is too young to understand the wrongness of the sexual conduct.

{¶ 11} At this point, the prosecutor said, "I see, [Juror McCarthy], you're making faces." Juror McCarthy pushed back on the idea that one would always expect children to react differently to being raped compared to adults:

> I think it depends . . . [;] there's plenty of situations that come up where there's young people, and there's older people. They probably all react—if you looked at all the reactions—similar. . . . So it's not just a—you know, a kid that doesn't know is just as scared as someone that does. It's circumstantial. So I'm not sure the reaction is gonna be any different.

The prosecutor agreed with Juror McCarthy that the circumstances, especially the relationship of the people involved, are important. He asked the prospective jurors whether they would agree not to make any decision on the case until they heard the circumstances. The prospective jurors all agreed.

{¶ 12} The prosecutor moved on to a discussion of the evidence that would be presented. He explained that the State did not intend to introduce DNA evidence and that most of the evidence would come from the testimony of Rogers and his daughter. He asked the prospective jurors whether they would be comfortable basing their decision on a child's testimony about her experiences of sexual abuse. The prosecutor noted that Juror McCarthy was shaking his head, and Juror McCarthy explained: "I might be expressive. I apologize. Just—I'm sure all of

us feel the same way." The prosecutor sympathized that it was normal to feel uncomfortable but said he wanted Juror McCarthy to speak up if he felt that he could not handle the demands of the case. Juror McCarthy said nothing in response.

{¶ 13} The prosecutor concluded his voir dire by talking about evaluating the truthfulness of child-witness testimony, the value of circumstantial evidence, and the reasonable-doubt standard. For his final question, the prosecutor specifically named Juror McCarthy and another prospective juror and asked whether they felt they could "sit in judgment" and "do the right thing" in this case. Both indicated that they could.

{¶ 14} Defense counsel began his voir dire examination by addressing the presumption of innocence. He acknowledged that it was "very normal" for the prospective jurors to wonder "what [Rogers] did" upon entering the courtroom and seeing him seated at counsel table. But defense counsel stressed that as jurors, they would have to disregard that natural inclination because Rogers was presumed innocent.

{¶ 15} After that preamble, defense counsel began to address individual prospective jurors about the presumption of innocence. He had this exchange with Juror McCarthy:

> Defense Counsel: Mr. [McCarthy], what would your verdict be if we asked your verdict right now?

Juror McCarthy: Well, I'd say when I first came in, that's my—I didn't know why I was here.

Defense Counsel: Yeah.

Juror McCarthy: And that's the person [Rogers] that's there. So, yeah, that's the first question I had in my mind.

Defense Counsel: Great.

Juror McCarthy: But then when the subject matter [of the case] was revealed, then that was a different feeling and reaction.

Defense Counsel: Yeah. So good. So if you had to give us a verdict right now, guilty or not guilty, knowing that there's a presumption of innocence, that [Rogers is] innocent as he sits here right now, what would your verdict be?

Juror McCarthy: I'd say it'd be hard for me to say that he's not guilty.

Defense Counsel: It'd be hard for you to say—

Juror McCarthy: Yeah, because we're here. We're—

Defense Counsel: Ahh.

> Juror McCarthy: And there's someone here from the police department that's—
>
> Defense Counsel: Right.
>
> Juror McCarthy: —that's gonna talk. So, yeah, people don't wind up here from not doing anything.
>
> Defense Counsel: Okay. That—that's what's going on in your head. That's an honest statement. Does anyone see it differently?

Defense counsel posed similar questions about the presumption of innocence to other prospective jurors. It soon became clear that Juror McCarthy was not the only one struggling with applying the concept. Another prospective juror called the presumption of innocence "a fundamental basis of our laws" and said that he would have no difficulty applying the presumption. But when defense counsel asked him what his verdict would be if he had to render one right now without any evidence having been presented, the prospective juror answered, "I couldn't do that because I haven't heard the full story."

{¶ 16} Realizing that the prospective jurors were struggling with his hypothetical question, defense counsel explained, "I was trying to get someone to say . . . if you had [to give] a verdict now, because there's been no evidence presented, [Rogers is] not guilty because that's the law, that the Prosecutor has a responsibility of proving each and every element of the offense." After

a longer explanation of why "not guilty" was the right answer, defense counsel asked the prospective jurors whether any of them disagreed or thought that was not the right answer. No one spoke up. Defense counsel then asked whether anyone had questions about "not guilty" being the right answer. The prospective jurors, including Juror McCarthy, collectively indicated that they had no questions.

{¶ 17} Defense counsel turned to the credibility of child witnesses. Rogers's defense at trial was that the allegations against him were fabricated by his wife and that she was putting words into their daughter's mouth. So defense counsel questioned prospective jurors about whether children are impressionable and "want to please their parents." Juror McCarthy was among the prospective jurors singled out for this question. Like the other prospective jurors questioned, he agreed that children are impressionable and want to please their parents.

{¶ 18} Before concluding voir dire, defense counsel asked the prospective jurors to rate the importance of honesty on a scale from one to ten. Juror McCarthy rated it a ten.

{¶ 19} At the close of voir dire, Rogers's attorney challenged one of the other prospective jurors for cause, but he did not elect to challenge Juror McCarthy. Rogers's attorney also exhausted his peremptory challenges, excusing four prospective jurors, but not Juror McCarthy. Juror McCarthy was empaneled on the jury, and the jury

ultimately found Rogers guilty of several sex offenses, including rape.

II. Rogers's Appeals

{¶ 20} Rogers appealed his convictions to the Twelfth District. He argued, among other things, that his trial counsel was constitutionally ineffective for not challenging for cause Juror McCarthy, who Rogers claimed tainted the jury and deprived him of a fair trial. *See* 2024-Ohio-1637, ¶ 9 (12th Dist.). The court of appeals found no merit to Rogers's argument and upheld his convictions. *Id.* at ¶ 38. Based on "an extensive review of the voir dire transcript," the court characterized Juror McCarthy's statements as "nothing more than [his] verbalizing the internal struggle he was facing." *Id.* at ¶ 20.

{¶ 21} It was clear to the court of appeals that Juror McCarthy was voicing abstract doubt "whether he, or anybody else, could honestly be expected to be remain fair and impartial while empaneled on a jury tasked with determining the guilt or innocence of a man accused of sexually abusing a child and close family member." *Id.* It saw the statements as "in no way indicative of an actual bias against Rogers." *Id.* The court also noted the many times Juror McCarthy—in response to the group questions addressed to all the prospective jurors—indicated alongside the rest of the group that he would be fair and impartial, would apply the presumption of innocence, and would hold the State to the requirement of proof beyond a reasonable doubt. *Id.* at ¶ 21.

{¶ 22} Because Rogers had not shown that Juror McCarthy was actually biased against him, the Twelfth District rejected his claim that he had received ineffective assistance of counsel and ultimately affirmed his convictions. *Id.* at ¶ 23, 39.

{¶ 23} We accepted Rogers's appeal on two propositions of law. *See* 2024-Ohio-3313. In the first, Rogers argues that a prospective juror who has expressed partiality cannot be rehabilitated through group answers in voir dire. In the second, he argues that for a prospective juror to be rehabilitated, he must individually affirm that he can be impartial. Because the propositions are closely related, we address them together.

III. Prevailing on an Ineffective-Assistance Claim Based on Empaneling of Biased Juror

{¶ 24} Because Rogers's attorney did not object to the seating of Juror McCarthy on the jury, Rogers can only prevail by demonstrating that his counsel was constitutionally ineffective. That is, Rogers must establish that his counsel's performance was so inadequate that he was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.1[1]

{¶ 25} To prevail on a claim of ineffective assistance of counsel, a defendant ordinarily must show "(1) deficient

1. Rogers has not raised a claim under Article I, Section 10 of the Ohio Constitution, which guarantees that "[i]n any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel."

performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that but for counsel's errors, the proceeding's result would have been different." *State v. Mundt*, 2007-Ohio-4836, ¶ 62, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694 (1984). Both the deficient-performance and prejudice prongs must be met for a successful ineffective-assistance claim; neither is individually sufficient. *See State v. Madrigal*, 2000-Ohio-448, ¶ 49 ("A defendant's failure to satisfy one prong . . . negates a court's need to consider the other.").

{¶ 26} In this case, however, Rogers argues that he does not need to establish the prejudice prong of the *Strickland* standard. He argues, instead, that prejudice should be presumed because Juror McCarthy was actually biased against him.

{¶ 27} The United States Supreme Court has never addressed whether prejudice may be presumed under *Strickland* when defense counsel fails to object to a biased juror. In *Strickland*, the Court identified only a few limited circumstances in which prejudice would be presumed: when there has been "[a]ctual or constructive denial of the assistance of counsel altogether," when the State has interfered with counsel's assistance, and when counsel has labored under a conflict of interest. *Strickland* at 692; *see also Weaver v. Massachusetts*, 582 U.S. 286, 308 (2017) (Alito, J., concurring in the judgment) ("The Court has relieved defendants of the obligation to make this affirmative showing in only a very narrow set of cases

in which the accused has effectively been denied counsel altogether.").

{¶ 28} Although the United States Supreme Court has never held that *Strickland* prejudice should be presumed based on the presence of a biased juror, it has held that when an objection is properly preserved, the presence of a biased juror would mandate the reversal of a conviction. *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *United States v. Martinez-Salazar*, 528 U.S. 304, 316-317 (2000). Based on this principle, federal circuit courts have expanded the categories in which prejudice may be presumed under *Strickland* to include instances when there has been a showing that a juror was actually biased against a particular defendant. *See, e.g.*, *Miller v. Francis*, 269 F.3d 609, 616 (6th Cir. 2001), citing *Hughes v. United States*, 258 F.3d 453, 458 (6th Cir. 2001); *Goeders v. Hundley*, 59 F.3d 73, 75 (8th Cir. 1995).

{¶ 29} We adopted this type of actual-bias standard in *Mundt*, 2007-Ohio-4836. There, we held that a defendant could establish prejudice under *Strickland* by showing that counsel failed to object to the empanelment of a juror who was actually biased against the defendant. *Id.* at ¶ 67. We explained that "[w]hen a defendant bases an ineffective-assistance claim on an assertion that his counsel allowed the impanelment of a biased juror, the defendant '*must* show that the juror was *actually biased* against him.' " (Emphasis added in *Mundt*.) *Id.*, quoting *Miller* at 616, citing *Hughes* at 458.

{¶ 30} Actual bias means "'bias in fact'—the existence of a state of mind that leads to an inference that

the person will not act with entire impartiality." *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997), citing *United States v. Wood*, 299 U.S. 123, 133 (1936). "'[T]he mere existence of any preconceived notion as to the guilt or innocence of an accused'" is insufficient to rebut the presumption that a juror is impartial. *State v. Warner*, 55 Ohio St.3d 31, 47 (1990), quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). An impression or opinion does not make a juror partial unless that juror cannot "'lay aside [the] impression or opinion and render a verdict based on the evidence presented in court.'" *Id.*, quoting *Irvin* at 723.

{¶ 31} A juror is not actually biased simply because he has some prior belief about an issue. *Griffin v. Bell*, 694 F.3d 817, 824 (7th Cir. 2012). Thus, a juror's prior belief that certain types of witnesses might be more believable than others (e.g., law-enforcement officers) is not a basis to dismiss a juror for cause unless the juror presents "an irrational or unshakeable bias that indicate[s] an inability or unwillingness to faithfully and impartially apply the law." *Id.*

{¶ 32} By its nature, the presumption of prejudice afforded by a showing of actual bias is difficult to attain. Actual bias is a high bar for a few reasons.

{¶ 33} First, prospective jurors are presumed impartial, so it is incumbent on the party challenging the empanelment of a juror to overcome that presumption to establish bias. *Warner*, 55 Ohio St.3d at 47, citing *Reynolds v. United States*, 98 U.S. 145, 157 (1878).

{¶ 34} Second, there are difficulties inherent in assessing the passions of jurors from a cold transcript. For one thing, "'[w]ritten records give us only shadows for measuring the quality of [counsel's] efforts' " in selecting a jury. *Mundt*, 2007-Ohio-4836, at ¶ 64, quoting *Romero v. Lynaugh*, 884 F.2d 871, 878 (5th Cir. 1989). The demeanor of a juror, which normally does not appear in the appellate record, "is oftentimes more indicative of the real character of [the juror's] opinion than [the juror's] words." *Reynolds* at 156-157. For another, "[j]urors . . . cannot be expected invariably to express themselves carefully or even consistently." *Patton v. Yount*, 467 U.S. 1025, 1039 (1984). So appellate courts reviewing voir dire are given the difficult task of squaring inconsistent juror statements in an inherently limited record.

{¶ 35} Third, and most important, appellate courts must be "highly deferential" to trial counsel's performance, *Strickland*, 466 U.S. at 689. Because "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial," the United States Supreme Court has cautioned that "the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." *Harrington v. Richter*, 562 U.S. 86, 105 (2011), quoting *Strickland* at 690.

{¶ 36} The "range of reasonable professional assistance" is "wide," *Strickland* at 689, and even "debatable trial tactics do not establish ineffective assistance of counsel," *State v. Conway*, 2006-Ohio-2815,

¶ 101, so this court does not "'second-guess trial strategy decisions,'" *Mundt* at ¶ 63, quoting *State v. Mason*, 1998-Ohio-370, ¶ 83. This deference is particularly important when analyzing attorney performance at voir dire, one of the most "'subjective'" aspects of trial, involving "'decisions [that] are often made on the basis of intangible factors.'" *Id.* at ¶ 64, quoting *Miller*, 269 F.3d at 620. Therefore, this court does not "impose 'hindsight views about how current counsel might have voir dired the jury differently.'" *Id.* at ¶ 63, quoting *Mason* at ¶ 83. As the Utah Supreme Court has explained, "[i]t is generally inappropriate for a trial court to interfere with counsel's conscious choices in the jury selection process, notwithstanding the existence of a reasonable basis for objecting to those jurors." *State v. Litherland*, 2000 UT 76, ¶ 32. Thus, "[o]nly where a juror expresses a bias or conflict of interest that is so strong or unequivocal as to inevitably taint the trial process should a trial court overrule trial counsel's conscious decision to retain a questionable juror." *Id.*

{¶ 37} The actual-bias standard for presuming prejudice necessarily means that when the voir dire record demonstrates only a possibility or a potential that a juror was biased, prejudice may not be presumed. Thus, when the voir dire transcript indicates statements that suggest potential bias but fall short of demonstrating actual bias, and counsel neglected to follow up on such statements, prejudice cannot be presumed. *See State v. King*, 2008 UT 54, ¶ 38 ("The effect of extending the *Strickland* presumption of prejudice to errors of counsel that allow the seating of potentially biased jurors would be to distort a well-developed body of law that strikes a proper balance

between the interests of the adversarial process and the guarantees of a fair trial in the jury selection process."); *see also State v. Romero*, 2023-NMSC-014, ¶ 19 ("The record in this case discloses at most potential bias that, absent further proof, does not rise to a constitutional violation.").

IV. Rogers Has Not Demonstrated that Juror McCarthy Was Actually Biased Against Him

{¶ 38} As we have explained, to prevail on a claim of ineffective assistance of counsel, a defendant must establish both that his counsel's performance was deficient and that he was prejudiced by that deficient performance. In the proceeding below, the Twelfth District focused on only the second prong of the test—whether prejudice could be presumed because of the presence of a biased juror. It reasoned that it was unnecessary to consider whether Rogers's counsel was deficient because if Rogers established that Juror McCarthy was actually biased, "in nearly every conceivable circumstance," failing to challenge a biased juror for cause constitutes deficient performance. 2024-Ohio-1637 at ¶ 14 (12th Dist.).

{¶ 39} The United States Supreme Court has made clear that in adjudicating a claim of ineffective assistance of counsel, the prongs of the *Strickland* test may be considered in any order and that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. In this case, we agree with the court of appeals

that because the question of whether Juror McCarthy was actually biased is so closely tied to the question of whether counsel rendered deficient performance in opting not to challenge him for cause, it is appropriate to proceed directly to the question of actual bias.

{¶ 40} Rogers's argument that Juror McCarthy was actually biased is centered on two sets of statements. He contends that Juror McCarthy demonstrated actual bias based on comments that (1) he would tend to favor the testimony of a child witness and (2) he presumed that Rogers was guilty because he was on trial.

{¶ 41} In reviewing claims of actual bias that are based on the jury-selection process, we consider the totality of the evidence, considering whether the voir dire transcript as a whole demonstrates that the juror was actually biased. *See Holder v. Palmer*, 588 F.3d 328, 340 (6th Cir. 2009) ("In assessing whether a juror was actually biased against a defendant, this court considers the totality of the juror's statements."). We begin with the two subjects on which Rogers predicates his claim of actual bias: evaluation of the testimony of child witnesses and the presumption of innocence.

A. Juror McCarthy's Statements About Child Witnesses Do Not Show Actual Bias

{¶ 42} In support of his claim that Juror McCarthy was actually biased against him, Rogers first focuses on Juror McCarthy's statements during voir dire about his uneasiness assessing the testimony of a child witness.

Specifically, he points to Juror McCarthy's comment that he "might have a hard time" evaluating a case involving a child witness and his subsequent response, "I don't have an answer for you," when asked by the judge whether he could put aside his feelings, listen to the evidence, and be fair.

{¶ 43} A review of the entire transcript reveals, however, that Juror McCarthy had a nuanced view about child witnesses that became evident as voir dire progressed. For example, when other prospective jurors agreed with the prosecutor's suggestion that child victims would react differently than adults to a sexual assault and might be reluctant to report it, Juror McCarthy pushed back. In his view, it wasn't necessarily the case that a child would react differently than an adult. Juror McCarthy also agreed with defense counsel's statements that children were impressionable and wanted to please their parents.

{¶ 44} Taken as a whole, the transcript demonstrates that Juror McCarthy initially expressed a natural discomfort when confronted with the task of hearing a sex-abuse case involving a child. But at the same time, his answers revealed that he was open to important parts of the defense's case—specifically, arguments that the victim's delay in reporting abuse made it less likely that abuse actually occurred and that the mother was foisting a fabricated tale of abuse on an impressionable child. His belief that a child's reaction to abuse would depend on the circumstances is the opposite of "a bias that would prevent him . . . from individually weighing the facts of the case," *State v. Madison*, 2020-Ohio-3735, ¶ 24.

{¶ 45} The voir dire transcript demonstrates that Juror McCarthy acknowledged that the difficult subject of the trial would pose a challenge to him, as it would to most jurors. It does not demonstrate that Juror McCarthy had an unalterable predisposition to find the defendant guilty regardless of the evidence or that he would not follow the judge's instructions. We conclude that Rogers has failed to meet his burden to demonstrate that Juror McCarthy was actually biased based on his statements about child witnesses.

B. Juror McCarthy's Statements About the Presumption of Innocence Do Not Show Actual Bias

{¶ 46} Rogers next argues that Juror McCarthy's answers regarding the presumption of innocence show that he had actual bias. Here, he relies on Juror McCarthy's answer that "it'd be hard for [him] to say [that Rogers is] not guilty" in response to defense counsel's hypothetical question asking what his verdict would be if he had to render one before trial.

{¶ 47} Juror McCarthy's comments are not unlike juror comments in *Patton*, 467 U.S. 1025, that the United States Supreme Court concluded did not require the excusal of a juror for cause. There, a defendant challenged the empanelment of jurors who "had formed an opinion as to [the defendant's] guilt" because of pretrial publicity. *Id.* at 1028-1030. One juror said during voir dire that he believed the defendant was guilty based on what he had read in the newspapers, that it would take evidence to

overcome his prior beliefs, and that it would be difficult for him to answer whether he could apply the presumption of innocence. *Id.* at 1030; *id.* at 1048-1049 (Stevens, J., dissenting). But the juror also said that he could enter the jury box with an open mind and that he could alter his original belief based on the facts presented. *Id.* at 1039; *id.* at 1049 (Stevens, J., dissenting). The Court concluded that the "ambiguity" in the juror's testimony was an insufficient basis to find that the trial court erred in failing to excuse the juror. *Id.* at 1039-1040.

{¶ 48} Here, in struggling with counsel's hypothetical question, Juror McCarthy voiced his assessment that generally, "people don't wind up [on trial] from not doing anything." Such feelings are common and not by themselves evidence of actual bias. As the United States Court of Appeals for the Seventh Circuit has explained, "[a] person told that X had been indicted, and asked whether he thought X guilty, might reply that he thought X probably was guilty because few innocent people are indicted." *Thompson v. Altheimer & Gray*, 248 F.3d 621, 625 (7th Cir. 2001). That answer certainly evidences a prior belief, but it would show a bias only "if, for example, the person added, 'Nothing will ever convince me that the government would indict an innocent person.'" *Id.*

{¶ 49} Juror McCarthy was not the only prospective juror to struggle with the hypothetical question about the presumption of innocence. In response, defense counsel explained why "not guilty" was the right answer. None of the prospective jurors spoke up when defense counsel asked whether anyone "disagrees with that or thinks

that's not the right answer." And all the prospective jurors collectively indicated that they had no questions about "not guilty" being the right answer.

{¶ 50} A review of the voir dire transcript reveals that Juror McCarthy was not hesitant to speak out when he had a question or disagreed with a statement made by counsel. And when defense counsel asked Juror McCarthy to rate the importance of honesty on a scale from one to ten, he answered ten. If Juror McCarthy was still confused about applying the presumption of innocence after counsel's explanation, there is no reason to think that he would not have said so.

{¶ 51} Juror McCarthy's answers regarding the presumption of innocence do not demonstrate actual bias against Rogers.

V. The Court of Appeals Did Not Err by Considering Group Answers in Determining Whether Juror McCarthy Was Biased

{¶ 52} Rogers presents two propositions of law for our review, both taking aim at what he describes as the court of appeals' consideration of "group answers" to voir dire questions in its determination that Rogers failed to establish that Juror McCarthy was actually biased against him. Underlying Rogers's argument is a premise that Juror McCarthy's individual answers establish that he was actually biased against him. He argues that because Juror McCarthy's answers established actual bias, the court of appeals should not have relied on group answers

to "rehabilitate" him. Indeed, Rogers argues that group answers must be disregarded in determining whether a prospective juror is actually biased.

{¶ 53} We reject the underlying premise of Rogers's argument. As we have already explained, we are not convinced that Juror McCarthy's initial individual answers, by themselves, were sufficient to demonstrate actual bias.

{¶ 54} Nor do we find it appropriate to adopt a blanket rule forbidding consideration of group answers. Instead, in determining whether a juror was actually biased, a reviewing court must consider the entire record and determine whether it demonstrates that the juror was actually biased against the defendant.

{¶ 55} In support of his argument, Rogers relies on three cases—*Johnson v. Armontrout*, 961 F.2d 748 (8th Cir. 1992), *Hughes v. United States*, 258 F.3d 453 (6th Cir. 2001), and *Morgan v.* Illinois, 504 U.S. 719 (1992)—in which courts in other contexts found collective responses by prospective jurors inadequate, by themselves, to ensure impartiality. In *Johnson*, several jurors had previously served on a jury that convicted the accused's codefendant of the same robbery. *Johnson* at 750. Not surprisingly, the United States Court of Appeals for the Eighth Circuit concluded that the collective silence of the entire jury panel in response to two questions about whether they could put aside evidence they had heard at the prior trial and rely on the evidence presented at the upcoming trial was insufficient to demonstrate the jurors' impartiality. *Id.* at 750, 755-756.

{¶ 56} In *Hughes*, the United States Court of Appeals for the Sixth Circuit held that "silence in the face of generalized questioning" of the whole venire was insufficient to demonstrate the impartiality of a prospective juror who had admitted that she could not be fair. *Hughes* at 456, 461.

{¶ 57} In *Morgan*, the trial judge refused defense counsel's request to ask the prospective jurors whether they would automatically impose the death penalty if they found the defendant guilty. *Morgan* at 721. The Supreme Court held as a matter of due process that the defendant had a right to inquire into the jurors' views on capital punishment at voir dire and that general questions by the judge about whether the jurors would follow the law and could be fair and impartial were insufficient to protect the defendant's rights. *Id.* at 733-736.

{¶ 58} We find nothing in these cases that undermines our confidence in the decision below. None of these cases stands for the proposition that group answers must be disregarded; they just make clear that, in the context of those cases, more was required to ensure an impartial jury. Indeed, we agree with Rogers up to a point. If a prospective juror makes an unequivocal declaration that he cannot afford the defendant a fair trial, we doubt that the prospective juror's mere silence in response to a judge's question like, "Is there anyone here who cannot follow the law," would be sufficient to overcome the actual bias that the prospective juror has expressed by his own words. But that is not the case that we confront today.

{¶ 59} The court of appeals did not rely solely on Juror McCarthy's response to group questions. It first

concluded, after "an extensive review of the voir dire transcript," that Juror McCarthy's statements were vocalizations of the internal struggle he or anyone else would face in dealing with the difficult subject matter of the case and were "in no way indicative of an actual bias against Rogers." 2024-Ohio-1637 at ¶ 20 (12th Dist.). Only after concluding that his statements did not show actual bias did the court add that its conclusion was supported by the "numerous occasions in which Juror McCarthy . . . agreed [as part of group answers] that he not only could, but would, [be] fair and impartial." *Id.* at ¶ 21.

{¶ 60} Further, not all the questions were directed to the entire venire. The prosecutor singled out Juror McCarthy and another prospective juror to ask whether they could fulfill their duties as jurors, sit in judgment, and do the right thing. Juror McCarthy and the other prospective juror answered affirmatively. That question, by being directed at a small group, was pointed and purposeful, like an individual question would be.

{¶ 61} In conducting voir dire, trial judges and attorneys rely on a variety of techniques to determine whether prospective jurors can be fair and impartial. These techniques include individual questions and group questions of varying types. An attorney deciding whether to challenge a prospective juror, either for cause or peremptorily, will necessarily consider all the prospective juror's responses and interactions in deciding whether to make a challenge. So too, a trial judge in deciding whether to excuse a prospective juror will necessarily consider the full context of voir dire. A reviewing court should do no

less. To review whether an attorney was constitutionally ineffective for allowing the empanelment of an allegedly biased juror, a reviewing court will need to review the full record of the jury-selection process. We decline to create a blanket rule that would forbid a reviewing court from considering any aspect of the jury-selection process.

VI. Conclusion

{¶ 62} After a full review of the voir dire transcript, we conclude that Rogers has failed to show that Juror McCarthy was actually biased against him. Therefore, Rogers has not shown that his attorney rendered ineffective assistance by failing to challenge Juror McCarthy for cause. We affirm the judgment of the Twelfth District Court of Appeals.

Judgment affirmed.

APPENDIX B — JUDGMENT ENTRY OF THE COURT OF APPEALS, TWELFTH APPELLATE DISTRICT OF OHIO, WARREN COUNTY, FILED APRIL 29, 2024

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

CASE NO. CA2023-08-063

STATE OF OHIO,

Appellee,

-vs.-

TODD JEFFREY ROGERS,

Appellant.

Filed April 29, 2024

JUDGMENT ENTRY

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Appendix B

Costs to be taxed in compliance with App.R. 24.

/s/ Stephen W. Powell
Stephen W. Powell, Presiding Judge

/s/ Robert A. Hendrickson
Robert A. Hendrickson, Judge

/s/ Robin N. Piper
Robin N. Piper, Judge

Appendix B

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

CASE NO. CA2023-08-063

STATE OF OHIO,

Appellee,

- vs -

TODD JEFFREY ROGERS,

Appellant.

Filed April 29, 2024

OPINION

CRIMINAL APPEAL FROM
WARREN COUNTY COURT OF COMMON PLEAS
Case No. 22CR39713

David P. Fornshell, Warren County Prosecuting Attorney, and Kirsten A. Brandt, Assistant Prosecuting Attorney, for appellee.

Flannery | Georgalis, LLC, and Nathan R. Coyne and Matthew L. Jalandoni, for appellant.

Appendix B

S. POWELL, P.J.

{¶ 1} Appellant, Todd Jeffrey Rogers, appeals his conviction in the Warren County Court of Common Pleas for one count of first-degree felony rape and five counts of third degree felony gross sexual imposition of a child and close family member who, at all times relevant, was under the age of ten years. For the reasons outlined below, we affirm Rogers' conviction.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On September 9, 2022, the Warren County Grand Jury returned an 11-count indictment against Rogers. The indictment charged Rogers with two counts of first-degree felony rape, two counts of first-degree felony attempted rape, and seven counts of third-degree felony gross sexual imposition. The charges arose based on allegations that Rogers had sexually abused an under ten-year-old child and close family member on multiple occasions while in Warren County, Ohio between January 1, 2019 and August 2, 2022.

{¶ 3} On July 24 through 26, 2023, the matter proceeded to a three-day jury trial. Prior to trial, the state dismissed three of the 11 counts. Rogers was tried for the following eight counts: one count of first-degree felony rape in violation of R.C. 2907.02(A)(1)(b) (Count 1); one count of first-degree felony attempted rape in violation of R.C. 2923.02 and 2907.02(A)(1)(b), which included an attempted rape specification pursuant to R.C. 2941.1419(A) (Count 2); four counts of third-degre felony gross sexual imposition

in violation of R.C. 2907.05(8) (Counts 3, 4, 6, and 8); and two counts of third-degree felony gross sexual imposition in violation of R.C. 2907.05(A)(4) (Counts 5 and 7).[1]

{¶ 4} On July 26, 2023, the jury returned a verdict finding Rogers guilty on all eight of the above-named counts, as well as on the single attempted rape specification. Following the return of the jury's verdict, the trial court proceeded to sentencing. The trial court merged Counts 1, 2 and 3 as allied offenses of similar import. Upon the trial court's merger, the state elected to proceed with sentencing Rogers on Count 1. This count, as set forth above, charged Rogers with first-degree felony rape in violation of R.C. 2907.02(A)(1)(b).[2] Based on the state's

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1. R.C. 2941.1419(A), which sets forth the attempted rape specification attached to Count 2, "mandates an indefinite prison term of ten years to life when an offender is convicted of attempted rape and the victim is under ten years old at the time of the offense." *State v. Dix,* 8th Dist. Cuyahoga No. 112458, 2023-Ohio-4123, ¶ 3.

2. R.C. 2907.02(A)(1)(b) prohibits any person from engaging 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 "[t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person." The term "sexual conduct" is defined by R.C. 2907.01(A) to include "vaginal intercourse" between a male and female. The term "sexual conduct" is also defined by R.C. 2907.01(A) to include "the insertion, however slight, of any part of the body" into the "vaginal opening" of another. "Thus, when the phrases 'vaginal intercourse' and 'vaginal opening' are read together, it is apparent that sexual conduct occurs when there is penetration of the vaginal opening by a penis or other

election, the trial court then sentenced Rogers on Count 1 to an indefinite mandatory minimum sentence of 15 years to life in prison, less seven days of jail-time credit, and designated Rogers a Tier Ill sex offender/child-victim offender in accordance with R.C. 2950.01(G).

{¶ 5} After imposing this sentence, the trial court then also sentenced Rogers to serve 60 months in prison on each of the five remaining counts of third-degree felony gross sexual imposition set forth in Counts 4, 5, 6, 7, and 8 of the indictment. The trial court ordered each of those five 60-month prison sentences to be served concurrently to one another and to the indefinite 15-years-to-life prison sentence the trial court had imposed on Count 1. This is in addition to the trial court notifying Rogers that he would be subject to a mandatory five-year postrelease control term when, and if, he was ever released from prison.

ROGERS' APPEAL AND TWO ASSIGNMENTS OF ERROR FOR REVIEW

{¶ 6} On August 17, 2023, Rogers filed a notice of appeal. Following briefing, oral argument was held before this court on March 11, 2024. Rogers' appeal now properly before this court for decision, Rogers has raised two assignments of error for review.

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body part." *State v. Strong,* 1st Dist. Hamilton Nos. C-100484 and C-100486, 2011-Ohio-4947, ¶ 53. "This necessarily includes digital penetration of the victim's vaginal opening with a finger or fingers." *State v. Zamora*, 12th Dist. Clermont Nos. CA2022-10-060 and CA2022-11-071, 2023-Ohio-1847, ¶ 7.

Appendix B

{¶ 7} Assignment of Error No. 1:

{¶ 8} DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO CHALLENGE A BIASED JUROR FOR CAUSE, DEPRIVING ROGERS OF HIS RIGHT TO AN IMPARTIAL JURY.

{¶ 9} In his first assignment of error, Rogers argues his trial counsel was ineffective for failing to challenge for cause an alleged "biased juror," Juror McCarthy, pursuant to R.C. 2313.17(B)(9).[3] This failure, according to Rogers, deprived him of a fair arid impartial jury guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution. We disagree.

INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

{¶ 10} "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *State v. Burns,* 12th Dist. Clinton No. CA2013-10-019, 2014-Ohio-4625, ¶ 7. Given this presumption, "[t]to prevail on an ineffective assistance of counsel claim, an appellant must satisfy the two-prong test set forth in *Strickland v. Washington,* 496 U.S. 668; 104 S.Ct. 2052 (1984)." *State v. Ford,* 12th Dist. Madison No. CA2019-10-027, 2021-Ohio-

3. Although identified by just his last name, we have never the less changed the name of the juror in question for purposes of issuing this opinion.

782, ¶ 13. "[U]nder *Strickland,* in order to prevail on a claim that counsel was ineffective; a criminal defendant must show (1) that his counsel's performance was deficient and (2) that that performance prejudiced him." *State v. Simpson,* 164 Ohio St.3d 102, 2020 Ohio-6719, ¶ 18; citing *Strickland* at 687. This requites the reviewing court to "determine whether the totality of circumstances supports a finding that counsel's performance was deficient, and if so, whether the deficient performance was prejudicial to the defendant." *State v. Romero,* 156 Ohio St.3d 468, 2019-Ohio-1839, ¶ 34. "The failure to make an adequate showing on either prong is fatal to an ineffective assistance of counsel claim." *State v. Jewell,* 12th Dist. Warren No. CA2021-09-080, 2022-Ohio-2727, ¶ 19.

{¶ **11**} "Trial counsel's performance is considered deficient where 'that counsel's performance fell below an objective standard of reasonable representation * * * .'" *State v. Zamora,* 12th Dist. Clermont Nos. CA2022-10-060 and CA2022-11-071, 2023-Ohio-1847, ¶ 21, quoting *State v. Drain,* 170 Ohio St.3d 107, 2022-Ohio-3697, ¶ 67. Therefore, to establish deficient performance, the "appellant must show that counsel made errors so serious that counsel failed to function as the 'counsel' guaranteed by the Sixth Amendment." *State v. Hamblin,* 37 Ohio St.3d 153, 156 (1988), citing *Strickland,* 466 U.S. at 687. "Trial counsel's deficient performance is deemed prejudicial where there exists 'a reasonable probability that, but for counsel's errors, the proceeding's result would have been different.'" *State v. Elcess,* 12th Dist. Warren No. CA2023-01.005, 2023-Ohio-2820, ¶ 22, quoting *State v. Lawson,* 165 Ohio St.3d 445, 2021-Ohio-3566, ¶ 93. Accordingly, to establish

prejudice, the appellant must show "'that counsel's errors were so-serious as to deprive [him] of a fair trial, a trial whose result is reliable.'" *State v. Cepec,* 149 Ohio St.3d 438, 2016-Ohio-8076, ¶ 51, quoting *Strickland.*

WHAT ROGERS MUST ESTABLISH TO PROVE HIS TRIAL COUNSEL WAS INEFFECTIVE.

{¶ 12} Given these principles, in order for Rogers to establish that his trial counsel's performance was deficient in this case, Rogers must establish that his trial counsel's performance was objectively unreasonable in light of his trial counsel's failure to challenge for cause the alleged "biased juror," Juror McCarthy, pursuant to R.C. 2313.17(B)(9).[4] *See State v. Bates,* 159 Ohio St.3d 156, 2020-Ohio-634, ¶ 25, citing *Hughes v. United States,* 258 F.3d 453, 461 (6th Cir.2001). As for prejudice, Rogers must establish that there exists a reasonable probability that his trial counsel's failure to challenge Juror McCarthy for cause deprived him of a fair and impartial jury guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution. To do this, Rogers must show that Juror McCarthy was, in fact, actually biased against

4. R.C. 2313.17(B)(9) sets forth one of the nine enumerated "good causes" for challenging any person called as a juror. *State v. Carter,* 7th Dist. Mahoning No. 15 MA 0225, 2017-Ohio-7501, ¶ 47. Specifically, "R.C. 2313.17(B)(9) provides that a prospective juror may be excused for cause when that person 'discloses by the person's answers that the person cannot be a fair and impartial juror or will not follow the law as given to the person by the court." *Long v. Harding,* 12th Dist. Butler No. CA2020-11-120, 2021 Ohio-4240, ¶ 15.

him. *Id.*, citing *State v. Mundt,* 115 Ohio St.3d 22, 2007-Ohio-4836, ¶ 67.

{¶ 13} "'Actual bias is "bias in fact"—the existence of a state of mind that leads to an inference that the person will not act with entire impartiality.'" *Id.,* quoting *United States v. Torres,* 128 F.3d 38, 43 (2d Cir.1997), citing *United States v. Wood,* 299 U.S. 123, 133, 57 S.Ct. 177 (1936). "Actual bias can be found from a juror's express admission or from circumstantial evidence of the juror's biased attitudes." *Id.* at ¶ 26, citing *Hughes* at 459. For example, courts have found actual bias where a juror unequivocally stated that she could not be fair due to law-enforcement bias, when a juror had a fixed opinion of the defendant's guilt based on pretrial publicity, when a juror expressed views on the death penalty that prevented or substantially impaired him from performing his duties as a juror, and where a Caucasian juror revealed in her jury questionnaire a blatant racial bias against Black people in a case where the defendant was Black. *Id.* at ¶ 26, 37.

THE DEFICIENCY PRONG

{¶ 14} As for the fast prong of the two-part *Strickland* test, the deficiency prong, Rogers argues that his trial counsel "performed deficiently" by failing to challenge for clause the alleged "biased juror," Juror McCarthy, pursuant to R.C. 2313.17(B)(9). The crux of this case, however, is not whether Rogers' trial counsel was deficient for failing to challenge Juror McCarthy for cause. This is because, as this court's research on this issue indicates, trial counsel's failure to challenge a juror who

is actually biased against their client would, in nearly every conceivable circumstance, constitute deficient performance that falls below an objective standard of reasonable representation. This holds true even though, as noted by the Ohio Supreme Court, "'[f]ew decisions at trial are as subjective or prone to individual attorney strategy as juror voir dire, where decisions are often made on the basis of intangible factors.'" *Mundt,* 2007-Ohio-4836 at ¶ 64, quoting *Miller v. Francis,* 269 F.3d 609, 620 (6th Cir.2001).

{¶ 15} "'[T]he decision whether to seat a biased juror cannot be a discretionary or strategic decision.'" *State v. Froman,* 162 Ohio St.3d 435, 2020-Ohio-4523, ¶ 49, quoting *Miller v. Webb,* 385 F.3d 666, 675 (6th Cir.2004). "If counsel's decision not to challenge a biased venireperson could constitute sound trial strategy, then sound trial strategy would include counsel's decision to waive, in effect, a criminal defendant's right to an impartial jury." *Hughes,* 258 F.3d at 463, citing *United States v. Martinez-Salazar,* 528 U.S. 304, 316, 120 S. Ct. 774 (2000) (holding that the seating of a biased juror who should have been dismissed for cause requires reversal of the conviction). "[T]here is no sound trial strategy that could support what is essentially a waiver of a defendant's basic Sixth Amendment right to trial by an impartial jury." *Miller,* 385 F.3d at 676. Therefore, rather than the first prong of the two-part *Strickland* test, the deficiency prong, it is instead that test's second part, the prejudice prong, that requires this court's attention.

Appendix B

THE PREJUDICE PRONG

{¶ 16} As stated previously, in order to satisfy the second prong of the two-part *Strickland* test, Rogers must establish that there exists a reasonable probability that his trial counsel's failure to challenge for cause the alleged "biased juror," Juror McCarthy, deprived him of a fair and impartial jury. To do this, Rogers must show that Juror McCarthy was, in fact, actually biased against him.

{¶ 17} Rogers argues that Juror McCarthy was actually biased against him, "and this was apparent from the start of the trial court's questioning." To support this claim, Rogers points to several instances in the trial transcript where Juror McCarthy admitted during voir dire that he had concerns about his ability to remain fair and impartial given the disturbing nature of the charges for which Rogers had been accused. This includes Juror McCarthy stating, "I might have a hard time with it," in response to the trial court asking the original 13 prospective jurors seated in the jury box whether any of them would have any problem with "deciding what the truth is in this case," and determining whether the state had proven its case beyond a reasonable without applying "sympathy" and "prejudice," but instead being "fair when you're evaluating this case," when considering much of the state's evidence would be based on the testimony from a "child witness."

{¶ 18} This also includes Juror McCarthy stating, "It's a good question. I don't have an answer for you," when specifically asked by the trial court whether he could follow

the trial court's instructions, including those instructions related to the presumption of Rogers' innocence and the application of the proof-beyond-a-reasonable-doubt standard necessary to prove Rogers' guilt, knowing that he was "having a hard time" with this case given the state's case was largely dependent on testimony from a child witness who he tended to "just want to favor," or whether he could "put that aside and listen to the evidence and be fair."

{¶ 19} This further includes Juror McCarthy stating, "I'd say it'd be hard for me to say that he's not guilty," and "people don't wind up here from not doing anything," when asked by Rogers' trial counsel what his verdict would be right then, guilty or not guilty, "knowing that there's a presumption of innocence," that Rogers was "innocent as he sits here right now, what would your verdict be?"[5] This is in addition to Juror McCarthy agreeing with the state that this type of case, a case involving the alleged sexual abuse of a child by a close family member, was not his "kinda case" and that he was "sure" the rest of the jury felt the same way.

{¶ 20} However, upon review, we disagree with Rogers' characterization of the record. That is to say, we disagree with Rogers' assertion that the record in this case firmly establishes that Juror McCarthy exhibited an actual bias against him. Rather, upon a thorough review

5. We note that, in response to Juror McCarthy's statement that "people don't wind up here from not doing anything," Rogers' trial counsel stated, "Okay. That—that's what's going on in your head. That's an honest statement."

of the record in this case, including an extensive review of the voir dire transcript; we find Juror McCarthy's statements set forth above are nothing more than Juror McCarthy verbalizing the internal struggle he was facing in determining whether he, or anybody else, could honestly be expected to be remain fair and impartial while empaneled on a jury tasked with determining the guilt or innocence of a man accused of sexually abusing child and close family member. Juror McCarthy's struggle is certainly understandable, and his honesty in answering the difficult questions posed to him as a prospective juror commendable, and in no way indicative of an actual bias against Rogers. This is particularly true here when considering Juror McCarthy later responded "10" when asked by Rogers' trial counsel, "How important on a scale of one to 10 is it to be honest, just generally?"

{¶ 21} What is more, and what simply cannot be ignored, is the numerous occasions in which Juror McCarthy, as part of the original 13 prospective jurors seated in the jury box; agreed that he not only could, but would, remain fair and impartial if he was ultimately selected to serve as a juror in this case. This also included the several instances in which all 13 prospective jurors, including Juror McCarthy, expressly stated that they would follow the trial court's instructions and would not "change the law or apply your own idea of what you think the law should be." For example, when the prosecutor remarked that "[i]t is very important to follow the law that the Judge gives you on what I have to prove to you," which the prosecutor followed up by asking whether "everybody here was willing to do that," the record indicates that

the 13 prospective jurors responded "affirmatively." This included Juror McCarthy. The record indicates that Juror McCarthy also responded "affirmatively" when specifically asked by the prosecutor whether he could fulfill his duties if he were selected to be a juror in this case because he would have to "sit in judgment, right, and you're asked to do the right thing." This would necessarily include Juror McCarthy following the trial court's instructions in regard to presumption of Rogers' innocence and the proof-beyond-a-reasonable-doubt standard the state would need to overcome in order to establish Rogers' guilt.

{¶ 22} In light of the foregoing, and while it may be true that Juror McCarthy did express some hesitancy regarding his own ability, and the ability of any of the other 12 prospective jurors then seated with him in the jury box, to remain fair and impartial while empaneled on a jury that was tasked with determining the guilt or innocence of a man accused of sexually abusing a child and close family member, Juror McCarthy never stated that he either could not, or would not, be fair and impartial if he was selected as a juror in this case. *See, e.g., State v. Miller*, 12th Dist. Butler No. CA2009-04-106, 2010-Ohio-1722, ¶ 27, 35 (finding appellant's trial counsel was not ineffective for failing to use a peremptory challenge against an alleged biased juror where the record did not support appellant's claim that juror was actually biased against the appellant despite the juror expressing some "hesitation" as to whether the juror could be unbiased in rendering a verdict in a case where appellant was charged with shaking and severely injuring his days old infant daughter). The record indicates that Juror McCarthy had in fact stated the exact opposite.

{¶ 23} "Where jurors demonstrate during voir dire that they are able to remain fair and impartial, no action will lie for ineffective assistance of counsel for not seeking their removal." *State v. Burns,* 12th Dist. Clinton No. CA2013-10-019, 2014-Ohio-4625, ¶ 12. Such is the case here. Therefore, because Rogers did not establish that Juror McCarthy, because of his partiality or biases, was incapable and unwilling to decide the case based solely on the evidence presented at trial, Rogers has not established that there exists a reasonable probability that his trial counsel's failure to challenge Juror McCarthy for cause pursuant to R.C. 2313.17(B)(9) deprived him of a fair and impartial jury. *See Bates,* 2020-Ohio-634 at ¶ 25 (noting that, to prevail on his ineffective assistance of counsel claim, appellant "must prove that at least one of the jurors at his trial, because of the juror's partiality or biases, was not 'capable and willing to decide the case solely on the evidence' before that juror"), quoting *Smith v. Phillips,* 455 U.S. 209, 217, 102 S.Ct. 940 (1982). Accordingly, Rogers' first assignment of error lacks merit and is overruled.

{¶ 24} Assignment of Error No. 2:

{¶ 25} THE PROSECUTOR COMMITTED MISCONDUCT THROUGH HIS IMPROPER COMMENTS THROUGHOUT THE TRIAL.

{¶ 26} In his second assignment of error, Rogers argues the prosecutor committed prosecutorial misconduct by making improper comments throughout trial, thereby mandating his conviction be reversed and a new trial ordered. We disagree.

Appendix B

PROSECUTORIAL MISCONDUCT STANDARD

{¶ 27} "For a conviction to be reversed on the basis of prosecutorial misconduct, a defendant must prove the prosecutor's acts were improper and that they prejudicially affected the defendant's substantial rights." *State v. Warnock,* 12th Dist. Madison No. CA2023-02-001, 2024-Ohio-382, ¶ 30, citing *State v. Elmore,* 111 Ohio St.3d 515, 2006-Ohio-6207, ¶ 62. "To demonstrate prejudice, a defendant must show that the improper acts were so prejudicial that the outcome of the trial would clearly have been different had those improper acts not occurred." *State v. Kaufhold,* 12th Dist. Butler No. CA2019-09-148, 2020-Ohio-3835, ¶ 42. "The focus of an inquiry into allegations of prosecutorial misconduct is upon the fairness of the trial, not upon the culpability of the prosecutor." *State v. Combs,* 12th Dist. Clermont No. CA2020-01-004, 2020-Ohio-5397, ¶ 19. A prosecutor's alleged misconduct "is not grounds for error unless the defendant has been denied a fair trial." *State v. Olvera-Guillen,* 12th Dist. Butler No. CA2007-05-118, 2008-Ohio-5416, ¶ 27. "Therefore, a finding of prosecutorial misconduct will not be grounds for reversal unless the defendant has been denied a fair trial because of the prosecutor's prejudicial conduct." *State v. Carpenter,* 12th Dist. Clinton No. CA2022-02-005, 2023-Ohio-2523, ¶ 95. This is because a defendant is only "guaranteed a fair trial, not a perfect one." *State v. Miller,* 12th Dist. Preble No. CA2019-11-010, 2021-Ohio-162, ¶ 45.

ROGERS' ARGUMENTS AND ANALYSIS

{¶ 28} As noted above, Rogers argues the prosecutor committed prosecutorial misconduct by making improper

comments throughout his trial. Rogers claims these improper comments began during voir dire when the prosecutor stated that, in "almost all of my cases, [the] sexual assault occurred by someone who kn[e]w the child, right?" Rogers claims the prosecutor's improper comments then continued a short time later when the prosecutor stated during voir dire that, in his experience, it was "pretty common" for victims of sexual assault to "freeze" while being assaulted rather than to run away or fight off their attacker. Rogers claims the prosecutor's improper comments also included the prosecutor stating, "I've had very few cases where a child was sexually assaulted and witnessed by another person." However, upon review of the record, we do not find the prosecutor's comments, whether improper or not, to be so prejudicial that the outcome of Rogers' trial would clearly have been different had the prosecutor not made any of the comments that he did.

{¶ 29} In reaching this decision, we note that the prosecutor's comments were made colloquially, and in a conversational manner, during a time when the prosecutor was admittedly trying to make the 13 prospective jurors then seated in the jury box "uncomfortable" in hopes that they would open up and speak to him more freely when answering his voir dire questioning. The challenged comments made by the prosecutor did not accuse Rogers of committing the charged offense or show the prosecutor's personal belief as to Rogers' guilt or innocence of the crimes charged. The prosecutor's comments also did not express his personal belief or opinion as to the credibility of any witness. This includes the credibility of the

alleged child victim. Therefore, although we question the prosecutor's tactics, we find the prosecutor's statements set forth above were nothing more than isolated, generally benign statements that did not undermine the overall fairness of Rogers' trial. Rogers' argument otherwise lacks merit.

{¶ 30} Rogers argues the prosecutor also committed prosecutorial misconduct during his direct examination of the child victim. To support this argument, Rogers claims that it was improper for the prosecutor to ask the victim, "Did you tell the grand jury the truth about what had happened?" Rogers claims this question was improper in that it "bolstered" the victim's credibility based upon evidence that "Was not and could not be presented at trial." Surely, it would be improper for the prosecutor to "bolster the testimony of a witness with statements of his or her personal belief in the credibility of the witness's testimony." *State v. Elliott,* 8th Dist. Cuyahoga No. 91999, 2009-Ohio-5816, ¶ 42. It would also be "improper for an attorney to vouch for the evidence by implying knowledge of facts outside the record." *State v. Ruggles,* 12th Dist. Warren Nos. CA2019-05-038 and CA2019-05-044 thru CA2019-05-046, 2020-Ohio-2886, ¶ 48. But, when taken in context, the prosecutor's question posed to the child victim about whether she had testified truthfully to the grand jury was merely a part of a long line of questions meant to show the victim's testimony elicited at trial was consistent in that it contained the same allegations against Rogers that the victim had initially told to her mother, allegations that her mother then confronted Rogers with directly, as well as what the victim had told the social worker who

interviewed her at a local child advocacy center. Therefore, in this context, we cannot say the prosecutor's question was improper.

{¶ 31} Regardless, even if we were to find the prosecutor's question improper, this was one, single question, that was brief in both the amount of time it took the prosecutor to ask the question, as well as the length of time it took the child victim to answer. What is more, shortly after this question was asked, the victim was then subject to cross examination by Rogers' trial counsel. This included many questions that were intended to call into question the child victim's credibility and veracity in regard to the allegations of sexual abuse that she had levied against Rogers. Therefore, as the trier of fact, the jury had ample opportunity to assess the child victim's credibility by witnessing for itself the victim testifying about the alleged sexual abuse she claimed Rogers had perpetrated against her, independent of any improper witness vouching that may have taken place by the prosecutor. *See State v. Sanchez-Garza,* 12th Dist. Butler No. CA2016-02-036, 2017-Ohio-1234, ¶ 48. Accordingly, while we again question the prosecutor's tactics, we find the prosecutor's question set forth above was nothing more than one, isolated question that did not undermine the overall fairness of Rogers' trial. Rogers' argument otherwise again lacks merit.

{¶ 32} Rogers further argues the prosecutor committed prosecutorial misconduct during his rebuttal closing argument. To support this argument, Rogers initially claims that it was improper for the prosecutor to

state at the start of his rebuttal that he was "sure" the child victim was not confused about what she claimed Rogers had done to her. However, upon review, we again find ourselves in disagreement with how Rogers characterizes the record. What the prosecutor actually stated, when read in conjunction with the rest of the words in that sentence, and the other sentences making up that paragraph, was the following:

> I get a chance to respond. I promise I will not talk long. I want to respond to some specific things that [Rogers' trial counsel] brought up. One, [the child victim] is not confused. She is not confused. I really—I think during this argument was the first time I heard that apparently [the victim] was so traumatized by the touching that [another family member] did that she apparently became hallucinatory or something. *I'm sure where that—[the victim] is not confused.* This is the thing I want you to take from this. Every question, every suggestion that [Rogers' trial counsel] made, he had the opportunity to ask [the child victim] about, and he didn't. You know you asked her those questions? I did. Because you know that she's not confused.
>
> [Rogers' trial counsel] could have asked [the victim], didn't you make this up? He didn't. [Rogers' trial counsel] could have sked her, aren't you confusing [Rogers] with [this other family member]? But he didn't. He doesn't want

> to hear what [the victim's] answers are. He wants to just throw suggestions out to you and I've kind of lost counting how many there are.

(Emphasis added.)

{¶ 33} When reviewing the italicized language set forth above, this was clearly an attempt by the prosecutor to state, "I'm [not] sure where that [idea came from]. [The victim] is not confused," and not, as Rogers suggests within his appellate brief, the prosecutor stating, "I'm sure * * * [the victim] is not confused." To claim otherwise, like Rogers does in his appellate brief, is to completely ignore the words "where that" and the context in which those words were actually spoken by the prosecutor in this case. Therefore, when read in its proper context, such a statement was not improper and cannot form the basis of a prosecutorial misconduct claim. Rogers' claim otherwise lacks merit.

{¶ 34} Regardless, even if we were to assume Rogers' reading of the record was correct, it is well established that, in closing argument, "[a] prosecutor may bolster his witnesses, may state that the evidence supports the conclusion that his witnesses are telling the truth, and may, in his rebuttal, state that the evidence does not support the defense's conclusions or that certain witnesses are more or less believable." *State v. Cisternino,* 11th Dist. Lake No. 99-L-137, 2001 Ohio App. LEXIS 1593, *14-*15 (Mar. 30, 2001). More specifically, in rebuttal, the prosecutor may:

> argue that the evidence does not support the conclusion postulated by defense counsel. He may comment upon the circumstances of witnesses in their testimony, including their interest in the case, their demeanor, their peculiar opportunity to review the facts, their general intelligence, and their level of awareness as to what is going on. He may conclude by arguing that these circumstances make the witnesses more or less believable and deserving of more or less weight.

State v. Fether, 5th Dist. Stark No. 2011-CA00148, 2012-Ohio-892, ¶ 67, quoting *State v. Draughn,* 76 Ohio App.3d 664, 670-671 (5th Dist.1992).

{¶ 35} While certainly unartfully done, when the challenged statement is reviewed in context, that was essentially what the prosecutor was doing in this case. That is to say, by claiming the child victim was not confused about what Rogers had done to her, the prosecutor was doing nothing more than arguing that the evidence did not support the conclusion postulated by Rogers' trial counsel. That being, Rogers' trial counsel's argument that the victim had become so traumatized by what another close family member had done to her that she believed the allegations of sexual abuse that she had levied against Rogers were true when they were not. Therefore, when taken in its proper context, we find the prosecutor's statement set forth above was neither improper nor was the prosecutor's statement prejudicial so as to affect Rogers' substantial rights. The prosecutor's

comment was instead permissible commentary based on the evidence properly admitted at trial. Rogers' argument otherwise lacks merit.

{¶ 36} Rogers lastly argues the prosecutor committed prosecutorial misconduct by telling the jury that the child victim had been consistent in the allegations she had levied against him "over and over again." Rogers argues that this statement was improper because the prosecutor was "referring to [the victim's] grand jury testimony, and expressly telling the jury that the witness's testimony was corroborated by evidence known to the government but not known to the jury." But, just as before, we once again find ourselves in disagreement with how Rogers characterizes the record. What the prosecutor actually stated, when the words "over and over again" are read in conjunction with the rest of the prosecutor's words used in that sentence, and the other sentences making up that portion of the prosecutor's rebuttal, was the following:

> [The victim] knows who [the other family member who abused her] is and [she] knows who [Rogers] is. [The victim] knows what [the one family member] did to her and she knows what [Rogers] did to her. [The victim] is not impressionable. Even her own grandmother had to admit that she's pretty smart. You had plenty of opportunity to see her. I agree, yes, that she was sheltered. And that's important because what's the—you know, available information for the detailed descriptions of abuse that happened to her.

> But you want to talk about fanciful, *I can't even imagine what it would take to try to convince an eight-year-old child to repeat over and over again, consistently abuse in that level of detail.* That's fanciful.

(Emphasis added.)

{¶ 37} "[l]t is well established that a prosecutor's latitude in closing argument is wider on rebuttal where the prosecutor has room to respond to closing arguments of defense counsel." *State v. King,* 12th Dist. Clermont No. CA2022-01-001, 2022-Ohio-3388, ¶ 50, citing *State v. Farwell,* 12th Dist. Clermont No. CA2001-03-041, 2002 Ohio App. LEXIS 1888, *32 (Apr. 22, 2002). Therefore, when taken in its proper context, we find the prosecutor's statement set forth above was neither improper nor was the prosecutor's statement prejudicial so as to affect Rogers' substantial rights. The prosecutor's comment, while possibly alluding to the victim's grand jury testimony as one example of the child victim's consistent, unwavering allegations of sexual abuse that she had levied against Rogers, was permissible commentary based on the arguments advanced by Rogers' trial counsel during counsel's own closing argument. That being, rather than the "fanciful" or "hallucinatory" allegations of a confused child, the child victim's allegations of sexual abuse against Rogers were consistent in that the victim's allegations repeatedly accused Rogers of sexually abusing her in the same manner and on multiple occasions over a period of several years while in Warren County, Ohio between January 1, 2019 and August 2, 2022. Accordingly, because

we find no merit to any of the arguments advanced by Rogers herein, Rogers' second assignment of error also lacks merit and is overruled.

CONCLUSION

{¶ 38} For the reasons outlined below, and finding no merit to any of the arguments advanced here in in support of Rogers' two assignments of error, Rogers' appeal challenging his conviction for one count of first-degree felony rape and five counts of third degree felony gross sexual imposition of a child who, at all times relevant, was under the age of ten years old, is denied.

{¶ 39} Judgment affirmed.

HENDRICKSON and PIPER, JJ., concur.

APPENDIX C — JUDGMENT ENTRY OF SENTENCE OF THE STATE OF OHIO, WARREN COUNTY, COMMON PLEAS COURT, CRIMINAL DIVISION, FILED JULY 27, 2023

STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT

CRIMINAL DIVISION

CASE NO. 22CR39713
(JUDGE ROBERT W. PEELER)

STATE OF OHIO,

Plaintiff,

v.

TODD JEFFREY ROGERS,

Defendant.

Filed July 27, 2023

JUDGMENT ENTRY OF SENTENCE

This matter is before the Court on July 26, 2023 for sentencing.

The Defendant appeared, in person, represented by Mark Babb. The State of Ohio was represented by Travis J. Vieux. The proceedings were recorded by audio/video recording and stenographic means.

Appendix C

The Defendant was afforded the opportunity for allocution and to speak in mitigation.

The Court has considered the record, any arguments of counsel, any statements of the parties, any statements or other information in mitigation, any presentence investigation and/or bond report, any victim impact, any statements or other information offered by the victim or victim representative.

The Court has considered the purposes and principals of sentencing in R.C. § 2929.11, the seriousness and recidivism factors in R.C. § 2929.12, and all other relevant sentencing statutes.

The Defendant was previously found guilty following a trial by jury and is to be sentenced for the following offense(s):

COUNT	OFFENSE LEVEL	NAME OF OFFENSE	CODE SECTION
1	Felony of the First Degree	RAPE (Child under 13 years of age/ Additional Finding that Child was under 10 years of age)	2907.02(A)(1)(b)
4	Felony of the Third Degree	GROSS SEXUAL IMPOSITION (Child under 12 years of Age/ Not through Clothing)	2907.05(B)

5	Felony of the Third Degree	GROSS SEXUAL IMPOSITION (Child under 13 years of Age)	2907.05(A)(4)
6	Felony of the Third Degree	GROSS SEXUAL IMPOSITION (Child under 12 years of Age/ Not through Clothing)	2907.05(B)
7	Felony of the Third Degree	GROSS SEXUAL IMPOSITION (Child under 13 years of Age)	2907.05(A)(4)
8	Felony of the Third Degree	GROSS SEXUAL IMPOSITION (Child under 12 years of Age/ Not through Clothing)	2907.05(B)

Sentence is pronounced upon the Defendant as follows:

☒ **PRISON SENTENCE** *(check if applicable)*

The Court finds the Defendant is not amenable to an available community control sanction and that a prison sentence is consistent with the purposes and principles of R.C. § 2929.11.

☒ The Court finds a prison sentence is necessary to adequately punish the Defendant and protect the public from future crime because the applicable

factors under R.C. § 2929.12 indicating a greater likelihood of recidivism outweigh the applicable factors indicating a lesser likelihood of recidivism.

☒ Further, a community control sanction would demean the seriousness of the offense because one or more factors under R.C. § 2929.12 indicate that the Defendant's conduct was more serious than conduct normally constituting the offense and outweigh the factors indicating the conduct was less serious than conduct normally constituting the offense.

It is hereby **ORDERED** that Defendant be sentenced as to Count 1 to an indefinite minimum term of 15 years to a maximum term of LIFE in prison pursuant to RC 2971.03(B)(1)(b), of which 15 year(s) is a mandatory term. Additionally, Defendant is sentenced to 60 months as to each of Counts 4, 5, 6, 7 and 8, each to be served concurrently to Count 1 and to each other.

The Defendant is not recommended for a Risk Reduction Sentence pursuant to R.C. § 2929.143.

The Defendant shall be conveyed by the Warren County Sheriff to the custody of the Ohio Department of Rehabilitation and Corrections forthwith.

COURT COSTS, FEES & FINANCIAL SANCTIONS

Upon the record before the Court and any evidence presented, and having considered the Defendant's present and future ability to pay, the Court orders as follows:

☒ **COURT COSTS / FEES WAIVED** *(check if applicable)*

The costs of prosecution and any jury fees in this case shall be waived.

MISCELLANEOUS PROVISIONS

☒ **VICTIM** *(check if applicable)*

The Court notes that pursuant to R.C. § 2930.14, there is a victim of the offense who has a right to be heard before the imposition of sentence.

The Victim/Victim Representative was present.

☒ **MERGER** *(check if applicable)*

The Court finds that Counts 1,2 and 3 merge under R.C. § 2941.25 for purposes of final conviction and sentence.

The State elected to proceed on Count 1 and therefore a final conviction and sentence is hereby entered on Count[s] 1, 4, 5, 6, 7, and 8 only.

Merger under R.C. § 2941.25 does not apply to any other counts.

☒ **SEX OFFENDER REGISTRATION REQUIREMENT** *(check if applicable)*

☒ The Court finds pursuant to R.C. § 2950.01 that as a result of these convictions the Defendant is a

Tier III Child Victim Offender and has been given written and oral notice of their responsibilities to register as a Child Victim Offender pursuant to R.C. 2950.04.

JAIL TIME CREDIT

The Court orders the Defendant be granted 7 days of local jail time credit for time served up to and including date of sentencing and excluding conveyance time.

POST RELEASE CONTROL

As a result of the conviction(s) in this case and the imposition of a prison sentence, and pursuant to R.C. § 2967.28, the Defendant is subject to post-release control as follows:

☒ Mandatory period of five years as to Counts 4,5,6,7, and 8.

The Adult Parole Authority will administer the post-release control pursuant to R.C. § 2967.28, and the Defendant has been advised that if the Defendant violates post-release control, the Parole Board may impose a prison term as part of the sentence of up to half of the stated prison term or stated minimum term originally imposed upon the Defendant in nine-month increments.

If while on post release control the Defendant is convicted of a new felony, the sentencing court will

have authority to terminate the post-release control and order a consecutive prison term of up to the greater of twelve months or the remaining period of post release control.

DNA COLLECTION / FINGERPRINTING

☒ The Defendant shall submit to DNA specimen collection as required by R.C. 2901.07. *(felony cases only)*

If the Defendant has not yet been fingerprinted in this case, they are ordered to report to Warren County Sheriff's Office to be fingerprinted pursuant to R.C. § 109.60.

TEMPORARY PROTECTION ORDER

Any Temporary Protection Order issued in this case is hereby terminated.

APPELLATE RIGHTS

The Defendant was notified of rights to appeal per Crim. R. 32 as well as the right to have a transcript and counsel appointed at no cost if determined to be indigent.

SO ORDERED.

/s/ Robert W. Peeler
ROBERT W. PEELER, Judge
Warren County Common Pleas Court

APPENDIX D — RELEVANT CONSTITUTIONAL PROVISIONS

U.S.C.A. Const. Amend. VI-Jury Trials

Amendment VI. Jury trials for crimes, and procedural rights

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 shall 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 defence.

Appendix D

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, 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 law; 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.