IN THE SUPREME COURT OF OHIO

Tamer El-Berri, Appellant, v. State of Ohio, Appellee.	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District 08-1959 Court of Appeals No. 89477

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT TAMER EL-BERRI

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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 case should be considered by the Ohio Supreme Court because Appellant was wrongfully convicted as a result of the lack of evidence with which to legally convict a person of rape under R.C. 2907.02(A)(2). The record will clearly reflect that what little evidence was presented at trial was scant and incomplete when failing to meet all of the required elements of the crime for which the Appellant was charged.

As in many cases where claims of insufficiency of evidence and manifest weight are made rotely by defendants in an attempt to get the Court to take a second look at the facts, in the present case, a reasonable jurist took a long hard look at the evidence and gave it considerable analysis. That jurist was was Judge Melody J. Stewart of the Court of Appeals. In her dissent in the present case, Judge Stewart makes a lengthy rationale why the evidence was not sufficient to convict the Appellant. Her analysis and opinion should be adopted by this Court not only because it is well reasoned, but also because the interests of justice show that when and if there are matters of this magnitude which represent a close call in the determination of guilt, the benefit of the doubt should be strewn in favor of the accused. This is no more prevalent than in the present case where the state failed to put forth sufficient evidence to meet its burden of proof.

This case is unique and a significant matter for the Court to take up because it involves the reasoning and rationale required to be employed by the reviewing courts when determining whether or not there is sufficient evidence by which a defendant can be convicted. When the Court of Appeals sits as the "thirteenth juror," it is incumbent that they be thorough and review the record with peculiarity as to the specifics and have some measurable guideline or yardstick by which to properly evaluate these issues. The Court of Appeals is being called upon to take all the evidence as a whole and provide a substantive discourse and analysis of the evidence as it pertains to the individual elements of the crime which must have been proven beyond a reasonable doubt.

The opinion of the Appeals Court in this case is an academic study in contrast, where the real life of the Appellant hangs in the balance. The majority opines as to both the first and second assignments of error which deal with the weight and sufficiency of the evidence, respectively. In the majority's opinion, the analysis of the sufficiency of the evidence outcome almost seems to be a foregone conclusion as the scant evidence is plugged into to the opinion and considerable leaps are

made to practically force the evidence to fit around a remotely plausible conclusion; however, when the majority attempted to analyze the evidence for the manifest weight standard, they merely adopted the analysis conducted under the previous heading for the sufficiency standard and formed a simple conclusion with virtually no logical foundation. Unfortunately, given the volume of cases and the workload, this type of intellectual laziness has crept its way into important constitutional decisions.

Where this becomes apparent is with the dichotomy between the majority opinion and the minority opinion in the comprehensiveness of the analysis performed concerning the weight and sufficiency of the evidence. The minority's opinion was thorough and used over sixty paragraphs of extensive discussion and deliberation to reach the informed conclusion that the evidence provided by the state was not sufficient to sustain the elements of the charged offenses. This is compared to the three paragraphs that the majority used to dispense the manifest weight analysis. That one judge could put forth the reasonably comprehensive effort to evaluate the evidence and come to the well-formed opinion that the decisions could not stand on the evidence, while the majority cajoles the evidence to fit its desire to uphold the jury's conviction only goes to show that the Appellant should be entitled to a review by other thoughtful and comprehensive jurists who can clearly see from the evidence, as meticulously laid out in the minority opinion, that a severe miscarriage of justice would occur if the Appellant's conviction is allowed to stand based upon the poor proffer of evidence by the state.

Although both arguments deal with the evidence presented, the legal distinction between whether the evidence is legally sufficient and whether the outcome of the trial is against the manifest weight of the evidence require two distinctly different legal analyses. The appeals court failed, at least in the majority opinion, to provide a distinct difference between its analyses and practically sought to infer evidence where none was given. Upon review of the trial court's decision, the Appellant is entitled to a full and comprehensive *de novo* review of both arguments as to sufficiency and manifest weight with separate conclusions based upon the distinctly different standards by which both issues are evaluated. The adoption of the argument for the sufficiency of the evidence by the majority opinion to cover having to analyze separately the manifest weight argument lacks the proper sufficiency in itself for what is required of the courts of appeal.

Granted, because of the overuse of these arguments by virtually every convicted appellant when challenging their case, the monotonous repetition of the arguments by the courts of appeal may have

become so routine that for judicial efficiency a formulaic opinion has been advanced to add up enough evidence from the record to reach the Court's foregone opinion that repeatedly sustains the verdict. This does the individual Appellant a disservice when the same rote formula is applied and short shrift is given to his particular case. This would not be so obvious, but for the minority's comprehensive analysis which concluded that there is no way possible that the verdict against the Appellant can be sustained by the limited testimony provided to convict the Defendant. This Court can use this opportunity to solve the macro problem presented which is applicable to so many defendants in similar circumstances, by addressing the differences between the two different arguments based upon sufficient and manifest weight. The Court can set a clear standard that the analysis of these differing legal theories should be reasonably comprehensive when reviewing the trial court verdict, more like the comprehensive and thorough opinion written by the minority and less like the formulaic cookie-cutter opinion utilized by the majority. This Court can make it clear that when the courts of appeal sit in the place of the thirteenth juror, the Court actually expects them to put as much if not more thought and consideration as the jurors are expected to put forth and not merely pay lipservice to the process. Additionally, this Court can simultaneously solve the micro problem by reviewing the court's opinion and reasonably seeing that the minority was spot on in its analysis. In doing so, the Court can adopt the minority's opinion and prevent a severe miscarriage of justice while making it clear that the Court expects the state to put forth more substantive proof if it intends to try cases such as this and sustain convictions.

Besides from a clear work ethic and proper sense of justice, there is only one prevailing reason why Judge Stewart spent the considerable time that she did and wrote such an extensive opinion on this matter. Clearly it was not meant to try to persuade the two other judges, whose arguments she criticized relentlessly in her opinion and it was not to give the Appellant the mere satisfaction that someone saw his point of view and recognized the injustice done against him. Simply put, the reason that such a well articulated opinion is written by her can only be that she was writing for the same audience the Appellant now addresses, the Supreme Court. It is clear that since she did not prevail at persuading her fellow judges, she had the forethought to write ahead and attempt to persuade this Court to correct the obvious injustice done to the Appellant. The Appellant implores the Court to review her dissent and accept jurisdiction for review of this case, and ultimately adopt the dissent.

For these reasons, it is asserted by the Appellant that a miscarriage of justice will occur if the Court does not address these issues and vacate the verdict or remand this case to correct the violations of the Appellant's rights.

STATEMENT OF THE CASE AND FACTS

Cleveland police officer Carmen Hernandez testified that on Thursday, December 23, 2004, she was assigned to the Second District desk and she took a complaint from Kelly Brittany and her mother Brenda Carmack. Officer Hernandez sent a car to look for the suspect and another car was sent to the hospital to conduct a rape kit.

Brenda Carmack testified that she met Appellant through Appellant's girlfriend Nikki. Appellant had a cell phone business out of Dollar Less which he arranged with Mitri, Brenda's boyfriend. Nikki, for a time, worked at the cell phone business. Brenda testify that Nikki lived with Appellant on South Hill in December of 2004. In Fall of 2004, Brittany was attending Parma Senior High School and turned 16 on June 5, 2004. A couple weeks after turning age sixteen. Brittany acquired a driver's license and received a car. Brenda began working for Appellant at his cell phone stand at Great Northern Mall in November of 2004 and worked five or six days a week. Brittany would get from school to work by driving her car. and work after school, from 3:00 p.m. to 11:00 p.m.

Brenda testified that on December 22, 2004, Brittany came home and changed her clothes, ate and left for work. Brenda testified that the mall is about 20 to 25 minutes away from her house. Brenda testified that on December 22, 2004, there was a bad ice storm. Brenda testified she left the dollar store late that night and got home around 10:30 p.m. Brenda testified that she called Brittany and asked her if she wanted her dad to pick her up because it was bad, and she said no, as Appellant was there at the store and was going to give her a ride home. Brenda testified that it was around 11:00, and Brittany said she was on her way home. Brenda testified that the next time that she called Brittany, Brittany was on her way home in a cab. Brenda testified that Brittany told her she would explain everything when she got home. Brenda testified that while she was on the phone with Brittany, Nikki called. Brenda testified that Nikki wanted to talk to Brittany, so Brenda let her.

Brenda testified that after she talked with Brittany, Brenda and Mitri decided to go to Appellant's house. Brenda knocked on Appellant's door, Nikki came out yelling. Brenda testified that Nikki said, "You better not have your fucking daughter with you." Brenda testified that Appellant said

that it was not like he was the first one. Brenda testified that she and Mitri left, went home, got Brittany, and took her to Parma Community Hospital. Brenda testified that no one from Parma police came, so she took Brittany to the Cleveland Police Second District. Brenda testified that she is now also a grandmother as Brittany has a two month old child (not with the Appellant). Brittany is not married. Brenda testified that Appellant had given Brittany a ride home before. Brenda testified that Nikki accused Appellant and Brittany of having an affair. When Brittany got home, Brenda was on the phone with Nikki. Then Brenda gave the phone to Brittany and Brittany and Nikki argued on the phone. Brenda testified that Nikki told Brittany that she was going to beat Brittany's ass. Brenda admitted that she told police that Brittany looked white as a ghost after her phone conversation.

Brittany Kelly testified that she is a 18 years old. In fall 2004, she was in the tenth grade at Parma High School. She turned 16 that summer and obtained her driver's license in August 2004. Brittany considered Mitri as a stepfather. Appellant had a cell phone store in Mitri's store. In November 2004, Brittany got a job after school at the cell phone store in Mitri's store. and then during the Christmas season she began working at Appellant's cell phone store at the mall. Brittany worked after school until 11:00 p.m. Brittany met Appellant through his girlfriend Nikki from the store. Brittany testified that at the mall store she did not see Appellant much, but that night he came to drop off phones.

Brittany had driven to the store that night. It was snowing heavily and Brittany had never driven in that kind of weather. Brittany's mother called and told Brittany to ask Appellant to give her a ride home. Brittany asked Appellant who said that he would. Brittany testified that Appellant told her that he had to stop at his house and get something. Brittany had been to Appellant's house before with Nikki. Brittany testified that they got to Appellant's house and Appellant asked her if she was going to come in and Brittany said "sure." No one else was home. Brittany testified that they walked into the kitchen and Appellant went into the other room. Brittany testified that when she went into the living room, Appellant began rubbing her back. Brittany did not say anything. Brittany testified that Appellant then bent her over the couch and unbuttoned her pants and pulled them down. Again, Brittany did not say anything. Brittany testified that Appellant pulled down her underwear and put his penis in her vagina. Brittany testified that she did not want his penis inside in her vagina, but did not indicate so to the Appellant in any way. When asked by the prosecutor, " Is there a reason why you

didn't say anything to him?," Brittany answered, "I don't know." Brittany testified once Appellant stopped, he asked her if she was ready to go and she told him "yes." Brittany pulled up her pants and they were going to leave, but Appellant's car got stuck in the snow. Brittany testified that Appellant used his cell phone to call a cab. It took a while for the cab to come. Brittany testified that she went back in the house and was sitting in the living room while waiting for the cab. Brittany testified that the cab came and Appellant gave her cash to pay for the cab. While Brittany was in the cab, Brittany's mom called and Brittany told her that she would talk to her when she got home. When Brittany got home, her mom was on the phone with Nikki. Her mom handed Brittany the phone and Brittany talked to Nikki. Brittany testified that she told her mom what happened and her mom and step dad left. When they came back, they took Brittany to Parma Hospital, where she was examined. Brittany testified that she did not consent or agree to have sex with Appellant that night. Brittany again admitted that when Appellant rubbed her back, she did not say anything, and that when Appellant removed her pants, she did not say anything. She again admitted that when Appellant removed her underwear. she did not say anything. Brittany admitted that while Appellant was doing anything to her, she not say or do anything, and especially did nothing to indicate her displeasure or objection. Brittany never asked Appellant what he was doing. Brittany never told Appellant that she did not want to do this. Brittany showed no signs that she was scared of or fearful of the Appellant at any time. While Brittany was waiting for the cab, she had her cell phone with her and it was working and operating. Brittany did not call her mom, any friends of hers, or 911. Brittany admitted that one of her best friends lives a street away or right around the corner from where the Appellant lives, which is within walking distance. Brittany did not call her or go to her house. When Brittany was being taken home by the cab, she did not call her mom but instead her mom called her. Brittany admitted that her mom asked the cab driver where he picked Brittany up from. Brittany testified that Nikki asked her if she was with Appellant and she said that she was. Brittany testified that Nikki did not threaten or argue with her at all during that conversation, which was directly contradicted. Brittany did not tell Nikki that Appellant did something to her or raped her or kidnapped her. Brittany was shown her jeans and her underwear and her shirt that she was wearing that night and admitted that her clothes were not ripped or torn off of her. Brittany admitted that she had no swelling anywhere or redness or bruises or marks after her sexual encounter with the Appellant.

A forensic scientist assigned to the serology DNA section for the Ohio Bureau of Criminal Investigation ("BCI") and testified that she performed DNA analysis on vaginal swabs, on underwear, and on a known standard for Brittany Kelly. The scientist found profiles consistent with Brittany but she could not tell who the seminal fluid came from. She could not link Appellant to this.

The defense presented a witness, Nicolett Arcuri ("Nikki"), who testified that she and Appellant rented a location from the dollar store. Nikki became really good friends with Brittany Kelly. Appellant was self-employed and owns cellular stores. Nikki used to work for him. On December 22, 2004, Nikki called Brenda around midnight because Appellant was not home. She noticed that Appellant was acting a little weird and thought something was going on with Appellant and somebody. While they were on the phone together, Nikki asked Brenda to go out to the taxi and ask them where he picked up Brittany. Nikki testified that Brittany indicated that she was having an affair with Appellant at the time. Nikki testified that Brittany told her that they only had sex one time.

The Defendant was convicted of one count of rape and one count of kidnapping by the jury. The Defendant filed an appeal with the Cuyahoga County Court of Appeals, which rendered its judgment on July 17, 2008. The majority opinion sustained the conviction for rape and vacated the conviction for kidnapping. The extensive minority opinion would have also vacated the conviction for rape based upon the sufficiency of the evidence and that the verdict was against the manifest weight of the evidence. The Court of Appeals denied the Appellant's motion for reconsideration on September 2, 2008 and journalized its opinion on the same day. The Appellant now brings this appeal from the final judgment of the Cuyahoga County Court of Appeals.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The trial court erred in denying Appellant's motion for acquittal as to the charges when the state failed to present sufficient evidence against Appellant.

The state failed to establish that Tamer EL-Berri was guilty of the crimes of which he was convicted. There is no evidence that Appellant committed the crime of rape or kidnapping. Brittany freely went to the Appellant's house and freely went inside, never forced. Brittany clearly admits in her testimony that when Appellant begins rubbing her back, she says or does nothing. When Appellant pulls down her jeans, she says or does nothing. When Appellant pulls down her panties, she says or

does nothing. When Appellant bends her over the couch, she says or does nothing. When Appellant sticks his penis inside her vagina, she says or does nothing.

R.C. 2907.03(C) states that a victim need not prove physical resistance; however, there has to be some safeguard to prevent a conviction such as this. As the minority opinion so clearly articulated, lack of consent is no longer an express element of rape. *State v. Gilliam* (Sept. 30, 1999), Montgomery App. No. 17491; *State v. Keeton*, Richland App. No. 03 CA 43, 2004-Ohio-3676. There is, however, an interplay between the concepts of resistance and consent. If the use of force or threat of force is not apparent from the Defendant's conduct, as is the case here, there must be some evidence of lack of consent or resistance to show that the Appellant "purposely compel[led" Brittany to submit. Absent this showing, there is no evidence that the Appellant had the requisite *mens rea* to cause Brittany to capitulate. When a person such as Brittany does absolutely nothing to communicate, either verbally or nonverbally, a lack of consent, the Appellant cannot be found to have compelled her to submit to sexual contact.

Even though Brittany did not affirmatively consent, such is not required for a sexual encounter to be considered consensual. R.C. 2907.02(A)(2) requires an offender to have purpose to compel the other person to submit to sexual conduct by force or threat of force. When a person such as Brittany manifests absolutely no objection or resistance but only later voices lack of consent, either out of regret or in an attempt to explain away a poor choice, the Appellant cannot be found to have compelled her to submit to sexual conduct, as she must have affirmatively conveyed some indication of non-consent as a predicate to a finding that, in the absence of force or threat of force, she was compelled to submit to sexual conduct.

R.C. 2907.02(A)(1) defines a separate offense of rape that occurs when the offender engages in sexual conduct with a person other than a spouse and (a) substantially impairs that person's ability to consent by surreptitiously administering any drug, intoxicant, or controlled substance to the other person, (b) the other person is less than 13 years of age, or (c) the offender knows the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age. See R.C. 2907.02(A)(1)(a)-(c). The state did not charge Appellant under

R.C. 2907.02(A)(1), and there is no suggestion in the record that the Brittany lacked the ability to resist or consent, or that her ability to do so was substantially impaired by Appellant.

The majority opinion stated erroneously that the Appellant forced Brittany, which is not supported by the evidence. As for the lack of objections, not once does she say "No" or try to stop Appellant. Brittany then cries rape only later when confronted by Appellant's girlfriend and to explain her actions to her mom and step-dad. She does not call her mother to tell her of the detour to Appellant's house, the fact that Defendant's car got stuck in the snow, or that she was waiting for a cab ride to come home. There are certainly serious questions of credibility of the accuser, including stating that she did not know why she did not say anything whatsoever to the Appellant that would indicate her lack of consent. The unreliability of credibility rises to the level that it cannot be relied upon as a matter of law. She claims that she was raped, yet does not call 911, her mother, step-dad, Nikki, or her friend (who lives a block away) for help; or anyone else for that matter, even though she had her cell phone on her at that time. Instead, she leaves with the Appellant and then after the car is stuck in the snow, remains at the Appellant's home, sitting next to him on the couch, until a cab comes to pick her up. There is no evidence of trauma, bruising or anything for that matter. The seminal fluid did not match Appellant's DNA. There is simply no evidence whatsoever to support these convictions. Once she is being taken home by a cab, she does not tell the cab driver to call or take her to the police. She does not call her mother. In fact, it is her mother who calls her. She tells her mother that she will explain everything to her once she gets home. She arrives home and then gets on the cell phone with Appellant's girlfriend who suspected that Appellant is having an affair with Brittany. Brittany does not tell her that she was raped although confronted with the accusation of his infidelity. Brittany's mother does not call the police but instead her and her boyfriend go to Appellant's house and confront him during this blizzard. The medical records offer no independent corroboration of an attack or forcible sex.

Crim. R. 29(A) provides, in pertinent part: "The court on motion of a defendant . . . 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." When the evidence lacks the sufficiency, as it clearly does here, the trial court should sustain a motion by trial counsel for such a directed verdict.

A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the state has met its burden of production at trial. *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 390. On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed the evidence against the defendant would support a conviction. *Id.* The relevant inquiry is whether, after viewing all 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. Jenks* (1991), 61 Ohio St.3d 259, paragraph two the syllabus.

Additionally, the majority opinion utilizes the wrong standard when reviewing the force aspect of the rape charge. The majority cites to *State v. Eskridge* (1988) 38 Ohio St.3d 56 for the proposition that force "need not be overt and physical brutal but can be subtle and psychological" depending on the age of the victim and relationship to the parties. The victim in *Eskridge* was a mere four (4) year old, while the victim here is four times the age of the victim in *Eskridge.* The Court's reliance upon *Eskridge* is misplaced because in this case the child victim is much older and not of tender years.

In *Eskridge,* in order for the life specification to be found, the state was required to show that force had been present in the rape of a four year old child by his father. The *Eskridge* court concluded that it was. The basis of its determination was that force does not need to be overt and physically brutal, but can be subtle and psychological. *Id.,* at 58-59, 526 N.E.2d 304. It went on to explain that, "[t]he youth and vulnerability of children, coupled with the power inherent in a parent's position of authority creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose." It then stated that the perpetrator of the rape was the victim's father and as such, he held a position of authority over her which did not require any explicit threats or display of force. *Id.,* at 59, 526 N.E.2d 304.

The dissent relied, however, on *State v. Schaim (*1992), 65 Ohio St.3d 51 to derive the appropriate standard. In *Shaim,* this Court refused to apply *Eskridge* and its underlying reasoning to a child victim who was an adult, age twenty, at the time of the offense. In distinguishing *Eskridge,* the *Schaim* court emphasized that a victim who is over the age of majority is not compelled to submit to a parent in the same manner as a four year old because she is no longer completely dependent on her parents and is more equal to the parent in size, strength and mental resources. *Id.*, at 55. The Supreme Court further held that, " as long as it can be shown that the rape victim's will was **overcome by fear or duress**, the forcible element of rape can be established." *Id.,* at 59 (Emphasis added.).

In 1998, this Court reviewed and supplemented *Eskridge. State v. Dye,* 82 Ohio St.3d 323, 695 N.E.2d 763, 1998-Ohio-234. In *Dye,* this Court Court stated that the "psychological force" instruction can be used in cases other than those that involve parents raping their children. The psychological instruction would also apply in a situation where a person holds a position of authority over the child. However, in the syllabus, this Court specifically stated that "[a] person in a position of authority over a child **under thirteen** may be convicted of rape of that child with force pursuant to R.C. 2907.02(A)(1)(b) and (B) without evidence of express threat of harm or evidence of significant physical restraint." *State v. Dye,* 82 Ohio St.3d 323, 695 N.E.2d 763 (Emphasis added.).

The Eighth Appellate District recently faced a similar argument in *State v. Milam,* 8th Dist. No. 86268, 2006-Ohio-4742. In *Milam,* the appellant wanted the court to apply the definition of force that was enumerated in *Schaim,* which was an adult victim rape case: "A defendant purposely compels another to submit to sexual conduct by force or threat of force if the defendant uses physical force against that person or creates the belief that physical force will be used if the victim does not submit." *Milam.* 2006-Ohio-4742 at ¶ 10. However. the Eighth District Appellate Court declined to use that definition. In doing so, it first explained that *Dye* does not necessarily preclude an *Eskridge* instruction when the victim is 13 years or older. The *Milam* court went on to note that it would not use the definition of force as used in *Schaim* because the victim in *Schaim* was an adult. *Milam, 2006-Ohio-4742 at ¶ 14.* The victim in *Milam* was 13 years old. However, the court went on to hold that the victim in Milam was "not of so tender age as the children in *Eskridge* and *Dye.* " *Id.* Thus, *Milam* concluded that the question was whether the child's will was overcome by fear or duress. *Id.* In finding that the victim's will was overcome by duress, the Milam court referenced the psychological force used and the perpetrator's position of authority over the child. *Id.*, at ¶ 25.

Therefore, even if the Court were to exclude *Shaim* as controlling authority on the issue, *Milam* dictates that the question is whether the victim's will was overcome by fear or duress as a result of both the psychological force used by the perpetrator in combination with the position of authority. Beyond the employer-employee relationship which was established on the record, there is no other evidence which suggests any psychological force, coercion or manipulation, employed by the Appellant or that she was so overwhelmed, like a child would be, by the Appellant's position over her that she felt forced to submit to the Appellant's advances. Unlike the girl in *Milam* who was the tender age of 13, the victim in the present case was 16 and although the span of three years may not seem significant, the independence and autonomy a sixteen-year-old has is much more considerable than that of a thirteen

year old and is supported by the record (e.g., the girl had a driver's license and was allowed to drive regularly, including to and from work; the girl had her own job and means of support at the cellular store; and the girl was allowed to be out late working a normal schedule and driving home after a shift that ended at 11 pm.) To go beyond overt force or threat of force and use the psychological force relied on by the majority in it's opinion, the majority overlooked *Milam,* which requires that the question in this type of case where the victim is not of so tender an age as *Eskridge* is whether the victim's will was overcome by fear or duress. This principal is further supported in additional appellate districts. See *State v. Dippel,* 10th Dist. No. 03AP-448, 2004-Ohio4649 (victim was 14 years old); *State v. Oddi,* 5th Dist. No. 02CAA01005, 2002-Ohio5926 (victim was 15 years old); *State v. Nieland,* 2d Dist. No.2005-CA-15, 2006-Ohio784 (victim was raped when 15 and 16, court questioned whether *Eskridge* instruction was appropriate but since the victim testified that she did not resist him because she was afraid of what he might do to her was enough to support the force element). The critical distinguishable feature from *Eskridge, Shaim, Dye & Milam* to the present case beyond the difference in age of the victims is that there is no evidence of fear or duress produced at trial. and specifically no fear or duress showing that the victim's will was overcome. As the dissent clearly pointed out, although witnesses (victim's mother) described the victim shortly after the incident as looking "white as a ghost, scared to death," a review of the record reveals that this characterization was made after a phone call between the victim and the Defendant's girlfriend. Furthermore, the evidence is completely devoid of what "scared" the victim, what she was scared of, or how that feeling of being scared impacted her.

Therefore, when assessing all the state's evidence, and believing it all to be true, a conviction of rape premised on "force or threat of force" cannot be sustained. As such, there is no evidence beyond a reasonable doubt to support the charges in this case. The convictions on these charges must be vacated and reversed.

<u>Proposition of Law No. II:</u> Appellant's convictions are against the manifest weight of the evidence.

The issues of whether there is sufficient evidence and whether the verdict is against the manifest weight of the evidence are separate and distinct. The question of sufficiency involves whether the case may go to the fact finder or, if it has, whether the evidence was sufficient to support the verdict. *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 386, citing *State v. Robinson* (1995), 162 Ohio St. 486, 487, and Crim. R. 29. See also *Tibbs v. Florida* (1982), 457 U.S. 31, 41(if insufficient evidence, then should not have been submitted to jury): *State v. Watson* (1971), 28 Ohio St. 2d 15, 20 (sufficient evidence is

required to prevent directed verdict).

The state must provide sufficient proof necessary to convince the trier of fact beyond a reasonable doubt of the existence of every element of the offense. *In re Winship* (1970), 397 U.S. 358; *State v. Haynes* (1971), 25 Ohio St. 2d 264, 270. The inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have convicted. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. See also *Tibbs*, 457 U.S. at 37.

"The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *Thompkins*, Ohio St.3d at paragraph two of the syllabus. Unlike sufficiency, "manifest weight" does not involve looking at the evidence in the light most favorable to the state or deferring to the trier of fact. "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence. *Id.*, at 387, citing *Robinson,* at 487.

"Weight of the evidence concerns the inclination of the greater amount of credible evidence, offered at trial, to support one side of the issue rather than the other." *Thompkins*, 78 Ohio St.3d at 387 (emphasis in *Thompkins*). " A reversal based in the weight of the evidence . . . draws the appellate court into questions of credibility." *Tibbs,* at 3. "The court reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins*, at 387 (emphasis added).

The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. See *State v. Martin* (1983), 20 Ohio App. 3d 172, paragraph three of the syllabus. This present case is the poster-child for just such a case.

Here, the jury simply lost its way as to the convictions. The evidence is lacking that Appellant is guilty of the crimes charged herein. Certainly the jury felt sorry for a teenager at the time of the incident as opposed to the Appellant, an Egyptian national who is in all likelihood going to be deported after his prison sentence. Additionally, while sex between an adult aged thirty-two and a consenting sixteen-year-old girl is not against the law in the State of Ohio, as it is in other jurisdictions, the jury clearly found the sexual encounter to be unconscionable despite the fact that there was no evidence of

force and no evidence of lack of consent and no evidence that the Appellant restrained the minor in any fashion whatsoever. In finding the Defendant guilty of rape and kidnapping when there was no direct evidence of either, the jury clearly sought to punish the Appellant for his poor morals and poor judgment by having sex with a sixteen-year-old and in doing so, lost their way.

When the majority opinion blatantly ignored the dearth of evidence available to convict the Appellant and merely incorporated its rationale, including several fallacies and leaps of faith in attempting to impute evidence of force where there was none when analyzing the sufficiency of the evidence, it deprived the Appellant of the proper review. As the outcome of the jury's verdict is against the manifest weight of the evidence, the convictions should be reversed and vacated.

Proposition of Law No. III: The trial court erred by ordering appellant to serve more than the minimum sentence.

Although the court indicated that Appellant had a previous criminal record only for a misdemeanor, the court in this case specifically found that Appellant had not previously served a prison sentence. As such, he should have been sentenced to the minimum term of incarceration, which would have been three years on a felony of the first degree, as opposed to the seven years that the court imposed. R.C. 2929.14(B) requires a trial court to impose a minimum sentence for first-time imprisonment, unless it "finds in the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender." The court did not make this finding. The court made no finding that the shortest prison term will demean the seriousness on Appellant. This Court should impose the correct sentence or alternatively, this Court should remand the matter for re sentencing.

Appellant submits that the law and the statutory scheme as it existed at the time of his incident; i.e. December 23, 2004, should apply to Appellant's case here. Therefore, the ruling in *State v. Foster*, 2006-Ohio-856, should not apply to this case.

Additionally, Appellant submits that the court is precluded by the Due Process Clause, in addition to the Ex Post Facto Clause, from applying *Foster's* remedy, which dispenses of the need for trial judges to make findings to exceed minimum and concurrent terms of imprisonment, to defendants such as Appellant whose criminal conduct pre-dated the release of *Foster*.

Therefore, the Court should vacate the sentence and remand the matter for re sentencing.

Proposition of Law No. IV: The appellate counsel's advocacy on behalf of the Appellant amounted to ineffective assistance of appellate counsel.

If there is a genuine issue as to whether there is a claim of ineffective assistance of counsel on appeal, the two-prong test developed in *Strickland v. Washington* (1984), 466 U.S. 668, and *State v. Bradley* (1989), 42 Ohio St.3d 136, for determining whether counsel rendered ineffective assistance of counsel, is also the standard for determining whether an appellant has presented a genuine issue of a colorable claim of ineffective assistance of appellate counsel that would mandate reopening his appeal. *State v. Smith*, 95 Ohio St.3d 127. Therefore, it must first be determined whether appellate counsel's performance was deficient and then determined whether that deficiency prejudiced the outcome of the appeal. *State v. Reed* (1996), 74 Ohio St.3d 534, 535. An appellant can demonstrate prejudice by demonstrating that had his claims been properly presented, there was a reasonable probability that they would have been successful. *State v. Goff*, 98 Ohio St.3d 327, 328.

Appellate counsel's failed to raise a significant issue which fell below an objective standard of reasonableness. To wit. the appellate counsel failed to raise the issue of the improper jury instructions which were given to the jury. The jury instructions for "force" were inappropriate concerning the facts of what was presented at trial and given the wrong instructions, it can be understood more fully how the jury would have reached its conclusion if it were not properly instructed. Specifically, the Court gave the instruction to the jury that did require the jury to analyze the special relationship between the Appellant and Brittany Kelly to determine if, because of that relationship, Brittany was not able to properly resist the sexual advances of the Appellant. That instruction was not appropriate given the facts of the case and caused the jury to consider issues which were not specifically elements of the charges against the Appellant. Failure to object to improper jury instructions and failure to argue the same on appeal are reasonable standards of practice which counsel should be held accountable and which caused the Appellant to be prejudiced by counsel's conduct.

Consequently, the case should be remanded for a new trial.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests this Court to adopt the minority opinion, reverse his convictions and/or remand this case for a new trial and/or vacate his sentence and/or remand his case for re sentencing.

Respectfully submitted,

Tamer El-Berri, *in pro persona*
Inmate No. 522-023
Belmont Correctional Institution
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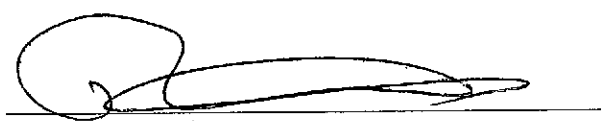
Certificate of Service

I certify that a copy of this **Memorandum in Support of Jurisdiction** was sent by ordinary U.S. mail to:

William D. Mason
Cuyahoga County Prosecutor
9th Floor Justice Center
1200 Ontario Street
Cleveland, OH 44113

on this 30th day of September, 2008.



Tamer El-Berri, *in pro persona*
APPELLANT

SEP 2 2008

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89477

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TAMER EL-BERRI

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-475596

BEFORE: Kilbane, J., Sweeney, A.J., and Stewart, J.

RELEASED: July 17, 2008

JOURNALIZED: SEP 2 - 2008

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VOL 0665 PG 0028

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

SEP 2 - 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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

JUL 17 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

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).

MARY EILEEN KILBANE, J.:

Defendant-appellant Tamer El-Berri (El-Berri) appeals his convictions for rape and kidnapping. For the following reasons, we affirm in part, reverse in part and remand.

On January 4, 2006, a Cuyahoga County Grand Jury indicted El-Berri on one count of kidnapping with a sexual motivation specification attached and one count of rape.

The facts giving rise to the instant case occurred in the late evening on December 22, 2004. The sixteen-year-old victim worked at El-Berri's cellular phone business located at Great Northern Mall. There was a heavy snowfall that night and, at the close of the victim's shift, El-Berri offered to drive the victim home as she lacked experience driving in snow storms. Brenda Carmak (Carmak), the victim's mother, consented because El-Berri and his girlfriend, Nicolet Arcuri (Arcuri), were family friends.

On the night in question, instead of taking the victim directly home, El-Berri drove past her exit and went to his home. While there, El-Berri proceeded to remove the victim's clothes, forced her over the couch, and engaged in vaginal intercourse with her against her will.

The victim arrived home later that evening via taxi cab because El-Berri's motor vehicle became stuck in the snow. Carmak described the victim as looking

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"white as a ghost, scared to death." The victim told Carmak that El-Berri raped her. Carmak took the victim to the hospital where vaginal swabs confirmed the presence of seminal fluid, although testing was unable to produce a male DNA profile.

On January 2, 2007, the case proceeded to jury trial. On January 11, 2007, the jury returned its verdict and found El-Berri guilty of kidnapping with a sexual motivation specification and guilty of rape.

On February 1, 2007, the trial court sentenced El-Berri to seven years of imprisonment for kidnapping and seven years of imprisonment for rape, counts to be served concurrently. The trial court also conducted a House Bill 180 hearing and designated El-Berri a sexually oriented offender.

On February 26, 2007, El-Berri filed a notice of appeal and asserted four assignments of error for our review.

ASSIGNMENT OF ERROR NUMBER ONE

> **"The trial court erred in denying Appellant's motion for acquittal as to the charges when the state failed to present sufficient evidence against Appellant."**

El-Berri argues that the trial court erred when it denied his Crim.R. 29 motion for acquittal.

Crim.R. 29(A), which governs motions for acquittal, reads as follows:

> **"The court on motion of a defendant or on its own motion,**

> 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, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."

Furthermore, in reviewing the sufficiency of the evidence, this court held:

> "A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the state has met its burden of production at trial. In reviewing for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. 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. The motion 'should be granted only where reasonable minds could not fail to find reasonable doubt.'" *State v. McDuffie*, Cuyahoga App. No. 88662, 2007-Ohio-3421. (Internal citations omitted.)

El-Berri argues that the State failed to present evidence of rape as set forth in R.C. 2907.02(A)(2). R.C. 2907.02(A)(2) delineates the crime of rape, as charged: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

El-Berri and the victim engaged in sexual conduct as defined in 2907.01(A):

> "'Sexual conduct' means vaginal intercourse between a male and female ***; and, without privilege to do so, the insertion, however slight, of any part of the body *** into the vaginal

or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

The victim testified, "He put his penis in my vagina." (Tr. 293.) Furthermore, vaginal and rectal swabs collected from the victim revealed the presence of seminal fluid.

Pursuant to R.C. 2907.02(A)(2), there is *sufficient* evidence that El-Berri purposely compelled the victim to submit by force. The victim's testimony included: she did not consent to having sexual intercourse with El-Berri; El-Berri removed her clothes; he forced her onto the couch; and El-Berri engaged in vaginal intercourse with her against her will. Force "need not be overt and physically brutal, but can be subtle and psychological" depending on the age of the victim and relationship to the parties. *State v. Eskridge* (1988), 38 Ohio St.3d 56, 58-59. (Further holding that, "as long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established.") Id. at 59. Other witnesses, who observed the victim shortly after the incident, described that "[s]he looked white as a ghost, scared to death."

At the time of the offense, the victim was a sixteen-year-old minor child, while El-Berri was fifteen years her senior. In addition, El-Berri was the victim's employer and a family friend, whereby a factfinder could determine that he occupied a position of authority over the victim. Indeed, the evidence shows

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At the time of the offense, the victim was a sixteen-year-old minor child, while El-Berri was fifteen years her senior. In addition, El-Berri was the victim's employer and a family friend, whereby a factfinder could determine that he occupied a position of authority over the victim. Indeed, the evidence shows

that the victim (and her mother) entrusted El-Berri to drive her home because of a heavy snow storm and her lack of experience with driving. Instead of taking her home, El-Berri took the victim to his house, where he subjected her to sexual intercourse and then sent her home in a taxicab.

The victim also stated that she was very scared and that she didn't know what El-Berri was going to do to her. She clearly testified that she did not want to have any kind of sexual relations with El-Berri that night. (Tr. 308.) Under the sufficiency standard, we are bound to accept that testimony as true and simply cannot reverse a conviction for insufficiency by disregarding or disbelieving evidence. The weight and credibility of that testimony was for the trier of fact to decide.

The dissent's comprehensive survey of the record and weighing of the evidence reflects a manifest weight analysis, rather than one of sufficiency. In essence, the dissent concludes that absent some overt evidence of resistance a rape could not have occurred between a thirty-one-year-old employer and his sixteen-year-old employee. But to reach this conclusion, the dissent rejects the reasonable inference that the victim submitted because she was, as she said, "scared." El-Berri's position of authority as her boss and the disparity in their ages cannot be discounted where the law is that the "force and violence necessary to commit the crime of rape depends on the age, size, and strength of

the parties and their relation to each other." *Eskridge*, at paragraph one of the syllabus. While the dissent advances a strong argument for reaching a different conclusion on these points than the jury did, it is not within our province to weigh and resolve these facts when conducting a sufficiency analysis. The record also supports El-Berri's conviction for kidnapping under R.C. 2905.01(A)(4) with a sufficiency of the evidence, which provides that no person, "by force, threat, or deception," shall "remove another from the place where the other person is found or restrain the liberty of the other person" to engage in sexual activity against the victim's will.

The dissent finds insufficient evidence in that the victim's initial agreement to the detour and that he asked her permission to stop at his home as being dispositive of the kidnapping by deception charge. It seems unlikely there would be a case where a person accused of kidnapping someone by deception would have explicitly advised the victim of such an intent, nor would the unwitting victim's initial agreement to the detour alter an undisclosed, subjective ill-intent. Although the victim willingly allowed El-Berri to drive her home, he did not do so. Instead, he took her to his house for the alleged purpose of getting "something." Given the course of events that ensued, *a rational trier of fact could glean from the evidence* that El-Berri's true purpose was not to get anything, but to lure the victim to his house in order to engage in sexual activity

with the victim against her will. See, e.g., *State v. Ware* (1980), 63 Ohio St.2d 84; *State v. Williams* (May 22, 1980), Cuyahoga App. No. 41378; see, also, R.C. 1.42, R.C. 2913.01(A) Accordingly, there is evidence from which a rational trier of fact could conclude that El-Berri committed kidnapping by deception. There is also evidence that El-Berri used force to restrain the victim when he bent her over the couch in order to engage in sexual intercourse with her. Further, in viewing the evidence in a light most favorable to the State, there is sufficient evidence to sustain El-Berri's conviction for rape and kidnapping. Thus, the trial court did not err when it denied El-Berri's Crim.R. 29 motion for acquittal.

El-Berri's first assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

> **"Appellant's convictions are against the manifest weight of the evidence."**

El-Berri argues that his convictions are against the manifest weight of the evidence.

> **"The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction."** ***State v. Thompkins*****, 78 Ohio St.3d 380, 1997-Ohio-52.**

We incorporate our application of the law to the facts of this case as set forth in El-Berri's first assignment of error. As such, in reviewing the entire record, in weighing the evidence and all reasonable inferences, in considering the credibility of the witnesses, and in resolving conflicts in the evidence, we cannot find that the jury clearly lost its way when it convicted El-Berri of rape. Regarding El-Berri's conviction for kidnapping, we find the same.

El-Berri's second assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER THREE

> **"The trial court erred by ordering convictions and a sentence for separate counts of rape and kidnapping because the offenses are allied offenses pursuant to R.C. 2941.25 and they are part of the same transaction under R.C. 2929.14."**

El-Berri argues that the trial court erred when it sentenced him for both rape and kidnapping because rape and kidnapping are allied offenses of similar import.

R.C. 2941.25 pertains to allied offenses of similar import and reads as follows:

> **"(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.**

> **(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."**

The Ohio Supreme Court directs that the determination of allied offenses be decided upon whether the offenses correspond to such a degree that the commission of one crime resulted in the commission of the other, rather than a strict textual comparison of statutory elements. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, at ¶ 25-26.

In *Cabrales*, the court continued to recognize that rape and kidnapping can be considered allied offenses. Id. at ¶25, citing *State v. Adams,* 103 Ohio St.3d 508, 2004-Ohio-5845, at ¶89-95 (kidnapping and rape are allied offenses).

"Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions." *State v. Logan* (1979), 60 Ohio St.2d 126, at paragraph (a) of the syllabus. In *Logan*, the court reasoned, "the primary issue, however, is whether the restraint or movement of the victim is

merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense." Id. at 135.

In this case, the evidence does not establish a separate animus between the kidnapping and rape counts that would demonstrate an independent significance for each of the offenses. Accordingly, these counts are allied offenses and the kidnapping conviction merges with the rape conviction. The kidnapping conviction is vacated and the matter must be remanded for proceedings consistent with this opinion and for resentencing.

El-Berri's third assignment of error is sustained.

ASSIGNMENT OF ERROR NUMBER FOUR

> "The trial court erred by ordering appellant to serve more than the minimum sentence."

This assignment of error is rendered moot by our disposition of the third assignment of error and is accordingly overruled.

Judgment affirmed in part, reversed in part and remanded for proceedings consistent with this opinion and for resentencing.

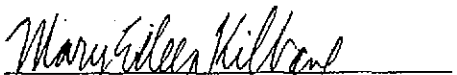
It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's

conviction having been affirmed, any bail pending appeal is terminated.

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



MARY EILEEN KILBANE, JUDGE

JAMES J. SWEENEY, A.J., CONCURS
MELODY J. STEWART, J., DISSENTS (SEE DISSENTING OPINION)

MELODY J. STEWART, J., DISSENTING:

I respectfully dissent from the majority decision affirming El-Berri's convictions for rape and kidnapping. The facts do not show that he compelled the victim to submit by force or threat of force, neither do they show that he restrained her liberty in any manner. Although El-Berri's conduct with a minor whom he employed was wholly inappropriate and distasteful to say the least, it did not support a finding of guilt on the charged offenses.

A more complete recitation of the facts shows that at trial, the victim's mother testified that her boyfriend owned a store where she and her daughter, the victim, worked. The boyfriend leased a portion of the store to a cell phone company owned and operated by El-Berri and his girlfriend. The victim's mother said that she and the girlfriend became friendly, and that she would

sometimes fill in at the cell phone store for the girlfriend. The mother said that El-Berri had trained the victim in the cell phone business and that he employed her at the boyfriend's store.

In December 2004, El-Berri assigned the victim to work at one of his stores located in a shopping mall. On the night of the incident, El-Berri scheduled the victim to work until 11:00 p.m. A heavy snow was falling that night and the victim's mother became concerned about the victim's ability to drive in poor weather. In its recitation of the facts, the majority states that "El-Berri offered to drive the victim home as she lacked experience driving in snow storms." Ante at 1. This statement is not exactly correct. It is undisputed that the mother called the victim to see if she wanted to be picked up. The mother testified that the victim told her El-Berri would give her a ride home; the victim testified that her mother asked her if El-Berri would give her a ride.

As they traveled on the interstate, El-Berri told the victim that he needed to stop by his house to get something. The victim testified that El-Berri asked her if he could make a detour to his house in order to get something, and that she told El-Berri it was "okay."

When he pulled up to the house, El-Berri asked the victim if she wanted to come in with him. She agreed to do so. When they entered the house, El-Berri went into another room while the victim remained in the kitchen. El-Berri

called for the victim to join him. She went into the living room and El-Berri started to rub her back. She did not say anything while he did this. He then bent her over the couch and started to unbutton her pants. During her testimony, she said that she was "scared" when asked what her thoughts were at the time, but she did not say anything to El-Berri. She testified that El-Berri pulled down her pants and underwear and then "put his penis in [her] vagina." She did not recall how long his penis was in her vagina, but when he removed his penis, El-Berri asked her if she was ready to go. She replied that she was, pulled her clothes up and left with him. The victim testified that as they were leaving, El-Berri's car became stuck in the snow. Unable to move the car, he called for a cab and both she and El-Berri went back in the house to wait. The victim stated that it took awhile for the cab to arrive, and neither she nor El-Berri said anything to each other during the wait.

When the cab arrived, El-Berri gave the victim money to pay the fare. The victim entered the cab and gave the driver directions to her house. At the same time, the mother, having grown concerned because the victim had not arrived home, called the victim's cell phone and asked where she was. The victim told her she was on her way home in a cab. When asked, "Did your mom want to know why you were in a cab," the victim responded, "I told her I would talk to her when I get home."

When the victim arrived home, she learned that her mother was talking on the telephone with El-Berri's girlfriend. The victim went into a bedroom and her mother handed the telephone to her. The victim briefly spoke with the girlfriend. The mother testified that the two argued on the phone. However, during cross-examination, the victim indicated that she and the girlfriend did not argue at all. Furthermore, when asked, "It was just a pleasant conversation, you told her you are with Tamer and that was that, right?" The victim answered, "yes." When she concluded the telephone call, the victim stated that she told her mother "what happened" with El-Berri.

The direct examination went as follows:

"Q. Did you tell your mom, once the phone conversation stopped -- when you got home your mom was on the phone. Then there came a time when your mom was no longer on the phone. Okay?

"After your mom was no longer on the phone did you tell your mom what happened?

"A. Yes.

"Q. How did that come about?

"A. I don't remember. I just remember telling her.

"Q. Do you remember what you told your mom?

"A. I told her what happened.

"Q. Back at Tamer's house?

"A. Yes."

The mother and her boyfriend then drove to El-Berri's house to confront him. The mother testified that the girlfriend answered the door and said to her, "you better not have your f***ing daughter with you." The mother angrily confronted El-Berri as he stood in the doorway and asked him "how could he betray me." The mother testified that her boyfriend said something, however, what was said is not in the record. Whatever the boyfriend stated, the mother testified that El-Berri said, "it is not like he was the first one." The mother stated that El-Berri invited them in to talk, but she refused.

The mother and her boyfriend returned home and the mother took the victim to the hospital emergency room. Results from a rape kit revealed the presence of seminal fluid on vaginal swabs, rectal swabs and the victim's underwear, but no semen was found on the vaginal smear slide, the rectal smear slide, the oral smear slide, the oral swabs, or the skin swabs. The source of the seminal fluid could not be determined as testing was unable to produce a male DNA profile. A record from the hospital emergency room contained an account of events that stated, "when the boss's [girlfriend] asked [the victim] if the patient had 'slept with Tamer' the patient said yes."

For his defense, El-Berri offered the testimony of the girlfriend who also lived with El-Berri. She stated that she ended her relationship with El-Berri immediately after the incident. She said that she had developed a close relationship with both the victim and her mother, and thought of herself and the victim as "almost best friends" and that the victim would tell others that they were "sisters" because they looked so much alike. The girlfriend testified that during the week before the incident occurred, and apparently coinciding with the victim's assignment to the mall location, she noticed El-Berri acting "a little weird" and staying longer at work than normal. While at her mother's house on the night in question, the girlfriend became concerned when El-Berri was not home by midnight, so she called the victim's mother to inquire into the victim's whereabouts. The victim's mother told the girlfriend that the victim was working with El-Berri. The girlfriend said that this was when she first learned that the victim had been working at the mall with El-Berri, and it aroused her suspicions. Later that evening, she again called the mother to find out if the victim had come home, thinking that if the victim had arrived home, it meant that El-Berri likewise should be home. The girlfriend and the victim's mother were on the telephone when the victim's cab arrived. The girlfriend asked the mother to go to the cab driver and ask him where he had picked up the victim. When told that the cab had come from El-Berri's house, it confirmed the

girlfriend's suspicions that El-Berri and the victim were having an affair. At that point, the girlfriend asked to speak with the victim and told her to admit that she was having an affair with El-Berri. The victim admitted to the girlfriend that she had an affair with El-Berri, but said that they only had sex one time.

I

At common law, the crime of rape was defined as "the unlawful carnal knowledge, by a man, of a woman, forcibly and against her will." *Smith v. State* (1861), 12 Ohio St. 466, 470. The courts interpreted rape as requiring proof of certain conduct by both the accused and the victim.

"Because 'against her will' is synonymous with 'without her consent,' many jurisdictions substituted the latter term. The prosecution, therefore, in order to satisfy its burden of proving all of the elements of the crime charged, had to establish both the victim's lack of consent and the defendant's use of force. The focus on the conduct of both the victim and the defendant resulted in the rule that the victim had to prove 'resistance to the utmost' to establish rape. Absent such resistance, rape was not established, notwithstanding evidence of the use of force." Wilk, Expert Testimony on Rape Trauma Syndrome: Admissibility and Effective Use in Criminal Rape Prosecution (1984), 33 Am.U.L.Rev. 417, 420-421. See, also, *State v. Driscoll* (1922), 106 Ohio St. 33,

40; *Frey v. State* (1907), 22 Ohio C.C. (N.S.) 607, 608.

A drawback of the "consent" requirement was that it tended to encourage a focus on the complainant's state of mind, and evidence of her prior sexual experience was often used to insinuate that she wanted to have sex. Abrams, Hearing the Call of Stories (1991), 79 Cal.L.Rev. 971, 1033-1034. To prevent such tactics, many modern statutes, guided by the Modern Penal Code, eliminated the express requirements of unwillingness or nonconsent.[1] The drafters explained that the Code's approach was not that "consent by the victim is irrelevant or that inquiry into the level of resistance by the victim cannot or should not be made. Compulsion plainly implies non-consent ***." Model Penal Code, Section 213.1, comment, at 301-306. One commentator has stated that under the Model Penal Code approach:

"The resistance standard is rejected where force is proved, but 'resistance by a woman of ordinary resolution' is the statutory standard used to define Gross Sexual Imposition, where the force exerted by the defendant is not an element. Thus, while the drafters intended to focus primarily on the actions of the defendant, they continued to stress the importance of the victim's non-consent.

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[1] Section 213.1 of the Model Penal Code states, "(1) Rape. A male who has sexual intercourse with a female not his wife is guilty of rape if: (a) he compels her to submit by force or threat of force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; ***."

The drafters noted that 'the possibility of consent by the victim, even in the face of conduct that may give some evidence of overreaching, cannot be ignored,' and echoed the concern of other commentators concerning the ambivalence of women toward forceful sexual intercourse. It was therefore *clearly intended* that the language '*compels* [*the victim*] *to submit by force' includes proof of the victim's non-consent.*" (Emphasis added.)

Ohio modeled its rape statute on the Model Penal Code.[2] As applicable to this case, R.C. 2907.02(A)(2) states that no person shall engage in sexual conduct with another when "the offender purposely compels the other person to submit by force or threat of force." A defendant purposely compels a victim to submit by force or threat of force when the defendant uses physical force against the victim, or creates the belief that physical force will be used if the victim does not submit. *State v. Schaim*, 65 Ohio St.3d 51, 55, 1992-Ohio-31. Depending on age and relationship, force "need not be overt and physically brutal, but can be subtle and psychological." *State v. Eskridge* (1988), 38 Ohio St.3d 56, 58-59; *Schaim*, 65 Ohio St.3d at 55. Physical resistance must no longer be shown by

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[2] "In its deliberations and as a guide, the Technical Committee and its staff relied on the Model Penal Code [MPC] of the American Law Institute, as well as the revised criminal codes from Illinois, New York and Wisconsin." Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code (1974), 23 Cleve.St.L.Rev 9. See, also, *State v. Graven* (1978), 54 Ohio St.2d 114, 122 (Celebrezze, J., dissenting) ("The General Assembly, in revising the Ohio Criminal Code, used the American Law Institute's Model Penal Code (1962) for guidance and language.").

the victim. See R.C. 2907.02(C) ("A victim need not prove physical resistance to the offender in prosecutions under this section.").

Lack of consent is no longer an express element of rape.[3] Nevertheless, there is an undeniable interplay between the concepts of resistance and consent. R.C. 2907.03(C) states only that the victim does not have to prove "physical" resistance to the defendant. This is not the same as saying that no resistance of any kind is required. With certain exceptions addressed shortly, if the use of force or threat of force is not apparent from the defendant's conduct, there must be some evidence of lack of consent or resistance to show that the defendant "purposely compel[led]" the other person to submit. See R.C. 2907.02(A)(2). Absent this showing, there would be no evidence that the defendant had the mens rea to cause the victim to capitulate. If the victim does nothing to communicate, either verbally or nonverbally, a lack of consent, a defendant cannot be found to have compelled the victim to submit to the sexual conduct.[4]

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[3] Consent is considered a defense to rape, albeit not an affirmative defense. See *State v. Gilliam* (Sept. 30, 1999), Montgomery App. No. 17491; *State v. Keeton*, Richland App. No. 03 CA 43, 2004-Ohio-3676.

[4] Some commentators have complained that courts have not been "interpreting 'without consent' to mean the absence of what is popularly understood to be 'consent,' yet instead have defined 'without consent' as 'without affirmative consent and with affirmative dissent,' thereby broadening the definition of consent to include acquiescence. See Note, Acquaintance Rape and Degrees of Consent: "No" Means "No," but What Does "Yes" Mean? (2004), Harv.L.Rev. 2341, 2348, fn.36, quoting Berliner, Note, Rethinking the Reasonable Belief Defense to Rape (1991), 100 Yale L.J. 2687,

A victim must affirmatively convey some indicia of non-consent as a predicate to a finding that the victim had been, in the absence of any force or threat of force, compelled to submit to the sexual conduct.[5]

I am aware that there are proponents of the concept of "affirmative consent." These advocates suggest that in the absence of express words of consent, the victim must be deemed to be non-consenting. See, generally, Note, Addressing Acquaintance Rape: The New Direction of the Rape Law Reform Movement (1995), 69 St. John's L.Rev. 291, 310-312. This standard, however, is inconsistent with R.C. 2907.02(A)(2), which requires the offender to have purpose to compel the other person to submit to sexual conduct by force or threat

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2689. This line of thinking is arguably at odds with other aspects of the law which routinely hold that a failure to voice objection is tantamount to consent in situations where one would be expected to voice disapproval. It in essence puts one person involved in a sexual encounter in the position of being a mind-reader when the other person makes no physical, verbal or non-verbal communication of a lack of consent, and for that reason is impractical as a legal standard.

[5] R.C. 2907.02(A)(1) defines a separate offense of rape that occurs when the offender engages in sexual conduct with a person other than a spouse and (a) substantially impairs that person's ability to consent by surreptitiously administering any drug, intoxicant, or controlled substance to the other person, (b) the other person is less than 13 years of age, or (c) the offender knows the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age. See R.C. 2907.02(A)(1)(a)-(c). The state did not charge El-Berri under R.C. 2907.02(A)(1), and there is no suggestion in the record that the victim lacked the ability to resist or consent, or that her ability to do so was substantially impaired by El-Berri.

of force. A standard that would, in the absence of force or threat of force, allow a victim to say nothing or manifest no form of resistence during the act but later voice her lack of consent, would fail as a matter of law under circumstances like those presented here because the defendant could not know that compulsion had been used against the victim.

II

The dispositive question is whether, in the absence of any evidence relating to force or the threat of force, El-Berri compelled the victim to engage in sexual conduct with him. The majority's discussion of the facts going to the elements of the offense is incomplete and belies the victim's own testimony. It offers no facts to show any force or threat of force used against the victim, and ignores significant testimony by the victim which showed that at all events she never communicated, in any manner whatsoever, that she did not consent to El-Berri's advances.

During direct examination by the state, the victim said that she asked El-Berri for a ride home, agreed to detour to his house, and further accepted his invitation to enter his house. When asked whether she said anything to El-Berri as he rubbed her back, the victim at first said, "I don't remember," and when asked again, she said "no." When asked whether she said anything to El-Berri as he began to remove her pants and underwear, she said "no." Although she

testified that she was "scared" as El-Berri did these things, when asked if there was any reason why she did not say anything at the time, the victim replied, "No. I don't know." Even though she claimed that she did not voluntarily bend over the couch, she continued to remain silent throughout. After referencing the specific act of penetration, the state asked the victim, "[i]s there any reason why you didn't say anything to him?" She replied, "I don't know." The testimony shows that her only word to him during and after the incident was "yes" when asked "if she was ready to go."

The victim's cross-examination further confirmed her lack of communication throughout the incident:

"Q. And you told the prosecutor that he began rubbing your back, correct?

"A. Yes.

"Q. And you didn't say anything, right?

"A. Right.

"Q. And then he basically started removing your pants?

"A. Yes.

"Q. And, again, you indicated to the prosecutor that you didn't say anything?

"A. Right."

After questioning the victim regarding how El-Berri penetrated her, the defense asked the following:

"Q. Again, you never said anything to him while he was doing this, correct?

"A. Right.

"Q. And you knew Tamer, right?

"A. Yes.

"Q. You have known him for a while, right?

"A. Right.

"Q. Yet you never said Tamer, what are you doing?

"A. No, I didn't.

"Q. Never said Tamer, I don't want to do this?

"A. No.

"Q. Never said Tamer, hey, [your girlfriend] and I are friends and if she finds out we are all going to be in trouble. Do you ever say that?

"A. No.

"Q. Did it ever occur to you?

"A. Yes."

At no point in any of the victim's testimony does it show that El-Berri used physical force of any kind to engage in sexual conduct. Neither is there any

evidence from which a reasonable trier of fact could find that El-Berri compelled the victim through nonphysical means or by the threat of force. The victim gave no verbal objection to his actions, nor did she engage in any form of nonverbal conduct, hesitation, or resistance to indicate that she did not consent to El-Berri's actions. Likewise, the state offered no evidence to show that El-Berri said anything coercive or threatening to the victim in the moments leading up to the sexual conduct.

While testifying, the victim stated that she was "scared" during the incident. However, her testimony does not indicate what she was afraid of or why she was scared. Unlike her earlier testimony where she specifically explains how she "was scared to drive in the snow," she did not testify that she was scared of El-Berri, scared that he might harm her or of what he might do to her, scared of losing her job, or scared of his retaliating against her. She may very well have been scared of having intercourse or scared of El-Berri's girlfriend coming home or scared of the unknown. All of these possibilities are plausible based on the evidence. The majority erroneously concludes that the victim's acknowledgment that she had been scared during the incident was sufficient to show that El-Berri used force or the threat of force to compel her to submit. The majority's conclusion is a non sequitur because it does not necessarily follow that a person is being forced or compelled to do anything just because she is scared.

Furthermore, the victim did not testify in any manner which would indicate that El-Berri knew she was afraid. If there had been any testimony to the effect that the victim's fear was manifest in any form or fashion, that evidence could be deemed sufficient to communicate to El-Berri that he was compelling the victim's submission to his advances. But the victim's testimony did not indicate that her fear, whatever its origin, was apparent or obvious to El-Berri. By her own admission, she wordlessly allowed him to escalate the encounter and engage in sex with her.

This analysis is not to suggest what the victim should or should not have done under the circumstances. But accepting her testimony as true, no reasonable trier of fact could conclude that there was evidence to show El-Berri knew that the victim did not consent to his actions. A defendant cannot be found to have compelled another to submit by force or threat of force when the evidence fails to show that the victim gave the defendant reason to know that she was being compelled. Under the circumstances of a case like this one, without any affirmative evidence showing lack of consent, a defendant will have no reason to know that his advances are unwelcome and therefore non-consensual.

The majority finds compelling as evidence of the element of force the victim's statement that El-Berri "bent" her over the couch to have sex with her. The victim's use of the word "bent," standing alone, does not establish that El-

Berri used force. Indeed, the most detailed account of his actions is given by the victim's testimony in response to being asked to describe the scenario where she states, "Like he put my arms on the couch and bent me over." A fair reading of the testimony shows that El-Berri positioned her over the couch rather than forced her over it against her will as the majority. This conclusion is consistent with the absence of any other testimony to show that El-Berri used force of any kind during this part of their encounter. For each action he made, whether rubbing her back, removing her clothes or bending her over the couch, the victim made no outward manifestation whatsoever that any of these actions were unwanted or that she was scared. A mere reference to being bent over the couch does not amount to force under these circumstances.

The majority likewise errs by accepting the argument that the victim was only 16 and one-half years old at the time and could not be expected to have the emotional or practical experience necessary to deal with the situation that was presented in this case.

In *State v. Eskridge* (1988), 38 Ohio St.3d 56, Eskridge was convicted of raping his four-year-old daughter and sentenced to life imprisonment on a finding that he used force during the commission of the rape. This court reversed the life sentence because it concluded that the state failed to present any evidence that Eskridge used force. The supreme court reversed this court,

stating in paragraph one of the syllabus that "[t]he force and violence necessary to commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other. With the filial obligation of obedience to a parent, the same degree of force and violence may not be required upon a person of tender years, as would be required were the parties more nearly equal in age, size and strength." In reaching this conclusion, the supreme court noted that the element of force as charged in a rape case "need not be overt and physically brutal, but can be subtle and psychological." Id. at 58-59.

In *State v. Schaim*, 65 Ohio St.3d 51, 1992-Ohio-31, the supreme court considered an appeal in which Schaim had been convicted of repeatedly demanding sex from his 19-year-old daughter in exchange for granting her certain privileges, even though there had been no proof of force. The state argued that a pattern of incest could suffice to establish the force element. The supreme court rejected this argument, explaining that:

"*State v. Eskridge* is based solely on the recognition of the amount of control that parents have over their children, particularly young children. Every detail of a child's life is controlled by a parent, and a four-year-old child knows that disobedience will be punished, whether by corporal punishment or an alternative form of discipline. Because of the child's dependence on his or her parents, a child of tender years has no real power to resist his or her parent's

command, and every command contains an implicit threat of punishment for failure to obey. Under these circumstances, a minimal degree of force will satisfy the elements of forcible rape. Id., paragraph one of the syllabus.

"The same rationale does not apply to an adult. No matter how reprehensible the defendant's alleged conduct, a woman over the age of majority is not compelled to submit to her father in the same manner as is a four-year-old girl. She is no longer completely dependent on her parents, and is more nearly their equal in size, strength, and mental resources. Although we are aware of the devastating effects of incest on its victims, and are sympathetic to the victim whose will to resist has been overcome by a prolonged pattern of abuse, we reluctantly conclude that a pattern of incest is not always a substitute for the element of force required by R.C. 2907.02(A)(2). A defendant purposely compels another to submit to sexual conduct by force or threat of force if the defendant uses physical force against that person, or creates the belief that physical force will be used if the victim does not submit. A threat of force can be inferred from the circumstances surrounding sexual conduct, but a pattern of incest will not substitute for the element of force where the state introduces no evidence that an adult victim believed that the defendant might use physical force against her." Id. at 55.

The victim in this appeal was 16 and one-half years old at the time of the incident, falling between the *Eskridge* "child of tender years" and the *Schaim* "woman over the age of majority." She was a sophomore in high school, had obtained her driver's license five months before the events in this case, worked, and at all times during the night of the incident had her cellular telephone with her. The victim had no filial relationship with El-Berri. She met El-Berri because he leased retail space in a store owned by her parents. She developed a close friendship with El-Berri's girlfriend and, on one or two occasions, even socialized with the girlfriend and El-Berri. When the girlfriend worked at the store owned by the victim's parents, the victim spent so much time with her that she became knowledgeable about El-Berri's business. He then hired her to work at his retail space located inside the store owned by the victim's parents, although that arrangement appeared to be informal. The victim testified that she earned a commission on each cell phone that she sold and El-Berri paid her in cash. The victim was unclear as to exactly how long she had worked at El-Berri's mall location, saying that it was "more than a week."

Unlike the four-year-old victim of incest in *Eskridge*, there is no evidence in this case to show or suggest that El-Berri had any type of control over the victim. Likewise, there was no evidence to show that the victim's age caused her to be so dependent on El-Berri that she capitulated to his advances because of

fear or duress. The evidence shows that the victim was very friendly with El-Berri and his girlfriend and apparently comfortable enough around El-Berri to 1) ask him to drive her home, 2) consent to stopping at his house, 3) agree to go inside with him, and 4) go back inside the house with him to wait for a cab after the sexual encounter had occurred. Throughout all of the events in his house that led to the sexual encounter, the victim's only response to why she did not object to El-Berri's advances was "I don't know." This testimony was insufficient to show the kind of subtle coercion addressed in *Eskridge*. The victim gave no outward indication of her state of mind, and admitted that she said nothing to El-Berri. She gave no nonverbal communication, either by hesitating, resisting or showing her fear, to communicate her lack of consent. Importantly, at no point in her testimony did the victim attribute her silence to being "scared." As events escalated, the victim remained silent, giving El-Berri no indication that his actions were unwanted. With the absence of force or subtle coercion, El-Berri could not know that his advances were unwelcome. To find otherwise would make the actions of any initiator in a sexual encounter no different from those of a rapist.

III

With regard to the kidnapping count, I find no evidence to support the majority's assertion that El-Berri's "true purpose" was to "lure the victim to his house in order to engage in sexual activity with the victim against her will." Ante at 5.

Viewing the evidence in a light most favorable to the state shows that the victim, or her mother, asked El-Berri to give her a ride home. He drove past her exit on the freeway, and told her that he was "going to stop at his house and get something." When asked if that was "okay" with her, the victim said "yes." When they arrived at his house, El-Berri "asked me if I was going to come in. I said sure." They entered through the kitchen door. El-Berri walked through the kitchen and entered a different room -- either the bedroom or the living room. The victim remained in the kitchen until he called for her to join him. The victim walked into the living room and El-Berri said something to her, but she could not recall what he said. He then began rubbing her back.

None of this evidence shows that El-Berri restrained the victim's liberty. As noted in the discussion of the rape count, El-Berri did not use any physical force or restraint against the victim. To the contrary, he asked for the victim's permission to stop at the house and she consented to enter. There is simply no

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evidence to show that El-Berri restrained the victim's liberty at any point in time.

The majority appears to conclude that El-Berri deceived the victim by bringing her to his house under pretense while all along intending to sexually assault her.

The word "deception" is not defined in R.C. Chapter 2905. However, R.C. 2913.01(A) defines "deception" as "knowingly deceiving another or causing another to be deceived by any false or misleading representation, *** or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact." Although this definition does not expressly apply to R.C. Chapter 2905, it nonetheless conforms to the generally-accepted meaning of the word "deception," so I apply it here. See R.C. 1.42; *State v. Young* (July 28, 1992), Meigs App. No. 458.

The majority's assertion that El-Berri "lured" the victim to his house in order to engage in "sexual activity with the victim against her will" finds absolutely no support in the record. There is no evidence of any kind to show what El-Berri's intentions were as they drove from the mall. Even if one assumes that he did hope to engage in sexual activity with the victim, the trial testimony did not show that he intended to do so against her will. To the

contrary, he asked for and received the victim's permission to stop at his house. Once at the house, he asked her if she wanted to come inside without any threat or hint of force or duress. Whatever El-Berri's intentions may have been, there is no evidence to show that he deceived the victim into entering his house.

The only evidence to show El-Berri's purpose in going to his house was the victim's testimony that he needed to stop by his house to get something. The victim did not know or did not say what El-Berri needed to retrieve from the house, but there is no question that he entered a least one other room of the house while she remained standing in the kitchen. This conduct at least supports the possibility that he accomplished his purpose of retrieving something from his house. At all events, El-Berri made no demonstrably false statements to the victim, and she willingly agreed to accompany him regardless of any unstated ulterior motive he may have had.

IV

Having reviewed all the evidence in a light most favorable to the state, I find as a matter of law that the state failed to prove all the elements of rape and kidnapping beyond a reasonable doubt. Although there are jurisdictions that make it unlawful for someone of El-Berri's age to have sexual intercourse with

a 16-year-old,[6] Ohio is not one of those jurisdictions. With the absence of force or threat of force, the state could only prove that a rape occurred by offering evidence that the victim did not consent to engaging in sexual conduct with El-Berri and that she communicated her lack of consent to him. The state failed to elicit any testimony from the victim showing that she communicated her lack of consent to El-Berri. As despicable as El-Berri's conduct on the night of this incident may be viewed, I find the evidence legally insufficient to establish the rape and kidnapping counts. I therefore dissent.

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[6] See, e.g., Cal.Crim.Code 261.5(b)-(d); Col.Rev.Stat. 18-3-402; N.Y.Pen.Code 130.25(2).

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