IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,	:	Case No. 09-1572
Plaintiff-Appellant,	:	On Appeal from the Seneca County Court of Appeals Third Appellate District
v.	:	
KIEL HENRY,	:	Court of Appeals Case No. 13-08-10
Defendant-Appellee.	:	

MEMORANDUM IN OPPOSITION OF JURISDICTION OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE KIEL HENRY

DEREK DEVINE #0062488
Seneca County Prosecutor

JAMES A. DAVEY #0078056
Assistant Seneca County Prosecutor
(COUNSEL OF RECORD)

Seneca County Prosecutor's Office
71 South Washington Street, Suite 1204
County Svcs. Bldg.
Tiffin, Ohio 44883
(419) 448-4444
(419) 443-7911 – Fax

COUNSEL FOR PLAINTIFF-APPELLANT, THE STATE OF OHIO

JAVIER HORACIO ARMENGAU #0069776
(COUNSEL OF RECORD)

Law Offices of Javier Armengau
857 South High Street
Columbus, Ohio 43206
(614) 443-0516
(614) 443-0608 – Fax

COUNSEL FOR DEFENDANT-APPELLEE, KIEL HENRY

FILED
SEP 28 2009
CLERK OF COURT
SUPREME COURT OF OHIO

DONALD W. WHITE #0005630
Clermont County Prosecutor

DAVID H. HOFFMAN #0005384
Assistant Clermont County Prosecutor

123 North Third Street
Batavia, Ohio 45103-3033
(513) 732-7313
(513) 732-7592 – Fax

COUNSEL FOR AMICUS CURIAE, THE OHIO PROSECUTING ATTORNEYS ASSOCIATION

THE OFFICE OF THE OHIO PUBLIC DEFENDER

KATHERINE A. SZUDY #0076729
Assistant State Public Defender

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
Kathy.Szudy@OPD.Ohio.gov

COUNSEL FOR AMICUS CURIAE, OHIO PUBLIC DEFENDER

TABLE OF CONTENTS

Page No.

STATEMENT OF THE CASE AND FACTS 1

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER 4

EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION 5

RESPONSE TO THE STATE'S PROPOSITIONS OF LAW 6

I. Introduction 6

II. The applicable law as stated by this Court 6

III. Application of the principles that have been established by this Court in *State v. Eskridge*, 38 Ohio St.3d 56 to the case sub judice 7

CONCLUSION 10

CERTIFICATE OF SERVICE 11

STATEMENT OF THE CASE AND FACTS

. The Third District Court of Appeals adduced the facts in the case sub judice as follows:

> In September 2007, the Seneca County Grand Jury indicted Henry for two counts of gross sexual imposition in violation of R.C. 2907.05(A)(1), felonies of the fourth degree. The indictment arose from an accusation that Henry, while intoxicated, went into a Heidelberg College campus residence, entered a sleeping woman's bedroom, got into her bed, and engaged in sexual contact with her.
>
> In January 2008, the case proceeded to trial, at which the following testimony was heard.
>
> The victim, K.C., testified that, on August 12, 2006, she was a student at Heidelberg College in Seneca County; that she lived in a campus house commonly referred to as the "CDH house" with six other women who were members of the same community service society; that the society was having a "retreat" at the house and no men were present; that she went to bed around 12:30 a.m. wearing only shorts and a sports bra; that the shorts were approximately eight inches long with an elastic waistband; and, that her bedroom was located on the second floor of the house and her bed was situated against the wall.
>
> K.C. continued that she was awakened during the night when she felt a man lying right behind her; that she was lying on her side, facing the wall; that she felt a hand underneath her shorts in her pubic area; that she initially thought the man was her boyfriend because she was sleepy; that she put her hand on his arm, removed it from her shorts, and said "no"; that her hand remained on his arm for the duration of the incident; that, for a second time, the man put his hand into her shorts and touched her vagina; that she again removed his hand and said "no"; that, for a third time, the man put his hand into her shorts and touched her vagina; that she again removed his hand and said "no"; that, for a fourth time, the man put his hand into her shorts, but this time penetrated her vagina with his finger; that she removed his hand again; that, for a fifth time, the man put his hand into her shorts, and, at that point, she "woke completely up" and realized that the man was not her boyfriend (trial tr., vol. II, p. 187); and, that she braced her feet against the wall and pushed the man off her bed and onto the floor, causing a loud thud.
>
> K.C. continued that she then jumped out of bed and ran out of the room, screaming to the other women in the house that there was a

man in her room; that the other women ran up the stairs and went into the bedroom; that the man, later identified as Henry, was still lying in the same spot on the floor; and, that the women lifted him up to carry him out of the room because Henry was "not with it," but then he "came to" and eventually left the house. (Id. at 191). K.C. further testified that she did not even know Henry's name at the time of the incident; that she never gave Henry permission to come into her bedroom, get into her bed, or to touch her; and, that she had never been in a relationship with Henry or had physical relations with him.

On cross-examination, K.C. testified that she did not lift up her shorts when Henry was touching her; that Henry did not make any verbal threats; that she did not make any efforts to scream or to get out of the bed until the fifth time that Henry touched her; that she was able to get out of the bed "as soon as [she] wanted to" (Id. at 207); that, once she pushed him off the bed and he landed on the floor, he did not move until the women dragged him out of the bedroom; that Henry was bigger, bulkier, and stronger than she was; and, that she told the police officers that he was "very, very wasted." (Id. at 209).

Rachel Goodenow, K.C.'s housemate at the time of the incident, testified that, on the night of the incident, she attended the society retreat at the CDH house; that, after K.C. went upstairs to bed, seven or eight men from the wrestling team arrived at the house; that some of the men were acquainted with some of the women in the house; that the men visited for approximately twenty to thirty minutes, and then departed, except for Henry; that Henry "small talked" with her and two other women on the first floor of the house; that, eventually, Henry either passed out or fell asleep; that she and the other women decided to walk him back to his apartment because they did not want him to sleep on their couch; that they left him alone on the couch for approximately four minutes; and, that when they returned, he was gone, and they assumed he had left.

Goodenow continued that, at some point thereafter, she heard a loud thud and K.C. came running down the stairs screaming; that K.C. was frantic, very distressed, and kept repeating "who the hell are you" and "get the f**k out" (Id. at 246); that she and the other women went up to K.C.'s bedroom and dragged Henry into the hallway; that he went into the bathroom where they heard him vomiting; and, that K.C. is very petite and Henry is a "larger wrestler." (Id. at 249).

Sergeant Mark E. Marquis, a police officer for the city of Tiffin, testified that he responded to an alleged sexual assault at the CDH house; that he located Henry walking down the street; that he asked Henry what had happened at the CDH house, and Henry advised that he had gone there with some friends after the bars closed, and that someone told him he needed to go to bed, so he went upstairs to go to bed.

Officer Jacob Demonte of the Tiffin Police Department testified that he and Sergeant Marquis spoke to Henry, who was obviously intoxicated; that Henry advised that he was coming "from the bars," was "very intoxicated," and "felt like throwing up" (trial tr., vol. III, p. 282); that Henry admitted he had been at the CDH house; that Henry advised that "the last thing he remembered was falling asleep on the couch [at the CDH house] downstairs by himself" (Id. at 283); and, that when Sergeant Marquis asked Henry if he went upstairs at all, he responded that "yes, he had went [sic] upstairs. Someone had told him he could go to sleep, but he couldn't remember who. He went upstairs. Found a bed and laid [sic] down in bed and remembered going to sleep with no one else in the bed." (Id.)

Detective Brian Bryant of the Tiffin Police Department testified that Henry was a "big wrestler" and at least twice the size of K.C. (Id. at 295); that he interviewed Henry approximately an hour and a half to two hours after the incident; that, at the time of the interview, he did not believe Henry was intoxicated, as he was coherent and talking; that he talked to K.C. about going to a hospital for an examination, but that she refused; and, that, where the allegation involves digital penetration, collection of DNA evidence must be done rather quickly, and, in this case, Henry had already washed his hands at least once.

At the close of the State's evidence, Henry made a Crim.R. 29 motion for acquittal, arguing that the State failed to present sufficient evidence of sexual contact or force or threat of force, which the trial court overruled.

Thereafter, the jury found Henry guilty of the first count of gross sexual imposition and not guilty of the second count of gross sexual imposition.

In February 2008, Henry filed a motion for acquittal, or in the alternative, a motion for a new trial, which the trial court denied.

> In May 2008, the trial court sentenced Henry to community control for a period of five years. Additionally, the trial court classified Henry as a sexually oriented offender.

State v. Henry, 3rd Dist. No. 13-08-10, 2009-Ohio-3535, at ¶2-16.

The Third District Court of Appeals reversed Mr. Henry's conviction for gross sexual imposition, finding that the conviction was not supported by sufficient, credible evidence. *State v. Henry*, 2009-Ohio-3535, at ¶26-31. The State filed a memorandum in support of jurisdiction on August 31, 2009.

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in the case sub judice insofar as the State is requesting this Court to engage in mere error correction. The Third District Court of Appeals applied the analysis that this Court developed in *State v. Eskridge* (1988), 38 Ohio St.3d 56. And the court of appeals properly determined that

Mr. Henry's conviction for gross sexual imposition was not supported by sufficient, credible evidence. *State v. Henry*, 2009-Ohio-3535, at ¶26-31.

Accordingly, the OPD has an enduring interest in protecting the integrity of the justice system and ensuring equal treatment under the law. To this end, the OPD supports the fair, just, and correct interpretation and application of Ohio's felony statutes.

EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

This Court should not accept jurisdiction in *State v. Henry*, 2009-Ohio-3535, because the case does not involve a substantial constitutional question, and is not of public or great general interest. The State proposes that this Court accept jurisdiction because the court of appeals misapplied this Court's decision in *State v. Eskridge*, 38 Ohio St.3d 56. (State's Memorandum in Support of Jurisdiction, pp. 1-4). However, the court of appeals merely agreed with Mr. Henry's argument, and ruled that insufficient evidence existed for the gross-sexual-imposition conviction because the State failed to prove that Mr. Henry forced or threatened force upon the alleged victim. *Henry* at ¶31. Accordingly, the lack of force evidenced that the will of the victim was not overcome. Id. Even the dissenting opinion in *Henry* recognized that "the lead opinion sets no precedent or binding rule of law beyond the impact upon the parties in this case." *Henry* at ¶42 (Shaw, J., dissenting). Indeed, the majority opinion did not create any new rule of law because the court's findings and conclusions were based upon a proper application of the syllabus law as created by this Court in *Eskridge* to the facts of the case sub judice. As such, in the absence of any issue deserving of this Court's resources, it should decline jurisdiction and dismiss the State's appeal.

RESPONSE TO THE STATE'S PROPOSITIONS OF LAW

I. Introduction

While the precise wording of the State's propositions of law differs, the issue presented by each is the same: May a court of appeals reverse a conviction for gross sexual imposition when the State failed to prove, as required by R.C. 2907.05, that the defendant compelled the victim to submit by force or threat of force? This Court has already affirmatively answered that question. See *State v. Eskridge*, 38 Ohio St.3d at paragraphs one and two of the syllabus, respectively ("The 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...."; "A reviewing court will not reverse a conviction where there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt."). Indeed, the court of appeals cited this Court's decision in *Eskridge* and applied this Court's ruling appropriately. (See Arguments II and III, pp. 3-7, infra). And the State just disagrees with the court of appeals' application of the facts in the case sub judice to the applicable law.

II. The applicable law as stated by this Court

In *State v. Eskridge*, this Court considered the issue of whether the State presented sufficient evidence at Mr. Eskridge's trial to prove that he forced or threatened force during the commission of a rape. This Court first reviewed the rape statute, R.C. 2907.02, which provided in pertinent part:

> (A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:
>
> * * *
>
> (3) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

> (B) Whoever violates this section is guilty of rape, an aggravated felony of the first degree. If the offender under division (A)(3) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(3) of this section shall be imprisoned for life.

The Ohio Revised Code defined force as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A).

The victim, who was the defendant's four-year-old daughter, testified that the defendant "took off [her] panties and kissed [her] on [her] lips, and [her] neck...," and that the defendant "put his thing in [her]." *Eskridge* at 57. This Court concluded that "while the record could have been more explicit on the amount of force involved, in light of all the circumstances, i.e., the child's testimony, the child's tender age, and the relationship of parental authority that defendant had with his four-year-old daughter, [this Court found] substantial evidence from which the trial court could have found beyond a reasonable doubt that Eskridge committed the act with force." *Eskridge* at 58. This Court continued, explaining that "[f]orce need not be overt and physically brutal, but can be subtle and psychological. 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.

III. Application of the principles that have been established by this Court in *State v. Eskridge*, 38 Ohio St.3d 56 to the case sub judice

Mr. Henry was convicted of gross sexual imposition. Ohio Revised Code Section 2907.05 governs gross sexual imposition and provides, in pertinent part:

> No person shall have sexual contact with another, not the spouse of the offender[,]...when any of the following applies: (1) The offender purposely compels the other person...to submit by force or threat of force.

The Ohio Revised Code defines "force" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1).

In reviewing whether sufficient evidence existed to support Mr. Henry's conviction, the court of appeals reviewed this Court's decision in *Eskridge*:

> The Supreme Court of Ohio has addressed the issue of "force or threat of force" several times in the context of the rape statute, R.C. 2907.02. The Court stated that, under R.C. 2907.02, the amount of force necessary to commit the offense "depends upon the age, size and strength of the parties and their relation to each other." *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, paragraph one of the syllabus. Additionally, in *Eskridge*, the Court stated that force is present where the "victim's will [is] overcome by fear or duress...[.]" 38 Ohio St.3d at 59; see, also, *State v. Byrd*, 8th Dist. No. 82145, 2003-Ohio-3958, ¶26. The Supreme Court of Ohio has further clarified that "[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...[.]" *State v. Schaim*, 65 Ohio St.3d 51, 1992-Ohio-31, 600 N.E.2d 661, paragraph one of the syllabus.

State v. Henry, 2009-Ohio-3535, at ¶26.

The court of appeals then noted numerous other appellate districts that dealt with similar fact patterns—i.e., victims who were sleeping, unconscious, or taken by surprise when the touching occurred. One such case was *State v. Byrd*, 8th Dist. No. 82145, 2003-Ohio-3958. In *Byrd*, the Eighth District Court of Appeals found that force or threat of force was absent when a fifteen-year-old victim awoke in her bed to find an adult defendant touching her genitals over her clothing. *Byrd* at ¶1-10. The main reasons for the court of appeals' conclusion were because: (1) Mr. Byrd did not apply any force in relation to the victim's body or clothing; (2) Mr. Byrd did not hold a position of authority over her; (3) as the victim became aware of the touching, she immediately got up and left the area; and, (4) the contact did not occur due to fear or duress. *Byrd* at ¶25-26. The *Byrd* court also noted that "perpetrators who engage in sexual conduct with another who is asleep or otherwise unable to appraise or control the nature of his or her conduct

are typically prosecuted for sexual battery in violation of R.C. 2907.03(A)(2) or (3), an offense which does not list force as an essential element. Byrd at ¶23. Emphasis added.

The court of appeals also discussed its previous decision in *State v. Euton*, 3rd Dist. No. 2-06-35, 2007-Ohio-6704, wherein the court held that a defendant's act of slipping his hand under a blanket to touch a victim was insufficient evidence that the victim was compelled to submit by force or threat of force. *Henry* at ¶29, citing *State v. Euton*, 2007-Ohio-6704. The *Euton* court came to that conclusion because the defendant made no comments or threats to the victim; because the defendant did not apply any force in relation to the victim's body or clothing; because, as soon as the victim overcame the surprise of the touching, the victim jumped up and left the room; and, because there was no evidence that the defendant attempted to restrain the victim from getting up or leaving the room. Id.

After reviewing this Court's and other appellate districts' caselaw, the *Henry* court reviewed the facts of the case sub judice:

> Henry made no comments or threats to K.C.; there was no evidence that Henry applied force in relation to K.C.'s body or clothing; as soon as K.C. became aware of what was happening, she pushed Henry out of her bed, jumped out of bed, and left the room; and, there was no evidence that Henry attempted to restrain K.C. from getting up or leaving the room. Further, although evidence was presented that Henry was much larger in size than K.C., and that she was positioned between him and the wall, K.C. did not testify that she was restrained because of Henry's size or her position on the bed. In fact, to the contrary, K.C. testified that she was able to push Henry out of her bed on her first attempt "as soon as [she] wanted to" and leave the room immediately. Additionally, K.C. testified that she was repeatedly able to remove his hand from her shorts. Thus, the evidence elicited at trial demonstrates that K.C.'s will was not overcome by fear or duress. Accordingly, we cannot find that Henry's actions constituted the "violence, compulsion, or constraint" contemplated by R.C. 2901.01(A)(1) in comprising force or threat of force *sufficient to overcome the will of the victim.*

Henry at ¶31. Emphasis original.

And just as the *Byrd* court explained that the State could have prosecuted the defendant for sexual battery, so did the *Henry* court:

> Additionally, although the dissent claims that our majority rule allows a perpetrator to impose any sexual activity upon a sleeping victim without fear of being charged with any sexual offense requiring force or threat of force, *we note that such a perpetrator may properly be charged with any number of offenses not requiring force, such as sexual battery in violation of R.C. 2907.03(A)(3) or sexual imposition in violation of R.C. 2907.06(A)(3)*. See, e.g., *State v. Lindsay*, 3d Dist. No. 8-06-24, 2007-Ohio-4490; *State v. Antoline*, 9th Dist. No. 02CA008100, 2003-Ohio-1130; *State v. Wright*, 9th Dist. No. 03CA0057-M, 2004-Ohio-603; *Byrd*, 2003-Ohio-3958, at ¶23.... Notably absent from the dissent is any discussion of Henry overcoming the will of the victim.

Henry at ¶33. Emphasis added.

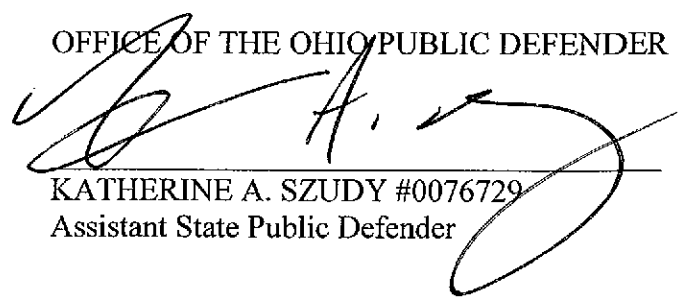
Accordingly, the State could have proceeded with a case against Mr. Henry for sexual battery or sexual imposition, but failed to so do. And to claim to this Court that a court of appeals misapplied this Court's precedent, when it merely came to a differing conclusion than what the State argued, is a request that this Court engage in error correction.

CONCLUSION

The Third District Court of Appeals properly analyzed the sufficiency-of-the-evidence claim under *State v. Eskridge*, 38 Ohio St.3d 56. Thus, this Court should decline to accept jurisdiction in this case and let the decision of the Seneca County Court of Appeals stand.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



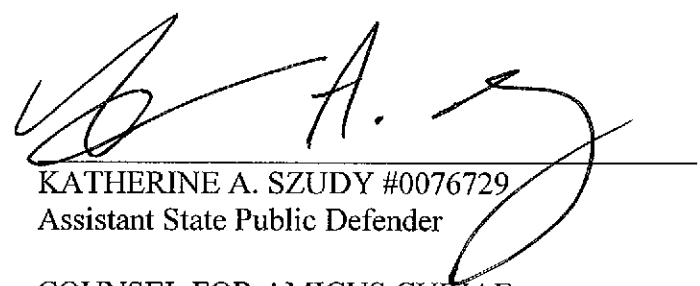
KATHERINE A. SZUDY #0076729
Assistant State Public Defender

250 East Broad Street
Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (Fax)
Kathy.Szudy@OPD.Ohio.gov

COUNSEL FOR AMICUS CURIAE,
OHIO PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Memorandum in Opposition of Jurisdiction of Amicus Curiae Office of the Ohio Public Defender in Support of Appellee Kiel Henry** was forwarded by regular U.S. Mail, postage prepaid to James A. Davey, Assistant Seneca County Prosecutor, addressed to his office at 71 South Washington Street, Suite 1204, County Svcs. Bldg., Tiffin, Ohio 44883; David H. Hoffman, Assistant Clermont County Prosecutor, addressed to his office at 123 North Third Street, Batavia, Ohio 45103; and Javier Armengau, addressed to his office at the 857 South High Street, Columbus, Ohio 43206, on this 28th day of September, 2009.



KATHERINE A. SZUDY #0076729
Assistant State Public Defender

COUNSEL FOR AMICUS CURIAE,
OHIO PUBLIC DEFENDER

#307065