IN THE SUPREME COURT OF OHIO

STATE OF OHIO, **CASE NO. 2006-2379**

Appellee,

vs.

JAMES L. COX, JR.,

Appellant.

On Appeal from the Court of Appeals of Butler County, Case No. CA2005-12-513, 2006-Ohio-6075

MEMORANDUM IN RESPONSE

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FILED
DEC 29 2006
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REASONS WHY LEAVE TO APPEAL SHOULD BE DENIED

In the case at bar, the court of appeals affirmed the appellant's conviction for one count of rape and two counts of gross sexual imposition as to his minor daughter, A.C., see ***State v. Cox***, Butler App. No. CA2005-12-513, 2006-Ohio-6075 at ¶¶10-25, 2006 WL 3345421, but vacated the appellant's sentence and remanded the case for resentencing, see ***Cox*** at ¶¶35-36.[1] The court of appeals rejected appellant's first assignment of error as to allowing the jury to review a transcript of a witness's testimony during deliberations, finding Ohio and federal case law on the issue — in particular, this Court's decision in ***State v. Berry*** (1971), 25 Ohio St.2d 255, 54 O.O.2d 374, 267 N.E.2d 775 (upon request from the deliberating jury, a court in the exercise of sound discretion may cause to be read all or part of the testimony of any witness, in the presence of or after reasonable notice to the parties or their counsel), and ***United States v. Rodgers*** (C.A.6, 1997), 109 F.3d 1138 (same, as to sending transcript of testimony into jury room) — to be persuasive and holding that the trial court, under the circumstances of this case, did not abuse its discretion when it permitted the transcript of testimony to be given to the jury, see ***Cox*** at ¶¶ 10-19. Further, the court of appeals also rejected the suggestion that the trial court erred in failing, *sua sponte*, to give the jury a limiting instruction regarding the use and weight of the transcribed testimony, citing ***Rodgers*** for the proposition that the lack of such an instruction did not rise to the level of plain error, see ***Cox*** at ¶¶ 20-25.

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[1] Upon remand consistent with this Court's decision in ***State v. Foster***, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, *reconsideration denied*, 109 Ohio St.3d 1408, 2006-Ohio-1703, 845 N.E.2d 524 (Table), *certiorari denied* (2006), ___U.S.___, 127 S.Ct. 442, the trial court reimposed the original sentence of twenty years, and the propriety of that resentencing is not before this Court.

The appellate court thus properly applied controlling principles of law to the facts contained in the record below, as its opinion reveals. This case therefore involves no substantial constitutional question or question of great public or general interest.

STATEMENT OF THE CASE AND FACTS

On January 20, 2005, appellant was indicted on ten felony counts, six involving acts committed against his minor daughter A.C., and four involving acts committed against his minor nephew D.H. All six counts relating to appellant's daughter were charges of rape in violation of R.C. 2907.02(A)(1)(b), first-degree felonies. Two of the charges relating to appellant's nephew were for illegal use of a minor in nudity-oriented material in violation of R.C. 2907.323(A)(1) and (3), a second-degree felony and a fifth-degree felony, respectively, and the remaining two charges relating to appellant's nephew were for pandering sexually-oriented matter involving a minor in violation of R.C. 2907.32.2(A)(1) and (5), a second-degree felony and a fourth-degree felony, respectively.[2]

On September 27, 2005, a jury trial commenced and the testimony of six of the State's witnesses. The first of those witnesses was appellant's daughter, A.C., who was eleven years old at the time and testified that, from the time she was in second grade (when she was about eight years old), her father repeatedly engaged in sexual acts with her. A.C. testified in detail about multiple occasions during which appellant had caused her to use KY Jelly and rub his penis until he had an orgasm, placed Hershey Kisses upon his penis and caused her to perform fellatio upon him, placed Hershey Kisses upon her vagina and performed cunnilingus upon her, and caused her to touch herself with various sex toys. A.C. also testified that

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[2] With verdicts of not guilty as to all charges involving appellant's nephew, those matters are likewise not before this Court.

appellant put his fingers inside her anus and, on at least one occasion, attempted to engage in vaginal sexual intercourse with her, but, because it hurt, he did not continue. In July 2004, A.C. told a friend who in turn told her mother, Sandra Inman, about the sexual abuse; Ms. Inman then called A.C.'s mother, who brought A.C. to the police station to report the abuse.

Following the testimony of the state's sixth witness, the trial was continued until September 29, 2005. The trial judge also informed the parties that he would be leaving town after 6:30 p.m. on the evening of September 29, 2005 and that if the jury was still deliberating after that time, another judge would step in to handle any issues during deliberations. In anticipation of discussions regarding lesser included offenses, a transcript of A.C.'s testimony was prepared and given to both the state and defense counsel prior to the second day of trial on September 29, 2005. (*Jury Trial*, T.p. 184-185, 328) This transcript of A.C.'s testimony was 51 pages in length. (*Jury Trial*, T.p. 20-71) On the second day of trial, both the state and appellant's trial counsel presented additional evidence and testimony. (T.p. 155) The case was turned over to the jury that morning and the jury began its deliberations at approximately 1:10 p.m. that day. T he jury deliberated until approximately 6:20 p.m., at which point they were released for the evening; the trial judge again informed the parties and the jury that he was needed out of town and that another judge, specifically Judge Andrew Nastoff, would be stepping in to handle the remaining deliberations and answer any questions. The trial judge further indicated that he would be available for questions by telephone if any should require his assistance. (*Jury Trial*, T.p. 320-322)

On the next day, September 30, 2005, the jury deliberated from approximately 9 a.m. until 1:30 p.m., at which time the jury had a question and a request; and since the trial judge was not available, Judge Nastoff introduced himself and informed all parties that he will be

handling that aspect of the case. (*Jury Trial*, T.p. 328) Appellant did not object to Judge Nastoff handling the verdict or addressing the jury request. (Id.) The judge on the record indicated that the jury had requested the transcript of the witness A.C. (*Jury Trial*, T.p. 328-329) Appellant's counsel objected to the request, arguing that the proper "instruction" would be to have the jury rely on their collective memory of the testimony, but indicated that it was within the trial court's discretion to grant the jury's request for the transcript. The judge overruled appellant's objection and granted the request. (*Jury Trial*, T.p. 329-331) The judge then asked if there were any objections to sending the transcript into the jury room. Appellant's trial counsel noted that, aside from his general objection, he did not object to the transcript being sent to the jury room (*Jury Trial*, T.p. 331-332), nor did appellant's counsel request any special instructions pertaining thereto. (Id.) After receiving the transcript, the jury deliberated for approximately three more hours until 4:45 p.m., at which time they returned with verdicts. (*Jury Trial*, T.p. 333) The jury found appellant guilty of the lesser included offense of gross sexual imposition as to count three, guilty of rape as charged in count four, guilty of the lesser included offense of gross sexual imposition as to count six, and not guilty on the remaining charges. (*Jury Trial*, T.p. 335-337)

Appellant proceeded to sentencing on November 9, 2005. The trial court found appellant to be a sexual predator and sentenced appellant to five years imprisonment on Count Three, ten years imprisonment on Count Four, and five years imprisonment on Count Six. The court went on to find that appellant posed the greatest likelihood of committing future sexually-oriented offenses and that consecutive terms were necessary to protect the public. The judge ordered that the sentences run consecutively for an aggregate incarceration term of 20 years, the maximum penalty under the law. (*Sentencing Hearing*, T.p. 11-12) On the

appeal that followed, the conviction was affirmed and the matter was remanded for resentencing pursuant to the ***Foster*** decision. Subsequent to that resentencing on December 12, 2006, this motion for leave to appeal follows.

ARGUMENT

Proposition of Law No. 1:

> **It is not an abuse of discretion for the trial court to provide the jury with a transcript of the testimony of a witness that was already prepared and copies were given to both the State and the defendant, and it is not plain error for the trial court to fail to give a limiting instruction, *sua sponte*, regarding the use and weight to be given such transcribed testimony.**

In his sole proposition of law, appellant argues that the trial court erred in allowing the jury to review the transcript of A.C.'s testimony during its deliberations; appellant would further contend that the trial court erred in failing, *sua sponte*, to give the jury a limiting instruction regarding the use and weight of the transcribed testimony. We disagree.

A trial court has broad discretion in determining whether to permit a jury during deliberations to re-hear part or all of a witness's testimony. ***State v. Leonard***, 104 Ohio St.3d 54, 2004-Ohio-6235 at ¶123, 818 N.E.2d 229 (finding trial court's decision to have portions of transcribed testimony of two witnesses read to deliberating jury within court's discretion). And specifically, a trial judge has discretion either to provide, or not to provide, the jury with a transcript of a particular witness's testimony, compare ***State v. Carter*** (1995), 72 Ohio St.3d 545, 560, 651 N.E.2d 965 (finding trial court's decision to refuse to provide transcript of expert testimony within court's discretion) with ***State v. Berry*** (1971), 25 Ohio St.2d 255, 54 O.O.2d 374, 267 N.E.2d 775, paragraph four of syllabus (finding trial court's decision to read portions of transcribed testimony to deliberating jury within court's discretion).

Therefore, a reviewing court will not reverse a trial court's decision absent an abuse of that discretion. Id. The term "abuse of discretion" "connotes more than just an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." ***State v. Hancock***, 108 Ohio St.3d 57, 2006-Ohio-160 at ¶130, 840 N.E.2d 1032, citing ***State v. Adams*** (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144. The term has been further defined as "a view or action that no conscientious judge, acting intelligently, could honestly have taken." ***Hancock***, id., citing ***State ex rel. Wilms v. Blake*** (1945), 144 Ohio St. 619, 624, 30 O.O. 220, 60 N.E.2d 308.

A review of Ohio case law reveals that a trial court's decision to provide the jury with an actual transcript of the testimony of a witness has been accepted as properly within its discretion. In ***State v. Smoot*** (Nov. 17, 1989), Clark App. No. 2588, 1989 WL 138412, the Second District Court of Appeals upheld the trial court's decision to deliver the transcribed testimony of three trial witnesses to the jury during deliberations. The court held that "the trial court was within its discretion in deciding to accommodate the jury by providing it with transcripts of the testimony which bore upon the factual questions that the jury had earlier propounded to the court." Id. at *5. The court came to a similar conclusion in ***State v. Malone*** (Jan. 2, 1992), Clark App. No. 2806, 1992 WL 217 at *2 (where the deliberating jury's request to be given the transcript of the testimony of the state's key witness was granted over objection as being properly within the court's discretion). Compare, ***State v. Boyd*** (Oct. 31, 1997), Champaign App. No. 91 CA 1, and ***State v. Strickland*** (Oct. 23, 1979), Greene App. No. 1085 (holding that preferred practice is to interpret a jury's request for a transcript as a request for a re-reading of the testimony, but finding that trial court's decision to deliver transcript to jury room was harmless).

In ***United States v. Rodgers*** (C.A.6, 1997), 109 F.3d 1138, the United States Court of Appeals for the Sixth Circuit reviewed a district court's decision to provide a deliberating jury with the transcript of a law enforcement officer's testimony and discussed what it recognized as "two inherent dangers" in allowing a jury to read a transcript of a witness's testimony during deliberations: "[f]irst, the jury may accord 'undue emphasis' to the testimony;" and "second, the jury may apprehend the testimony 'out of context.' " Id. at 1143. Additionally, the court also recognized other concerns, including: "(1) any transcript provided to a jury should be accurate; (2) transcription of side bar conferences, and any other matters not meant for jury consumption, must be redacted; and (3) as a purely practical matter, a district court 'should take into consideration the reasonableness of the jury's request and the difficulty of complying therewith.' " Id., citing ***United States v. Hernandez*** (C.A.9, 1994), 27 F.3d 1403. In the case before it, the Sixth Circuit noted that the accuracy of the transcript was not disputed, the transcript was free of side bar conferences, and the district court was able to provide the transcript the morning after it was requested. Id. The court went on to find that the district court had eliminated the second identified "inherent danger" by providing the complete transcript of the witness's testimony, elicited under both direct and cross-examination, id.; and turning to the first identified "inherent danger," the court found that there was no evidence to support the appellant's contention that the jury had afforded the transcript "undue emphasis." Id. at 1144. The court explained that "[i]t is true that 'after the jury has reported its inability to arrive at a verdict,' there is heightened concern that the jury will place inordinate emphasis on any testimony it then reviews." However, finding that no such situation occurred in the circumstances of the case before it, and noting that there was not an inordinate amount deliberation before or after the delivery of the transcript, the court held that the case did not

present an "obvious intent to emphasize a specific portion of the transcript." Id. Thus, the Sixth Circuit held that the district court had not abused its discretion in allowing the deliberating jury to review the witness's transcribed testimony.

In the case at bar, based on the circumstances of the case, the above legal analysis, and the fact that appellant's trial counsel did not object to the jury's review of the transcript in the jury room, the court of appeals found that the trial court did not abuse its discretion in permitting the transcript of A.C.'s testimony to be delivered to the jury room, see ***Cox*** at ¶19. A.C. was the first of ten witnesses to testify, having done so two days before the jury began deliberating, and her testimony regarding the circumstances of the sexual abuse, particularly with regard to the specifications charged in the indictment that A.C. was under the age of ten when the abuse began, were facts important for accurate analysis by the jury. Also, as in ***Rodgers***, both parties were previously provided a copy of the transcript of A.C.'s testimony and there was nothing to suggest that there were any inaccuracies whatsoever in this transcript. Further, the only side bar conference held during A.C.'s testimony was redacted from the transcript given to the jury. Moreover, as in ***Rodgers***, the trial court avoided the "inherent danger" encountered when a jury apprehends the testimony "out of context" by providing the jury with A.C.'s ***entire*** testimony, as elicited during both direct and cross-examination. And the amount of time that the jury deliberated — a full ten hours before requesting the transcript, and another three hours after receiving the transcript — was clearly not indicative of the jury's placing "undue emphasis" on the transcript. See ***Cox*** at ¶¶ 16-18.

Appellant further cites ***Rodgers***, supra, for the proposition that the trial court was required to *sua sponte* issue a limiting instruction cautioning the jury about the proper use and weight of the transcribed testimony. ***Rodgers***, 109 F.3d at 1145. But the ***Rodgers*** court

specifically refrained from reversing the trial court's judgment for that reason; while holding that a district court is required to give a cautionary instruction when providing a deliberating jury with such a transcript (in the context of upholding the decision to deliver a witness's transcribed testimony to the jury), the ***Rodgers*** court went on to also hold that the failure to do so did not rise to the level of plain error, see id. at 1145. The court explained that the record failed to demonstrate that the district court's failure to give the cautionary instruction prejudicially affected the outcome of the trial or resulted in a miscarriage of justice, and therefore held that the error did not rise to the level of plain error. Id.

Similar to the situation in ***Rodgers***, in the case at bar the appellant's trial counsel did not request any limiting instruction, and thus, appellant waived this issue for purposes of appeal, see ***State v. Davis*** (1991), 62 Ohio St.2d 326, 339, 581 N.E.2d 1362, citing Crim.R. 30(A), which provides in pertinent part: "[a] party may not assign as error the giving or failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury." In light of counsel's failure to request a limiting instruction, the court of appeals below properly reviewed for plain error, see ***State v. Perry***, 101 Ohio St.3d 118, 2004-Ohio-297 at ¶14, 802 N.E.2d 643, and ***State v. Hill*** (2001), 92 Ohio St.3d 191, 196, 749 N.E.2d 274. Crim.R. 52(B) governs plain error and states that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B) thus distinguishes between errors to which a defendant objected at trial and errors that a defendant failed to raise at trial; if the defendant failed to raise an error affecting substantial rights at trial, an appellate court reviews the error under the plain error standard, and under Crim.R.

52(B), plain error does not exist unless, but for the error, the outcome of the trial would have been different. See ***State v. Long*** (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph one of the syllabus. The defendant bears the burden of demonstrating that a plain error affected his substantial rights, see ***Perry*** at ¶14, citing ***United States v. Olano*** (1993), 507 U.S. 725, 734, 113 S.Ct. 1770. And even if the defendant satisfies that burden, an appellate court has discretion to disregard the error and should correct it only to " 'prevent a manifest miscarriage of justice.' " ***State v. Barnes*** (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, quoting ***Long***, paragraph three of the syllabus.

In the case at bar, the court of appeals carefully found no indication that the jury placing "undue emphasis" on the transcript, stating as follows: "The jury, at no time, indicated a difficulty in reaching a unanimous verdict. Additionally, the length of time that the jury spent deliberating, before and after receiving A.C.'s transcribed testimony, was not inordinate for the circumstances of the case and do not plainly suggest that they placed undue emphasis on the transcript." See ***Cox*** at ¶ 25. Furthermore, it is clear that the jury was instructed by the trial court to weigh all the evidence, and juries are presumed to follow the instructions of the trial court. (T.d. 108) See ***State v. Ahmed***, 103 Ohio St.3d 27, 2004-Ohio-4190 at ¶93, 813 N.E.2d 637. Thus finding that the alleged error in failing to *sua sponte* issue a limiting instruction cautioning the jury about the proper use and weight of the transcribed testimony, per ***Rodgers***, "did not rise to the level of plain error requiring reversal to cure a manifest miscarriage of justice," the court of appeal accordingly overruled the appellant's assignment of error on the basis of sound legal reasoning.

CONCLUSION

For the foregoing reasons, this Court should deny leave to appeal for want of a substantial constitutional question or question of any great public or general interest.

Respectfully submitted,

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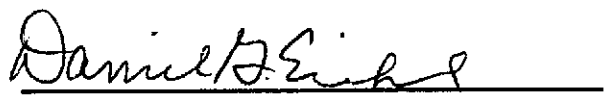

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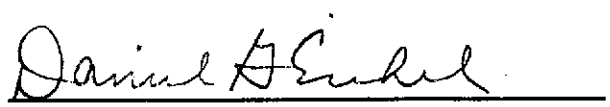
PROOF OF SERVICE

This is to certify that a copy of the foregoing Memorandum in Response was sent to Fred Miller, Counsel of Record for Appellant, 246 High Street, Hamilton, Ohio 45011, by U.S. ordinary mail this 27th day of December, 2006.



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