

IN THE SUPREME COURT OF OHIO

08-0974

STATE OF OHIO

CASE NO.

Plaintiff-Appellee

On Appeal From The  
Cuyahoga County Court  
Of Appeals, Eighth  
Appellate District

vs.

RICKY DUNBAR, JR.

Defendant-Appellant

Court of Appeals  
Case No. CA89711

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MEMORANDUM IN SUPPORT OF JURISDICTION OF  
APPELLANT RICKY DUNBAR, JR.

---

RICKY DUNBAR, JR.  
#A523-925  
Mansfield Correctional Institution  
Post Office Box #788  
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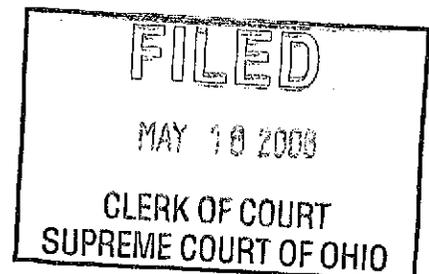


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EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST AND  
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This Court should accept jurisdiction of this case for the reason that the decision of the court of appeals is inadequate, insufficient and not complete, based upon the record, because it does not demonstrate that the court of appeals fully considered the issues, nor did it notice 'plain error' as argued in the Appellant's Propositions of Law. Hence, the court of appeals' decision is based upon unreasonable determination of the facts, and the lack of evidence to sustain a conviction, on at least, two of the counts charged. In other words, the state failed to meet its burden of proof beyond a reasonable doubt on the essentially element of 'venue', where one count is alleged to occur at an unidentified "park" and another at an unidentified "strip mall". See *Jackson v. Virginia*, 443 U.S. 307, 316 (1979); and, *State v. Gardner* (1987), 42 Ohio App.3d 157.

The record is devoid of any other information [facts] or circumstances from which reasonable minds could conclude beyond a reasonable doubt that the offense occurred in Cuyahoga County. Nothing of record suggests that the "park" and "strip mall" where two of the counts are said to have occurred are located, or situated in Cuyahoga County. Neither alleged location was ever identified as to their name. These are the only clues to the alleged location of the two counts, and they are not sufficiently unique to permit the conclusion that that the "park" and/or "strip mall" was in Cuyahoga County. These matters should have been identified by the court of appeal as 'Plain Errors' affecting a substantial right, Crim.R. 52(B).

In *State v. Truesdale* (Feb. 28, 1979), Butler App. No. CA78-05-0042, unreported, the court held that defendant "waived venue" by not raising before trial the defect in the institution of the prosecution or the defect in the indictment. Crim.R. 12(B)(1) and (2), (C), and (G). In that case, the absence of venue was plain on the

face of the indictment because "the grand jury's indictment, returned to the Court of Common Pleas of Butler County, charged that appellant's committed aggravated trafficking at [ sic ] Warren County, Ohio [emphasis supplied]. Truesdale, supra, at 3. In the instant case, the charging document was without defect apparent on its face, and the failure occurred in the prosecution's evidence presented at the trial. That failure was the functional equivalent of a failure to prove one of the operative facts in the conduct constituting the violation of a criminal law, commonly called "an essential element."

Likewise, appellate counsel's assignment of error relating to the denial of a mistrial motion, as argued below in Proposition of Law No. I, was lacking any authoritative case law supporting the assigned error. Even after appellate counsel set forth, in his argument, at Appellant Brief at page 10: "Thus, we don't even have jurisdiction set forth, and in any event, no location whatsoever", appellate counsel failed to raise the jurisdiction defect in his brief below.

This case could have far-reaching and broad impact on the criminal justice system and be of necessity, when court of appeals are affirming judgments on flimsy conclusions of fact, and the presence of plain error(s), where the factual record is contrary to the appellate court's decision. It could provide the guidelines we are so desperately in need of if a higher quality of justice with greater uniformity is to be realized and obtained.

STATEMENT OF THE CASE

On April 18, 2006, Defendant-Appellant Ricky Dunbar, Jr. was arrested by the Cleveland Police, and charged with kidnapping and gross sexual imposition on a minor under the age of 13 years, to wit: Brianna Hershey. He was subsequently indicted by the Cuyahoga County Grand jury on four counts of gross sexual imposition upon a minor under the age of 13 years, in violation of ORC 2907.05, with sexually violent predator specifications as to each such charge, and on two counts of kidnapping, in violation on ORC 2905.01, also with sexually violent predator specifications.

After several continuances, which were in general charged to Defendant, he was brought to trial before the Court of Common Pleas on January 17, 2007. A Motion in Limine had been made on behalf of Appellant to bar the State or its witnesses from mentioning or disclosing the Appellant's prior criminal record, and the Motion was granted. Tr. 184. The State's second witness, Dale Pitkiewicz, upon direct examination testified to contacting Appellant's parole officer, thus alerting the jury to the fact that Appellant was on parole. Tr. 233. Appellant moved for a mistrial, Tr. 236, and the State concurred at Tr. 237, but the Trial Court in effect overruled the Motion at Tr. 239, and proceeded with the case. Then, at the conclusion of said witness's testimony, without further explanation, the Court did grant the Mistrial at Tr. 244.

Trial re-convened on January 22, 2007. Tr. 246, at which time the same in limine motion was made and granted. This time several State's witnesses testified without incident, until the State called the child's counselor, one Anne Crowley, whose expertise as a counselor of child sex abuse victims was testified to. Tr. 530-533. From Tr. 533-548, the expert witness testified to the course of counseling/treatment she was providing for the child, when she was asked by the prosecutor

if she was still a client, Tr. 548, and then, "And will she still be one for some time?, at which time the witness answered:

"Yes I can't tell you how long. Part of it will be how---what these folks decide---whether she's believed."

An objection was immediately made by Appellant, and the Court ordered the jury to disregard. Appellant's counsel then moved for a mistrial at Tr. 549. This time the State opposed the Mistrial, and the Court overruled the Motion, stating that she would issue a corrective instruction. At Tr. 584-585, as Appellant's counsel stated that "I still hold to (the mistrial motion)," he agreed with the prosecutor that an instruction directed to the remarks would reinforce the counselor's remark rather than cure them. At Tr. 563, upon the close of the State's case, Appellant moved under Rule 29 for dismissal of the case, but the Court overruled the Motion. Appellant then proceeded with one witness and two Joint Exhibits. The Rule 29 was renewed, and again overruled, at Tr. 583. The jury was then given instructions, and closing arguments, and ultimately the case was given to the jury.

The jury initially reported that it was hung on an unspecified number of counts and could not reach a unanimous verdict. Tr. 664. The Court read the jury a Howard charge at Tr. 665-668. At Tr. 669, the jury returned with a verdict on five of the six counts, still hung on one kidnapping charge, with the Court taking the verdict on the other five counts. The jury acquitted Appellant of Count One, Kidnapping, but found him guilty on all four counts of gross sexual imposition. At 673-674, the Court discharged Appellant, upon motion, on the other kidnapping charge, count five.

The case had been bifurcated, and Appellant elected to be tried by the Court on the sexual predator specification, which because of the acquittals on the kidnap charges was now the highest level at which he could be adjudicated.

The Court re-convened on March 28, 2007 for the sexual predator hearing and sentencing. The hearing was held at Tr. 672-692, and the Court found Appellant to be a sexual predator. The Court then sentenced Appellant on each of the four counts to four years in prison to life, running all the terms consecutively, so that the total sentence was 16 years to life.

Notice of Appeal was timely filed, and the record was timely filed. On April 13, 2008, the court of appeals affirmed the convictions and sentences and journalized its decision/opinion as a final appealable order. Appellant now timely appeals to this Court and requests that it accept jurisdiction of the case.

#### STATEMENT OF THE FACTS

Brianna Hershey, born June 27, 1994, is the minor daughter of Michelle Gonzalez, and was age 11 on April 17, 2006. Tr. 383. On Thursday, April 13, 2006, she went on an extended Easter weekend visit (Thursday the 13th until Tuesday, April 18) to the home of her maternal grandmother and step-grandfather, being taken there by her aunt, the grandmother's daughter Margaret (Maggie) Burrows, and Maggie's boyfriend Ricky Dunbar, Jr., Appellant herein. Tr. 392-409. The visit began in the evening.

In the early hours of Tuesday, the 18th, Brianna told her aunt that Appellant had "touched" her (Tr. 455, 521). What Brianna was to describe at trial involved the following alleged incidents:

1. She alleged that Appellant woke her at the air mattress in the home's living room, on which she was sleeping, pulling up the covers and pulling down her pants and underwear, that she repeatedly told him to leave her alone, but that he said, "I'm not going to lie to you. I'm looking at your butt." She also stated that while there he touched her breasts and her buttocks, and tried to touch her vagina, also showing her his penis. Tr. 483-491.

She testified at Tr. 496 that this followed an incident the previous day in which she had ridden with him in a car, seat belted in, when she had raised her buttocks from her seat while joking, and he had bitten the buttocks hard enough to hurt, while stopped at a traffic light.

She testified that Appellant stopped the incident at the air mattress when her step-grandfather came along and told them to get back to bed, and that Appellant said the same to her. Tr. 491. Dale Pitkiewicz, the step-grandfather, testified that he woke up, heard Appellant tell Brianna to go back to bed, that at the time Brianna was on the air mattress and Appellant in a dining room separated from the living room by an archway (Tr. 419-420), and that this occurred Saturday night into Sunday morning (th 15th to 16th), Sunday being Easter.

2. Brianna testified that on Monday the 17th, she had ridden on errands with Appellant at Tr. 499-502, including the obtaining of a birth certificate (also confirmed by Appellant's mother and by Joint Exhibit 2, as having occurred on April 17th 2007) with Appellant's mother, and the obtaining of a driver's license (actually State ID), established by Joint Exhibit 1, as having occurred shortly after 1 PM that day. Appellant's mother's testimony, at Tr. 573-578, was that this visit took about twenty minutes, with about 15 minutes of driving each way. Brianna did not testify to any "touching" on this date up to this point.

She then testified that they went to a park, which neither she nor any other State witnesses were ever to specify or name or locate, where she stated that he unbuttoned her pants and stuck his hands on her vagina, Tr. 502-504, then to a strip mall, also unidentified, where she said he forced her hand onto his penis. Tr. 507. She testified at Tr. 521, that "Monday night was the night I told Maggie, and before Easter and before Monday was the days that he did that stuff to me."

Testimony was that on Easter, the family had Easter dinner, and there was nothing unusual occurring. Tr. 508. Also, Maggie testified at Tr. 465 that Appellant and Brianna had picked her up for lunch on the 17th in mid-afternoon, and that they had also picked her up from work, Defendant eventually taking her to the home of Brianna's mother Michelle Gonzalez, about 7:30 PM. Michelle Gonzalez confirmed this visit at Tr. 17, and both testified to an argument between Maggie and Appellant over the phone around 11:30 that night which resulted in Appellant's refusal to give her a ride home, so that she took two buses to her home, getting home around 1 AM. Both Maggie and Brianna testified to Maggie then complaining about Appellant to Brianna, at which time Brianna came forward with the story which was set forth above. (Tr. 470-471; 521-523).

Maggie called Brianna a liar, an argument ensued, and the grandparents came out, first the grandmother, who sat there discussing the matter, then the step-grandfather who told everyone to go to bed. (Tr. 420-423; 471; 509-511). The next morning, with the grandmother who had been part of the conversation present, the step-grandfather asked Brianna what the "fight" was all about, and she told him, again with her grandmother present.

Brianna also testified at Tr. 524-525 to a day of bike riding in which essentially nothing happened.

Following Brianna's report to her grandparents, the police were called and an officer came out late that morning, staying for about 20 minutes (Tr. 437-441). At Tr. 430, after taking the same two buses that took Maggie an hour or less in the middle of the night before, the grandparents arrived at Michelle's home with Brianna, telling Michelle what had allegedly happened. Tr. 425. Talks with the police and counselors followed, and Appellant was arrested the next day at Maggie's job, as he went to pick her up.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The trial court erred in overruling Appellant's motion for mistrial, made in response to the State's expert witness telling the jury, in response to a question from the prosecutor, that the duration of treatment for the alleged child victim would depend in part on how the jury would decide, and whether the child would be believed.

As pointed out by appellate counsel, this was a closely-decided case. The jury initially reported a deadlock, and ultimately still hung on one count, while acquitting on another. There were problems with the time and place of Brianna's story, as will be more fully discussed below, but which in the context of this Proposition of Law make this clearly a case in which the verdict was not foreordained.

Because of that, any impropriety on the part of the State or of its witnesses must be closely scrutinized. In this case, the impropriety was astounding. Its wrongness was never in dispute between the parties or the Court. The witness openly told a jury that the duration of treatment for a 12 year old girl, who the judge had noted had been crying in court, would depend in part on their decision, on whether or not they believed her.

There is no way anyone can argue that this was not horrendous, and could not have influenced the jury. Indeed, it was ultimately agreed that no corrective instruction directly addressing the issue would work; it would simply reinforce the original appeal to sympathy and prejudice.

Appeals to the prejudice of the jury must result in a reversal unless it can be established beyond a reasonable doubt that the jury verdict would have been the same regardless of the misconduct, and in this closely-decided case that cannot be reasonably argued. Thus, even in civil cases in which liberty is not at stake, jury verdicts tainted by unlawful appeals have been reversed. *Book v. Erskine & Sons* (1951), 154 Ohio St. 391, 96 N.E.2d 289; *Hudak v. Youngstown Municipal Ry. Co.* (1956)

164 Ohio St. 493, 132 N.E.2d 108.

In *City of Sidney v. Walters* (1997), Shelby Cty.) 118 Ohio App.3d 825, 694 N.E.2d 132, a DUI conviction was reversed because of improper prosecutorial argument. Also, see *State v. Cloud* (1960), Cuyahoga) 112 Ohio App. 208, 217, 168 N.E. 2d 761.

In a very close case to this one what happened in *State v. Boston* (1989), 46 Ohio St.3d 108, 545 N.E.2d 1220, a pediatrician and psychologist testified to the veracity of the child's statements, that testimony resulting in reversal and remand. In the present case, the expert didn't simply say that the testimony was true, or that she believed it was true---instead she told the jury that they would be responsible for the length of time the child would require treatment.

A similar holding occurred in *State v. Eastham* (1988), 39 Ohio St.3d 307, at 312, 530 N.E.2d 409, at 414.

In this case of course, the witness essentially told the jury they were to be held responsible for the future mental health of a small girl. If verdicts could not be sustained for mere opinionating, this one cannot possibly be acceptable.

Because Appellant promptly objected, promptly asked for a mistrial, and it was agreed that no instruction could be directed at the actual statement without reinforcing it, the Court erred when it denied the Mistrial Motion. The Court's ruling should be reversed, with a Mistrial ordered, the conviction vacated, and the case remanded for further proceedings consistent with law.

Proposition of Law No. II: The trial court erred in overruling Appellant's Motions made under Criminal Rule 29 for dismissal of the charges against him.

Criminal Rule 29 provides that "The court on motion of a defendant...after the evidence on either side is closed, shall order the entry of a judgment of acquittal

of one or more offenses charged in the indictment...if the evidence is insufficient to sustain a conviction of such offense or offenses."

In this case, the evidence as in fact is insufficient. Brianna testified concerning a Friday thru Monday period in which she was unable to put events in sequence for the most part; and on a Monday series of events in which she omitted a lunch break and in which her timeline runs into itself, and ultimately in which she alleges activities in public places.

While the State might argue that these are jury matters, these are part of a pattern which is even worse. No place is alleged for two of these events, and she cannot even identify the park in which one event allegedly took place or the strip mall in which another allegedly took place. And apparently no investigators ever bothered to try and locate these places. Thus, we don't even have jurisdiction set forth, and in any event, no location whatsoever.

Further, as to the two counts concerning the air mattress (and none of the counts were specified as to any alleged acts, so that ultimately one can only make an educated guess as to which count is which), the grandfather testified that the two individuals were in different parts of the room; she testified that he got up when the grandfather came in, at a time when he'd allegedly had his pants down, her pants down, and been by the air mattress.

Proposition of Law No. III: The Court of Appeals erred and denied Appellant due process of law guaranteed under the 5th, 6th, and 14th Amendments of the United States Constitution and section 10 of Article I of the Ohio Constitution, when it failed to notice 'plain error', Crim.R. 52(B), where the absence of evidence proving venue is plain error, and conviction(s) cannot be supported when evidence is not sufficient to establish venue beyond reasonable doubt, R.C. 2901.05, despite failure of counsel to bring in sufficiency to attention of trial court.

The court of appeals erred denying Appellant due process of law when ignoring 'plain error', that the State had not met its burden of proof, R.C. 2901.05, when

at least two of the counts charged failed to establish 'venue', thus, the convictions are not supported with sufficient evidence.

The failure to demonstrate venue may not be "noticed" unless it was 'plain error' affecting a substantial right. Crim.R. 52(B).

It has been the Ohio law since 1907 that venue must be proved beyond a reasonable doubt in a criminal case. *State v. Gribble* (1970), 24 Ohio St.2d 85; *State v. Nevius* (1947), 147 Ohio St. 263, certiorari denied sub nom. *Nevius v. Ohio* (1947), 331 U.S. 839, 67 S.Ct. 1521; *State v. Dickerson* (1907), 77 Ohio St. 34; *State v. Gardner* (1987), 42 Ohio App.3d 157; *State v. Trantham* (1969), 22 Ohio App.2d 187. It may be argued that venue is not an "essential element" of the offense because it is not one of the operative facts that make the accused's conduct a violation of a criminal statute. *State v. Loucks* (1971), 28 Ohio App.2d 77, 86. It is beyond debate, that a conviction fails if the evidence does not establish venue beyond a reasonable doubt. The United States Supreme Court that it is a violation of due process to convict a person on insufficient evidence of all the essential elements of the offense, *Jackson v. Virginia* (1979), 443 U.S. 307, 316, and the rule in Ohio is that venue must be established with the same degree of proof as the criminal conduct.

In the instant case, the charging document was without defect apparent on its face, and the failure occurred in the prosecutor's evidence presented at the trial. That failure was the functional equivalent of a failure to prove one of the operative facts in the conduct constituting the violation of a criminal law, commonly called an essential element. Accordingly, the conviction on at least two counts was not supported by sufficient evidence, and the second, that it was contrary to the manifest weight of the evidence. Simply put, the evidence was insufficient to prove venue. If not with regard to all four counts charged, at least with the undistin-

guished counts involving alleged acts committed at a "park" and a "strip mall".

Proposition of Law No. IV: Appellant was denied the effective assistance of 'appellate' counsel, where appellate counsel failed to support assignments of error with sufficient constitutional case law, and authorities, in assignments of error numbers one and two, in violation of Appellant's due process rights guaranteed under the 5th, 6th and 14th Amendments of the United States Constitution and Section 10 of Article I of the Ohio Constitution.

The Sixth and Fourteenth Amendments to the United States Constitution guarantees that a defendant is Constitutionally entitled to adequate and effective appellate review. Griffin v. Illinois (1956), 351 U.S. 12, 19; Meyers v. Chicago (1971), 404 U.S. 189, 194. That includes the constitutional right to the effective assistance of appellate counsel. Strickland v. Washington (1984), 466 U.S. 668; Evitts v. Lucey (1985), 469 U.S. 387.

Appellate counsel argued under 'assignments of error one and two that: (1)"the trial court erred in overruling appellant's Motion for Mistrial, made in response to the State's Expert Witness telling the jury, in response to a question from the prosecutor, that the duration of treatment for the alleged child victim would depend in part on how the jury would decide, and whether the child would be believed.

When appellate counsel concluded assignment of error one, he closed the argument with: "Because Defendant promptly objected, promptly asked for a mistrial, and it was agreed that no instruction could be directed at the actual statement without reinforcing it, the Court erred when it denied the Mistrial Motion.

Appellate counsel failed to support the assignment of error with sufficient, or any federal constitutional authority or case law. Since, it was "\*\*\*agreed that no instruction could be directed at the actual statement without reinforcing it", then appellate counsel should have supported his assignment of error number one, with the case Dunn v. United States (1962), 307 F.2d 883, at 886, wherein the court found: "If you throw a skunk in the jury box, you cannot instruct the jury not to smell it.

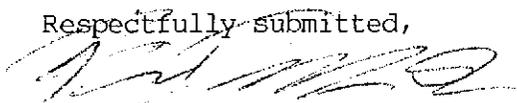
Courts relies too heavily on judicial admonitions. Cautioning the jury is simply not that effective, people being people. There is an overwhelming probability that the jury will be unable to follow an instruction to disregard\*\*\*. Richardson v. Marsh (1987), 481 U.S. 200, 211, 107 S.Ct. 1702, 1709, 95 L.Ed.2d 176.

Next, and likewise, appellate counsel failed to support assignment of error number two with any authority or case law, but only with Crim.R. 29. Pursuant to the argument presented herein under "Proposition of Law No. III", appellate counsel should have argued assignment of error number two, using the standard of Jackson v. Virginia, supra; and, State v. Gardner, supra. Accordingly, appellant was denied adequate review of the meritorious issues, via appellate counsel's deficient conduct in the arguments presented. Strickland v. Washington, supra.

#### CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits, to its complete determination, as required pursuant to Section 2(B)(f) of Article IV of the Ohio Constitution.

Respectfully submitted,



RICKY DUNBAR, JR.

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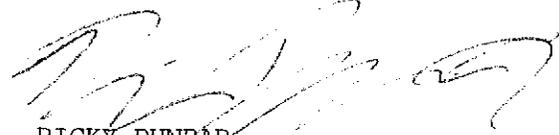
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellee, Ronni Ducoff, Assistant Cuyahoga County prosecutor, Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on May 12, 2008.



RICKY DUNBAR  
Defendant-Appellant, Pro-se

APR 14 2008

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 89711

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**RICKY DUNBAR, JR.**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Common Pleas Court  
Case No. CR-480618

**BEFORE:** Sweeney, A.J., Cooney, J., and Celebrezze, J.

**RELEASED:** April 3, 2008

**JOURNALIZED:** APR 14 2008

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FILED AND JOURNALIZED  
PER APP. R. 22(E)

APR 14 2008

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY: [Signature] DEP

ANNOUNCEMENT OF DECISION  
PER APP. R. 22(B), 22(D) AND 26(A)  
RECEIVED

APR - 3 2008

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY: [Signature] DEP

CA07089711

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this Court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COURSE,  
FOR ALL PARTIES-COSTS TAXED

JAMES J. SWEENEY, A.J.:

Defendant-appellant, Ricky Dunbar, Jr. ("defendant"), appeals his convictions in the Court of Common Pleas for gross sexual imposition. For the following reasons, we affirm the decision of the trial court.

On May 24, 2006, defendant was indicted by the Cuyahoga County Grand Jury for four counts of gross sexual imposition of a minor in violation of R.C. 2907.05, with sexually violent predator specifications, and two counts of kidnapping in violation of R.C. 2905.01, also with sexually violent predator specifications. On January 17, 2007, a jury trial began.

At trial, the victim gave the following testimony: She was eleven years old at the time of the incidents. From April 13 through April 18, 2006, she was staying at her paternal grandmother's house for Easter break. Defendant was the boyfriend of her Aunt Maggie. Maggie and the defendant lived at the grandmother's house.

On or about April 14, 2006, the victim went with the defendant to pick Maggie up from work. While in the car, defendant bit the victim on the buttocks after she jokingly told him to "bite me." After the victim told him that it hurt, defendant told her that he would come and rub her buttocks later.

In the early morning hours of April 16, 2006, while the victim was sleeping on an air mattress in the living room, the defendant came into the room, sat

down beside her, and pulled down her pants. Defendant touched her breasts, buttocks, and vagina. Defendant showed the victim his penis. The victim told him to leave her alone. Defendant left the room when he heard the grandfather come out of his room and tell them to get back to bed.

On April 17, 2006, the victim went with the defendant on some errands. While in the car, the defendant offered to teach the victim how to drive. Defendant drove to a park. The victim sat on the defendant's lap and began steering the car. While on his lap, the defendant unbuttoned her pants and put his hands on her vagina. The victim told the defendant to stop or she would take her hands off the steering wheel. After defendant refused to remove his hands, the victim took her hands off the steering wheel. Defendant grabbed the wheel and the victim got off his lap. The defendant then took his penis out of his pants and told the victim to touch it. When she refused, the defendant grabbed her hand and put it on his penis.

The following day, the victim told Maggie what happened. Maggie got upset and called her a liar. The victim started crying. The grandmother came into the room and the victim told her what happened. The following morning, the victim told both grandparents what happened again. The grandparents called the police.

In addition to the victim, the State called Michelle, the victim's mother. She testified that the victim went to the paternal grandparents for a long weekend on April 13, 2006. On April 18, 2006, the grandparents brought the victim home. The grandmother told Michelle what had happened and gave her the names of the police officers who had spoken to her. Shortly thereafter, Michelle took the victim to children services to speak with a detective. She also began taking the victim to see a professional therapist.

The State called the victim's paternal step-grandfather, Dale. He testified that Maggie and the defendant lived at his home and that the victim was spending several days with them over Easter vacation. He testified that on April 16, 2006, he got up between 2:00 and 4:00 a.m. to let the dogs out and heard the defendant telling the victim to go back to bed. Dale told the defendant to go to bed. On April 18, 2006, at approximately 3:00 a.m., Dale heard Maggie, the victim, and the grandmother arguing. He got up and told them to go to bed. Later that morning, Dale asked the victim what the fight was about and she told him about the defendant's actions. Dale was upset and called the police immediately. After the police questioned the victim, he took her home.

The State called Officer James Holt ("Officer Holt") of the Cleveland Police Department. He testified that he responded to a call and interviewed the victim and the victim's grandparents. He referred the case to the Sex Crimes unit.

Next, the State called Maggie. She testified that she lived with her mother and Dale. Defendant was her boyfriend and had recently moved in with her in her parents' home. Maggie testified that she was very close to the victim. She testified that on the evening of April 17, 2006, she was upset because of a fight she had gotten into with the defendant. She arrived home after midnight. She talked to the victim and was crying. The victim told her what the defendant had done. Maggie got upset and called the victim a liar. The victim ran into the bathroom and locked herself in. Maggie's mother woke up and asked what was going on. Maggie told her what the victim had said. Dale woke up and told everyone to go to bed. After everyone went to bed, Maggie called the defendant, told him what the victim had accused him of, and told him to come home so that they could all talk. The defendant did not come home. The next day, Maggie learned that the police had been called. The defendant was subsequently arrested.

The State called Anne Crowley ("Crowley"), a clinical therapist at Applewood Centers. She testified that the victim was assigned to her in late September 2006. She testified that she was involved in ongoing therapy with the victim due to the sexual abuse allegations.

Finally, the State called Detective Sherilyn Howard ("Det. Howard") of the Cleveland Police Department, Sex Crimes and Child Abuse Unit. She testified

that she interviewed the victim, the victim's mother, and the grandparents. A short time thereafter, she presented the case to the grand jury.

The defendant presented one witness on his behalf: his mother. She testified that on the morning of April 17, 2006, she went with the defendant and the victim to City Hall to get a birth certificate.

On January 26, 2007, the jury found defendant guilty of four counts of gross sexual imposition and not guilty of one count of kidnapping. The jury could not reach a decision on the other count of kidnapping. Upon motion by the defendant, the court dismissed the remaining kidnapping charge.

On March 28, 2007, defendant was classified as a sexual predator and sentenced to four years to life in prison on all four counts, to run consecutively, for a total sentence of 16 years to life.

Defendant timely appeals and raises the following three assignments of error for our review.

"I. The trial court erred in overruling appellant's motion for mistrial, made in response to the State's expert witness telling [the] jury, in response to a question from the Prosecutor, that the duration of treatment for the alleged child victim would depend in part on how the jury would decide, and whether the child would be believed."

In his first assignment of error, defendant argues that he was denied his right to a fair trial when the victim's clinical therapist, Anne Crowley, offered testimony suggesting that the victim's mental health depended on the jury's verdict. Specifically, Crowley testified as follows:

"STATE: Is [the victim] still a client?

"CROWLEY: Yes, ma'am.

"STATE: And will she still be one for some time?

"CROWLEY: Yes. I can't tell you how long. Part of it will be how--what these folks decide--

"STATE: Well--

"CROWLEY: --whether she's believed.

"DEFENDANT'S ATTORNEY: Objection.

"THE COURT: Objection sustained. The jury will disregard."

Following the court's admonishment, defendant moved for a mistrial, asserting that Crowley's testimony resulted in extreme prejudice to him because it appealed to the sympathies of the jury. At a side bar, the trial court denied the motion and indicated that it would issue a curative jury instruction. Defense counsel later declined a limiting instruction, commenting that the instruction would be more prejudicial and "reinforce" the jury's memory. The jury instructions did, however, state that matters to which the court sustained

objections were not evidence and should not be considered in determining the issue of the defendant's guilt and that there should be no sympathy for the victim or bias against the defendant.

The grant or denial of a mistrial rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 182. Moreover, mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118. "An appellate court will not disturb the exercise of that discretion absent a showing that the accused has suffered material prejudice." *Sage*, at 182.

Here, we do not find that the defendant suffered "material prejudice." Crowley's comment was fleeting and entirely unsolicited by the State. The court took immediate action after the comment was made and told the jury to disregard the statement. Moreover, the trial court advised the jury not to be influenced by sympathy, bias, or prejudice. There was substantial testimony supporting the conviction. Accordingly, we do not find that defendant's right to a fair trial was substantially prejudiced by Crowley's single inappropriate comment.

Defendant's first assignment of error is overruled.

"II. The trial court erred in overruling appellant's motions made under Criminal Rule 29 for dismissal of the charges against him."

In his second assignment of error, defendant argues that there was insufficient evidence to support his convictions for gross sexual imposition.

An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

Defendant argues that his convictions were not supported by sufficient evidence because he generally claims the State failed to establish the essential elements of all the crimes. Defendant argues that inconsistencies in the victim's testimony and the lack of consistent details render the evidence insufficient to survive his motion for acquittal. Under a sufficiency review, we do not weigh the evidence but instead ascertain whether there is evidence, if believed, that would support a conviction. *Id.*

Here, the victim's testimony presents sufficient evidence that if believed could support a conviction on each element of the charged offenses. Accordingly, the second assignment of error is overruled.

“III. The trial court erred in finding defendant-appellant to be a sexual predator, as if the court had either declared a mistrial or dismissed the charges, as set forth above, no such finding would be lawful.”

In his third assignment of error, defendant argues that the State erred in classifying him as a sexual predator since the trial court should have declared a mistrial (Assignment of Error I) or granted his Crim.R. 29 motion for acquittal (Assignment of Error II). Defendant does not address the merits of the finding that he is a sexual predator. Rather, he concedes that he raises this argument solely to preserve the issue if we reverse his convictions. Based upon our disposition of the first two assignments of error, we therefore overrule this assignment of error.

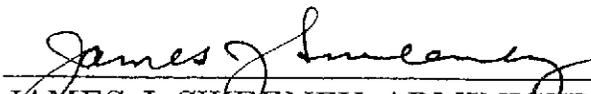
Judgment affirmed.

It is ordered that appellee recover from appellant its 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 Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

  
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JAMES J. SWEENEY, ADMINISTRATIVE JUDGE

COLLEEN CONWAY COONEY, J., and  
FRANK D. CELEBREZZE, JR., J., CONCUR