

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO, : NO. 2007-0380
Plaintiff-Appellee, : On Appeal from the Hamilton County
Court of Appeals, First Appellate
vs. : District
THOMAS P. LEACH, JR., : Court of Appeals
Case Number C050163
Defendant-Appellant. :

MEMORANDUM IN RESPONSE

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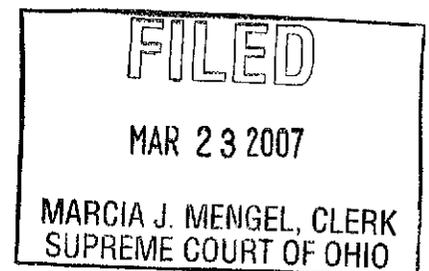


TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION 1.

STATEMENT OF THE CASE AND FACTS 2.

ARGUMENT AGAINST APPELLANT’S PROPOSITIONS OF LAW

Appellee’s First Proposition of Law: A conviction will be upheld when it is supported by sufficient evidence and also by the manifest weight of that evidence. 5.

Authorities Presented:

R.C. 2905.01(A)(4) 6.
R.C. 2905.02(A) 6.
R.C. 2907.05(A)(1) 6.
Crim. R. 29 5.
State v. Bridgeman (1978), 55 Ohio St. 2d 261, 381 N.E.2d 184 5.
State v. Jenks (1991), 61 Ohio St. 3d 259, 273, 574 N.E.2d 492. 5.
State v. Thomkins (1997), 78 Ohio St. 3d 380, 678 N.E.2d 541. 5, 9.
State v. Willard (10th Dist. 2001), 144 Ohio App. 3d 767, 761 N.E.2d 688. 5.

Appellee’s Second Proposition of Law: A defendant may be fully convicted of both kidnapping and gross sexual imposition as the two offenses are not allied offenses of similar import. 9.

Authorities Presented:

State v. Fears, 86 Ohio St. 3d 329, 344, 715 N.E.2d 136 10.
State v. Logan (1979), 60 Ohio St. 2d 126, 397 N.E.2d 1345 10.
State v. Rance, 85 Ohio St. 3d 632; 1999-Ohio-291, 710 N.E.2d 699. 10.
State v. Yarbrough, 104 Ohio St. 3d 1, 2004-Ohio-6087, 817 N.E.2d 845 10.

CONCLUSION 12.

CERTIFICATE OF SERVICE 12.

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STATE OF OHIO : NO. 2007-0380
Plaintiff-Appellee :
vs. :
THOMAS P. LEACH, JR. : MEMORANDUM IN RESPONSE
Defendant-Appellant :

**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

Defendant-Appellant Thomas Leach asks this Court to review two things in this matter. First, he asks that this court double check the sufficiency and manifest weight of the evidence presented at trial. Second, he asks this Court to double check the finding that his crimes were not allied offenses of similar import. Each of these issues can be quickly resolved through the application of settled Ohio law. There is no reason why this Court should take this matter in simply to reaffirm standing Ohio law. Therefore, this Court should decline jurisdiction over this matter.

STATEMENT OF THE CASE AND FACTS

After having the jury verdict in this matter being reversed and the matter remanded this matter proceeded once again to trial. Defendant-Appellant Thomas P. Leach, Jr., waived his right to a jury. After a complete bench trial he was found guilty of gross sexual inhibition, abduction, and kidnapping along with gun specifications. He was then sentenced to a total of twelve years in the Ohio Department of Corrections.

The facts of the case are as follows. Ashlee Decker was asked to watch the Sheblessy's house and cats while they were on vacation April Crothwaite stayed the night at the house with Decker on one evening after they had rented and watched videos Before going to bed Decker was careful to make sure all the doors were locked and the garage door was closed.

April Crothwaite woke up and saw Leach's shadowy figure overtop of Ashlee Decker, who was sleeping next to her. She began to call Decker's name and suddenly she had a gun stuck in her face. Leach told her to be quiet and then returned the gun to Decker. Crothwaite saw that he was straddling Decker and would lean from one of them to the other as he shifted which girl he was focusing his attention on. Decker and Leach began talking. Suddenly, Leach reached over, touched her, and began trying to pull the bed sheets away from her. Leach then returned his attention to Decker, but he went back to Crothwaite. While putting a gun to her face he told her that they could "do this the easy way or the hard way." He then pulled down the bed sheets and reached into Crothwaite's shirt and began fondling her breasts.

Decker, likewise, testified that she was woken when Leach straddled her in the bed and put a gun to her face. She testified that Leach first told her to be quiet when she woke up. She also recalled Crothwaite calling for her and Leach shifting his attention to Crothwaite. She also

testified that Leach told her and Crosthwaite that they could “do this the easy way or the hard way.” She saw Leach trying to touch Crosthwaite. Leach tried to get the bed sheets away from her as well, but was unsuccessful in doing so. She testified that Leach was definitely pointing a gun into each of their faces.

Decker recognized Leach and asked, “Tom, why are you doing this. Neither one of us are enjoying it.” Suddenly the sexual assaults stopped and Leach asked Decker, “how do you know this is Tom?” She told him that “[u]nless Tom has a twin, you are Tom.” Suddenly, Leach just wanted to talk. Decker told him that she was scared and did not want to talk and he told her that he was not going to hurt anyone. Decker told him she would not talk to him while he had the gun so Leach put it in a duffle bag he had brought with him.

Decker got up and turned on the lights. She and Leach went to another room to talk. Decker stayed in the hallway between Leach and the duffle bag containing the gun. During their conversation Leach told Decker that he was a “sexaholic” and that he had heard the same thing about Decker. He got up and told her “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 that he left by the garage.

While Decker was speaking to Leach, Crosthwaite locked herself in the bathroom where she began vomiting. She came out only after Decker assured her it was safe to do so. The girls decided they should call 911 immediately, but when they picked up the phone there was no dial tone. They soon found that the phone in the kitchen had been taken off the hook. They returned the phone to its base and got in contact with 911.

Crosthwaite testified that she was positive that Leach was the person who assaulted her.

Decker also testified that she was certain that it was Leach.

ARGUMENT AGAINST APPELLANT'S PROPOSITIONS OF LAW

Appellee's First Proposition of Law: A conviction will be upheld when it is supported by sufficient evidence and also by the manifest weight of that evidence.

The law on this issue is perhaps the most well settled law in the State of Ohio. When reviewing the sufficiency of the evidence to support a criminal conviction, a reviewing court must examine the evidence admitted at trial in the light most favorable to the prosecution and determine whether such evidence could have convinced any rational trier of fact that the essential elements of the crime had been proved beyond a reasonable doubt.¹ In deciding if the evidence was sufficient, this Court neither resolves evidentiary conflicts nor assess the credibility of the witnesses, as both are functions reserved for the trier of fact.² In contrast, when reviewing the weight of the evidence, this Court must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and decide whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice.³ A new trial should be granted only in exceptional cases where the evidence weighs heavily against conviction.⁴ In regards to the denial of Carson's Crim. R. 29 motions, this Court must determine "whether, viewing the evidence in the light most favorable to the state, a reasonable mind might fairly [have found] each element of the offense proven beyond a reasonable doubt."⁵

¹See *State v. Thomkins* (1997), 78 Ohio St. 3d 380, 678 N.E.2d 541.

²See *State v. Willard* (10th Dist. 2001), 144 Ohio App. 3d 767, 777-778, 761 N.E.2d 688.

³See *State v. Thompkins*, supra, 78 Ohio St. 3d at 387.

⁴Id.

⁵See *State v. Bridgeman* (1978), 55 Ohio St. 2d 261, 381 N.E.2d 184, syllabus; *State v. Jenks* (1991), 61 Ohio St. 3d 259, 273, 574 N.E.2d 492.

Leach was found guilty of gross sexual inhibition, abduction, and kidnapping, as well as accompanying gun specifications. Gross sexual inhibition is defined in R.C. 2907.05(A)(1) as “No person shall have sexual contact with another . . . when . . . [t]he offender purposely compels the other person . . . to submit by force or threat of force.” Abduction is defined in R.C. 2905.02(A) as “No person, without privilege to do so, shall knowingly . . . [b]y force or threat of force, restrain the liberty of another person, under circumstances which create a risk of physical harm to the victim, or place the other person in fear.” Kidnapping is defined in R.C. 2905.01(A)(4) as “No person by force, threat, or deception . . . shall . . . restrain the liberty of the other person . . . [t]o engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim’s will.”

The evidence produced in this matter showed that Leach snuck into the Shebbley’s home. He proceeded to sneak through the house, not turning on any lights. Once he found the bedroom that Crosthwaite and Decker were sleeping in he straddled Crosthwaite and put a gun to her head. When the girls woke up Leach informed them they could do things the “easy way or the hard way.” He then started to pull the bed covers away from them, moving the gun between each girl’s head. While restraining her at gunpoint, he forced his hand down Crosthwaite’s shirt and fondled her breast. He only stopped because Decker recognized his voice and asked him, by name, why he was doing this.

Once he knew that Decker knew who he was he stopped his sexual assaults, but he continued to hold each girl at gunpoint while he asked how knew that he was Tom. After she positively identified him, Leach suddenly just wanted to talk. She agreed, but only on the condition that he put the gun away. He reluctantly complied and the two went into a different room to talk. He told her

that he heard she was a sexaholic and that he was one as well. He spoke to her a bit more, got up, kissed her on the forehead, told her not to talk to anyone about what happened, and left.

Leach is quick to point out that there were some inconsistencies between the testimony of the State's witnesses during Leach's first trial and this trial. He is not so quick to point out that his own witnesses suffered from inconsistencies, as well. Both the State's and Leach's witnesses attributed their inconsistencies to the length of time between the events, the first trial, and this trial. Regardless, these inconsistencies were revealed at trial and it was for the trier of fact to resolve them.

During trial there was also much to do made about whether or not the girls had been given permission to stay the night. But whether or not they were given permission to stay in the house has nothing to do with whether Leach committed these crimes. Leach also introduced testimony that the Shebblesy's returned home to find empty alcohol bottles, cigarette butts, and cigarette burns about the house. He claims that the girls made up this story just to keep themselves out of trouble for throwing a party at the house. However both Decker and Crosthwaite denied having anything to do with alcohol, cigarettes, or throwing a party at the house. Police who were at the house did not recall seeing any evidence of a party taking place nor did Leach introduce any evidence, such as photos of the bottles or burns, to back up this allegation.

As its has been ruled in the past, Leach's guilt was a matter of which witnesses were the most credible. The trier of fact believed Crosthwaite and Decker told the truth and believed that Leach lied. It properly considered the evidence and made a proper determination as to which witnesses were most credible. Its findings were made on evidence that fully supports each and every element of the crimes Leach was found guilty of committing.

The Gun Specifications

Leach argues that the gun specifications should have been dismissed because one victim, Crosthwaite, when asked if what she felt against her head could have been a flashlight she answered “I don’t think so.” Of course, depending on the inflection put on the answer, saying “I don’t think so” can mean “no.” While the record before this Court does not reveal how the words were said, a reading of the surrounding testimony indicates that when Crosthwaite said “I don’t think so” she meant “no”:

A. Then I had a gun in my face. I pushed it away thinking I was dreaming and I realized it was real.

Q. Why did you realize it was real?

A. Because it was in my face and I touched it.

Q. What did it feel like?

A. Felt like a gun that has a revolver, like the Wild, Wild West revolver guns.

Q. Could it have been a flashlight?

A. I don’t think so.

Q. Where was it when you felt it? Where was it on you?

A. My head.

The fact that this was a gun was further verified by Decker’s testimony. Decker testified that she “[s]aw a gun and felt it.”⁶ She recognized it as a “small handgun” and said that it could not have

⁶T.p. 132.

been a flashlight.⁷ She made Leach put the gun into his duffel bag before she would speak with him.⁸ The evidence shows that Leach used a gun while he committed his crimes.

Leach goes on to argue that he should not have been found guilty of a firearm specification because the firearm was never recovered. A firearm does not need to be recovered to prove that one was used during the commission of a crime. “A firearm enhancement specification can be proven beyond a reasonable doubt by circumstantial evidence.”⁹ “In determining whether an individual was in possession of a firearm and whether the firearm was operable or capable of being readily rendered operable at the time of the offense, the trier of fact may consider all relevant facts and circumstances surrounding the crime, which include any implicit threat made by the individual in control of the firearm.”¹⁰ While moving the gun from one of the girl’s head to the other’s he threatened that they could “do things the easy way or the hard way.” Whenever either struggled too much he would quickly return the gun to their forehead. This is ample evidence to support the gun specification.

Appellee’s Second Proposition of Law: A defendant may be fully convicted of both kidnapping and gross sexual imposition as the two offenses are not allied offenses of similar import.

Leach argues that he should not have been found guilty of both kidnapping and gross sexual imposition because there was no separate animus for restraining Crosthwaite other than what was

⁷T.p. 135.

⁸T.p. 137.

⁹*Thompkins*, supra, paragraph 1 of the syllabus.

¹⁰*Id.*

necessary to touch her breast. Leach failed to raise this issue at trial and thus waived all but plain error.¹¹

In *State v. Logan*, this Court ruled that rape and robbery are unique in that both inherently involve some type of kidnapping.¹² For all other crimes, the determination as to whether two crimes are allied offenses of similar import is determined via the test set forth in *State v. Rance*,¹³ which is: “If the elements of the crimes ‘correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import.’ If the elements do not so correspond, the offenses are of dissimilar import and the court’s inquiry ends—the multiple convictions are permitted.”¹⁴ The comparison is made in the abstract.¹⁵

Unlike rape, which always involves some form of restraint of liberty, the same is not true with gross sexual inhibition. For example, Leach could have committed gross sexual imposition without committing a kidnapping offense. Before straddling and wakening her he could have grabbed her breast. As such, *State v. Rance* applies to this matter because kidnapping and gross sexual inhibition are separate offenses and a conviction for both offenses may stand.

Second, even if *Rance* did not apply to this matter, the facts of this matter show that the kidnapping and the gross sexual inhibition were each committed with a separate animus. In this

¹¹*State v. Yarbrough*, 104 Ohio St. 3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 96.

¹²*State v. Logan* (1979), 60 Ohio St. 2d 126, 397 N.E.2d 1345, syllabus. See also *State v. Fears*, 86 Ohio St. 3d 329, 344, 715 N.E.2d 136.

¹³*State v. Rance*, 85 Ohio St. 3d 632; 1999-Ohio-291, 710 N.E.2d 699.

¹⁴*Id.* at 636 (internal citations omitted).

¹⁵*Id.* paragraph 1 of the syllabus.

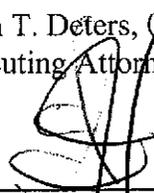
matter Leach held each girl at gunpoint independent of the moment he held Crothswaite at gunpoint while grabbing her breast. Once Leach was identified he continued to hold each girl at gunpoint before he decided he just wanted to talk, further restraining their liberty. This continued restraint was committed after he had completed the commission of a gross sexual inhibition. The continued restraint amounted to a kidnapping independent of the gross sexual inhibition and the conviction for both offenses must stand.

CONCLUSION

Unlike the first time this matter was before this Court, there is nothing for this Court to decide. The issues before this Court involve nothing more than arguments related to the proper application of well settled law. There is no reason for this Court to double check the First District's review of the sufficiency and the manifest weight of the evidence. Nor is there any reason for this Court to double check its determination that the crimes committed were not allied offenses of similar import. Therefore, this Court should decline jurisdiction over this matter.

Respectfully,

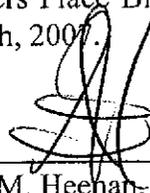
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CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Chris McEvilley, 7723 Tylers Place Blvd. #301, West Chester, Ohio 45069-4684, counsel of record, this 2nd day of March, 2007.



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