



TABLE OF CONTENTS

Page

EXPLANATION OF WHY THIS PARTICULAR CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION..... 4

STATEMENT OF THE CASE AND FACTS..... 4

ARGUMENT IN SUPPORT OF THE PROPOSITION OF LAW...

Proposition of Law No. 1: Where the record on appeal demonstrates that several offenses alleged in the indictment and bill of particulars did not occur within the time frames charged therein, the counts in the indictment relating to those offenses must be dismissed..... 6

Proposition of Law No.2: Where the statements made by a prosecuting attorney during the closing argument phase of trial are not based on the record evidence as to mislead a jury in a prejudicial way, the improper closing statements prejudicially affect the rights of the accused and a denial of the right to fair trial results..... 10

Proposition of Law No. 3: Where defense attorney's inexperience, inattention or lack of knowledge of the law led to their failure to object to prosecutor's misleading improper closing statements, the Sixth Amendment right to effective assistance of counsel is violated and the accused denied due process right to fair trial..... 10

Proposition of Law No. 4: Where a trial court overrule a motion for new trial based on newly discovered evidence without making the required findings as to the new evidence, a trial court thereby err in denying the accused motion for a new trial and the conviction should be reversed and new trial granted..... 11

CONCLUSION..... 12

CERTIFICATION..... 12

APPENDIX

Judgment Entry of the Hamilton County Court of Appeals

(October 8, 2008)..... i

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

This particular case involves an issue of great great concern in the State of Ohio. One of the questions needed to be resolved in this matter is whether the accused has been denied a fair trial when the victim initially told the grand jury the rape happened in 1997 but later indicate at trial that it actually happened in 1999? Likewise, the court appointed counsel lack of interest in this case and the unlimited leeway the trial court granted to the prosecution in this particular type of case are crucial issues. The appellant here asks this Court to take time to address this issue in a more effective manner so that clear guidelines are established for these types of cases in the future.

**STATEMENT OF THE CASE AND FACTS**

Appellant Levon Milloy ("appellant") was indicted by the Hamilton County Grand Jury for Rape in Counts One, Two, and Three in violation of R.C. 2907.02, and Gross Sexual Imposition in violation of R.C. 2907.05 in Counts Four and Five. On June 5, 2000, the case proceeded to trial by jury, the Honorable Steven Martin Presiding. At the conclusion of trial, the jury found appellant guilty on Counts One thru Four of the indictment. Count Five having been dismissed by the trial court pursuant to defense's Criminal Rule 29 motion. On June 30, 2000, appellant was sentence to Life imprisonment on each of the four counts, to be served consecutively to one another. On July 20, 2007, the First Appellate District for Hamilton County Vacated appellant's sentence Pursuant to State v. Jordan

holding the trial court failed to advise appellant of post release control. At the new sentencing hearing, held on November 13, 2007, a hearing was held on the three(3) motions, appellant previously filed on September 7, 2007, with supporting case law warranting the dismissal of Counts One, Two, Three and Four of the indictment. All three motions were denied by the trial court and appellant was resentenced to the same sentences as before. From the trial court's November 13, 2007 decision and the decision of the First District Appellate court on October 8, 2008, appellant now appeal to this Court.

**The Facts Presented at trial were as follows:**

The victim of the alleged sexual assault was Ronnelle Evans, born June 30, 1992. Ronnelle was the young daughter of Michelle Reynolds. At the time appellant met, dated, and became intimate with Ms. Reynolds and moved into her 500 E. 12th Street apartment in August of 1997, Ronnelle was Ms. Reynolds only child. As their relationship grew, appellant and Ms. Reynolds had two(2) birth daughters of their own together - Myshailah, born July 10, 1998 when Ronnelle was 6 years old and, Aaliyah, born July 5, 1999 when Ronnelle was 7 years old (Tp.210,333). The five member family moved from the 500 E. 12th Street residence to their new Beekman Street residence on July 9, 1999 (Tp.210,219-220).

Now that there were two additional children born to the household, Ronnelle felt appellant "always pays attention to his two daughters and never to her (Tp.175,190). Later, at Beekman Street on August 13, 1999, Ronnelle accused that appellant sexually abused her.

At trial, Ms. Reynolds confirmed an incident wherein Ronnelle had falsely accused appellant of having an affair with another woman, and confirmed the family fight that occurred the day before Ronnelle made the sexual abuse allega-

tions. She also testified she caught Ronnelle reviewing a pornographic movie just prior to her alleging sexual abuse (Tp.223). Also at trial, Dr. Schulbert testified he examined Ronnelle but could not determine to any medical certainty whether she had been sexually abused (Tp.246).

At trial, Ronnelle testified that appellant had sexually abused her four times; three on 12th Street and once on Beekman. At trial, she testified that the "First time" it happened at 12th Street; that appellant "put his tongue in her private part". She said this "First event" occurred when her "Sisters" were home (Tp.154). According to Ronnelle, the "Second time" it happened was at 12th Street; that appellant "put his private part in her private part". She said this "Second event" occurred when her "two sisters" were home (Tp.182). The "Third time it happened, according to Ronnelle, was at 12th Street; that appellant put his private part in her mouth (Tp.160-161). The "Fourth final Time", according to Ronnelle, was at Beekman Street; that the appellant "put his tongue in her private part". She said this "Fourth final event" occurred "the day they did not have beds"(Tp.163). In addition, Ms. Reynolds confirmed, during her testimony, that "July 9th, 1999" is the only day her Beekman residence did not have beds (Tp.219-220).

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: Where the record demonstrates the State failed to prove beyond a reasonable doubt that the offenses it alleged in the First, Third and Fourth counts occurred at the time it is stated in the indictment, the counts relating to those offenses must be dismissed.

The state failed to prove beyond a reasonable doubt that the offenses it alleged on Counts One, Three and Four occurred at the time it is stated in the

indictment and bill of particulars. The indictment must be construed as written. see. *U.S. v Darby* (1994), 37 F.3d 1059, 1064. The Counts One, Three and Four offenses were stated to have occurred, in the words of the indictment, as follows:

CT 1 & 4 : "FROM" june 30, 1997 "TO" june 30, 1998.

CT 3 : "FROM" august 6, 1999 "TO" august 13, 1999.

The judge's charge to the jury was to find, beyond a reasonable doubt, that the offenses occurred "FROM" and "TO" the dates alleged. Not "on or about".

In the mist of Ronnelle testifying on direct about the "First time" she recall being abused by appellant, the prosecutor asked Ronnelle the following simple question:

(Tp.154) "Q: "was anyone home at that time?"

"A: "My sisters were".

In the mist of Ronnelle testifying on cross about the "Second time" she recall being abused by appellant, the defense counsel asked Ronnelle the following simple question:

(Tp.182) "Q: "were your two sisters in there too?"

"A: "Yes".

It was the prosecutor's decision to develop and admit into evidence the birthdates of Ronnelle's two sisters which showed the first younger sister was born July 10, 1998 and the youngest sister was born July 5, 1999. The state's evidence was that Ronnelle's two sisters were present at the time of the "First and Second events". The prosecutor, during closing arguments, invited the jury to draw inference that the First event Ronnelle described occurred at the time the indictment state the Count Four offense to occurred, and that the Second event she described occurred at the time the indictment state the Count Four

to occurred (Tp.311-316). The evidence was not sufficient to prove the crime for which appellant was indicted. The state's evidence actually showed that, (1) the evidence concerning the First and Second events only give rise to a reasonable inference that both events occurred sometime in July 1999, in the month and year Ronnelle's youngest sister was born, (2) the first and second events could not possibly occurred at anytime "FROM" june 30, 1997 "TO" june 30, 1998 because neither of Ronnelle's sisters were born at the time the indictment state the Counts One and Four offenses to have occurred; and (3) the evidence concerning the First and Second events was not sufficient to enable a reasonable rational jury to date any abuse at the time the indictment state the Counts One and Four offenses to have occurred.

Ohio Law, however, does not allow a jury to find an element of a crime from inference based on inference. see. **Mutual Insurance v. Hamilton Township Trustees** (1986), 28 Ohio St.3d 13, 502 N.E.2d 204. Without impermissably stacking inferences, the fact that evidence show appellant abused Ronnelle in July 1999 does not constitute proof he abused her sometime "FROM" june 30, 1997 "TO" june 30, 1998. Also, the state argue that the First and Second event has the same elements of the crimes charged in Counts One and Four. However, the evidence was not sufficient to prove the crime for which appellant was indicted. The case in **U.S. v. Tsinhnahjinnie** (1997), 112:F.3d at 992, summarize the point as follows:

"A man indicted for robbing First National Bank in Springfield on January 1st cannot be convicted on the indictment of robbing Second National Bank in Middletown on December 30, even though the elements of the crime would be exactly the same. The problem would be that the defendant was not indicted for the crime proved, had no fair notice, and would lack double jeopardy protection for the December 30 crime if he won acquittal."

Here (Tp.189), in light of Ronnelle's testimony that "there were "alot" of times that incidents occurred, other than the four she elected to testify about at trial, it cannot be said with certainty that the two July 1999 crimes and the two crimes which allegedly occurred "FROM" June 30, 1997 "TO" June 30, 1998 are one in the same. Clearly, the grand jury did not indict appellant on Counts One and Four with July 1999 crimes. The date July 1999 cannot be found throughout the time the indictment state the Counts One and Four offenses to have occurred. Whether like or unlike, or similar or dissimilar to the one charged, is never admissible when its sole purpose is to establish the defendant committed the act alleged of him in indictment. see. *State v. Wilkinson* (1980), 415 N.E.2d 261, 269.

As its only reason given for affirming appellant's conviction on Counts One, Three and Four, the First District Court of Appeals, in its October 8, 2008 judgment entry, takes the position that "the record evidence of Ronnelle's sisters birthdates show that at least one of Ronnelle's sisters were born at the earliest time the the indictment state the Counts One and Four offenses to have occurred and, therefore, the jury could have found that the state proved beyond a reasonable doubt that appellant committed the crimes at the time the indictment state the Counts One and Four offenses to have occurred".

The First District Appellant Court gave no sound reason for affirming appellant's convictions. Once again, the trial court was satisfied Ronnelle past the competency test. see. *State v. Frazier* (1991), 574 N.E.2d 483. Her consistent and unshaken testimony on direct and cross was that both her "sisters" were home when the First and Second events occurred. Her sisters birthdates, to which the state elected to develop and admit into evidence, provide a certainty

that neither of her two sisters were born at the earliest time the indictment state the Counts One and Four offenses to occurred. Also, the state prosecutor did not prove that the Count Three offense occurred at the time it is stated in the indictment and bill of particulars. The "bed testimony" offered by Ronnelle and Ms. Reynolds only enabled a reasonable rational jury to date the "Fourth final" abuse on July 9, 1999 at Beekman Street. The indictment state that the Count Three offense occurred "FROM" august 6, 1999 "TO" august 13, 1999. The grand jury did not indict appellant on Count Three with a July 1999 crime. The date July 1999 cannot be found throughout the time the indictment state the Count Three offense to occurred, and the "Fourth final" event was therefore not admissable to prove appellant's guilt on the third count of the indictment. see. State v. Wilkinson, supra. In support of reversing appellant's conviction as to the Counts One, Three and Four, the court in State v. Barnecut (Ohio App. 1988), 542 N.E.2d 353, two of the syllabus, has held:

"Counts not proven to have occurred at the time it is stated in the indictment had to be dismissed."

Because of the state's failure to prove that the Counts One, Three and Four offenses occurred at the time it is stated in the indictment and bill of particulars, the appellant's convictions on Counts One Three and Four should be dismissed as a matter of law.

Proposition of Law No. 2: Where the prosecutor's closing statements are improper, the accused is denied a right to a fair trial.

Proposition of Law No. 3: Where defense attorney fails to object to prosecutor's improper closing statements, a duty owed to the accused is violated in his Sixth Amendment right to effective assistance and the accused is denied a fair trial.

[ARGUED TOGETHER]

The misconduct by the prosecuting attorney during closing statements was improper and counsel's failure to object to prosecutor's improper closing statements both denied appellant's Due Process right to fair trial,

The proof at trial was that the First, Third and Fourth events occurred in July 1999. But the prosecutor, during closing arguments, told the jury that the First and Second events occurred sometime "FROM" June 30, 1997 "TO" June 30, 1998, and that the Fourth event occurred sometime "FROM" August 6, 1999 "TO" August 13, 1999. The prosecutor's improper closing statements was misleading to the jury as to deny appellant Due Process to fair trial. see. *U.S. v. Carroll* (6th Cir. 1994), 26 F.3d 1386; *U.S. v. Lichenstein*, 610 F.2d 1272, 1281. Defense counsel's failure to object to prosecutor's improper and misleading closing statements violated appellant's Sixth Amendment Due Process rights to effective assistance of counsel. see. *Strickland v. Washington* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. Because of the improper and misleading closing statements by the prosecutor. And where trial counsel violated an essential duty owed to the accused which results in undue prejudice, reversible error results and appellant denied a fair trial. Thus case should be reversed and appellant granted a new trial.

Proposition of Law No. 4: Where trial court on motion for new trial based on newly discovered evidence fails to make required findings as to new evidence in decision to grant or deny motion for new trial, the trial court err, the conviction should be reversed and new trial granted.

The trial court erred in denying appellants motion for new trial based on newly discovered evidence without making the required findings. The Ohio Supreme Court in *State v. Petro* (1947), 76 N.E. 2d 370, syllabus, has held that a trial court shall make findings as to whether the new evidence:

(1) disclose a strong probability that it will change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before trial even with exercise of due diligence; (4) is material to the issue; and (5) is not merely cumulative or impeaching to former evidence.

At the trial, the state argued that what Ronnelle evans described during her testimony all occurred over a period of three(3) years. At the new sentencing hearing on November 13, 2007, appellant's motion with newly discovered evidence demonstrated that what Ronnelle actually described during her testimony all occurred on one single day on July 9, 1999; that Ronnelle in fact could not have been sexually abused by appellant at the time she testified to because she nor appellant was living or had slept at 12th Street on July 9, 1999.

In denying appellant's motion for new trial based on newly discovered evidence, the trial court failed to make the findings required by the Court in *Petro, supra*. It was an abuse of the trial court's discretion to grant or deny the motion on grounds other than that prescribed. see. *Blackmore v. Blackmore* (1983), 450 N.E.2d 1140. For this reason, the decision of the trial court should be reversed and appellant granted a new trial.

#### CONCLUSION

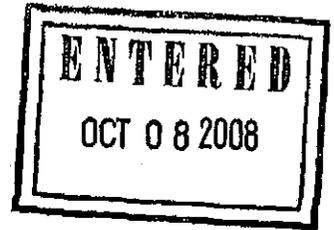
For the foregoing reasons, the trial court's judgment should be reversed.

#### CERTIFICATE OF SERVICE

*Levon Millow*  
Levon Millow # 394-353  
W.C.I. P.O.Box 120  
Lebanon, Ohio 45036  
Appellant

I do hereby certify that on this 18 day of November, 2008, an accurate and true copy of this foregoing document was served by regular u.s. mail service to the Hamilton County Prosecutor's Office at 230 E.9th Street, Suite 4000, Cincinnati, Ohio 45202.

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**



STATE OF OHIO,

Plaintiff-Appellee,

vs.

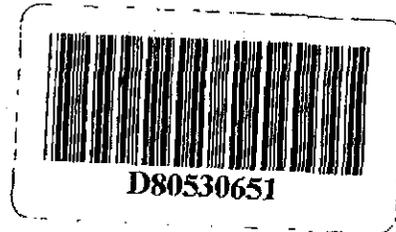
LEVON MILLOW,

Defendant-Appellant.

APPEAL NO. C-070832

TRIAL NO. B-9908530

*JUDGMENT ENTRY.*



We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant Levon Millow was indicted on three counts of rape<sup>2</sup> and two counts of gross sexual imposition.<sup>3</sup> A jury found Millow guilty on the three rape counts and on one count of gross-sexual-imposition and acquitted him on the remaining count.

On appeal, counsel for Millow has filed a brief in accordance with *Anders v. California*, stating that counsel has conscientiously reviewed the record and has found no nonfrivolous grounds on which to appeal.<sup>4</sup> Counsel requests permission to withdraw and, as required by *Anders*, requests that this court independently examine the record to determine if the proceedings below were free of prejudicial error. Counsel has properly notified Millow of the filing of this *Anders* brief, providing sufficient time for Millow to provide grounds for this

<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

<sup>2</sup> R.C. 2907.02(A)(1)(b).

<sup>3</sup> R.C. 2907.05(A)(1).

<sup>4</sup> *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396.

appeal. Millow has responded with the assertion that the trial court erred in denying his motion to dismiss three of the charges against him.

The thrust of Millow's argument is that the evidence adduced at trial failed to show that the offenses had occurred within the time parameters listed in the indictment and the bill of particulars. In support of his argument, Millow cites the victim's testimony that her two sisters had been present during three of the offenses. He argues that because the younger sister had not yet been born when the offenses were alleged to have been committed, the victim's testimony and the evidence at trial did not establish that the offenses had been committed within the time frame listed in the indictment and the bill of particulars. We are not convinced.

The older sister had been born at the earliest time during which the indictment alleged that the offenses had occurred. The victim's young age could easily account for the inconsistency in her testimony. Though the victim testified that her "sisters" had been around when the offenses had been committed, we disagree that the evidence contradicted the indictment and the bill of particulars. One sister had been born, and the evidence otherwise supported the victim's testimony such that a jury could have found that the state had proved all elements of the offenses beyond a reasonable doubt.<sup>5</sup>

After examining the entire record, we are satisfied that counsel has provided Millow with a diligent and thorough review of the proceedings, and that the proceedings below were free of prejudicial error.

We conclude that Millow's appeal is without merit and wholly frivolous. Therefore, we overrule counsel's motion to withdraw and affirm the judgment of the trial court.

---

<sup>5</sup> See *State v. Millow* (June 15, 2001), 1<sup>st</sup> Dist. Nos. C-000510 and C-000524.