

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  
v. : C.A. No. 07CA835  
Joseph Hofer :  
Defendant-Appellant. :

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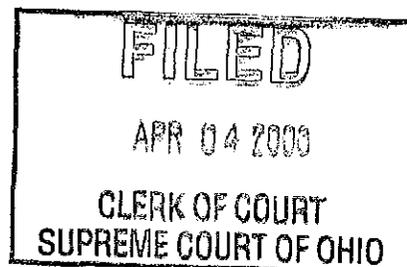
MEMORANDUM CONTRA JURISDICTION OF APPELLANT JOSEPH HOFER

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## INTRODUCTION

On April 19, 2005, Appellant Joseph A. Hofer raped his two-year old child, placing his face and tongue into and on her vagina. Upon being discovered in the act by the little girl's mother, police were summoned. Under tape-recorded police questioning, Hofer admitted that he raped his daughter. Hofer then further admitted to the rape in the form of a written apology for the crime.

On March 30, 2006, Hofer went to trial on the rape charge. Immediately following the opening argument of the State, a photo of the child at an Easter party inadvertently appeared on the presentation screen for a split second. Despite the fact that the display was accidental (the record was uncontroverted on the point and no one present at the time disagreed that the error was accidental) the judge granted a mistrial on the defense's motion. The judge further ruled that no prosecution misconduct was involved and that double jeopardy did not attach.

On October 26, 2006, after the second trial, the jury convicted Hofer on the rape charge. He now claims, in a brief that contains at least one significant misstatement of fact (as he did in the appeal below), that the judge and defense counsel in the first trial acted improperly and that the judge and defense counsel in the second trial acted improperly. Mandatory precedent for this Court supports the State and fails to support these meritless assertions by Hofer. There is no great issue of public concern addressed in Appellant's case and a Ohio Supreme Court ruling in this case will provide no new guidance to the courts of appeal. This Court should decline jurisdiction in this case.

## STATEMENT OF FACTS

On April 19, 2005, Charity Newton walked into her apartment and saw her then-boyfriend, Defendant-Appellee Joseph Hofer lying on the couch, naked but for a blanket. She also saw her two-year old daughter naked with her legs straddling Hofer's face, with the child's vagina directly on Hofer's face. *Transcript of Second Trial, pages 260-262*. More specifically, Charity testified that "[the child's] genitals were up on his face." *Id. at 261*. Appellant Hofer had a visible erection. *Id. at 262*.

While being questioned by police, Hofer admitted on audiotape that he put his tongue "inside her vagina." *Id. at 445*. While being questioned by police, Hofer voluntarily admitted in writing that he was sorry for "putting his tongue in her vagina." *Id. at 405*. At the second jury trial, on direct examination, the child's mother Charity Newton answered affirmatively to this question: "The man that you just testified, who had his face in your daughter's vagina\*\*\* the man you asked if it's time \*\*\* the first time he had done this \*\*\* he said that it was?" *Id. at 270*.

On cross examination, Charity Newton did not dispute the characterization in this question from Hofer's own attorney: "You came in and saw your husband \*\*\* your boyfriend with his mouth on her genitals, and the first thing you wanted to do is call your mom?" *Id. at 279-280*. At the first trial, one photo of the child victim (not "several pictures" as falsely alleged in Hofer's merit brief) was inadvertently displayed for a "split second" on a presentation screen as the computer projector was powering down. *Id. at 584, 591, 603, 605, 611*, See, also, *Trial Court entry granting Defendant's Motion for Mistrial.*

The photo of the child was not taken at the crime scene but several days later and showed her fully clothed, wearing a diaper and white tights that covered all of her feet, legs, and covered all of her diaper, up to her waist. On top of all that, she was also wearing a jumper dress, a long sleeve turtleneck sweater, and fancy white baby shoes. (The photo was provided to the Fourth District Court of Appeals in the appellate record).

The photo had been provided in discovery to both the defense and the court. *Transcript of First Trial, at P. 584*. The trial court judge acknowledged that, when the State eventually offered the photo as evidence, the Court would have most likely admitted the photo into evidence upon its proper authentication. *Id. at 595*.

The State was required to prove the age of the child to prove all the required elements of the crime and the photo was in queue in the computer slideshow to offer as evidence in the State's case in chief, which was about to be presented. *Id. at 602-603, 608-609*.

The prosecutor informed the court – in statements that were uncontroverted anywhere in the record – that the “split second” display of the photo occurred only because of a technical malfunction involving the computer projector. *Id. at 581, 582, 589, 591, 594, 607*.

Indeed, the prosecutor placed on the record – and neither the two defense attorneys nor the trial judge disputed it – the fact that the technical glitch was not purposeful, was inadvertent, and there was no disagreement from anyone when the prosecutor said “which, I think we all agree was the case here.” *Id. at 613*. The trial court judge, in his mistrial entry, agreed. *See, e.g., Trial Court entry granting Defendant's Motion for Mistrial*.

Counsel for Hofer suggested in open court that the photo of the fully-clothed baby was sexually suggestive. The prosecutor vehemently disagreed that a fully-clothed photo of a baby could possibly be sexually suggestive to anyone. *Transcript of First Trial at P. 598, 600.*

Hofer's appellate brief appears to attempt to mislead this court into believing that the photo was somehow controversial. "The [photo] showed her with her legs apart, wearing a skirt." *Merit Brief of Appellant at P. 4.* Yet, as detailed supra, the photo depicts a fully-clothed child.

**1. WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST, DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION, AND SHOULD NOT BE GRANTED LEAVE TO APPEAL.**

Joseph Hofer ("Appellant") was convicted of rape. Contrary to his arguments to this Court, Appellant was not convicted due to his attorney's ineffectiveness. Instead, Appellant was convicted by his own confessions and the irrefutable evidence of his guilt. Appellant's attorney was simply unable to change these facts; he was not ineffective. The proposition that failure to vigorously object in vain constitutes ineffective assistance of counsel is preposterous. This case involved well settled questions of criminal law that were decided properly in the trial court. The Fourth District Appellate Court correctly affirmed that decision.

The facts of this case do not demonstrate a public or great interest. Furthermore, this case does not involve a substantial constitutional question. This case involved a defendant who admitted to committing a crime and was well represented in the trial court. Appellant's propositions of law are substantial exaggerations from the actual facts of the case. In short, there is no reason for this Court to hear Appellant's arguments. This Court should not grant jurisdiction in this case.

**2. APPELLEE'S COUNTER PROPOSITION OF LAW: APPELLANT'S ATTORNEY WAS NOT INEFFECTIVE UNDER OHIO LAW.**

The United States Supreme Court has held 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, 104 S. Ct. 2052, 80 L. Ed. 2d 674. The Fourth District Appellate District has stated that, "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*, supra at 685-686.

To demonstrate that his counsel was ineffective, Appellant 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*, supra at 687. As will be obvious, Appellant's counsel's conduct does not rise to a level that would satisfy either prong of *Strickland*.

**a. APPELLANT’S ATTORNEY’S FAILURE TO OBJECT TO APPELLANT’S SELF-INCRIMINATING STATEMENT DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.**

Appellant’s Proposition of Law states that his attorney was ineffective due to his failure to object at two specific occasions. Appellant’s first claims that his attorney’s failure to object to the admission of Appellant’s self-incriminating statement constitutes ineffective assistance of counsel. Appellant 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 such an objection.

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, 114 N.E. 1038, paragraph one of the syllabus. See, also, *State v. Van Hook (1988)*, 39 Ohio St.3d 256, 261, 530 N.E.2d 883. The prosecution must produce independent evidence of the corpus delicti of a crime before any court may admit an extrajudicial confession. *Maranda* at paragraph two of the syllabus.

As the Fourth District noted, “[t]he 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. That evidence may be direct or circumstantial.” *State v. Hofer*, 4<sup>th</sup> Dist. No. 07CA835, 2008 Ohio 242, at ¶36 citing *State v. Nicely (1988)*, 39 Ohio St.3d 147, 154-155, 529 N.E.2d 1236.

The Twelfth District Court of Appeals previously considered a strikingly similar case. In *State v. Ledford* (Jan. 24, 2000), 12<sup>th</sup> Dist. No. CA99-05-014, 2000 Ohio App. LEXIS 149, the defendant confessed to police that he raped a five-year-old boy. The boy described the rape to his mother and other witnesses before trial. At the trial, the boy recanted his previous statements. The state relied primarily on the defendant's extrajudicial confession to obtain a conviction. The trial court found that the state produced sufficient evidence of the corpus delicti of rape prior to the confession's admission. *Id.* at P. 4-7.

Specifically, there were three facts that established the corpus delicti of rape. First, the mother had testified that the boy spent the night at the defendant's apartment. Second, she testified that the boy made a statement to her which caused her to call the police and take him to the hospital. Finally, there was evidence that the hospital staff had examined the child's genitals. The appellate court held that those three points of evidence were sufficient to introduce Defendant's extra-judicial confession. *Id.* at 18-19.

Here, the evidence introduced prior to the confession was *stronger* in this case than it was in *Ledford*. In this case, the child's Mother's testimony contained strong evidence of the elements of rape. As she entered the apartment, the mother saw Hofer naked, covered only with a blanket. She testified that 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 discussed the incident with her family, which ultimately led to the police being called.

There was also testimony that a medical examination of the child was taken by a qualified SANE nurse. As the Fourth District court noted, those facts “[constitute] some evidence outside of the confession that tends to prove some material elements of rape. Therefore, we cannot find that Hofer's failure to object to the confession, including the letter of apology, was deficient\*\*\*.” *State v. Hofer*, supra at ¶40. Appellant’s attorney cannot be deemed ineffective for failing to make a losing argument.

**b. APPELLANT’S ATTORNEY’S FAILURE TO OBJECT AT APPELLANT’S SECOND TRIAL ON DOUBLE JEOPARDY GROUNDS DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.**

Appellant’s first trial ended in a mistrial. Appellant’s next proposition of law contends that his counsel should have moved to dismiss the indictment on double jeopardy grounds after the mistrial. A brief explanation of the events at Appellant’s first trial demonstrates Appellant’s blatant misrepresentation of the facts. Appellant’s first trial began on March 30, 2006. The Adams County Prosecutor utilized a PowerPoint presentation in his opening statement. At the conclusion of his opening statement, an image of the child victim was momentarily displayed. The prosecutor immediately covered the image from the jury’s view. Contrary to Appellant’s assertions, there was nothing sexually suggestive about the picture. It was merely a photograph of a two-year-old child sitting down. Appellant’s counsel immediately moved for a mistrial. The prosecution argued strongly against it. Dubiously, Appellant alleges that the Prosecutor intended to provoke that mistrial. Appellant’s second trial proceeded without incident. Appellant was convicted of rape.

The Supreme Court of the United States has held 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, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (emphasis added). See, also, *State v. Loza* (1994), 71 Ohio St.3d 61, 70, 1994 Ohio 409, 641 N.E.2d 1082.

In this case, the trial court thoroughly questioned the Prosecutor and concluded that the state did not intentionally show the picture to the jury. More pointedly, the trial court cited the *Oregon* case in its judgment entry granting Appellant’s mistrial saying that “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.” See, e.g., Entry Granting Defendant’s Motion for Mistrial. As this Court knows, “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.” *Oregon*, supra at 679.

As the Appellate court noted, “[t]he 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.” *State v. Hofer*, 4<sup>th</sup> Dist. No. 07CA835, 2008 Ohio 242, at ¶45. Appellant’s brief suggests that the State intentionally tried for a mistrial in order to complete DNA testing. Considering the overwhelming evidence of Appellant’s guilt, the DNA evidence was merely cumulative. It is not believable that the state would intentionally seek a mistrial in order to introduce a piece of useful, but far from critical evidence.

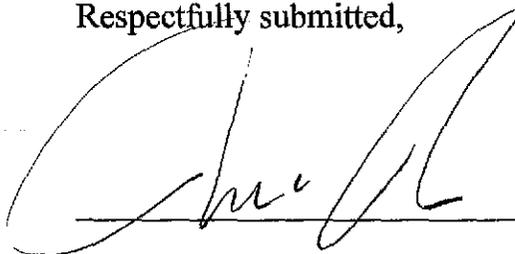
In short, both the trial court and the appellate court reached the obvious conclusion: the Prosecutor did not intentionally seek a mistrial in Appellant's first trial. As such, Appellant's second trial was not barred for double jeopardy grounds. Again, Appellant's attorney cannot be deemed ineffective for failing to make a losing argument.

### 3. CONCLUSION

Appellant Joseph Hofer was convicted of rape. He was convicted due to the overwhelming evidence presented. Appellant gave both written and oral confessions to the crime. The victim's mother testified that she personally observed Appellant, holding the naked child to his mouth, sitting naked under a blanket. At both of his trials, Appellant's counsel was far from ineffective. Each of Appellant's propositions as to why his counsel was in fact ineffective is incorrect. The state did not attempt to introduce Appellant's extrajudicial confession until *substantial* evidence of his crime had been presented. The victim's mother testified that she observed Appellant sitting naked while holding her two year old daughter's vagina to his face. Additionally, there was testimony from a SANE nurse that supported introduction of Appellant's conviction.

Furthermore, it is obvious from the trial record and the trial court's ruling that the state did not intentionally seek a mistrial. In short, there are no issues of great or constitutional concern here. This Court should refuse jurisdiction to hear Appellant's case.

Respectfully submitted,

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**Mark R. Weaver (0065769)**

Assistant Prosecuting Attorney

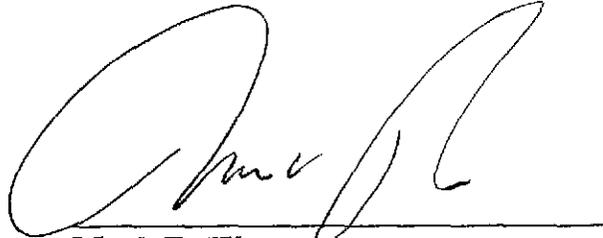
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**CERTIFICATE OF SERVICE**

I hereby certify that a complete copy of the foregoing has been served upon counsel for Appellant on this 4<sup>th</sup> day of April, 2008 via US Mail.

A handwritten signature in black ink, appearing to read 'Mark R. Weaver', written over a horizontal line.

**Mark R. Weaver**

*Adams County Assistant Prosecuting Attorney*