

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

PLAINTIFF-APPELLANT,

v.

KIRK SESSLER

DEFENDANT-APPELLEE.

: Supreme Court #: **07-2426**
: On Appeal from the Crawford
: County Court of Appeals, Third
: Appellate District
: Court of Appeals Case #:3-06-0023

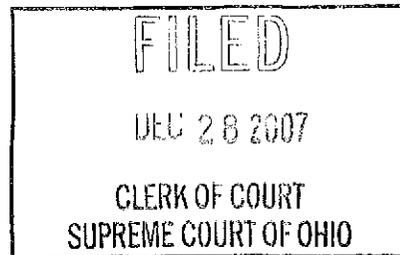
NOTICE OF CERTIFICATION OF CONFLICT

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO : Supreme Court No. _____
Plaintiff-Appellant : On Appeal from the Crawford
County Court of Appeals, Third
v. : Appellate District
KIRK SESSLER : Court of Appeals Case #3-06-0023
Defendant-Appellee : Notice of Certification By
Appellate Court

Now comes the State of Ohio and gives Notice pursuant to Rule 4, Section 1 of the Rules of Practice of the Supreme Court of Ohio that the Court of Appeals for the Third District has certified a conflict on the 30th day of November, 2007 on the following issue :

Is the holding in *State v. Pelfrey*, 112 Ohio St. 3d 422, applicable to charging statutes that contain separate sub-parts with distinct offense levels. (See the attached Journal Entry, Case #3-06-23)

Attached is a copy of the conflicting Court of Appeals decision of *State v. Kepiro* (10th Appellate Dist. 2007) 2007 Ohio 4593 which is in conflict with *State v. Sessler* also attached hereto.

Respectfully submitted,


Clifford J. Murphy, #0063519
Asst. Crawford County Prosecutor
Counsel of Record
Counsel for Appellant, State of Ohio
By: Michael J. Wiener, #0074220
Asst. Crawford County Prosecutor

CERTIFICATE OF SERVICE

The undersigned certifies that true copies of the foregoing Notice of Certification has been served via ordinary U.S. Mail postage pre-paid this 27th day of December, 2007 upon Appellee's counsel, John Spiegel, Esq., P. O. Box 1024, Bucyrus, OH 44820.

Mich J. Murphy #0074320
Clifford J. Murphy, #0063519

NOV 30 2007

SUE SEEVERS
CRAWFORD COUNTY CLERK

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

CRAWFORD COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 3-06-23

v.

KIRK SESSLER,

JOURNAL
ENTRY

DEFENDANT-APPELLANT.

This cause comes on for determination of appellee's application to reconsider and motion to certify a conflict as provided in App.R. 25 and Article IV, Sec. 3(B)(4) of the Ohio Constitution, and appellant's response in opposition.

Upon consideration the court finds that the application fails to set forth any error in the decision or issue not properly considered in the first instance. See *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1992), 85 Ohio App.3d 117; *Columbus v. Hodge* (1987), 37 Ohio App.3d 68. As such, the court finds no good cause shown to reconsider the opinion and judgment pursuant to App.R. 26(A).

The court further finds that the judgment in the instant case is in conflict with the judgment rendered by the Tenth District Court of Appeals in *State v. Kepiro*, 10th App.No. 06AP-1302, 2007-Ohio-4593. Accordingly, the motion to certify a conflict is well taken and the following issue should be certified pursuant to App.R. 25:

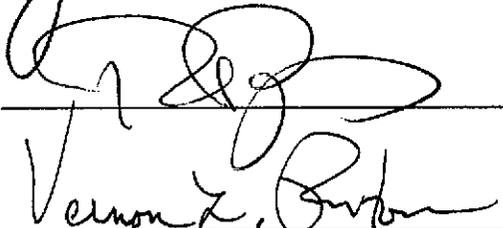
VOL 0440 PG 3558

Is the holding in *State v. Pelfrey*, 112 Ohio St.3d 422, applicable to charging statutes that contain separate sub-parts with distinct offense levels.

It is therefore **ORDERED** that appellee's application to reconsider be, and hereby is, denied.

It is further **ORDERED** that appellee's motion to certify a conflict be, and hereby is, granted on the certified issue set forth hereinabove.





Vernon L. Burton
JUDGES

DATED: November 29, 2007

/jlr

WD 0440 PG 3534

SEP 24 2007

SUE SEEVERS
CRAWFORD COUNTY CLERK

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO
CRAWFORD COUNTY

STATE OF OHIO,

CASE NUMBER 3-06-23

PLAINTIFF-APPELLEE,

JOURNAL

v.

ENTRY

KIRK SESSLER,

DEFENDANT-APPELLANT.

For the reasons stated in the opinion of this Court rendered herein, it is the judgment and order of this Court that the judgment of the trial court is affirmed in part and reversed in part with costs to be divided equally between the parties for which judgment is rendered and this cause is remanded to that court for further proceedings consistent with the opinion and judgment of this Court.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.

Jim

John B. Hallamond
Kennon Z. Butcher

JUDGES

DATED: September 24, 2007

Willamowski, J.

{¶1} Defendant-appellant Kirk B. Sessler (“Sessler”) brings this appeal from the judgment of the Court of Common Pleas of Crawford County finding him guilty of two counts of intimidation.

{¶2} On May 22 and 23, 2006, Sessler and his live-in girlfriend, Linda Chatman (“Chatman”) had a dispute. Eventually Sessler left the home and Chatman went to bed. Chatman was awoken at approximately 2:00 a.m. by Sessler demanding an apology for her earlier comments. Sessler also indicated that he had been drinking. After Chatman apologized, Sessler struck Chatman on her face twice. Chatman attempted to reach for the telephone and Sessler jumped on top of her, placed his hands on her throat, and threatened to kill her if she called the police. Sessler then left the room. Chatman then attempted to call for help. Sessler returned to the room, took the telephone from her, and threatened to kill her son or anyone else she called for help. Sessler again left the room, but took the telephone with him. Sessler went through the remainder of the house pulling the remaining telephones from the walls. As Chatman attempted to leave the house, Sessler grabbed her by the hair, pulled her back through the house, slammed her head into the floor, and began kicking her in the back and legs. Sessler then smashed the glass coffee table by throwing a rock through it.

{¶3} Chatman again attempted to get to the door. Sessler grabbed her and a piece of glass from the coffee table. Sessler then held the glass to Chatman's throat, placed a pillow over her face and began suffocating her. While doing these acts, Sessler told Chatman that he was going to kill her. Eventually, Chatman was able to escape to the neighbors' home, who took her to the hospital and then the police station.

{¶4} On June 12, 2006, Sessler was indicted for two counts of intimidation in violation of R.C. 2921.04(B), which are classified as third degree felonies. The State provided Sessler with open discovery, meaning that Sessler had access to the entire prosecution file and the entire police file. Throughout the pretrial proceedings, Sessler filed numerous pro-se motions despite the fact that counsel was provided. These motions included one for a Bill of Particulars, which the State provided on August 31, 2006. On September 21, 2006, a jury trial was held. Sessler was convicted on both counts and ordered to serve five years in prison on each charge, with the terms to be served consecutively. Sessler appeals from this judgment and raises the following assignments of error.

The trial court erred in overruling [Sessler's] motion for acquittal, pursuant to Rule 29.

The trial court erred in convicting [Sessler] of two general felonies, rather than a specific misdemeanor.

The trial court erred by allowing trial on indictments that were void, lacking elements, and failed to give [Sessler] proper notice of what allegations would be proven.

The trial court erred by failing to order that a proper bill of particulars be given to [Sessler].

The trial court erred in finding [Sessler] guilty of a felony, when the verdict forms supported only a verdict of a misdemeanor.

The trial court erred in sentencing [Sessler] to maximum consecutive sentences.

{¶5} Sessler's first assignment of error claims that the trial court erred in overruling his motion for acquittal pursuant to Criminal Rule 29. Sessler was charged with two counts of intimidation in violation of R.C. 2921.04(B). To prove a charge of intimidation of a victim in a criminal case, the State must show that the defendant knowingly by force attempted to intimidate a victim of a crime from filing criminal charges. R.C. 2921.04(B). An appellate court's function when reviewing a denial of a motion for acquittal pursuant to Criminal Rule 29 is to determine whether, after viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find all of the essential elements of the offense proven beyond a reasonable doubt. *State v. Shoemaker*, 3rd Dist. No. 14-06-12, 2006-Ohio-5159, ¶59. "Under [Criminal Rule 29(A)], a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt." *Id.* at ¶61.

{¶6} Here, Chatman testified that after Sessler had hit her several times, she returned to the bed where she had placed the cordless phone. Tr. 74-75. She then testified that Sessler “jumped on top of me on the bed and had me by my throat and told me if I had tried to call the police or anybody he was going to kill me.” Id. at 75. She also testified that Sessler kept threatening her that he would kill her if she tried to call the police or anyone else. Id. at 76-80. At the time he was threatening to kill her, he put a shard of broken glass to her throat and threatened to cut her and at another time placed a pillow over her face while threatening to kill her. Id. Finally, Chatman testified that she was afraid that Sessler would kill her if she went for help. Id. at 102-104. Viewing this evidence in a light most favorable to the State, a juror could conclude that the elements of the offense were proven beyond a reasonable doubt. The trial court did not err in denying the motion for acquittal and the first assignment of error is overruled.

{¶7} Sessler’s second assignment of error alleges that the trial court erred in convicting him of two general felonies rather than a specific misdemeanor. Sessler argues that the trial court should only have been convicted of either domestic violence, assault, or aggravated menacing for his actions. Sessler claims that the facts of this case could potentially support charges for assault or aggravated menacing, which are more specific charges than intimidation. “Where it is clear that a special provision prevails over a general provision or the Criminal

Code is silent or ambiguous as to which provision prevails, under R.C. 1.51, a prosecutor may charge only on the special provision.” *State v. Wickard*, 3rd Dist. No. 5-05-30, 2006-Ohio-6088, ¶10. “However, where it is clear that a general provision applies coextensively with a special provision, R.C. 1.51 allows a prosecutor to charge on both.” *Id.* at ¶12. The restriction set forth in R.C. 1.51 only applies if the offenses are allied offenses of similar import. *Id.*

{¶8} To be an allied offense of similar import, the elements must align in such a way that the commission of one offense automatically results in the commission of the other. *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699. The elements of intimidation do not line up with those of either assault or aggravated menacing. While an assault or aggravated menacing may occur while intimidation is being committed, it is not necessary. Additionally, one can commit assault or aggravated menacing without committing intimidation. The difference is the use of force or threat of force for the purpose of hindering a victim from reporting a crime. Since the offenses are not allied offenses of similar import, the restriction set forth in R.C. 1.51 does not apply, and the trial court did not err in allowing the convictions for intimidation. The second assignment of error is overruled.

{¶9} Next, Sessler claims that the indictment was inadequate because they merely provided a recitation of the statute. “The statement may be in the

words of the applicable section of the statute, provided the words of that section of the statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged.” Crim.R. 7(B).

Although a flaw in the indictment could result in the dismissal of the case for lack of jurisdiction, the standard for determining the legal sufficiency of an indictment is relatively simple. In *Childs*, the Supreme Court of Ohio stated that the requirements for a proper indictment can generally be met if the prosecutor follows the language of the statute defining the offense. [*State v. Childs*, 88 Ohio St.3d 194, 2000-Ohio-298, 724 N.E.2d 781]. Based upon this general rule, it has been held that, so long as the indictment refers to all statutory elements of a crime, it will be deemed sufficient even when it does not state the particular facts of that case. *State v. Blackwell*, 6th Dist. No. L-01-1031, 2002-Ohio-6352. For example, the failure to state the specific felony offense upon which a kidnapping charge is based, does not render an indictment insufficient because the defendant can obtain a statement of the specific allegations through a bill of particulars. *State v. Smith*, 8th Dist. No. 83007, 2004-Ohio-3619.

State ex rel. Smith v. Mackey, 11th Dist. No. 2004-A-0080, 2005-Ohio-825, ¶6.

{¶10} The indictment in this case used the exact language of the statute, quoted the statutory section, and specified that Sessler committed the acts on or about May 23, 2006. Although the indictment did not state the particular facts upon which the indictment is based, the statutory elements were all present. Sessler then was able to obtain the factual basis from the bill of particulars and the State’s prosecutorial file. Because the indictment contained all of the statutory

elements, the indictment is sufficient to provide Sessler with the required notice.

The third assignment of error is overruled.

{¶11} The fourth assignment of error claims that the trial court erred in not ordering a more specific bill of particulars than was provided by the State.

The purpose of a bill of particulars “is to inform a defendant of the nature of the charge against him with sufficient precision to enable him to prepare for trial, to prevent surprise, or to plead his acquittal or conviction in bar of another prosecution for the same offense.” * * *

* * *

While the bill of particulars must enable the defendant to prepare for trial, it is not designed to provide the accused with specifications of evidence or to serve as a substitute for discovery. * * * A bill of particulars need not include information that is within the knowledge of the defendant or information that the defendant could discover herself with due diligence. * * * Additionally, a bill of particulars need not be precise, but rather “need only be directed toward the conduct of the accused as it is understood by the state to have occurred.” * * *

State v. Miniard, 4th Dist. No. 04CA1, 2004-Ohio-5352, ¶21-23 (citations omitted). In this case, Sessler was told that the charges stemmed from his actions on May 23 where he threatened the life of the victim and “brutally beat the victim.” Bill of Particulars. Under its policy of open discovery, the State had previously provided Sessler with copies of the indictment and the entire police report in the State’s possession. The State also notified Sessler of his right to completely review any evidence possessed by the Galion Police Department.

Given the facts that Sessler had access to all of the evidence that the State had and was allegedly present for the offense, the bill of particulars did not need to include any additional information. The trial court did not abuse its discretion in denying Sessler's motion for a more detailed bill of particulars and the fourth assignment of error is overruled.

{¶12} The fifth assignment of error alleges that the verdict forms did not support convictions for intimidation. Sessler cites the Ohio Supreme Court's recent opinion in *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, as requiring the verdict form to specify the degree of the offense. In *Pelfrey*, the Supreme Court addressed the question "[w]hether the trial court is required as a matter of law to include in the jury verdict form either the degree of the offense of which the defendant is convicted or to state that the aggravating element has been found by the jury when the verdict incorporates the language of the indictment, the evidence overwhelmingly shows the presence of the aggravating element, the jury verdict form incorporates the indictment and the defendant never raised the inadequacy of the jury verdict form at trial." *Id.* at ¶1. The Ohio Supreme Court answered the question in the affirmative and held as follows.

The statutory requirement certainly imposes no unreasonable burden on lawyers or trial judges. R.C. 2945.75(A) plainly requires that in order to find a defendant guilty of "an offense * * of more serious degree," the guilty verdict must either state

“the degree of the offense of which the offender is found guilty” or state that “additional element or elements are present.” R.C. 2945.75(A)(2) also provides, in the very next sentence, what must occur if this requirement is not met: “Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.” When the General Assembly has written a clear and complete statute, this court will not use additional tools to produce an alternative meaning.

Id. at ¶12. “The express requirements of the statute cannot be fulfilled by demonstrating additional circumstances, such as that the verdict incorporates the language of the indictment, or by presenting evidence to show the presence of the aggravated element at trial or the incorporation of the indictment into the verdict form, or by showing that the defendant failed to raise the issue of the inadequacy of the verdict form.” Id. at ¶14. The Supreme Court held that if the verdict form does not state the degree of the offense or the additional elements necessary to reach the higher degree, then the defendant must be presumed to have been convicted on the least degree of the offense charged. Id.

{¶13} The verdict forms in this case specify that the jury is finding Sessler either guilty or not guilty of intimidation “in manner and form as he stands charged in the indictment.” Form. The forms did not specify the degree of the offense charged or set forth any aggravating factors. The only difference between divisions A and B of R.C. 2921.04 as it applies to this case is the question whether the defendant “knowingly and by force or by unlawful threat of harm to any person or property” attempted to intimidate the victim. If there is no force or

threat of harm, the defendant may be found guilty under R.C. 2921.04(A), which is a first degree misdemeanor. R.C. 2921.04(D). If there is force or the threat of harm, the defendant may be found guilty of a third degree felony. R.C. 2929.04(D). This court notes that Sessler was properly charged, the jury instructions specified the correct offense and degree, and the verdict form incorporated by reference the indictment. However, the verdict form does not specify the degree of the offense or even statutory section upon which the offense is based and does not contain any reference to the use of force or threat of harm. The form, therefore, does not permit a determination as to which degree of offense Sessler is guilty of committing. Being obligated to follow the rulings of the Ohio Supreme Court, we must, pursuant to R.C. 2945.75(A)(2) and the holding of the Ohio Supreme Court in *Pelfrey*¹, hold that as to each count of intimidation, the jury found Sessler guilty of the least offense, which is intimidation under R.C. 2921.04(A), a first degree misdemeanor. The fifth assignment of error is sustained.

{¶14} Finally, Sessler claims that the trial court erred in sentencing him to maximum, consecutive sentences. Having found an error with the verdict forms and determined that Sessler can only be sentenced for misdemeanors rather than

¹ While we note that the trial in this case occurred prior to the decision in *Pelfrey*, we must nonetheless apply the holding of *Pelfrey* to this appeal.

Case No. 3-06-23

felonies. Sessler must be resentenced. Thus, this assignment of error is moot and need not be addressed.

{¶15} The judgment of the Court of Common Pleas of Crawford County is affirmed in part and reversed in part. The matter is remanded for further proceedings in accordance with this opinion.

*Judgment affirmed in part,
reversed in part and cause
remanded.*

ROGERS, P.J., and PRESTON, J., concur.

r

2007 Ohio 4593, *; 2007 Ohio App. LEXIS 4134, **

State of Ohio, Plaintiff-Appellee, v. John Kepiro, Defendant-Appellant.

No. 06AP-1302

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2007 Ohio 4593; 2007 Ohio App. LEXIS 4134

September 6, 2007, Rendered

PRIOR HISTORY: [**1]

APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 03CR12-8584).

DISPOSITION: Judgment affirmed in part, reversed in part, and cause remanded for further appropriate proceedings.

CASE SUMMARY

PROCEDURAL POSTURE: Following a jury trial, the Franklin County Court of Common Pleas (Ohio) convicted defendant of 25 counts of gross sexual imposition, in violation of R.C. 2907.05(A). He was sentenced to an aggregate total of 12 years in prison. Defendant appealed.

OVERVIEW: Defendant argued that his convictions were not supported by the weight or the sufficiency of the evidence. The appellate court held that there was sufficient evidence to support the convictions and that they were not against the manifest weight of the evidence. The victim testified that defendant, her stepfather, began molesting her just before her mother died and continued regularly until 1998. Defense counsel was afforded wide latitude during the victim's cross-examination. However, the State failed to prove that defendant committed the alleged acts after the gross sexual imposition statute was amended on July 1, 1996. Because the old and amended versions of R.C. 2907.05 were in conflict regarding the presumption of a mandatory prison term, the rule of lenity had to be applied. Also, the fact that the revised statute provided a harsher punishment than its predecessor, sentencing defendant under the revised statute--without proof that the conduct occurred after July 1, 1996--operated as an ex post facto law. Thus, because the State did not prove that defendant molested the victim after July 1, 1996, a mandatory prison term was inappropriate.

OUTCOME: Defendant's conviction was affirmed. However, the sentence was vacated and the cause was remanded for resentencing.

CORE TERMS: assignment of error, sexual, rape, felony, indictment, molestation, touched, victim's testimony, fair warning, sentencing, convicted, lenity, touch, buy, jury verdict, prison term, reasonable doubt, cross-examination, accusation, mandatory, sentence, sexual abuse, interpreter, sexual intercourse, jury convicted, criminal statute, credibility, tampering, manifest, deviate

LEXISNEXIS® HEADNOTES Hide

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence Evidence > Procedural Considerations > Burdens of Proof > Proof Beyond Reasonable Doubt

Evidence > Procedural Considerations > Weight & Sufficiency

HN1 Sufficiency of the evidence is the legal standard applied to determine whether the evidence is legally sufficient, as a matter of law, to support the jury's verdict. The weight of the evidence, also called "manifest weight," refers to the inclination of the greater amount of credible evidence offered at trial, and whether that greater weight of that evidence tends to support one side of the issue rather than the other. In reviewing the record for sufficiency, the relevant inquiry is 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 proven beyond a reasonable doubt. [More Like This Headnote](#)

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Rape > General Overview

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Sexual Imposition > General Overview

Criminal Law & Procedure > Witnesses > Credibility

HN2 At least insofar as rape is at issue, there is no statutory requirement that a victim's testimony be corroborated. Although corroborating testimony, or evidence, gives greater weight to a victim's testimony, it is not a requirement. The only real difference between the crimes of rape and gross sexual imposition (GSI) is that the former requires actual penetration, where the latter does not. R.C. 2907.01 et seq.; R.C. 2907.05(A). Thus, under the current law, if the victim's testimony in a rape trial does not require corroboration, there is no legitimate reason to require corroboration in a trial for GSI. [More Like This Headnote](#)

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence Evidence > Procedural Considerations > Weight & Sufficiency

Evidence > Testimony > Credibility > General Overview

HN3 When considering the weight of evidence, the test is considerably different from the sufficiency test. In that regard, an appellate court sits as a "thirteenth juror," weighs the quality of the evidence, and the credibility of the witnesses. All things considered, the appellate court determines whether the jury "clearly lost its way," in a manner that created such a manifest miscarriage of justice that the conviction must be reversed and a

new trial ordered. This discretionary power should only be exercised in the extraordinary case where the evidence weighs heavily against the conviction. Indeed, the Ohio Constitution prevents an appellate court from overturning the jury's verdict without a unanimous vote by the appellate panel. More Like This Headnote

**Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence Evidence > Procedural Considerations > Weight & Sufficiency
HN4 See Ohio Const. art. IV, § 3(B)(3).**

**Evidence > Relevance > Sex Offenses > Rape Shield Laws
Evidence > Testimony > Credibility > Impeachment > Bad Character for Truthfulness > General Overview
HN5 Even though a victim's character is usually inadmissible in sex offense cases, a witness's reputation for truthfulness is always fair game. More Like This Headnote**

**Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Sexual Imposition > Elements
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Sexual Imposition > Penalties
HN6 R.C. 2907.05(A) is not a basic statute with enhancements. The gross sexual imposition statute, rather, has multiple parts, each paragraph setting forth a separate crime, and each having a different penalty. More Like This Headnote**

**Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Sexual Imposition > Elements
Criminal Law & Procedure > Verdicts > General Overview
HN7 The gross sexual imposition statute R.C. 2907.05(A), essentially prohibits five different kinds of conduct--sexual conduct with another: (1) by force; (2) by deception (using drugs, alcohol, or other intoxicants); (3) knowing the other person's judgment is impaired; (4) when the victim is less than 13-years old; or (5) whose judgment is impaired because of a mental defect. Each of these is a separate offense, having a separate penalty. Under R.C. 2907.05(A), there are no additional elements or attendant circumstances that change the penalty. Therefore, R.C. 2945.75, regarding a jury verdict with respect to the degree of the offense, does not apply to R.C. 2907.05(A). More Like This Headnote**

**Governments > Legislation > Effect & Operation > Amendments
Governments > Legislation > Effect & Operation > Operability
HN8 As a result of statutory revisions to the Ohio Criminal Code Omnibus Criminal Sentencing Act that took effect July 1, 1996, any crime committed prior to July 1, 1996 is to be adjudicated under the statute previously in existence. More Like This Headnote**

**Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > General Overview**

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN9 It is a cornerstone of American jurisprudence that a criminal defendant is entitled to be informed of the nature and cause of the accusation against him. Sixth Amendment to the United States Constitution; Ohio Const. art. I, § 10. Although the United States Supreme Court has yet to hold that a criminal defendant's right to indictment by grand jury relative to the Sixth Amendment to the United States Constitution is binding upon the states, the Ohio Constitution recognizes this right in Article I. The rationale is that a criminal defendant cannot prepare a defense unless he or she knows precisely of the crime charged. Without that knowledge, the defendant cannot know what elements the State is required to prove, and consequently, how to negate the elements of the offense. **More Like This Headnote**

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview

HN10 Due process of law, as guaranteed by the United States and Ohio Constitutions, requires some legal procedure in which the person proceeded against, if he is to be concluded thereby, shall have an opportunity to defend himself. **More Like This Headnote**

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview

HN11 While the constitutional phrase "due process" eludes exact definition, it would seem to require in a criminal case, where the liberty of a defendant is at stake, accuracy, clearness, and certainty in the charge of the court to the jury. **More Like This Headnote**

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > General Overview

Constitutional Law > Substantive Due Process > General Overview

Criminal Law & Procedure > Accusatory Instruments > Indictments

HN12 Though, oftentimes, courts neglect to distinguish between the different types of due process, there are two--substantive and procedural due process. Procedural due process requires that individuals be given a meaningful opportunity to be heard before their fundamental rights are encroached. Substantive due process protects an individual's fundamental rights, regardless of the sufficiency of the process afforded. Fundamental rights are those that are enumerated in the Bill of Rights, or those identified as fundamental rights by the United States Supreme Court. Criminal trials are themselves, processes; thus, procedural due process protects how those trials are conducted. In Ohio, a criminal defendant's right to indictment is specifically enumerated in the constitution, which makes the right fundamental. Thus, criminal defendants are also entitled to substantive due process under Ohio law. It is also axiomatic that what the constitution grants, no statute may take away. **More Like This Headnote**

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > General Overview

HN13 A criminal defendant is denied due process when he is convicted of a crime without the State having proved each element of the crime beyond a reasonable doubt. Similarly, a defendant is denied due process when convicted of a crime other than the crime charged (unless it is a lesser included offense). More Like This Headnote

Constitutional Law > Congressional Duties & Powers > Ex Post Facto Clause & Bills of Attainder > Ex Post Facto Clause > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

Governments > Legislation > Interpretation

HN14 In a criminal law context, due process is essentially the proposition that a statute must give fair warning of the conduct that it makes a crime. The constitutional requirement of definiteness is violated when a criminal statute fails to give fair notice that the conduct is forbidden, and no one should be held criminally responsible for conduct he or she could not reasonably understand to have been prohibited. This so-called fair warning requirement has even deeper roots, however, in the Ex Post Facto Clause of the United States Constitution. Section 10, Article 1, United States Constitution. Read literally, ex post facto means "after the fact." These laws, of course, are prohibited. The essence of an ex post facto law is retroactivity: No statute may punish conduct that was not criminal at the time it was committed. Thus, the prohibition applies to conduct occurring before the statutory enactment that disadvantages the offender by, either: (1) altering the definition or elements of a crime; (2) increasing the punishment for its commission; or (3) depriving the defendant of any defense that was available when the act was committed. Related to the fair warning requirements are the vagueness doctrine, and the rule of lenity. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness

HN15 The vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. More Like This Headnote

Governments > Legislation > Interpretation

HN16 The rule of lenity--also known as the canon of strict construction of criminal statutes--is similar to the vagueness doctrine to the extent that the rule ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. The touchstone of whether there was fair warning is whether the statute, either standing alone or as construed, made it reasonably clear that the defendant's conduct was

criminal. The rule of lenity is most commonly invoked when a statute is ambiguous (as opposed to merely vague). Because the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal, when applying the rule to an ambiguous statute, any ambiguity should be resolved in favor of the criminal defendant, rather than the government. More Like This Headnote

**Criminal Law & Procedure > Accusatory Instruments > Indictments
Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution
Criminal Law & Procedure > Trials > Motions for Acquittal**

HN17 It is the State's burden to prove each element of each count of an indictment beyond a reasonable doubt. If the State cannot meet its burden as to any element, of any count, that count must be dismissed. More Like This Headnote

COUNSEL: Ron O'Brien , Prosecuting Attorney, and Jennifer L. Maloon, for appellee.

Todd W. Barstow , for appellant.

JUDGES: TYACK, J. BROWN, J., concurs. FRENCH, J., concurs in judgment only.

OPINION BY: TYACK

OPINION

(REGULAR CALENDAR)

TYACK, J.

[*P1] Defendant-appellant, John Kepiro ("appellant"), appeals his sentence and conviction on 25 counts of Gross Sexual Imposition ("GSI"). In 1987, appellant immigrated to the United States from Hungary. Shortly thereafter, he married Anna Payer, also a Hungarian immigrant, who had four children from a previous marriage. The children were still living in Hungary with their biological father. The children's father passed away and, in 1994, appellant rescued two of the children, twins, J.S. and A.S. from foster care. About six months later, their mother died from lung cancer. A.S. alleges that around that time, appellant began sexually molesting her.

[*P2] A.S. claims that the molestation persisted regularly until 1998, although she did not tell anyone about it until 2003. The grand jury indicted appellant on 25 counts [**2**] of GSI, all third-degree felonies. The only evidence against appellant was A.S.'s accusations. The jury convicted him on all counts, and the court sentenced him to an aggregate 12 years' incarceration. Appellant now appeals his conviction, arguing that there was insufficient evidence to convict. He also appeals his sentence on grounds that the trial court violated his due process rights by sentencing him under a statute that was not yet in effect when the**

majority of the alleged incidents occurred.

[*P3] Ohio law sets the bar very high before an appellate court may reverse a jury verdict because of the weight of the evidence. Within those parameters, we cannot say that the jury got it wrong. Therefore, we affirm appellant's conviction. We do find error, however, in the trial court's sentencing and, accordingly, we vacate the sentence and remand for re-sentencing.

[*P4] Appellant has assigned four errors for our consideration:

I. THE VERDICT FORMS WERE INADEQUATE [sic] TO SUPPORT APPELLANT'S CONVICTIONS FOR GROSS SEXUAL IMPOSITION AS A THIRD DEGREE FELONY, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

II. THE TRIAL COURT ABUSED ITS DISCRETION [3] BY IMPOSING AN IMPERMISSIBLE SENTENCE FOR ACTS COMMITTED PRIOR TO JULY 1, 1996, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.**

III. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT A PRISON TERM WAS MANDATORY FOR ACTS COMMITTED AFTER JULY 1, 1996, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

IV. THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF GROSS SEXUAL IMPOSITION AS THOSE VERDICTS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

[*P5] The fourth assignment of error attacks both the sufficiency and weight of the evidence supporting appellant's conviction. Standing alone, either argument is dispositive, therefore, we address the fourth assignment of error first.

[*P6] HN1 Sufficiency of the evidence is the legal standard applied to determine whether the evidence is legally sufficient, as a matter of law, to support the jury's verdict. *State v. Smith* (1997), 80 Ohio St.3d 89, 1997 Ohio 355, 684 N.E.2d 668. [**4] The weight of the evidence, also called "manifest weight," refers to the inclination of the greater amount of credible evidence offered at trial, and whether that greater weight of that evidence tends to support one side of the issue rather than the other. *Id.* In reviewing the record for sufficiency, the relevant inquiry is 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 proven beyond a reasonable doubt. *Id.* (quoting *State v. Jenks* [1991], 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L. Ed. 2d 560).

[*P7] In considering whether appellant's convictions were supported by sufficient the trial court. As we have said, the only evidence of appellant's guilt was the alleged victim's testimony. There was no physical evidence of sexual abuse, and the prosecution presented no other witnesses, psychological or otherwise, to corroborate A.S.'s allegations.

[*P8] A.S. testified that the first instance of sexual molestation occurred about a week or two before her mother died on April 20, 1995. (Tr. 49, 55.) She claims that, on that occasion, **[**5]** she was lying on a futon with her brother and appellant, and that appellant placed her hand "on his private and started to move it up and down and said your daddy has to have a little bit of fun since he brought you out here." (Tr. 54, 60.) (Emphasis added.) A.S. testified that this was the only time she touched appellant's penis, but that on subsequent occasions he touched her genitals. (Tr. 59, 60.) She described the second incident as having occurred several months later, while watching a Disney movie with appellant and her brother. She testified that the three of them were in her bedroom, and that while lying on her bed, appellant fondled her vaginal area from under her clothes. A.S. said she was nine years old at that time. She estimated that during calendar year 1995, appellant touched her vagina six times. (Tr. 64-65.)

[*P9] In late 1995, Franklin County Children Services ("FCCS") came to appellant's home to investigate a report that appellant had been leaving the kids at home unattended for extended periods of time. (Tr. 69.) The complaint is believed to have been related by a neighbor, one of A.S.'s half-siblings. *Id.* FCCS talked with both of the children, and also with appellant, **[**6]** and despite the fact that the complaint made no mention of sexual abuse, the caseworker inquired about it (probably as a matter of formality). The investigation did not reveal evidence of any sexual abuse and, in fact, A.S. specifically denied that appellant had touched her inappropriately. (Tr. 70-71.) The defense offered a copy of the FCCS intake referral form into evidence, which contained A.S.'s statement denying that anyone "ever touched her private places."

[*P10] In spite of flatly denying any sexual abuse in late 1995, in August 2006, A.S. testified that appellant continued to molest her in the same manner, and with the same frequency. (Tr. 72-74.) She added that sometime in 1997, appellant began French kissing her, and as she started puberty, he also began touching her breasts. (Tr. 76.)
[PROSECUTOR:] During the time period of 1997 looking at that 365-day-time period, January 1<st> through December 31<st>, how many times to your memory did [Mr. Kepiro] place his hand on the skin of your vagina?

[A.S.:] Probably once or twice a month.

Q. I'm sorry?

A. Once or twice a month.

Q. So would it have been at least six times?

A. Yes.

Q. And possibly quite a bit more than that?

A. Yes.

(Tr. 77.)

[*P11] On [7] September 30, 1997, A.S. turned 12-years old. By that time, she and J.S. attended public school, went to church regularly, and had numerous friends and social acquaintances. Despite what appears to have been a wide social circle, no one close to appellant suspected what A.S. later alleged.**

[*P12] A.S. testified that the fondling continued until roughly August 1998, around the time when appellant remarried. (Tr. 84.) A.S. estimated five fondling incidents between January 1, 1998 and July or August of that same year. A.S. described the last incident as having occurred when she was watching television, while reclining on a futon in the living room. She said that appellant came into the living room, laid down on top of her, and "started grinding * * * moving up and down." (Tr. 85.) She said that she looked him in the eye, then turned her head and said nothing, and after that, "he got off of me and never touched me again." Id.

[*P13] Later in 1998, FCCS came back to appellant's house to investigate another complaint, similar to the previous one. (Tr. 83, 84.) Again, no sexual abuse was reported. A.S. testified that she decided not to alert the caseworker to molestations because she thought that the incidents [8] had stopped. In contrast, she also stated that the reason she never told anyone was because she was scared, and did not know whom she could tell. (Tr. 57.) On cross-examination, appellant's attorney probed A.S. regarding her continued failure, or neglect, to report the abuse. She contended that she declined to report the incidents because she was afraid of being placed in foster care.**

[*P14] In early 2002, A.S. ran away from home following an incident when appellant disciplined her by slapping her. This time, she immediately reported the incident to the police. FCCS again got involved. The joint investigation resulted in FCCS issuing a "safety plan" to appellant, which prohibited him from physically disciplining the children. The defense offered a copy of the safety plan into evidence at trial.

[*P15] The scope of A.S.'s cross-examination also touched on a variety of issues not directly related to her accusations against appellant, including the slapping incident and her running away from home. She admitted that the reason appellant had slapped her was because he caught her kissing an older man in a public place, and that appellant disapproved of her relationship with the man because of his age. [9] This man, Peter**

Soos, was about ten years older than A.S. Also on cross-examination, A.S. revealed that one of her uncles (on her mother's side) was jailed for molesting a girl.

[*P16] The prosecution rested its case after the close of A.S.'s testimony. Appellant's attorney moved for judgment of acquittal, arguing that the victim's testimony, standing alone, was insufficient to prove appellant's guilt. (Tr. 196-199.) Although the trial court denied the motion, the court acknowledged the weakness of the case: "It's certainly not the strongest of cases and I think both lawyers would concur with that. But it is a question of fact for the jury." (Tr. 198.)

[*P17] After the trial court denied the defense's motion to acquit, they presented two witnesses to rebut A.S.'s testimony: Margie Jarrell--the woman whom appellant married in 1998, but had since divorced--and appellant himself. Ms. Jarrell denied having any knowledge of the alleged fondling, and further testified that she believed A.S. was a liar and a thief. When cross-examined by the prosecution, however, Ms. Jarrell admitted that she did not know A.S. during the bulk of the time the alleged abuse took place. Ms. Jarrell also had difficulty answering [**10] a question relating to an allegation that appellant intended to charge his children to help them get their citizenship. (Tr. 219.)

[*P18] Appellant testified with the assistance of a courtroom interpreter, and wasted no time in flatly denying the allegations against him:

Q. I'll just ask you: You have seen [A.S.] testify?

A. Yes.

Q. You've heard her testify?

A. What do you mean? (Interpreter and defendant conferring.) Oh, yes.

Q. She has said that you had taken her hand and put it on your penis.

A. No, sir.

Q. Do you know what your penis is?

A. Yes.

Q. Did you ever take [A.S.'s] hand and put it on your penis?

A. No, sir.

Q. She has said that she watched movies with you and [J.S.] and that you would put your hand down her pants or on her pants --

A. No, sir.

said okay. I go to McDonald's. I working in the paper to get insurance. I say okay. And that's why I buy this car. Go ahead. Everybody do this.

But I open a bank account for her. She's not 16 years old. So she doesn't have a -- a bank not give her an account. I put it under my name. I tell her don't touch. Maybe -- I can tell her maybe just a bit. Every money, I paid the insurance. I paid everything, you know, it's parents after, you know --
(Tr. 231-234.)

[*P19] Although he stumbled frequently during [**12] direct and cross-examination, appellant's denial was unequivocal. His testimony, moreover, was consistent with that of Ms. Jarrell--that A.S. fabricated the allegations because of anger and frustration over her inability to get U.S. citizenship.

[*P20] In early October 2003, just before A.S. reported the molestation to the police, Ms. Jarrell testified that A.S. came to her house for a surprise visit. This was within a few days of A.S.'s 18th birthday. Ms. Jarrell had not seen A.S. in almost two years--since she had run away from home. She testified that A.S. demanded that she persuade appellant to help A.S. finalize her U.S. citizenship, and that if he did not, A.S. threatened to go to the police and report the molestation. A.S. said she could get \$ 50,000 from the Ohio Victims of Crime Compensation Program if appellant was convicted. Although she admitted going to Ms. Jarrell's house, A.S. denied making any demands or threats. Coincidentally, perhaps, A.S. reported the abuse to the police at about the same time as the visit.

[*P21] At the end of the day, either appellant's broken-English testimony lacked credibility, or A.S. simply appeared more credible, because the jury convicted appellant [**13] on all 25 counts. To the legal test of the sufficiency of the evidence supporting appellant's conviction, we must view all the evidence in a light most favorable to the prosecution. Unlike the jury, we did not have the luxury of watching A.S. testify. Because the jury believed A.S.'s testimony, we presume that her testimony was credible. Based on that assumption, we consider whether the evidence is sufficient to support each element of the crimes charged. We hold that it is.

[*P22] We have already said, HN2at least insofar as rape is at issue, there is no statutory requirement that a victim's testimony be corroborated. *State v. Jackson* (Feb. 20, 2001), Franklin App. No. 00AP-183, 2001 Ohio App. LEXIS 589 (citing *State v. Love* [1988], 49 Ohio App.3d 88, 91, 550 N.E.2d 951). Although the issue has not been squarely addressed by the Supreme Court of Ohio, this is the established view among the appellate districts who have decided it. See, e.g., *State v. Heilman*, Trumbull App. No. 2004-T-0133, 2006 Ohio 1680, at P46; *State v. Adams*, Lorain App. No. 05CA008685, 2005 Ohio 4360, at P13; *State v. Wright*, Columbia App. No. 97 CO 35, 2002 Ohio 1548, at P23; *State v. Corrothers* (Feb. 12, 1998), Cuyahoga App. No. 72064, 1998 Ohio App. LEXIS 491; *Love*, supra; *State v. Shafeek* (Dec. 14, 1994), Montgomery App. No. 13666, 1994 Ohio App. LEXIS 5610; [**14] *State v. Rickard* (Sept. 25, 1992), Mercer App. No. 10-91-5, 1992 Ohio App. LEXIS 4908 (each citing *State v. Gingell* [1982], 7 Ohio App.3d 364, 365, 7 Ohio B. 464, 455 N.E.2d

1066). Although corroborating testimony, or evidence, gives greater weight to a victim's testimony, it is not a requirement. Shafeek, *ibid.* The only real difference between the crimes of rape and GSI is that the former requires actual penetration, where the latter does not. See R.C. 2907.01 *et seq.*; *cf.* R.C. 2907.05(A). Thus, under the current law, if the victim's testimony in a rape trial does not require corroboration, there is no legitimate reason to require corroboration in a trial for GSI.

[*P23] Although A.S.'s testimony shows obvious weaknesses, sufficiency of the evidence does not take those circumstances into account. All that matters is whether a reasonable jury could have believed A.S.'s testimony. Accordingly, to the extent the fourth assignment of error alleges the evidence was insufficient to support the jury's verdict, we must overrule.

[*P24] HN3When considering the weight of evidence, the test is considerably different. In that regard, we sit as a "thirteenth juror," we weigh the quality of the evidence, and the credibility of [**15] the witnesses. See, e.g., *State v. Robinson* (Jan. 22, 2002), Franklin App. No. 01AP-748, 2002 Ohio App. LEXIS 169 (quoting *Tibbs v. Florida* [1982], 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L. Ed. 2d 652; *State v. Martin* [1983], 20 Ohio App.3d 172, 175, 20 Ohio B. 215, 485 N.E.2d 717). All things considered, we determine whether the jury "clearly lost its way," in a manner that created such a "manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.* This discretionary power should only be exercised in the extraordinary case where the evidence weighs heavily against the conviction. Indeed, the Ohio Constitution prevents us from overturning the jury's verdict without a unanimous vote by this panel. See Section 3(B)(3), Article IV, Ohio Constitution. (HN4"No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.") With this standard in mind, we turn to the evidence in this case.

[*P25] The sole issue here is the victim's credibility, because, again, the victim's testimony was the only evidence weighing in favor of conviction. Clearly, A.S. exhibited some credibility issues, based on her testimony, the alleged facts at-large, and the circumstances [**16] and timing of her accusation.

[*P26] As the trial judge acknowledged, this case is not very strong. At first glance, we take notice that the defense presented two witnesses, while the prosecution presented only one. Although Ms. Jarrell testified that she had no knowledge of the alleged molestation, A.S. made her allegations as to a time frame that effectively eliminates Ms. Jarrell's testimony from weighing against her own. Further, defense counsel was afforded wide latitude during A.S.'s cross-examination. (Tr. 134-136.) HN5Even though a victim's character is usually inadmissible in sex offense cases, a witness's reputation for truthfulness is always fair game. See, generally, *State v. Williams* (1986), 21 Ohio St.3d 33, 34, 21 Ohio B. 320, 487 N.E.2d 560 (quoting R.C. 2907.02[D]); see, also, Evid.R. 608; but, see, Evid.R. 404(A)(2). Counsel for appellant delved into A.S.'s tumultuous past, exposed various inconsistencies in her stories, and attacked her reputation for dishonesty. (Tr. 136, 140, 173, 180.) Had counsel been denied that opportunity, there may have been prejudicial

error (see, e.g., *State v. Swann*, 171 Ohio App.3d 304, 2007 Ohio 2010, at P12, 870 N.E.2d 754, citing *Holmes v. South Carolina* [2006], 547 U.S. 319, 126 S.Ct. 1727, 164 L. Ed. 2d 503). **[**17]** But this did not happen.

[*P27] On the other hand, appellant vehemently denied having any inappropriate or sexual contact with A.S. (Tr. 231-234.) He blamed the accusations on A.S.'s greed and desire to get revenge, citing her threats to Ms. Jarrell. (Tr. 233.) He also admitted slapping A.S., when he found her kissing Peter Soos in a public place. Shortly after this event was when A.S. ran away from home with Mr. Soos.

[*P28] Ultimately, the jury believed A.S. And even though we sit as the proverbial thirteenth juror, there is not enough conflicting testimony or evidence that would warrant a reversal on manifest weight review. This simply means that the record lacks substantive evidence to weigh against it. Applying the legal standards for assessing the sufficiency and weight of the evidence set forth by the Supreme Court of Ohio, we cannot say that the verdicts were against either. Accordingly, the fourth assignment of error is overruled.

[*P29] Turning to the first assignment of error, counsel for appellant argues that, because the statute under which Kepiro was convicted can be either a third or fourth degree felony, under *State v. Pelfrey*, 112 Ohio St.3d 422, 2007 Ohio 256, 860 N.E.2d 735, he cannot be guilty of the **[**18]** more severe crime unless the jury made a specific finding to that effect. We hold that Pelfrey does not control, because the statute at issue in Pelfrey was mechanically different from the statute at issue here.

[*P30] The state responds to appellant's argument by noting that HN6R.C. 2907.05(A) is not a basic statute with enhancements like the one in Pelfrey. (Appellee's brief, at 7.) The GSI statute, rather, has multiple parts, each paragraph setting forth a separate crime, and each having a different penalty. See R.C. 2907.05(A). The state is correct.

[*P31] The defendant in Pelfrey was convicted of tampering with records, under R.C. 2913.42(B)(4), a felony of the third degree. *Id.* at P3. Tampering with records is a first-degree misdemeanor; however, there are a number of elements that can enhance the crime to a felony of the fifth, fourth, or third degree. A conviction on the most severe level of the statute can only occur if the records at issue belonged to the government. See R.C. 2913.42(B)(4). Obviously, under the statute, whether the records belonged to the government is an essential element of the crime which must be proven to the jury beyond a reasonable doubt. See, generally, *In re Winship* (1970), 397 U.S. 358, 361, 90 S.Ct. 1068, 25 L. Ed. 2d 368 **[**19]** (holding that the prosecution must prove each element of the crime charged beyond a reasonable doubt).

[*P32] But the jury convicted Pelfrey of tampering with records, "as charged in the indictment." Pelfrey, at P17 (O'Donnell, J., dissenting). That is, they did not expressly find that the records belonged to a governmental entity, nor did they specify that they were convicting him of a third-degree felony. On appeal to the Supreme Court of Ohio, Pelfrey argued that under R.C. 2945.75 he could only be guilty of the least severe crime unless the

jury's verdict form stated otherwise. Justice O'Donnell rejected that argument, noting that the indictment properly put the defendant on notice that he was being tried for the third-degree felony, and that convicting him "as charged in the indictment" was the same thing as convicting him of the third-degree felony. See *id.* The majority, however, strictly applied R.C. 2945.75, holding that it requires that the guilty verdict state either: (1) the degree of the offense; or (2) that the additional element making it more serious is present. Pelfrey, at P4 (majority opinion). The court remanded the case with instructions to enter a conviction under the [**20] misdemeanor, interpreting R.C. 2945.75(A)(2) to mean that an unspecified guilty verdict can only constitute a finding of guilty as to the least degree of the offense charged. See *id.*

[*P33] The reason Pelfrey does not control here is that the tampering with records statute only prohibits a single type of conduct. Depending on the attendant circumstances, that conduct can be punished in varying ways. This is similar, for example, to the theft statute, which, more or less prohibits "stealing." See R.C. 2913.02. Obviously, the punishment for stealing \$ 13,000,000 in rare coins will be more severe than the punishment for stealing a candy bar from 7-Eleven.

[*P34] The statute appellant was convicted under, HN7R.C. 2907.05(A), essentially prohibits five different kinds of conduct--sexual conduct with another: (1) by force; (2) by deception (using drugs, alcohol, or other intoxicants); (3) knowing the other person's judgment is impaired; (4) when the victim is less than 13-years old; or (5) whose judgment is impaired because of a mental defect. Each of these is a separate offense, having a separate penalty. Under R.C. 2907.05(A), there are no additional elements or attendant circumstances that change the [**21] penalty. Therefore, unlike in Pelfrey, R.C. 2945.75 does not literally apply here. The jury convicted appellant of having sexual contact with another who was less than 13-years old. See R.C. 2907.05(A)(4). The statute defines this conduct as a third-degree felony. We, therefore, overrule the first assignment of error.

[*P35] Turning to the third assignment of error, the state concedes that the trial court erred by finding that the prison term was mandatory for acts committed after July 1, 1996. We, therefore, sustain this assignment of error.

[*P36] The state also concedes that the trial court erred as to Counts 1 through 7 of the indictment. We, therefore, sustain the second assignment of error as to those counts.

[*P37] With regard to Counts 8 through 13 of the indictment, the state argues that because the prohibited conduct could have occurred after the General Assembly's enactment of S.B. No. 2, on July 1, 1996, appellant's conviction under these counts is proper. (Appellee's brief, at 11.) We disagree.

[*P38] At issue here is which version of R.C. 2907.05 applies when the prosecution cannot prove when the alleged crime(s) occurred. In 1995, the General Assembly overhauled the Ohio Criminal Code by passing [**22] the Omnibus Criminal Sentencing Act. See Publisher's Note to R.C. 2901.01 (1996). HN8These statutory revisions took effect July 1,

1996. As a result, any crime committed prior to July 1, 1996 is to be adjudicated under the statute previously in existence. In this case, applying the old version of R.C. 2907.05 substantially changes the outcome, at least insofar as appellant is concerned.

[*P39] Under the current statutory provision, R.C. 2907.05(B)(2) provides "a presumption that a prison term shall be imposed." Under the old provision, subsection (B) (2) did not exist. Thus, under the old statute there was no presumption of mandatory prison time.

[*P40] A.S. testified that appellant molested her regularly throughout 1996--about once or twice each month. (Tr. 77.) Assuming that A.S.'s testimony was true, about half the molestation incidents occurred before July 1, 1996, and half of the incidents occurred after. This assumption, however, fails to take into account the facial imprecision with which A.S. recounted her allegations. The state is essentially arguing that we should disregard that imprecision, and simply presume that appellant molested her with calendar-like regularity. (Appellee's brief, at [**23] 11.) But making this assumption would rob appellant of the constitutional guarantees of due process, and the presumption that a criminal defendant is innocent until proven guilty.

[*P41] HN9It is a cornerstone of American jurisprudence that a criminal defendant is entitled to "be informed of the nature and cause of the accusation" against him. See, generally, the Sixth Amendment to the United States Constitution; see, also, Section 10, Article I, Ohio Constitution. Although the United States Supreme Court has yet to hold that a criminal defendant's right to indictment by grand jury vis-à-vis the Sixth Amendment to the United States Constitution is binding upon the states, the Ohio Constitution recognizes this right in Article I. See, e.g., *State ex rel. Hoel v. Brown* (1922), 105 Ohio St. 479, 486, 1 Ohio Law Abs. 230, 138 N.E. 230 (holding that HN10due process of law, as guaranteed by the United States and Ohio Constitutions, requires "some legal procedure in which the person proceeded against if he is to be concluded thereby, shall have an opportunity to defend himself"); *State v. Collins* (1952), 94 Ohio App. 401, 402, 115 N.E.2d 844 (HN11"While the constitutional phrase 'due process' eludes exact definition, it would seem to require in a criminal case, [**24] where the liberty of a defendant is at stake, accuracy, clearness, and certainty in the charge of the court to the jury"). Cf. Section 1, Fourteenth Amendment. The rationale is that a criminal defendant cannot prepare a defense unless he or she knows precisely of the crime charged. Without that knowledge, the defendant cannot know what elements the state is required to prove, and consequently, how to negate the elements of the offense.

[*P42] HN12Though, oftentimes, courts neglect to distinguish between the different types of due process, there are two--substantive and procedural due process. Procedural due process requires that individuals be given a meaningful opportunity to be heard before their fundamental rights are encroached. See, e.g., *Fuentes v. Shevin* (1972), 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L. Ed. 2d 556; *Hoel*, supra, at 486. Substantive due process protects an individual's fundamental rights, regardless of the sufficiency of the process afforded. Fundamental rights are those that are enumerated in the Bill of Rights, or those identified

as fundamental rights by the United States Supreme Court. See *ibid*; see, also, *Washington v. Glucksberg* (1997), 521 U.S. 702, 721, 117 S.Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772.

[*P43] Criminal trials [**25] are themselves, processes; thus, procedural due process protects how those trials are conducted. In Ohio, a criminal defendant's right to indictment is specifically enumerated in the constitution, which makes the right fundamental. Thus, criminal defendants are also entitled to substantive due process under Ohio law. It is also axiomatic that what the constitution grants, no statute may take away. *Grieb v. Dept. of Liquor Control* (1950), 153 Ohio St. 77, 81, 90 N.E.2d 691.

[*P44] HN13A criminal defendant is denied due process when he is convicted of a crime without the state having proved each element of the crime beyond a reasonable doubt. See, e.g., *Winship*, *supra*, at 361. Similarly, a defendant is denied due process when convicted of a crime other than the crime charged (unless it is a lesser included offense). See, e.g., *Cokeley v. Lockhart* (C.A.8, 1991), 951 F.2d 916, certiorari denied, 506 U.S. 904, 113 S.Ct. 296, 121 L. Ed. 2d 220. In *Cokeley*, the Eighth Circuit held that the defendant was denied due process when he was charged with rape by sexual intercourse, but the trial judge instructed the jury to return a guilty verdict if it found the state established that the defendant had forced the victim to engage either in [**26] sexual intercourse, or deviate sexual activity--under Arkansas law, rape by sexual intercourse and rape by deviate sexual activity were two separate crimes, and the court's instruction permitted conviction for the uncharged crime of rape by deviate sexual activity. Before coming to the Eighth Circuit on collateral review, on direct appeal the defendant argued that the trial judge should not have instructed the jury on rape by deviate activity, because the State had charged him only with rape by sexual intercourse. Thus, the resulting general verdict constituted a conviction for a crime not charged. The Arkansas Supreme Court rejected that analysis, and upheld *Cokeley's* conviction. See *Cokeley v. State* (1986), 288 Ark. 349, 350-352, 705 S.W.2d 425, certiorari denied, 479 U.S. 856, 107 S.Ct. 195, 93 L. Ed. 2d 127. The Arkansas Supreme Court specifically held that the rape statute constituted a single criminal offense with two means of commission, and concluded that the jury instructions properly comported with the language of the statute. See *id*; see, also, *Cokeley*, at 917-918.

[*P45] HN14In a criminal law context, due process is essentially the proposition that a statute must give fair warning of the conduct that it makes a crime. [**27] *Bouie v. City of Columbia* (1964), 378 U.S. 347, 350-351, 84 S.Ct. 1697, 12 L. Ed. 2d 894 (quoting *United States v. Harriss* [1954], 347 U.S. 612, 617, 74 S.Ct. 808, 98 L. Ed. 989). The constitutional requirement of definiteness is violated when a criminal statute fails to give fair notice that the conduct is forbidden, and no one should be held criminally responsible for conduct he or she could not reasonably understand to have been prohibited. *Harriss*, *ibid*.

[*P46] This so-called fair warning requirement has even deeper roots, however, in the Ex Post Facto Clause of the United States Constitution. Section 10, Article 1, United States Constitution. Read literally, *ex post facto* means "after the fact." *Black's Law Dictionary* (8 Ed.2004) 620. These laws, of course, are prohibited. The essence of an *ex post facto* law is retroactivity: No statute may punish conduct that was not criminal at the time it was

committed. Thus, the prohibition applies to conduct occurring before the statutory enactment that disadvantages the offender by, either: (1) altering the definition or elements of a crime; (2) increasing the punishment for its commission; or (3) depriving the defendant of any defense that was available when the act was committed. **[**28]** See *Lynce v. Mathis* (1997), 519 U.S. 433, 440-441, 117 S.Ct. 891, 137 L. Ed. 2d 63; see, also, *Collins v. Youngblood* (1990), 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L. Ed. 2d 30.

[*P47] Related to the fair warning requirements are the vagueness doctrine, and the rule of lenity. *United States v. Laton* (C.A.6, 2003), 352 F.3d 286, 313-314 (Sutton, C.J., dissenting). Though the precise issue in *Laton* is inapposite to the issue here, the dissenting opinion provides a good backdrop of the relevant doctrines. **HN15**The vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* (quoting *United States v. Lanier* [1997], 520 U.S. 259, 266-267, 117 S.Ct. 1219, 137 L. Ed. 2d 432). **HN16**The rule of lenity--also known as the canon of strict construction of criminal statutes--is similar to the vagueness doctrine to the extent that the rule "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Liparota v. United States* (1985), 471 U.S. 419, 427, 105 S.Ct. 2084, 85 L. Ed. 2d 434; *United States v. Bass* (1971), 404 U.S. 336, 347-348, 92 S.Ct. 515, 30 L. Ed. 2d 488. *Lanzetta v. State of New Jersey* (1939), 306 U.S. 451, 453, 59 S.Ct. 618, 83 L. Ed. 888. **[**29]** The touchstone of whether there was fair warning is whether the statute, either standing alone or as construed, made it reasonably clear that the defendant's conduct was criminal. *Swann*, at P33.

[*P48] The rule of lenity is most commonly invoked when a statute is ambiguous (as opposed to merely vague). *Id.* Because "the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal," when applying the rule to an ambiguous statute, any ambiguity should be resolved in favor of the criminal defendant, rather than the government. *Laton*, at 314.

[*P49] All this discussion of due process and the rule of lenity is relevant because appellant is arguing that the prosecution failed to prove that he committed the alleged acts after the statute at issue was amended on July 1, 1996. We agree. Furthermore, because the old and amended versions of R.C. 2907.05 are in conflict regarding the presumption of a mandatory prison term, we must apply the rule of lenity. Additionally, the fact that the revised statute provides a harsher punishment than its predecessor, sentencing appellant under the revised statute--without proof the conduct occurred after July 1, 1996--operates **[**30]** as an ex post facto law. The state's argument that the conduct could have occurred after July 1, 1996 is fundamentally flawed. **HN17**It is the state's burden to prove each element of each count of the indictment beyond a reasonable doubt. If the state cannot meet its burden as to any element, of any count, that count must be dismissed. Here, the state did not prove that appellant molested A.S. after July 1, 1996. Therefore, a mandatory prison term was inappropriate and, accordingly, we sustain the second assignment of error in its entirety.

[*P50] In sum, we overruled the first and fourth assignments of error. The conviction is therefore affirmed. We sustained the second and third assignments of error. Having found reversible error relating to sentencing, the judgment of the Franklin County Court of Common Pleas is hereby reversed, and the sentence is vacated. The case is remanded to the trial court for a new sentencing hearing consistent with the preceding instructions.

Judgment affirmed in part, reversed in part, and cause remanded for further appropriate proceedings.

BROWN, J., concurs.

FRENCH, J., concurs in judgment only.