

**IN THE
SUPREME COURT OF OHIO**

07-0380

STATE OF OHIO

Plaintiff-Appellee

-vs-

THOMAS P. LEACH, JR.

Defendant-Appellant

No.

On Appeal from the
Hamilton County Court of Appeals
First Appellate District

Court of Appeals
Case Number C-050163

MEMORANDUM IN SUPPORT OF JURISDICTION

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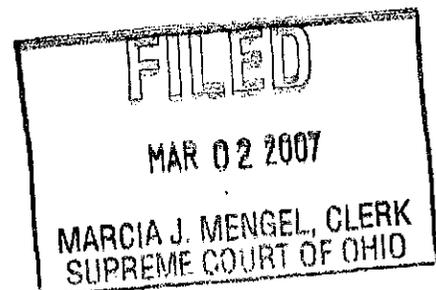


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STATE OF OHIO :
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 Plaintiff-Appellant : Case No.
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 -vs- :
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 THOMAS P. LEACH, JR. : **MEMORANDUM IN SUPPORT**
 : **OF JURISDICTION**
 :
 Defendant-Appellee :

**THIS CASE IS A FELONY
AND IS OF PUBLIC OR GREAT GENERAL INTEREST**

Thomas P. Leach, Jr., was convicted of gross sexual imposition, abduction, and kidnapping, along with firearm specifications, after he allegedly entered a friend's home, held two young women at gunpoint, and touched the breast of one.

This Court, in a prior review, found that the evidence of guilt against Leach was not overwhelming, holding that "[The] use of a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination. Because the evidence of guilt was not overwhelming in this case, the admission of defendant's pre-arrest, pre-*Miranda* silence was clearly prejudicial."¹ Similarly, the First District Court of Appeals held, in Leach's first appeal, that the evidence turned solely on the credibility of the two women.² Yet, after a new trial, Leach was once again convicted, despite the fact that there was no physical evidence whatsoever, no evidence offered by the state as to the operability of the alleged firearm, and less than credible testimony from the victims.

¹ *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335, at ¶ 38.

² *State v. Leach*, 150 Ohio App.3d 567, 2002-Ohio-6654, 782 N.E.2d 631.

Moreover, the First District Court of Appeals affirmed Leach's convictions for both kidnapping and gross sexual imposition, totally ignoring this Court's recent decision in *State v. Adams*.³ This Court's guidelines, as announced in *State v. Logan*,⁴ and reaffirmed in *Adams*, are as follows:

"In establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. §2941.25(B), this court adopts the following guidelines: (a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions; (b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions."⁵

As to the particular facts of this case, Leach allegedly straddled one of the victims, held a gun to her head, and touched her breast. There was no evidence that Leach moved or restrained the victim in any way other than what was necessary to fondle her breast. Thus, there was no separate animus to support the kidnapping conviction, and it should have been vacated.

Instead of following this Court's mandates of *Logan* and *Adams*, the First District compared the elements of kidnapping and gross sexual imposition by force in the abstract,

³ *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29.

⁴ *State v. Logan* (1979), 60 Ohio St. 2d 126, 397 N.E.2d 1345.

⁵ *Id.*

pursuant to *State v. Rance*,⁶ and concluded that they do not correspond to such a degree that the commission of one will result in the commission of the other. The court stated:

“Gross sexual imposition by force requires that a person have sexual contact with another by the use of [sic] threat of force. On the other hand, kidnapping, as charged in this case, is complete when a person removes or restrains another’s liberty for the purpose of engaging in sexual activity. Because kidnapping does not require that sexual activity actually take place, while the gross sexual imposition does, they are not allied offenses of similar import under the test set forth in *State v. Rance*. Thus, Leach could have been properly convicted of both offenses”⁷ [citations omitted].

Oddly enough, a year earlier, the First District held that convictions for kidnapping and attempted rape involved allied offenses of similar import under R.C. 2941.25, and that the trial court erred by entering a separate conviction and sentence for kidnapping.⁸ In that case, the defendant attempted to rape the victim after pushing her down on a grassy area by the street. Being too close to traffic, he then grabbed the victim’s arm and led her away from the street, near some train tracks with dense trees and bushes. The defendant fell, and the victim got away.

The First District held that, “[T]here was no evidence presented to establish a separate animus for kidnapping. Similar to *Adams*, the state here did not present any evidence that the victim was moved or restrained any more than was necessary to attempt to rape her. There is nothing in the record indicating that there was any substantial movement of the victim from

⁶ *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699.

⁷ *State v. Leach* (January 24, 2007), 1st Dist. No. C-050163.

⁸ *State v. Willis*, 1st Dist. No. C-040588, 2005-Ohio-5001.

the street where [the defendant] encountered her or any prolonged restraint. In sum, we hold that the evidence was insufficient, under *Adams* and *Logan*, to establish the separate animus required to separately convict [the defendant] for kidnapping the victim. Accordingly, the conviction for kidnapping is reversed and the sentence imposed for kidnapping is set aside.”⁹

This same reasoning was used by the First District to decide a similar case, *In re Rashid*.¹⁰ It is incongruous to suggest that, somehow, Leach’s case should be treated differently, by applying different tests and different reasoning. The First District’s disparate treatment of similar cases should be of grave concern to this Court, and should be addressed.

STATEMENT OF THE CASE AND FACTS

Sarah Sheblessy, at her teen-aged daughter Madeline’s suggestion, hired Madeline’s friend, Ashlee Decker, to feed the family’s four cats while she and Madeline were away on a week’s vacation. The Defendant-Appellant, Thomas P. Leach, Jr., and Mrs. Sheblessy were friends. Mrs. Sheblessy had asked Leach to keep an eye on the house as well.

One evening, Decker and her friend, April Crosthwaite, decided to spend the night at the Sheblessy home. They called Madeline for permission. It was disputed whether Decker and Crosthwaite obtained permission to spend the night. Mrs. Sheblessy testified that they did not have permission. Decker and Crosthwaite believed that they had obtained permission through Madeline. Madeline testified that she had given Decker permission to spend the night in spite of her mother’s refusal to do so.

The two women spent the night in Madeline’s bed. During the early morning hours, a man awakened Decker by straddling her hips and pointing a gun at her head. He was trying to

⁹ Id. at ¶¶ 8, 10.

¹⁰ *In re Rashid*, 1st Dist. Nos. C-040734, C-040735, C-040736, 2005-Ohio-4851.

pull down the comforter that was covering Decker. When the man spoke, Decker allegedly recognized his voice as Leach's, and said, "Tom, why are you doing this?" Decker had met Leach at a party she had attended with the Sheblessys earlier that year.

Crosthwaite awoke, saw the man over Decker, and called her name. The man told her to be quiet and put a gun in her face; she pushed it away. However, when later asked if it could have been a flashlight, Crosthwaite said, "I don't *think* so" (emphasis added). Crosthwaite began to cry while the man was trying to pull down the blankets. The man alternated in leaning toward one woman and then the other woman, while pointing the gun at each woman's head. The man said, "We can do this the easy way or the hard way." He then reached down through the collar of Crosthwaite's shirt and touched her breast.

The man said that he wanted to talk to Decker alone. Decker convinced the man to put the gun away, and Decker and the man went into Mrs. Sheblessy's bedroom. According to Decker, the man said that he was a sexaholic and had heard the same about Decker. The two talked for a minute or two longer, then the man kissed Decker on the forehead and left. In the meantime, Crosthwaite had locked herself in the bathroom and vomited.

After the man left, Decker told Crosthwaite that it was safe to come out. Crosthwaite went back into Madeline's bedroom, picked up the telephone and tried to call 911, but there was no dial tone. The women went downstairs, where they discovered that the kitchen telephone was off the hook. Crosthwaite dialed 911, but then hung up and called her mother. Crosthwaite asked her mother if she should come home to call the police or call from there, as she was afraid the man would come back. While on the phone with her mother, a 911 operator called back, and Crosthwaite told the operator what had happened. The police arrived, took their statements, and photographed the scene; the women called Mrs. Sheblessy.

Leach's defense was that Decker and Crosthwaite did not have permission to spend the night in the house. Leach indicated at trial that while he was talking to Mrs. Sheblessy on the telephone earlier that evening, he heard her say to Madeline, "Get the girls the hell out of my house." Later, Leach decided to place a call to the home telephone of Mrs. Sheblessy. When he did, a young man answered the phone, and Leach could hear someone in the background say, "Hang up the phone, hang up the phone." Leach was disconnected; when he tried the number again, there was no answer.

Leach then drove over to Mrs. Sheblessy's home, looked around using his flashlight, and found Decker and Crosthwaite in Madeline's bed. He then told the women that they could leave, or he was going to call Mrs. Sheblessy, who would call the police. The women agreed to leave; Leach then left. Leach claimed that the women had lied about the attack to avoid getting in trouble with Mrs. Sheblessy or to avoid a criminal record for trespassing. There was also evidence that Leach may have believed that Mrs. Sheblessy had asked him to remove the women from her home.

Leach was subsequently indicted for two counts of attempted rape (Counts 1 and 2), in violation of R.C. 2923.02, one count of gross sexual imposition (Count 3), in violation of R.C. 2907.05, two counts of kidnapping (Counts 4 and 5), in violation of R.C. 2905.01, and one count of aggravated burglary (Count 6), in violation of R.C. 2911.11. All counts included two firearm specifications, with the exception of Count 3, which included only a one-year firearm specification.

The case was tried to a jury before the Honorable Dennis S. Helmick in January of 2002. Pursuant to Leach's Crim.R. 29 motion at the close of the state's case-in-chief, Count 6 was dismissed. The jury considered the remaining counts. Leach was found guilty as charged in

Counts 1, 3, 4, and 5, and the firearm specifications attached to those counts. The jury indicated it was hung as to Count 2; the prosecution later dismissed that count and the accompanying specifications.

The trial court then sentenced Leach to 5 years in prison on Count 1, the attempted rape charge, 9 years on each of the kidnapping counts, Counts 4 and 5, and 1 year on Count 3, the gross sexual imposition charge. All sentences were ordered to run concurrently. The firearm specifications were merged for sentencing purposes and Leach received a single three-year sentence on the firearm specifications to be served consecutively to the sentence for the underlying charges. Thus, Leach was sentenced to a total term of imprisonment of 12 years. Additionally, the Court made a finding that Leach was a sexually-oriented offender and advised him of the statutory requirements attached to such a finding. Leach appealed.

The First District Court of Appeals reversed the judgment of the trial court and remanded the cause.¹¹ That court held that it was error for the state to use Leach's invocation of his constitutional right to remain silent and to consult an attorney as substantive evidence of his guilt in its case-in-chief. The court further held that the cumulative effect of improperly admitted evidence denied Leach a fair trial. The state appealed.

This Court affirmed the judgment of the appellate court, and remanded the cause for a new trial.¹² This Court held that use of a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination. This Court stated, "Because the evidence of guilt was not overwhelming in this case, the admission of defendant's

¹¹ *State v. Leach*, 150 Ohio App.3d 567, 2002-Ohio-6654.

¹² *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335.

pre-arrest, pre-*Miranda* silence was clearly prejudicial. We further affirm the appellate decision with respect to the post-*Miranda* invocation of counsel.”¹³

The case was reassigned to the Honorable Melba D. Marsh, but was ultimately transferred to Visiting Judge Fred J. Cartolano. In the middle of jury selection, Leach decided to waive a jury and have his case decided by the court. The trial court found Leach not guilty of Count 1, attempted rape, guilty of Count 3, gross sexual imposition, guilty of Count 4 as a lesser-included offense of abduction, and guilty of kidnapping in Count 5. The court also found Leach guilty of the three-year firearm specifications attached to Counts 4 and 5, and the one-year firearm specification of Count 3.

Leach was sentenced to consecutive sentences of 1 year on the gross sexual imposition charge, 3 years on the abduction charge, and 5 years on the kidnapping charge. Again, the firearm specifications were merged for sentencing purposes and Leach received a single three-year sentence on the firearm specifications to be served consecutive to the sentence for the underlying charges. Thus, Leach was (again) given an aggregate prison sentence of 12 years.

Leach appealed to the First District Court of Appeals. The First District affirmed Leach’s conviction, but remanded his case for resentencing based upon this Court’s decision in *State v. Foster*.¹⁴ Leach now appeals his conviction to this Court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A conviction based upon insufficient evidence and one that is contrary to the manifest weight of the evidence offends due process and should be reversed.

¹³ Id. at ¶ 38.

¹⁴ *State v. Leach* (January 24, 2007), 1st Dist. No. C-050163.

To reverse a conviction for insufficient evidence, this Court must be persuaded, after viewing all of the evidence in the light most favorable to the prosecution, that no rational trier of fact could have found the essential elements of the crimes proven beyond a reasonable doubt.¹⁵ A conviction is supported by sufficient evidence if the record contains substantial, credible evidence from which it could reasonably be concluded that all elements of the charged offenses have been proven beyond a reasonable doubt.¹⁶

To reverse on the manifest weight of the evidence, this Court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and conclude that, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.¹⁷ A new trial should be granted only in exceptional cases where the failure of the fact-finder to correctly assess the evidence is obvious.¹⁸

In the case at bar, Leach submits to this Court, first of all, that the firearm specifications appended to each count of his indictment should have been dismissed, or in the alternative, that he should have been acquitted of the specifications.

To establish a firearm specification, the state is required to prove that the offender possessed a weapon that was capable of firing a projectile by means of an explosive or combustible propellant and was operable or could readily have been rendered operable at the

¹⁵ See *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541; *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, superseded by state constitutional amendment on other grounds in *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668.

¹⁶ *State v. Waddy* (1992), 63 Ohio St.3d 424, 588 N.E.2d 819.

¹⁷ See *State v. Thompkins*, supra, at 387.

¹⁸ Id.

time of the offense.¹⁹ But R.C. 2923.11(B)(2) provides that, in determining whether a weapon is capable of expelling a projectile, “the trier of fact may rely on circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm.”²⁰

Here, Decker testified that Leach was in possession of a “small handgun.” Crosthwaite testified that the gun “felt like a gun that has a revolver, like the Wild, Wild West revolver guns. However, Crosthwaite was asked by the prosecution if what she felt could have been a flashlight, and she answered, “I don’t *think* so” (emphasis added). In essence, the incongruity and uncertainty of this testimony alone invalidates Leach’s conviction on the firearm specifications. Moreover, there was no evidence proving that whatever instrument these two women saw was a firearm. No firearm was recovered; no firearm was even sought via a search warrant. There was no evidence whatsoever that, even if the instrument were a firearm, it was capable of firing a projectile by means of an explosive or combustible propellant.

Leach submits to this Court that without a shred of evidence, the trial court should have dismissed the firearm specifications. In the alternative, Leach argues that his conviction on the firearm specifications was against the manifest weight of the evidence.

Applicable to the case at bar are the holdings in *State v. Gaines*²¹ and *State v. Thompkins*.²² (1997) 78 Ohio St.3d 380. In *Gaines*, this Court noted that admission into evidence of the firearm used in the crime was not necessary to establish the gun specification therein. The *Gaines* Court went on to note that the operability of a weapon may be established

¹⁹ R.C. 2923.11(B)(1); see, also, *State v. Jeffers* (2001), 143 Ohio App.3d 91, 757 N.E.2d 417.

²⁰ R.C. 2923.11(B)(2); see, also, *State v. Green* (1996), 117 Ohio App.3d 644, 651, 691 N.E.2d 316.

²¹ *State v. Gaines* (1989), 46 Ohio St.3d 65, 545 N.E.2d 68.

²² *State v. Thompkins*, supra.

by circumstantial evidence, such as testimony about gunshots, the smell of gun powder, bullets (presumably expelled bullets) or bullet holes. The *Gaines* Court noted that, “. . . nevertheless, there must be *some evidence* relative to the gun’s operability.”²³ In *Gaines*, there was testimony concerning the appearance of the gun in question and the witness’s subjective belief that it was operable. However, these lay witnesses could have drawn the same conclusion from the appearance of a toy gun, a situation specifically held insufficient in *Gaines*. Absent evidence tending to establish that the gun was operable, Leach argues that in his case the firearm specifications were not proven beyond a reasonable doubt.

Finally, Leach argues, there was insufficient evidence to prove any of the underlying charges. As was described by this Court in its decision regarding Leach’s first appeal, “This is a case based entirely on the credibility of the witnesses.”²⁴ In that opinion, the First District Court of Appeals stated, “The jury’s verdict depended entirely upon whom it chose to believe because there was no physical evidence implicating Leach. Further, there was some evidence to support Leach’s claim that Decker and Crosthwaite had fabricated their story to keep from getting in trouble for being in the Sheblessy house overnight without permission and for having parties there while the Sheblessys were on vacation.”²⁵ That court could not say beyond a reasonable doubt that the evidence of Leach’s guilt was so overwhelming that the errors in the first trial did not contribute to Leach’s conviction.²⁶ This Court agreed with the First District: “Here, the state’s case against Leach contained no physical evidence and rested solely on the credibility of the state’s witnesses.”²⁷

²³ *State v. Gaines*, supra, 46 Ohio St.3d at 71-72.

²⁴ *State v. Leach*, 150 Ohio App.3d 567, 2002-Ohio-6654, at ¶ 5.

²⁵ *Id* at ¶ 45.

²⁶ *Id* at ¶ 58.

²⁷ *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, at ¶ 29.

In Leach's second trial, Decker and Crosthwaite were impeached numerous times, with major discrepancies among their written statements, taped statements, testimony from the first trial, and their testimony in the trial at bar. Moreover, Leach's defense included his own testimony as evidence, lending more credence to his defense. Nevertheless, the trial court found Leach's testimony not to be credible. The court found it implausible that, assuming Leach was going to the Sheblessy home to investigate, he would not turn on any lights, but use a flashlight instead. Moreover, the court said that Leach had no business even entering the Sheblessy house when the women were present, as he had been so warned by Sheblessy. Finally, the court found no reason for the women to fabricate this story.

However, none of the court's findings is supported by the evidence, and certainly not to such a degree that the evidence supported the convictions beyond a reasonable doubt. Leach submits to this Court that, when sitting as the "thirteen juror," it will determine that the trial court clearly lost its way and created a manifest miscarriage of justice.²⁸ Therefore, Leach urges this Court to conclude that the weight and sufficiency of the evidence does not support his conviction.

Proposition of Law No. 2: Where there is no separate animus for a kidnapping incidental to gross sexual imposition, a defendant may not be convicted of both charges.

Where conduct by a defendant can be construed to constitute two or more allied offenses of similar import, the defendant may be convicted of only one of the offenses.²⁹ But, where the conduct results in two or more offenses of the same or similar kind committed

²⁸ *State v. Thompkins*, supra, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

²⁹ R.C. 2941.25(A).

separately or with a separate animus as to each, the defendant may be convicted of all the offenses.³⁰

Leach argues that the kidnapping and the gross sexual imposition of Crosthwaite were not separate acts. Rather, Leach contends that there was no evidence that Crosthwaite was moved or restrained any more than was necessary to touch her breast. No evidence existed in the record of substantial movement, prolonged restraint, or secretive confinement. Thus, Leach submits that the evidence was insufficient to establish the separate animus required to separately convict him for kidnapping Crosthwaite.

In *State v. Logan*, this Court adopted guidelines for courts to determine whether kidnapping and another offense of the same or similar kind have been committed with a separate animus.³¹ This Court held, "Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions."³²

This Court also stated that where the victim, as a result of any restraint or movement, has been subjected to a substantial increase in the risk of harm separate from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.³³

³⁰ R.C. 2941.25(B).

³¹ See *State v. Logan*, *supra*.

³² *Id.*

³³ *Id.*

In *Logan*, this Court determined that the defendant did not have a separate animus, defined as an immediate motive, for kidnapping and then raping the victim when he forced her into an alley and down a flight of stairs before raping her.³⁴ This Court concluded that the restraint and movement of the victim had no significance apart from facilitating the rape, and that the limited restraint and movement did not substantially increase her risk of harm.³⁵ Therefore, in that case, kidnapping and rape were held to be allied offenses of similar import, and the defendant could be convicted only of one offense.

More recently, in *State v. Adams*, this Court considered whether the defendant's convictions for kidnapping and rape constituted allied offenses of similar import under R.C. 2941.25.³⁶ This Court cited and applied the test announced in *Logan*. This Court discussed the particular facts of the case and determined that because there was no evidence that the defendant had moved or restrained the victim in any way other than what was necessary to rape and kill her, there was no separate animus to support the kidnapping conviction.³⁷ The court consequently vacated the defendant's kidnapping conviction.³⁸

The First District Court of Appeals, faced with a similar decision concerning kidnapping and attempted rape, opined that the *Adams* decision "is a clear enough statement that the *Logan* test, and not the *Rance* test, is the proper way to analyze whether kidnapping and another crime constitute allied offenses of similar import"³⁹ [citations omitted].

However, the First District did not even cite to *Adams* or *Logan* in its decision in the case at bar. It held that:

³⁴ *Id.* at 135.

³⁵ *Id.*

³⁶ *State v. Adams*, *supra*.

³⁷ *Id.* at ¶¶93-94.

³⁸ *Id.* at ¶95.

³⁹ *In re Rashid*, *supra*, at ¶28; see, also, *State v. Willis*, *supra*.

"Gross sexual imposition by force requires that a person have sexual contact with another by the use of [sic] threat of force. On the other hand, kidnapping, as charged in this case, is complete when a person removes or restrains another's liberty for the purpose of engaging in sexual activity. Because kidnapping does not require that sexual activity actually take place, while the gross sexual imposition does, they are not allied offenses of similar import under the test set forth in *State v. Rance*. Thus, Leach could have been properly convicted of both offenses"⁴⁰ [citations omitted].

This Court needs to right the wrong perpetrated on Leach, who was improperly convicted of kidnapping and gross sexual imposition with no separate animus as to each.

CONCLUSION

For the foregoing reasons, Leach respectfully requests this Court to grant jurisdiction herein to accept this case on its merits and to reverse the decision of the First District Court of Appeals, affording Leach a new trial, or, in the alternative, vacating Leach's kidnapping conviction.

Respectfully submitted,


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⁴⁰ *State v. Leach* (January 24, 2007), 1st Dist. No. C-050163.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum in Support of Jurisdiction of Defendant-Appellant was served by U.S. mail upon Scott M. Heenan, Assistant Prosecuting Attorney, at the Hamilton County Prosecutor's Office, 230 E. Ninth Street, Suite 4000, Cincinnati, OH 45202, this 1st day of March, 2007.



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**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-050163
	:	TRIAL NO. B-0105753
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
THOMAS P. LEACH, JR.,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this Judgment Entry is not an Opinion of the Court.¹

Following a bench trial, defendant-appellant Thomas P. Leach, Jr., was convicted of abduction, kidnapping, gross sexual imposition, and the accompanying firearm specifications.² The trial court sentenced Leach to three years in prison for abduction, to three years in prison for the merged firearm specifications, to five years in prison for kidnapping, and to one year in prison for gross sexual imposition. The trial court ordered the sentences to be served consecutively, for a total of 12 years' incarceration. After review of the record and for the reasons set forth below, we affirm the findings of guilt, but vacate the sentence and remand for resentencing.

At trial, the state presented evidence that Sarah Sheblessy had hired her daughter Madeline's friend, Ashlee Decker, to feed the family's cats while she and Madeline were

¹ See S.Ct.R. Rep. Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² All the counts in the indictment contained two firearm specifications with the exception of the gross-sexual-imposition count, which included only a one-year firearm specification.

away for a week-long vacation. Sarah also asked Leach, who was a good friend, to keep an eye on the house. Decker and her friend, April Crosthwaite, decided to spend the night at the Sheblessy home. They called Madeline for permission. It was disputed whether Decker and Crosthwaite had obtained permission to spend the night. Ms. Sheblessy testified that they did not have permission. Decker and Crosthwaite believed they had obtained permission from Madeline. Madeline testified that she had given Decker permission to spend the night in spite of her mother's refusal to do so.

The two women watched some videos and then spent the night in Madeline's bed. During the early morning hours, a man awakened Decker by straddling her hips and pointing a gun at her head. He was trying to pull down the comforter that was covering Decker. Crosthwaite awoke, saw the man over Decker, and called her name. The man told Crosthwaite to be quiet and put a gun in her face. She pushed it away. As the man was trying to pull down the blankets, Crosthwaite began to cry. The man alternated in leaning toward one woman and then the other, while pointing the gun at each woman's head. The man then said, "We can do this the easy way or the hard way." He then reached down through the collar of Crosthwaite's shirt and touched her breast.

When the man spoke, Decker recognized his voice as Leach's and said "Tom, why are you doing this?" Decker had met Leach at party she had attended with the Sheblessys earlier that year. The man then said, "How do you know this is Tom?" Decker replied, "Unless Tom has a twin, you are Tom." The man then stated that he wanted to talk to Decker alone.

Decker told Leach that she was scared and did not want to talk. Leach told her that he was not going to hurt anyone. Decker told Leach that she did not want to talk to him while he was holding the gun, so Leach put the gun in a duffel bag in the hallway. Decker then got up and turned the lights on. Then she and Leach went into Ms.

Sheblessy's bedroom to talk. Decker stayed in the hallway between Leach and the duffel bag. During their conversation, Leach told Decker that he was a sexaholic and that he had heard the same about her. Leach talked for a minute or two longer with Decker. Leach told her that "this doesn't leave the house. It doesn't leave the room." He then got up, kissed her on the forehead, and left the house. Decker followed him as he left and saw him leave through the garage door.

Decker then went upstairs to check on Crosthwaite, who had locked herself in the bathroom and vomited. She would not come out of the bathroom until Decker assured her that it was safe. Crosthwaite then walked into Madeline's bedroom, picked up the telephone, and tried to dial 911, but the phone was not working. The two women then went downstairs, where they discovered that the kitchen phone had been taken off the hook. Crosthwaite dialed 911, but then hung up and called her mother. While she was on the phone with her mother, a 911 operator called back. Crosthwaite told the operator what had happened. Shortly thereafter, the police arrived. They took the women's statements and photographed the scene. The women then called Sarah Sheblessy.

Leach testified that Decker and Crosthwaite did not have permission to be in the Sheblessy's home. Leach testified that, during a phone conversation with Sarah Sheblessy earlier that evening, he had heard her say to Madeline, "[G]et the girls the hell out of my house." Later, he decided to place a phone call to the Sheblessy home. When he did, a young man answered. Leach heard someone in the background say, "Hang up the phone, hang up the phone." The phone line then went dead. When Leach tried the number again, there was no answer. Leach then drove to the Sheblessy home, where he looked around with a flashlight. When he found Decker and Crosthwaite in Madeline's bed, he told the women that they would have to leave or he would call the police. The women agreed to leave, and Leach left the house as well. Leach claimed that the girls

had lied about the attack to avoid getting into trouble with Sarah Sheblessy or the police. There was also some evidence that Leach may have believed that Sarah Sheblessy had asked him to remove the girls from the home.

In his first and second assignments of error, Leach contends that his convictions were based on insufficient evidence and that the trial court erred by denying his motions for a judgment of acquittal.

When reviewing a trial court's denial of a Crim.R. 29 motion, this court applies the same standard of review as it would in reviewing a challenge based upon the sufficiency of the evidence.³ When a defendant claims that his conviction is supported by insufficient evidence, this court must review the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found all the elements of the crime proved beyond a reasonable doubt.⁴

Based upon our review of the record, we conclude the state presented sufficient evidence to sustain Leach's convictions for abduction, kidnapping, gross sexual imposition, and the accompanying firearm specifications. With respect to the abduction conviction, Decker testified that Leach had straddled her in the bed and pointed a gun to her head, and that she was afraid. With respect to the kidnapping and gross sexual imposition, Crosthwaite testified that while Leach was holding them at gunpoint, he moved toward her, told her they could do it the easy way or the hard way, and then fondled her breast. Because this evidence was sufficient to sustain Leach's convictions for abduction, kidnapping, gross sexual imposition, and the accompanying firearm specifications, the trial court did not err in overruling Leach's Crim.R. 29 motions.

³ *State v. Johnson*, 1st Dist. Nos. C-020256, and C-020257, 2003-Ohio-3665, at ¶50.

⁴ *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132.

Next, Leach contends that the trial court erred in entering convictions for the kidnapping and gross sexual imposition of Crosthwaite. Leach contends that the two offenses were allied offenses of similar import under the facts of this case. We disagree.

In comparing the elements of kidnapping and gross sexual imposition by force in the abstract, we conclude that they do not correspond to such a degree that the commission of one will result in the commission of the other. Gross sexual imposition by force requires that a person have sexual contact with another by the use of threat of force. On the other hand, kidnapping, as charged in this case, is complete when a person removes or restrains another's liberty for the purpose of engaging in sexual activity. Because kidnapping does not require that sexual activity actually take place, while the gross sexual imposition does, they are not allied offenses of similar import under the test set forth in *State v. Rance*.⁵ Thus, Leach could have been properly convicted of both offenses.⁶ We, therefore, overrule Leach's first and second assignments of error.

In his third assignment of error, Leach contends that inconsistencies in Crosthwaite's and Decker's testimony rendered his convictions against the manifest weight of the evidence. Having reviewing the record, we cannot say that the trier of fact clearly lost its way and created such a manifest miscarriage of justice that we must reverse Leach's convictions and order a new trial.⁷ We, therefore, overrule his third assignment of error.

In his fourth assignment of error, Leach contends that the trial court's imposition of non-minimum, consecutive sentences violated his Sixth Amendment right to a jury trial as set forth by the United States Supreme Court in *Blakely v. Washington*.⁸

⁵ (1999), 85 Ohio St.3d 632, 710 N.E.2d 699.

⁶ See *State v. Shepherd*, 1st Dist. Nos. C-060042 & C-060066, 2007-Ohio-24, at ¶7.

⁷ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

⁸ (2004), 542 U.S. 296, 124 S.Ct. 2531.

Because the trial court relied upon R.C. 2929.14(B) and 2929.14(F) in sentencing Leach, and because those sections are unconstitutional under *State v. Foster*,⁹ we sustain that portion of the fourth assignment of error challenging the constitutionality of Leach's sentence. The remaining portion of Leach's fourth assignment of error, in which he argues that the trial court's imposition of consecutive sentences was not supported by the record, is rendered moot and need not be addressed. We, therefore, vacate the sentences imposed by the trial court and remand the case for resentencing in accordance with *Foster*. In all other respects, we affirm the trial court's judgment.

Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN and HENDON, JJ.

JUDGE RUPERT A. DOAN was a member of the panel, but died before the release of this judgment entry.

To the Clerk:

Enter upon the Journal of the Court on January 24, 2007

per order of the Court _____
Presiding Judge

⁹ 109 Ohio St.3d 1. 2006-Ohio-856. 845 N.E.2d 470.