IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 08-0498
Plaintiff-Appellee,	:	On Appeal from the Adams County Court of Appeals Fourth Appellate District
vs.	:	
JOSEPH HOFER,	:	C.A. Case No. 07CA835
Defendant-Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JOSEPH HOFER

C. DAVID KELLEY 0061368
Adams County Prosecutor

Office of the Adams County Prosecutor
110 West Main Street
West Union, Ohio 45693
(937) 544-3600
(937) 544-8296 (fax)

COUNSEL FOR THE STATE OF OHIO

OFFICE OF THE OHIO PUBLIC DEFENDER

CRAIG M JAQUITH 0052997
Assistant State Public Defender
(Counsel of Record)

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (fax)
jaquithc@opd.state.oh.us

COUNSEL FOR JOSEPH HOFER

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WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Joseph Hofer was convicted of rape. His right to effective assistance of counsel were violated at the trial level, and not remedied on appeal. This Court should grant jurisdiction in order to reestablish the vital constitutional principles presented by this case.

STATEMENT OF THE CASE

A one-count indictment was filed against Joseph Hofer by the Adams County grand jury, alleging that he committed rape by engaging in sexual conduct with a person under ten years of age. The case proceeded to a jury trial on March 29, 2006. At the close of the State's opening statement, Hofer moved for a mistrial, due to a controversial image of the victim having been shown to the jury. The trial court granted the motion, and the case was set for a new trial in October 2006. In the interim, Hofer was assigned new appointed counsel, his original counsel no longer being under contract to provide representation of indigent defendants.

The second trial commenced on October 23, 2006. After the State presented its case, Hofer moved the trial court for an instruction regarding gross sexual imposition, and said motion was denied. Hofer was convicted of rape and sentenced to life in prison, with eligibility for release after ten years.

A timely appeal was filed. The Fourth District Court of Appeals overruled two assignments of error and affirmed Hofer's convictions. *State v. Hofer* (Jan. 22, 2008), Adams App. No. 07CA835.

STATEMENT OF FACTS

On April 19, 2005, Charity Nelson, then the girlfriend of Joseph Hofer, witnessed Hofer with their two-year-old daughter, H.H., on the couch in their home. H.H. was naked, and was on top of Hofer with "her genitals up on his face." Nelson testified that H.H.'s vagina was on Hofer's face. Nelson further testified that Hofer was also naked, had a blanket covering his body from the waist down, and appeared to have an erection. She asked him what was happening, and he said "I don't know what to say." He assumed she would call the police about what she had witnessed, and asked her to wait two or three weeks, so he could acquire enough money to move elsewhere. Nelson contacted her family, who then contacted the police, and H.H. was taken to be examined. Mary Pat Burke, a Sexual Assault Nurse Examiner (SANE nurse) at Cincinnati Children's Hospital, examined H.H. and collected a rape kit, and found no evidence of sexual assault.

Based on Nelson's complaint, relayed to the Winchester Police Chief, Hofer was placed under arrest, and Mirandized. Patton questioned Hofer in the Sheriff's office. Hofer initially stated that the contact with H.H. was a mistake, in that the child had moved unexpectedly while he was playing with her. Patton testified that Hofer then claimed that he "licked the genitalia of the child," which Patton stated meant her vagina. Hofer also made a written statement.

Sheriff's Detective Jim Heitkemper testified that he recorded an interview with Hofer. The videotape of that interview was played at trial, and Hofer stated that while H.H. was on top of him, and the blanket was between them, he ejaculated. He denied any direct contact between H.H. and his penis, but admitted that he placed his tongue in her vagina. BCI personnel testified that they examined Hofer's underwear, and determined that there was a semen stain on them. The semen was then subjected to DNA testing, and the DNA profile matched Hofer's.

ARGUMENT

PROPOSITION OF LAW: Failure to object to the admission of a defendant's self-incriminating statement to the authorities, when the corpus delicti of a crime has not yet been established by the State, and failure to move to dismiss the indictment on double jeopardy grounds after the first trial ended in a mistrial due to misconduct by the prosecution, constitute ineffective assistance of counsel. 6th & 14th Amendments, U.S. Const.

All criminal defendants are entitled to the effective representation of counsel. *Strickland v. Washington* (1984), 466 U.S. 668. Where counsel's performance falls below an objective standard of reasonableness, and there is a reasonable probability that absent counsel's errors the outcome would have been different, reversal of a conviction is required. Id. at 694. While it cannot be said that Mr. Hofer's trial counsel was incompetent in every respect, inexcusable errors cannot be rationalized as reasonable strategic decisions.

Hofer's statement to the authorities admitted mouth-to-vagina contact between himself and H.H, and he authored an apology letter regarding the same. But prior to that videotaped statement being played for the jury, and the letter being introduced, the State had not first adduced evidence to establish the corpus delicti of rape. What the State had introduced was some evidence from Charity Nelson that sexual contact, as it is statutorily defined, had occurred, but there was no evidence that sexual conduct had occurred. As discussed in the preceding Assignment of Error, Nelson never testified to oral-genital contact; she solely testified that Hofer's face was under H.H.'s vagina, which cannot be considered "some evidence" of sexual conduct.

What the State had presented to the jury, before Hofer's statements were used to secure his own conviction, was not sufficient to establish the corpus delicti of rape. See, e.g., *State v. Black* (1978), 54 Ohio St. 2d 304, 307 (state must produce "*some* evidence outside of the

confession that tends to prove *some* material element of the crime charged" (italics sic; underlining added)). Here, the State only adduced "some evidence" of gross sexual imposition—not rape—before Hofer's extrajudicial confession was used against him. Thus, reasonably competent counsel would have objected to the admission of his statement and apology.

The prejudice to Hofer resulting from this error of counsel is patent, and undermines confidence in the jury's verdict. Had Hofer's statement and apology letter been excluded, the jury would only have heard that:

1) Nelson witnessed face-to-genital contact,

2) the medical personnel detected no trace evidence of sexual assault,

3) Hofer's underwear bore a semen stain with DNA that matched Hofer's DNA.

A rape conviction could not have been sustained on such evidence. At most, a gross sexual imposition count could reasonably have been based on these facts. Trial counsel failed to act as reasonably competent counsel would have, and confidence in the jury's verdict is severely undermined as a result.

Regarding the double jeopardy argument that trial counsel failed to make, Hofer's first trial on the instant indictment commenced March 29, 2006, and the jury was impaneled on March 30, 2006. On the latter date, during his opening statement, the assistant prosecutor displayed for the jury several pictures of H.H. The last of these showed her with her legs apart, wearing a skirt. Defense counsel immediately moved for a mistrial, noting the irremediable prejudice that occurred when the jurors viewed that image. The State protested and requested that a mistrial not be ordered, indicating that the display of the photograph was inadvertent.

Absent other considerations, such an action would normally not rise to the level of misconduct that would bar a retrial on double jeopardy grounds. In *Oregon v. Kennedy* (1982), 456 U.S. 667, the United States Supreme Court held that double jeopardy protection is triggered only when the mistrial was the result of intentional misconduct on the part of the prosecution, designed to force the defense into seeking a mistrial.

But the State's assertion that the display of the offending photograph was wholly inadvertent must be viewed with skepticism in light of subsequent developments in the case, and in light of the trial court's reaction to the event. To address the latter point first, the court's incredulity is apparent: "Mr. Weaver, how could there not possibly be a protection device? We have counted on your technology. How could you possibly not have a protection device, when I have – I have said this from the very first pre-trial . . . nothing hits that screen." "What makes you believe that the Court was going to allow that to ever be flashed on that wall?" Id. "[W]e were informed there would be one photo. . . . Always informed there would be one photo. Let's talk about that one photo. That's the problem that the Court is having right now."

But it is the former point—subsequent case activities—that most forcefully undermines the State's claim of inadvertence. Two weeks to the day *after* the mistrial had been declared, a forensic scientist from BCI analyzed, for the first time, the substance found on Hofer's underwear. It was determined that the substance was semen. Significantly, BCI had been in possession of the evidence since June 2, 2005, but did not test it until after the date on which the mistrial occurred. Subsequently DNA testing performed by BCI confirmed that the DNA of the sperm found on the underwear matched Hofer's DNA.

Had the State proceeded through the entire first trial without causing a mistrial, this important corroborative evidence would not have been presented to the jury. Because the State

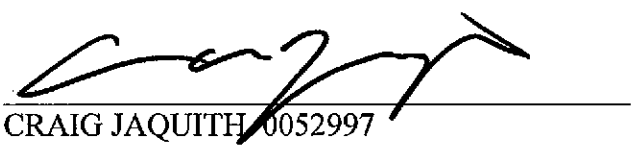
gained additional scientific evidence by forcing the mistrial, the cause of the mistrial cannot be deemed to be accident or mistake. "[O]nly in a rare and compelling case will a mistrial declared at the request of the defendant . . . bar a retrial." *Oregon v. Kennedy*, 456 U.S. at 690. The particular facts herein make this such a case. Retrial would have been barred on double jeopardy grounds, had such a motion been made and zealously argued to the trial court. Competent counsel would have moved the court for dismissal of the case against Hofer, and the failure to do so resulted in his conviction and the violation of his Sixth Amendment rights.

CONCLUSION

As demonstrated above, Mr. Hofer suffered deprivation of his constitutional rights. This Court should assert jurisdiction and assess his claim on its merits.

Respectfully submitted,

Office of the Ohio Public Defender



CRAIG JAQUITH 0052997
Assistant State Public Defender
(Counsel of Record)

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (fax)

COUNSEL FOR JOSEPH HOFER

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JOSEPH HOFER has been served by regular U.S. Mail upon C. David Kelley, Adams County Prosecutor, 110 West Main Street, West Union, Ohio 45693, on this 7th day of March, 2008.

CRAIG M. JAQUITH 0052997
Assistant State Public Defender
Counsel of Record

COUNSEL FOR JOSEPH HOFER

273730

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STATE OF OHIO,	:	Case No.
Plaintiff-Appellee,	:	On Appeal from the Adams County Court of Appeals Fourth Appellate District
vs.	:	
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APPENDIX TO MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JOSEPH HOFER

C. DAVID KELLEY 0061368
Adams County Prosecutor

Office of the Adams County Prosecutor
110 West Main Street
West Union, Ohio 45693
(937) 544-3600
(937) 544-8296 (fax)

COUNSEL FOR THE STATE OF OHIO

OFFICE OF THE OHIO PUBLIC DEFENDER

CRAIG M JAQUITH 0052997
Assistant State Public Defender
(Counsel of Record)

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (fax)
jaquithc@opd.state.oh.us

COUNSEL FOR JOSEPH HOFER

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY, OHIO

State Of Ohio PLAINTIFF-APPELLEE VS Joseph Hofer DEFENDANT-APPELLANT	:	Case No: CA 835 NOTICE OF ENTRY

Pursuant to Appellate Rule 30-A, you are hereby notified that an Entry, copy hereto attached, was filed for journalization in this Court on 01/22/08 .

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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

State of Ohio,	:	
Plaintiff-Appellee,	:	Case No. 07CA835
v.	:	
	:	DECISION AND
Joseph Hofer,	:	JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

David H. Bodiker, OHIO PUBLIC DEFENDER, and Craig M. Jaquith, ASSISTANT OHIO PUBLIC DEFENDER, Columbus, Ohio, for appellant.

C. David Kelley, Adams County Prosecutor, and Mark R. Weaver, Assistant Adams County Prosecutor, West Union, Ohio, for appellee.

Kline, J.:

{¶1} Joseph Hofer appeals his rape conviction in the Adams County Common Pleas Court. On appeal, Hofer contends that the trial court erred when it refused to instruct the jury on the lesser-included offense of gross sexual imposition. Because the evidence presented at trial would not reasonably support both a rape acquittal and a conviction of gross sexual imposition, we disagree. Hofer next contends that he did not receive the effective assistance of counsel as guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution. Because Hofer failed to satisfy the first prong of the two-pronged test of *Strickland v. Washington* (1984), 466 U.S. 668, we disagree.

Accordingly, we overrule Hofer's two assignments of error and affirm the judgment of the trial court.

I.

{¶2} An Adams County Grand Jury indicted Hofer for rape in violation of R.C. 2907.02(A)(1)(b) & (B), with the additional finding that the victim was less than ten years old, a felony of the first degree. Hofer entered a not guilty plea and the case proceeded to a jury trial.

{¶3} Hofer moved for a mistrial after he claimed that the state intentionally showed a sexually suggestive photo of the victim with her legs open to the jury. The state claimed that the split second showing of the fully clothed victim was inadvertent. The court granted Hofer's motion for a mistrial but stated in its judgment entry "that it is the Court's belief, that the State of Ohio did not intend to provoke a Mistrial, and therefore Retrial is not barred." Later, after the seating of a second jury, the case proceeded to trial.

A. State's Version of the Facts at Second Trial

{¶4} Hofer lived with Charity Nelson (hereinafter "Mother") and their two children. Their two-year-old daughter was the victim.

{¶5} One early afternoon in 2005, Mother returned home to find Hofer with the victim on the sofa. She said, "When I walked in, I saw him on the couch, with just a blanket on, and he had..., [victim] was, she was uh, she was naked, and she was..., he had her on his face." She explained, "He had her facing the other wall, with her feet towards his stomach, and her genitals were up on his face." The Mother defined genitals as "vagina." She said that she could tell that he had

an "erection" because the blanket was "poofed up." She said that Hofer had one hand on the victim's back and one hand down under the blanket.

{¶6} The Mother confronted Hofer and then left with their children. She immediately told her mom, who is a nurse, about the incident. She said that her "uncle and papaw" reported the incident to the Winchester Police Department. The Mother's mom drove the Mother and victim to the hospital emergency room for a rape examination.

{¶7} During a taped interview played to the jury, Hofer admitted to Winchester Police Chief Phillip Patton, Jr. and Detective Jim Hietkemper of the Adams County Sheriff's Department that he stuck his tongue in the victim's vagina. He further admitted to Chief Patton and Detective Hietkemper that, during the incident with his daughter, he got an erection and ejaculated into his underwear. Hofer said that he had a flaw in judgment. At some time during or after the interview, he wrote an apology letter and said that he was sorry for sticking his tongue in his daughter's vagina.

{¶8} At the hospital, Mother and victim saw Amiee Sundeen, who was a registered nurse and a Sexual Assault Nurse Examiner (hereinafter "SANE"), for a rape exam. However, nurse Sundeen's training did not include sexual assaults of young children. Thus, she referred the victim to Children's Hospital in Cincinnati for a children's sexual assault exam and made all the arrangements.

{¶9} Mother took the victim to Children's Hospital that same evening. They saw Mary Pat Burke, a registered nurse and a SANE nurse. After examining the victim, Nurse Burke did not find any evidence of sexual abuse. She said that her

finding was not uncommon when oral sex was the alleged sexual assault. She said that if the victim urinated after the incident, then that event could wash the evidence away. The Mother said that the victim urinated two or three times between the assault and the examination.

{¶10} Dan Laux, from BCI, verified that Hofer's underwear contained sperm. Linda Eveleth, also of BCI, verified that the sperm was consistent with Hofer's DNA.

B. Hofer's Version of Facts at Second Trial

{¶11} Hofer did not testify. He called one witness, Charles Hofer, his oldest brother. His brother testified that Hofer and Mother "fought like cats and dogs" during their relationship. He stated that he personally "broke up a couple [of] shouting matches." He further stated that he observed the violence of Mother when she picked up the baby's playpen and threw it at his brother. In addition, he said that at the time of the incident, Hofer was in the process of arranging to go to Delaware to live with a new girlfriend.

{¶12} Earlier, through cross-examination of the state's witnesses, the Mother admitted that she only saw Hofer's face on the victim's vagina. SANE Nurse Burke testified that she could find no evidence of sexual assault. While Detective Hietkemper would not admit that he put words in Hofer's mouth during the interview, he did admit that he did most of the talking and that "there was a lot of silence on Mr. Hofer's part." The detective never asked Hofer during the interview to define or clarify what Hofer meant when he used the word "vagina" or

vagina cavity. He also did not tell Hofer the legal or medical definitions of those terms.

{¶13} The evidence further showed that Hofer feared for his safety after the incident. Mother's father or step-father came outside of Hofer's apartment with a baseball bat. Some of Mother's other relatives were upset with Hofer, including Mother's brother. Hofer stated during the taped interview that, for his own safety, he would have to leave the area.

C. Jury Verdict, Sentencing, & Appeal

{¶14} The jury returned a verdict of guilty as charged. The court accepted the guilty verdict and sentenced Hofer accordingly.

{¶15} Hofer appeals his rape conviction and asserts the following two assignments of error: I. "The trial court erred when it refused to instruct the jury on the lesser included offense of gross sexual imposition." And II. "Hofer's counsel rendered ineffective assistance of counsel, and violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution."

II.

{¶16} Hofer contends in his first assignment of error that the trial court erred when it refused to instruct the jury on the lesser-included offense of gross sexual imposition.

{¶17} The state charged Hofer with rape under R.C. 2907.02(A)(1)(b), which states that "[n]o person shall engage in sexual conduct with another who is not the spouse of the offender * * * when * * * [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

R.C. 2907.02(B) provides that a violation of this section is a felony of the first degree and where the victim is less than ten years of age, the court shall imprison the defendant for life.

{¶18} "'Sexual conduct' means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." R.C. 2907.01(A). However, penetration is not necessary to commit cunnilingus; it "is completed by the placing of one's mouth on the female's genitals." *State v. Lynch*, 98 Ohio St.3d 514, 2003 -Ohio- 2284, ¶86.

{¶19} The court refused to give a gross sexual imposition instruction, under R.C. 2907.05(A)(4), which states, "No person shall have sexual contact with another, not the spouse of the offender * * * when * * * [t]he other person * * * is less than thirteen years of age, whether or not the offender knows the age of that person." R.C. 2907.05(B) provides that whoever violates this section is guilty of a felony of the third degree. The maximum penalty is a five-year prison term. See R.C. 2929.14(A)(3).

{¶20} "'Sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

{¶21} In reviewing a trial court's refusal to give a jury instruction on a lesser-included offense, we employ a two-tiered analysis.

{¶22} First, we must determine whether the offense for which the instruction is requested is a lesser-included offense of the charged offense. To do so, we must assess whether "(i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense." *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph three of the syllabus.

{¶23} Here, the state agrees with Hofer that gross sexual imposition is a lesser-included offense of rape. We agree and find that gross sexual imposition, R.C. 2907.05(A)(4), is a lesser-included offense of rape, R.C. 2907.02(A)(1)(b). See, also, *State v. Johnson* (1988), 36 Ohio St.3d 224, paragraph one of the syllabus (holding that "[g]ross sexual imposition, R.C. 2907.05(A)(3), is a lesser included offense of rape, R.C. 2907.02(A)(3) [now R.C. 2907.02(A)(1)(b)].").

{¶24} Second, when the *Deem* test is met, we then examine whether the record contains evidentiary support upon which a jury could reasonably acquit the defendant of the greater offense and convict him on the lesser offense. *State v. Thomas* (1988), 40 Ohio St.3d 213, paragraph two of the syllabus.

{¶25} Hofer maintains that the evidence supported a rape acquittal and a gross sexual imposition conviction. We disagree.

{¶26} The trial court has discretion in determining whether the record contains sufficient evidentiary support to warrant a jury instruction on the lesser-included offense, and we will not reverse that determination absent an abuse of discretion. See, e.g., *State v. Endicott* (1994), 99 Ohio App.3d 688, 693; *U.S. v. Ursary* (1997), 109 F.3d 1129; see, also, *State v. Davis* (1992), 81 Ohio App.3d 706, 714.

{¶27} The Supreme Court of Ohio has held that when the evidence for rape included a defendant's confession that he placed his tongue in the child victim's vagina, the trial court did not have to give a jury instruction on the lesser included offense of gross sexual imposition because contact between the defendant's mouth and the victim's vagina completed the act of cunnilingus, and thus rape. *Lynch,* supra, at ¶86.

{¶28} Hofer contends, however, that *Lynch* does not apply in this case because the victim's Mother's family members threatened him to the point that he feared for his safety. Hence, he concludes that the jury could have reasonably concluded that any confession he made was for the purpose of remaining in jail for protection. And, if the jury did not believe his confession, then the jury could further find that Mother's testimony only showed that his face, not his mouth, had contact with the victim's vagina. Consequently, he claims once the jury reasonably reached these two conclusions, then the jury could reasonably acquit him of rape and convict him of gross sexual imposition.

{¶29} We are not persuaded. If Hofer wanted protection, then jail is not his only means of safety, nor the most logical means for protection. Many people in

our society worry about their safety, but they do not confess to criminal activity in an attempt to be placed in jail for protection. In addition, Hofer stated during his taped interview that, for his safety, he would have to leave the area. He did not say anything about wanting to go to jail for safety reasons.

{¶30} As such, we find that a reasonable jury would conclude that any confession Hofer made was not for the purpose of remaining locked up for protection. The jury was not incorrect in believing his confession. Therefore, we cannot find that the jury could reasonably acquit Hofer of rape and convict him of the lesser offense of gross sexual imposition. Consequently, we find that the trial court did not abuse its discretion by refusing to give the gross sexual imposition instruction.

{¶31} Accordingly, we overrule Hofer's first assignment of error.

III.

{¶32} Hofer contends in his second assignment of error that he had ineffective assistance of counsel at trial. He claims that his counsel failed to: (1) object to his confession to law enforcement, including his letter of apology; and (2) move to dismiss the indictment on double jeopardy grounds.

{¶33} The United States Supreme Court holds that "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington* (1984), 466 U.S. 668, 684. "[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Id. at 685. As this court has stated, "effective counsel is one who 'plays the role necessary

to ensure that the trial is fair.'" *State v. Wright,* Washington App. No. 00CA39, 2001-Ohio-2473, citing *Strickland* at 685. Therefore, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id., citing *Strickland* at 685-686.

{¶34} In showing his attorney's ineffectiveness, Hofer must show two things: (1) "that counsel's performance was deficient[,]" which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[;]" and (2) "that the deficient performance prejudiced the defense[,]" which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland* at 687.

A.

{¶35} Hofer first contends that his counsel should have objected to the admission of his confession. He asserts that the state failed to produce any substantive evidence of the corpus delicti of the crimes, and therefore that the trial court would have sustained an objection.

{¶36} The corpus delicti of a crime is essentially the fact of the crime itself. It is comprised of "(1) The act [and] (2) the criminal agency of the act." *State v. Maranda* (1916), 94 Ohio St. 364, paragraph one of the syllabus. See, also, *State v. Edwards* (1976), 49 Ohio St.2d 31, 34; *State v. Van Hook* (1988), 39 Ohio St.3d 256, 261. The state must produce independent evidence of the corpus delicti of a crime before the court may admit an extrajudicial confession.

Maranda at paragraph two of the syllabus; *State v. Haynes* (1998), 130 Ohio App.3d 31, 34.

{¶37} "The quantum or weight of such outside or extraneous evidence is not of itself to be equal to proof beyond a reasonable doubt, nor even enough to make it a prima facie case. It is sufficient if there is some evidence outside of the confession that tends to prove some material element of the crime charged." Id. That evidence may be direct or circumstantial. Id. at 371; *State v. Nicely* (1988), 39 Ohio St.3d 147, 154-155; *State v. Clark* (1995), 106 Ohio App.3d 426, 431.

{¶38} In *State v. Ledford* (Jan. 24, 2000), Clinton App. No. CA99-05-014, the defendant confessed to police that he raped a five-year-old boy. The child described the rape to his mother and other witnesses but recanted his statements at trial. Although a medical examination of the child revealed no evidence of rape, the trial court found that the state produced some evidence tending to prove the material elements of rape. Specifically, the mother testified that her child spent the night at the defendant's apartment, that the child made a statement which caused her to call the police and take him to the hospital, and that the hospital staff examined the child's genitals.

{¶39} Here, as in *Ledford,* the victim's Mother's testimony contains some evidence of the elements of Hofer's crime. As she entered the apartment, she saw Hofer covered only with a blanket. He appeared to have an erection. She saw her naked two-year-old daughter on top of Hofer with her legs down towards Hofer's stomach and her vagina up on Hofer's face. Based on what the mother

saw, she testified that she talked to her family, which led to a call to police and a medical examination of the child by a qualified SANE nurse.

{¶40} We find that the foregoing constitutes some evidence outside of the confession that tends to prove some material elements of rape. See *Haynes,* supra. Therefore, we cannot find that Hofer's failure to object to the confession, including the letter of apology, was deficient under the first prong of the *Strickland* test.

B.

{¶41} Hofer next contends that his counsel should have moved to dismiss the indictment on double jeopardy grounds after the mistrial. He claims that the prosecutor intentionally showed a sexually suggestive picture of the victim to the first jury that caused defense counsel to move for the mistrial.

{¶42} The Supreme Court of the United States holds that "the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Oregon v. Kennedy* (1982), 456 U.S. 667, 679. See, also, *State v. Loza* (1994), 71 Ohio St.3d 61, 70; *State v. Greene*, Mahoning App. No. 02CA122, 2004-Ohio-1540, ¶59.

{¶43} Here, the trial court found that the state did not intentionally show the picture to the jury. Specifically, the trial court cited the *Oregon* case in its judgment entry granting Hofer's motion for a mistrial when it found "that it is the

Court's belief, that the State of Ohio did not intend to provoke a Mistrial, and therefore Retrial is not barred."

{¶44} When the mishap occurred, the trial court properly asked the state some pointed questions before it granted Hofer's motion for a mistrial, finding that the state did not intentionally show the picture to the jury. "The trial court, having found that the prosecutor did not act with the design to create a mistrial, must be afforded deference in that finding." *State v. Knotts* (Sept. 19, 1991), Washington App. No. 90CA4, citing *Oregon* at 679.

{¶45} The record shows that the state indicated that the "split second" display of the photo occurred only because of a technical malfunction involving the computer projector and that it was "inadvertent." The picture showed the victim fully dressed. Her legs were apart but she was wearing a diaper. Further, in the retrial, the court admitted the photo into evidence. As such, we find that these facts support the trial court's finding that the prosecutor's conduct was not calculated to manipulate Hofer into seeking a mistrial. Therefore, Hofer's retrial was not barred by the prohibition against double jeopardy. Consequently, we cannot find that Hofer's failure to move the court to dismiss the indictment on double jeopardy grounds was deficient under the first prong of the *Strickland* test.

{¶46} Accordingly, we overrule Hofer's second assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that this JUDGMENT BE AFFIRMED and that Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. The stay as herein continued will terminate in any event at the expiration of the sixty day period.

The stay shall terminate earlier if the appellant fails to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec.2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, P.J. and Harsha, J.: Concur in Judgment and Opinion.

For the Court

BY: Roger L. Kline

Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.