

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee

-vs-

REGINALD WARREN

Appellant

06-2148

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 86854

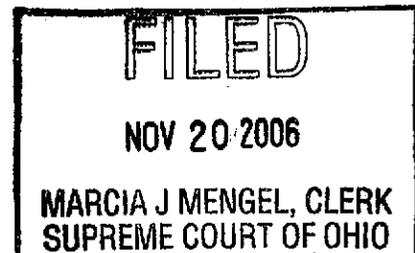
MOTION FOR DELAYED APPEAL IN FELONY CASE

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COUNSEL FOR APPELLEE, THE STATE OF OHIO



IN THE SUPREME COURT OF OHIO

STATE OF OHIO :
Appellee : MOTION FOR DELAYED
-vs- : APPEAL IN FELONY CASE
REGINALD WARREN : FROM THE CUYAHOGA
Appellant : COUNTY COURT OF APPEALS,
CA 86854, AND
INCORPORATED
MEMORANDUM OF LAW.

Reginald Warren, Appellant, through undersigned counsel, moves this Honorable Court to grant him a delayed appeal from the judgment of the Cuyahoga County Court of Appeals journalized on August 21, 2006, in CA 86854, a felony case. This motion is made pursuant to S.Ct. R. II, Section 2(A)(4)(a), and is based on the reasons set forth below and in the accompanying affidavits.

SUMMARY

Mr. Warren respectfully submits that this Court should exercise its discretion to allow a delayed appeal because the period of delay of approximately 55 days was not occasioned by the actions of Mr. Warren. The delay in this case occurred because your appellant, his current counsel and his appellate counsel were all laboring under the reasonable, but ultimately erroneous belief that the Ohio Public Defender was handling the case. Mr. Warren is serving a life sentence for a rape conviction grounded on allegation of sexual misconduct stemming from incidents occurring in 1988, when he was 15 years old and the alleged victim was nine.

Mr. Warren's future ability to litigate his case hinges on whether he first exhausted his claims in this court. As demonstrated below, this delay cannot be attributed to Mr. Warren or his appellate and current counsel. Under the circumstances, whether or not this Court ultimately chooses to entertain the merits of his appeal, he requests that it at least allow him to submit this

Notice of Delayed Appeal, its supporting affidavits, and accompanying Memorandum in Support of Jurisdiction.

BACKGROUND

A. Announcement and Journalization of Decision by Eighth District Court of Appeals.

The Eighth District Court of Appeals released its decision on August 10, 2006. In accordance with Eighth District local rule, the decision was not journalized until August 21, 2006. Thus, a timely appeal should have been filed in this court on or before October 4, 2006. Shortly after the decision was issued, Margaret Robey, Mr. Warren's counsel on appeal, contacted current counsel, an Assistant Cuyahoga County Public Defender, who previously represented Mr. Warren in an unrelated matter in this Court.

After advising current counsel that Mr. Warren's conviction had been reversed in part, but largely affirmed, it was agreed that current counsel would file an Application to Reopen pursuant to Appellate Rule 26(B). Ms. Robey indicated that she would attempt to proceed with the Notice of Appeal and Memorandum in Support of Jurisdiction to this Court, but shortly thereafter advised that she had forwarded that task on to the Ohio Public Defender's Office. (Affidavit Ex. A)

B. Failure of the Ohio Public Defender's Office to Meet the Appeal Deadline or Notify Mr. Warren

In the interim, current counsel was contacted by Jeremy Masters, an Assistant Ohio Public Defender, who advised that he had been assigned to prepare the Memorandum in Support of Jurisdiction in this Court. Mr. Masters asked current counsel for a copy of the journalized decision in Mr. Warren's case. During that conversation, current counsel made it very clear to Mr. Masters that she had a professional interest in Mr. Warren's case. Based on that conversation, current counsel believed that the Ohio Public Defender's Office would be filing the materials in this Court

necessary to pursue an appeal. Current counsel eventually forwarded the requested journal entry to the Ohio Public Defender's Office via facsimile and did not hear from Mr. Masters again. (Affidavit Ex. B)

Current counsel undertook to prepare the Application to Reopen in the Eighth District and on November 7, 2008, discovered that the Notice of Appeal to this Court was never filed. When she learned that the time had lapsed, counsel immediately contacted Ms. Robey and Mr. Warren. Mr. Warren advised that he had not received any paperwork from the Ohio Public Defender's Office informing him that the Office would not be filing an Appeal to this Court. Mr. Warren also stressed that he wanted to pursue the matter. (Affidavit Ex. C) Nevertheless, Mr. Warren has been and remains indigent, and he cannot afford to hire someone to assist him in the Ohio Public Defender's absence. (Affidavit Ex. D).

Counsel promptly undertook to prepare this motion, along with a Notice of Appeal and Memorandum in Support of Jurisdiction. This Court will note that these pleadings were submitted the day after counsel was able to obtain all of the supporting documentation, which includes Mr. Warren's affidavit.

ARGUMENT

This Court has indicated that it will allow for delayed appeals in felony cases where the requesting party demonstrates "adequate reasons" for the delayed appeal. S. Ct. R. II, Section 2(A)(4)(a). Mr. Warren has met that threshold in this instance.

This Office, which litigates frequently in this Court, generally meets its deadlines before this Court. There is nothing that this Office could have done, however, to prevent what occurred in Mr. Warren's case. Had current counsel learned in a timely fashion that the Ohio Public Defender had rejected Mr. Warren's appeal, this Office would have filed the Notice of Appeal

and Memorandum in Support in a timely manner. Similarly, Ms. Robey advises that she too would have pursued Mr. Warren's case to this Court.

Mr. Warren, who is serving a life sentence, wishes to prosecute this appeal, and advises that he was never made aware that the Ohio Public Defender had opted not to pursue the case. Allowing his appeal to this Court is his only opportunity to preserve significant issues raised on appeal for future litigation. In the end, Mr. Warren should not be forced to suffer for his attorneys' failures to communicate.

CONCLUSION

Wherefore, Mr. Warren, through counsel, prays that his motion for delayed appeal will be granted.

Respectfully submitted,



ERIKA B. CUNLIFFE, ESQ.
Assistant Public Defender
Cuyahoga County

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Delayed Appeal and Incorporated Memorandum of Law was hand delivered upon William Mason, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 17th day of November, 2006.



ERIKA B. CUNLIFFE

EXHIBIT A

State of Ohio)
County of Cuyahoga)

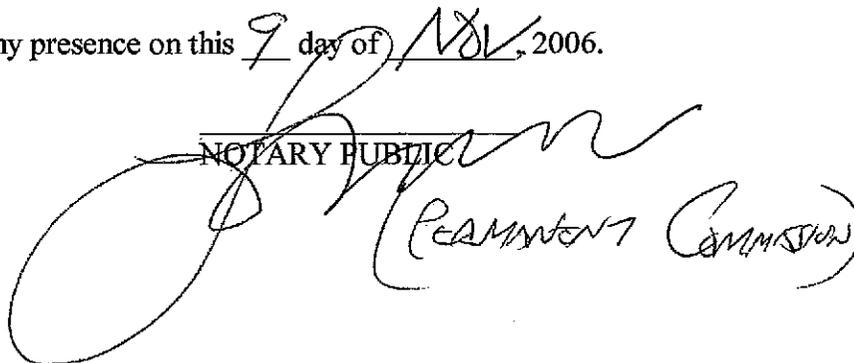
SS: AFFIDAVIT OF MARGARET AMER ROBEY

1. I served as appointed counsel in *State v. Warren*, Eighth District Case No. 86854, representing Reginald Warren in his appeal from multiple convictions for rape and other sexual criminal offenses.
2. Although the Court of Appeals reversed some of Mr. Warren's convictions and sentences, he was left with such a substantial amount of time to serve - and had such significant and meritorious arguments to make - that I believed an appeal to the Ohio Supreme Court was necessary. Mr. Warren agreed.
3. Due to my heavy caseload at the time, as well as the fact that I would have to seek another appointment from the court in order to represent Mr. Warren, I recommended that the Ohio Public Defender's Office handle the Ohio Supreme Court appeal.
4. I corresponded with an attorney at the Ohio Public Defender's Office about filing the appeal for Mr. Warren, and I provided that attorney with copies of the briefing from the Eighth District appeal. I understood that their office would handle the appeal for Mr. Warren, so I did nothing further.
5. I also contacted Erika Cunliffe at the Cuyahoga County Public Defender's Office and requested that her office investigate whether a Murnahan was necessary.
6. I have recently learned that the Ohio Public Defender's Office did not file a Notice of Appeal for Mr. Warren. If I had known earlier that that office intended not to file the appeal for Mr. Warren, I would have taken other means to ensure that his appeal was timely filed, either filing it myself or finding another attorney who could.

FURTHER AFFIANT SAYS NAUGHT.


MARGARET AMER ROBEY

Sworn before me and subscribed in my presence on this 9 day of Nov, 2006.


NOTARY PUBLIC
(Commission Commission)

AFFIDAVIT OF ERIKA CUNLIFFE

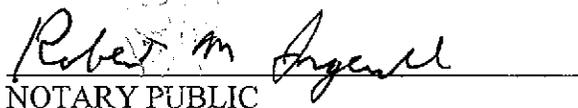
1. Affiant, Erika Cunliffe, has been an Assistant Public Defender in Cuyahoga County since August of 2005, where she is assigned to the Appellate Division. Before coming to the County Public Defender's Office, your affiant spent two years as a law clerk on the Seventh District Court Appeals.
2. Affiant has been admitted to the practice of law since 1991 and is currently a member in good standing of the bars of Ohio and Illinois. For much of that time the majority of her practice has focused on appellate and collateral or extraordinary remedies in civil and criminal cases
3. Affiant became involved in Mr. Warren's case after conferring with Margaret Robey, who was appointed to represent Mr. Warren on appeal, concerning the prospect of filing a Motion to Reopen Mr. Warren's Appeal pursuant to Appellate Rule 26(B). During several conversations with Ms. Robey, counsel initially learned that Ms. Robey intended to file a Notice of Appeal from the Appellate Court decision largely affirming Mr. Warren's conviction. Later, Ms. Robey advised that the Ohio Public Defender's Office was going to be handling the Notice of Appeal and Memorandum in Support.
4. Sometime in mid September, 2006, the Affiant received a telephone call from Jeremy Masters, an Asst Public Defender with the Ohio Defender's Office. Mr. Masters advised Affiant that he was working on the Notice of Appeal and Memorandum in Support and asked the Affiant to forward Journalized Copy of the Eighth District decision to his office. Counsel faxed that decision to Mr. Masters at the end of September. The Affiant did not hear from Mr. Masters and assumed that the Notice of Appeal to this Court was filed.
5. Affiant only learned that the Ohio Public Defender has opted to forgo submitting the Notice of Appeal for Mr. Warren while preparing the procedural history section of the Motion to Reopen, which was filed in the Court of Appeals on November 8, 2006.

FURTHER AFFIANT SAYETH NAUGHT.


ERIKA B. CUNLIFFE

Sworn to and subscribed before me this

15th day of November, 2006.


NOTARY PUBLIC

my commission does not expire

REQUEST FOR LATE APPEAL

I never received any paperwork from the Ohio Public Defenders Office, stating that I'll not be represented for appeal to the Ohio Supreme Court. I very much will like to contest the decision of the Court of Appeals Eighth Appellate District Cuyahoga County, Ohio. Ms. Erica Cuntliffe, an attorney from the Public Defenders Office has advised me of this mishap! In any future legal matters, I would very much like to have Ms. Cuntliffe, represent me in this regard. I thank you for considering my appeal. #86854

Respectfully Submitting,
 Ronald Warren Jr.
 #463-766

Karen Denman

KAREN DENMAN
 NOTARY PUBLIC, STATE OF OHIO
 My Commission Exp. 10-06-09

11-16-06

IN THE COURT OF COMMON PLEAS

Cuyahoga COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs.

CASE NO. CR-04-458468-A

JUDGE Corrigan (Peter)

REGINALD WARREN Sr.

Defendant.

AFFIDAVIT OF INDIGENCY

I, Reginald Warren Sr. do hereby solemnly swear that I have presently this 16th day of November, 2006, no means of financial support and no assets of any value and, therefore, cannot afford to pay for any legal services, fees or costs in the above-styled case.

Reginald Warren Sr.
DEFENDANT, *pro se*

Sworn to and subscribed in my presence, a notary public, on this 16th day of November, 2006

Karen Denman
Notary Public

KAREN DENMAN
NOTARY PUBLIC, STATE OF OHIO
My Commission Exp. 10-26-09

AUG 21 2006

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86854

STATE OF OHIO :
 :
 Plaintiff-appellee :
 :
 vs. :
 :
 REGINALD WARREN :
 :
 Defendant-appellant :

JOURNAL ENTRY
 and
 OPINION

DATE OF ANNOUNCEMENT OF DECISION : AUGUST 10, 2006

CHARACTER OF PROCEEDING : Criminal appeal from Cuyahoga
 : County Common Pleas Court
 : Case No. CR-458468

JUDGMENT : AFFIRMED IN PART; REVERSED
 IN PART.

DATE OF JOURNALIZATION : AUG 21 2006

APPEARANCES:

For plaintiff-appellee: WILLIAM D. MASON
 Cuyahoga County Prosecutor
 SALEH AWADALLAH, Assistant
 MARK SCHNEIDER, Assistant
 Justice Center, Courts Tower
 1200 Ontario Street
 Cleveland, Ohio 44113

For defendant-appellant: MARGARET AMER ROBEY
 Attorney at Law
 14402 Granger Road
 Cleveland, Ohio 44137

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KENNETH A. ROCCO, J.:

Defendant-appellant, Reginald Warren, appeals from his convictions for eight counts of rape with violence specifications, eight counts of gross sexual imposition, four counts of gross sexual imposition with violence specifications, and twelve counts of kidnaping with violence specifications. He contends that the sixteen-year delay from the time the crimes were committed until he was indicted and the twenty-year statute of limitations for these offenses violated his due process rights. He also asserts that the indictment containing twelve identical counts for each of four different offenses did not provide him with adequate notice of the individual charges. He argues that the court erroneously considered inadmissible evidence, and used "uncharged and untested" allegations against him in sentencing. He claims the kidnaping convictions should have been merged with the other offenses because the restraint of the victim was incidental to the other crimes. He urges that he has a right to have the court consider his age at the time he committed the offenses in deciding what punishment to impose, and that the court erred by imposing maximum consecutive sentences.

Procedural History

On November 12, 2004, appellant was charged in a forty-eight count indictment concerning events that occurred from June to August 1988, when he was fifteen years old. Counts 1-12 charged

him with rape of a child under the age of 13. Counts 13-24 alleged that he committed felonious sexual penetration. Counts 25-36 charged appellant with gross sexual imposition. Counts 37-48 charged appellant with kidnaping. Each of the forty-eight charges carried a violence specification.

Appellant moved the court to dismiss the charges against him because of excessive pre-indictment delay. The court orally overruled this motion prior to trial, as well as appellant's oral motion to dismiss for lack of jurisdiction because of his age at the time the offenses occurred.

Appellant waived his right to a jury trial and the matter then proceeded to trial before the court. At trial, the court heard the testimony of Cleveland Police Detective Daniel Ross; the victim, Tiffany Logan Youngblood; the victim's mother, Edith Logan Gaffney; the victim's sister, Alisa Marie Logan; the victim's former husband, Louis Williams; and Cleveland Police Officer James McPike.

The victim testified that during the summer when she was nine years old, she and her younger sister stayed at the home of James Thomas while their mother was at work. Thomas lived two or three houses away from their home with his cousin, Mr. Murphy. Another girl, Thomas's granddaughter, was also at Thomas's house every day, and the girls played together. Thomas was "crippled," and would sit in a chair at the base of the stairs in the front room of the house.

Appellant came to Thomas's house to help with yard work and housework. The first time anything happened, appellant entered an upstairs bedroom where the victim was playing with dolls. He started kissing her and "playing with my breasts." The next time, appellant had her lay down on the dining room floor. He held her hands over her head, then pulled down her shorts and inserted his finger approximately 1½ inches into her vagina. He did this on 11 or 12 occasions. He would tell her to be quiet or he would hurt her and her mother and sister and Mr. Thomas.

On another eight or nine occasions, the victim testified that appellant rubbed his penis against her vagina and attempted to insert it. On another occasion, he tried to force her to perform fellatio sex on him. He tried to insert a brush handle into her vagina on another occasion, but Mr. Murphy called him away before he could do so.

The victim said these events occurred every other day for a period of approximately two months, and appellant threatened her every time. At her mother's prompting, the victim told her mother that appellant was "messing with me." Her mother then spoke with Mr. Thomas and the victim did not see appellant again.

At the conclusion of the state's case, appellant moved the court for a judgment of acquittal pursuant to Crim.R. 29. The court granted this motion as to four of the rape charges and all twelve of the charges of felonious sexual penetration. The court

further dismissed the violence specifications with respect to eight of the charges of gross sexual imposition. Appellant presented no evidence at trial. The court found appellant guilty of each of the remaining charges and specifications. It subsequently sentenced appellant to life imprisonment on each of the eight rape charges, to be served concurrently with one another but consecutively to the other sentences; four to ten years' imprisonment on each of the four gross sexual imposition charges with violence specifications, to be served concurrently with one another but consecutively to the other sentences; two years' imprisonment as to three of the gross sexual imposition charges to be served concurrently with one another but consecutively to the other sentences; two years' imprisonment as to the remaining five gross sexual imposition charges, to be served concurrently with one another but consecutively to the other sentences; and fifteen to twenty-five years' imprisonment on the kidnaping charges with violence specifications, to be served concurrently with the other sentences.

Law and Analysis

Appellant first contends that his due process rights were violated by the sixteen year delay between the criminal acts and the indictment against him. The United States Supreme Court has acknowledged that "the Due Process Clause has a limited role to play in protecting against oppressive [preindictment] delay." *United States v. Lovasco* (1977), 431 U.S. 783, 789. "[P]roof of

prejudice is generally a necessary but not sufficient element of a due process claim *** [T]he due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." Id. at 790.

In *Lovasco*, the court held that due process is not violated by an "investigative delay" in prosecution, even if the defendant is "somewhat prejudiced" by this delay. The court distinguished investigative delay from delay undertaken for the purpose of gaining a tactical advantage, noting that an investigative delay is "not so one sided. Rather than deviating from elementary standards of 'fair play and decency,' a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of 'orderly expedition' to that of 'mere speed.'" Id., quoting *Smith v. United States* (1959), 360 U.S. 1, 10.

In this case, the delay was not caused by government action or inaction. See, e.g., *United States v. Cruikshank* (1876), 92 U.S. 542, 554 ("The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights

which belong to every citizen as a member of society"): The victim did not report the crime to the police until April 2004. Her delay in reporting the crime cannot be ascribed to the state for purposes of finding a violation of appellant's due process rights. Therefore, we overrule the first assignment of error.

Second, appellant argues that the amendment of the statute of limitations effective March 9, 1999 violated his rights to due process. R.C. 2901.13 formerly provided for a six-year limitations period for all felonies except murder and aggravated murder. In 1999, the statute was amended to increase the limitations period to twenty years for certain crimes, including rape, gross sexual imposition and kidnaping. 1997 Ohio H.B. 49. House Bill 49 provided that the amended statute of limitations "applies to an offense committed prior to the effective date of this act if prosecution for that offense was not barred under section 2901.13 of the Revised Code as it existed on the day prior to the effective date of this act."

Appellant's prosecution for these 1988 offenses was not barred before the effective date of House Bill 49, because the statute of limitations was tolled because of the victim's age. Pursuant to R.C. 2901.13(F), "[t]he period of limitation shall not run during any time when the corpus delicti remains undiscovered." When the victim of a sex offense is a child, the corpus delicti generally is deemed to be discovered when the child reaches the age of majority.

See *State v. Elsass* (1995), 105 Ohio App.3d 277, 280, and cases cited therein. However, when the child tells a "responsible person" who is required by law to report the events to a peace officer or children's services agency pursuant to R.C. 2151.421(A)(1), the statute of limitations begins to run as of that time, even if the child has not attained the age of majority. *State v. Hensley* (1991), 59 Ohio St.3d 136. In this case, there is no evidence that the victim reported these crimes to a "responsible person" before she attained the age of eighteen in 1997. Thus, the statute of limitations did not begin to run until then, and had not expired as of March 9, 1999, when the statute was amended.

We have recently held that the extension of an unexpired statute of limitations is not an invalid ex post facto law. *State v. Diaz*, Cuyahoga App. No. 81857, 2004-Ohio-3954, at ¶12; also see *State v. Bentley*, Ashtabula App. No. 2005-A-0026, 2006-Ohio-2503. Apparently, however, appellant is arguing that a twenty-year statute of limitations is unreasonable and therefore unconstitutional. He has cited no support for this proposition, and we find none. Therefore, we overrule the second assignment of error.

Third, appellant argues that the indictment was insufficient to inform him of the charges because it did not distinguish the multiple allegations of the same type of wrongful conduct.

Furthermore, appellant claims the actual testimony at trial also did not distinguish the incidents of which appellant was accused and convicted.

Appellant requested and received a bill of particulars. "Ambiguity, if any, in the indictment which was not cured by the bill of particulars should have been brought to the attention of the court. Since defendant made no such request or motion it is presumed he possessed sufficient notice of the charges; any error in this regard is waived." *State v. Haberek* (1988), 47 Ohio App.3d 35, 43, quoted with approval in *State v. Endsley*, Columbiana App. No. 04-CO-46, 2005-Ohio-5631, ¶24.

To the extent that appellant challenges the sufficiency of the evidence to support his convictions, we must determine "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime[s] proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

A rational trier of fact could have found the essential elements of gross sexual imposition from the first incident involved here, where appellant touched the victim's chest and threatened her with physical harm. Likewise, a rational trier of fact could also have found the essential elements of gross sexual

imposition¹ from the following events: (1) the incident in which appellant held the victim on the dining room floor and digitally penetrated her, (2) the incident in which appellant inserted a brush handle into her vagina, and (3) the incident in which appellant attempted to force her to perform fellatio on him. A rational trier of fact could find appellant raped the victim by his attempt to insert his penis into her vagina, causing her to suffer a burning sensation in her vagina for an hour or two afterward. A rational trier of fact could find that appellant kidnapped the victim by restraining her for the purpose of engaging in sexual activity with her against her will on each of these occasions.

However, we are constrained to agree that the victim's testimony that appellant inserted his penis into her vagina "eight, nine times" and that he inserted his finger into her vagina "a good 11 or 12 times" is not sufficient to support appellant's convictions of additional charges of rape and gross sexual imposition. "[W]e cannot accept the numerical estimate which is unconnected to individual, distinguishable incidents." *State v. Hemphill*, Cuyahoga App. No. 85431, 2005-Ohio-3726, ¶88. *Valentine v. Konteh* (6th Cir. 2005), 395 F.3d 626. Accordingly, we will affirm the judgment with respect to the charges as to which we have

¹This conduct would constitute rape under the current statute. However, sexual conduct was more narrowly defined at the time this offense was committed, and did not include digital penetration. Cf. *State v. Polk* (May 17, 1979), Cuyahoga App. Nos. 38832 & 38833 (digital penetration may constitute gross sexual imposition).

found sufficient evidence, specifically, four of the counts of gross sexual imposition, one count of rape, and five counts of kidnapping. The other convictions are reversed.

Appellant's fourth assignment of error urges that the court erred by allowing hearsay and other inadmissible evidence to be introduced at trial, and further erred by relying on it. "[I]n a bench trial, the court must be presumed to have 'considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary.'" *State v. Richey* (1992), 64 Ohio St.3d 353, 357-358, 1992 Ohio 44, 595 N.E.2d 915, quoting *State v. Post* (1987), 32 Ohio St.3d 380, 384, 513 N.E.2d 754, 759. First, appellant complains that the victim's testimony suggested that appellant vandalized Mr. Thomas's house. Neither the victim nor the court suggested that the vandalism was committed by appellant; the court mentioned the vandalism in rendering its verdicts only to show why the victim perceived that her safety was still in danger if she told anyone about what had happened. This testimony has no relevance to the charges. There is no evidence that the court relied upon it to convict appellant.

Appellant also argues that the victim's former husband and the police detective who interviewed her improperly buttressed the victim's testimony. The victim's former husband testified that, long before she went to the police, the victim "went berserk" when he pinned her hands down either at her side or over her head when

they were having sexual intercourse. The court viewed this behavior as corroborating the victim's testimony about the details of appellant's modus operandi. Appellant did not object to the testimony of Detective McPike, and there is no indication that the court relied on his testimony in finding appellant guilty.² Therefore, we overrule the fourth assignment of error.

Fifth, appellant contends that the court erred by failing to merge the sentences for kidnaping with the other charges. The defense did not raise this issue at trial, and therefore waived all but plain error. *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, ¶139. For this purpose, we consider only those charges we have found to be supported by sufficient evidence.

The question whether two offenses are of similar import is determined by objectively analyzing the statutory provisions at issue to determine whether the elements of the charged offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117. This statutory analysis is performed in the abstract, focusing solely on the elements of the offenses charged without reference to the facts of the particular

²In finding appellant guilty, the court did rely upon the testimony of Detective Ross, whom the court incorrectly identified as Detective McPike. Detective Ross testified that, although the victim's sister did not allege that appellant committed any crime against her, in questioning appellant, he was careful to refer to both the victim and her sister. Appellant's responses referred only to "Tiffany," suggesting guilty knowledge.

case. *State v. Rance* (1999), 85 Ohio St.3d 632, paragraph one of the syllabus.

As charged in this case, gross sexual imposition and kidnaping are not allied offenses of similar import. The indictment charged appellant with sexual conduct with a child under the age of thirteen years. The commission of this form of gross sexual imposition will not necessarily result in kidnaping because no restraint or removal is involved. Therefore, these offenses are not allied offenses of similar import, and R.C. 2941.25 does not apply. *State v. Hay*, Union App. No. 14-2000-24, 2000-Ohio-1938; *State v. Moralevitz* (1980), 70 Ohio App.2d 20, 27-28. Nor are the charges of rape and kidnaping allied offenses as charged in this case. Appellant was charged with engaging in sexual conduct with a child under the age of thirteen. R.C. 2907.02(A)(1)(b). Again, no restraint or removal was required to commit this crime. Therefore, the form of rape charged in this case does not necessarily result in kidnaping. Cf. *State v. Logan* (1979), 60 Ohio St.2d 126, 130 ("implicit within every forcible rape (R.C. 2907.02[A][1]) is a kidnaping"). We overrule the fifth assignment of error.

Sixth, appellant asserts that the court erred by basing its sentence "on the speculative allegation that [appellant] vandalized the Thomas house." The court did not cite the vandalism incident

as a factor in sentencing, much less accuse appellant of that crime. Therefore, we overrule the sixth assignment of error.

Seventh, appellant claims that the mandatory life sentence required by R.C. 2907.02 is unconstitutional as applied to him because it does not allow for consideration of his juvenile status at the time he committed the offense. Although appellant does not explain the constitutional basis for his argument, we presume from his citations to *Roper v. Simmons* (2005), 543 U.S. 551, and *Thompson v. Oklahoma* (1988), 487 U.S. 815, that he intends to argue that life imprisonment is "cruel and unusual punishment" for a fifteen-year-old offender.

The life sentence imposed here was mandated by statute. "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." *Harmelin v. Michigan* (1991), 501 U.S. 957, 994-95. Consideration of mitigating factors in sentencing (including the defendant's chronological age) is not constitutionally required except when the death penalty is imposed. *Id.*; *Rice v. Cooper* (7th Cir. 1998), 148 F.3d 747, 752.

Outside the death penalty context, the "Eighth Amendment does not require strict proportionality between crime and sentence [but] forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 1001. We cannot say that a sentence of life imprisonment (with possibility of parole) is grossly

disproportionate to the crime of rape of a child under the age of 13. Therefore, we overrule the seventh assignment of error.

Finally, appellant claims the court abused its discretion by sentencing him to consecutive terms of imprisonment. He argues that the consecutive sentences imposed violated the limitation set forth in R.C. 2929.41(E)(2) at the time these offenses were committed. R.C. 2929.41(E)(2) formerly provided that "[c]onsecutive terms of imprisonment imposed shall not exceed: *** (2) An aggregate minimum term of fifteen years, *** when the consecutive terms imposed are for felonies other than aggravated murder or murder[.]" The absence of a minimum term of imprisonment for the charge of rape takes this case out of the ambit of R.C. 2929.41(E)(2). *McMeans v. State Adult Parole Auth.* (Oct. 27, 1998), Franklin App. No. 98AP-42; *State v. Gregory* (1982), 8 Ohio App.3d 184. In any event, this statute is self-executing, automatically operating to limit the minimum term of imprisonment. *State v. White* (1985), 18 Ohio St.3d 340. It is not a basis for reversal. Accordingly, we overrule the eighth assignment of error.

For the foregoing reasons, we affirm appellant's convictions and the resultant sentences for one count of rape, four counts of gross sexual imposition with violence specifications, and five counts of kidnaping with violence specifications. We reverse his convictions for the remaining charges.

Affirmed in part, reversed in part.

This cause is affirmed with respect to appellant's convictions and sentences for one count of rape, four counts of gross sexual imposition with violence specifications, and five counts of kidnaping with violence specifications. The convictions and sentences imposed for all remaining charges are reversed.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

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



JUDGE
KENNETH A. ROCCO

SEAN C. GALLAGHER, P.J. and

MARY EILEEN KILBANE, J. CONCUR

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

FILED AND JOURNALIZED
PER APP. R. 22(E)

AUG 10 2006

AUG 21 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY:  DEP.

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS

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

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED