

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO :  
Appellant : Case No. 09-1572  
vs : On Appeal from the Court of Appeals,  
Third Judicial District, Court of Appeals  
KIEL A. HENRY : Case No. 13-08-10  
Appellee :

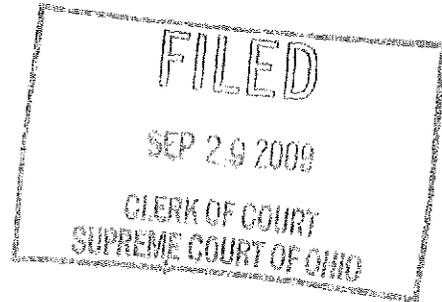
---

MEMORANDUM IN OPPOSITION OF JURISDICTION  
OF APPELLEE, KIEL A. HENRY

---

Counsel for Appellee

Javier H. Armengau (#0069776)  
857 South High Street  
Columbus, Ohio 43206  
Telephone: 614/443-0516



Counsel for Appellant

Derek W. DeVine (#0062488)  
Prosecuting Attorney  
James A. Davey (#0078056)  
Assistant Prosecuting Attorney  
71 South Washington Street #1204  
Tiffin, OH 44883  
Telephone: 419/448-4444

Table of Contents

|   |    |
|---|----|
| Explanation of Why this Case is Not a Case of Public or Great General Interest .....  | 1  |
| Statement of the Case and Facts .....   | 3  |
| Argument in Response to State’s Proposed Propositions of Law .....  | 7  |
| <br><u>State’s Proposition of Law No. 1:</u> To determine whether an offender used the force necessary to commit gross sexual imposition, consideration of whether will of the victim was overcome may be relevant. An offender, however, may commit gross sexual imposition in cases in which the will of the victim is not overcome.  |    |
| <br><u>State’s Proposition of Law No. 2:</u> The force necessary to commit the crime of gross sexual imposition depends, in part, on the relative positions of equality or of inequality of the offender and the victim. When an offender exploits a superior position relative to a victim to facilitate sexual contact, the force necessary to commit the offense may not be the same as would otherwise be required. |    |
| Conclusion .....  | 11 |
| Certificate of Service .....  | 12 |

### **Explanation of Why this Case is Not a Case of Public or Great General Interest**

The instant case involves the conviction of the Defendant, Kiel Henry, for one (1) count of gross sexual imposition following a jury trial in the Seneca County Common Pleas Court. This case does not involve a substantial constitutional question, nor is it one of public or great general interest. The State contends this Court should accept jurisdiction because it claims the Third District Court of Appeals misapplied a statement contained in this Court's earlier decision in *State v. Eskridge* (1988), 38 Ohio St. 3d 56, 59. The State claims it is necessary this Court exercise its jurisdiction and accept this case for review to prevent future misinterpretations of this Court's ruling in *Eskridge*, and to permit this Court an opportunity to reinforce its interpretation of the statutory definition of force.

Mr. Henry argued before the Third District Court of Appeals that his conviction for gross sexual imposition was not supported by sufficient, credible evidence. Specifically, Mr. Henry argued that although the State could establish some elements of the offense of gross sexual imposition, it could not establish all of the elements of the offense beyond a reasonable doubt. Based on the facts before it, the Third District Court of Appeals agreed that the State failed to establish Mr. Henry used force or threatened the alleged victim with force. *Henry* at ¶31. Evidence of the lack of force and the lack of the threat of force was indicative that the will of the victim was not overcome. Without evidence of force or the threat of force demonstrating the victim's will was overcome out of fear or duress, the Court of Appeals in a divided 2-1 decision concluded the State failed to establish an essential element of the crime of gross sexual imposition. The dissenting opinion in *Henry* noted 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).

The Third District Court of Appeals' decision was based on this Court's ruling in *Eskridge*, and it applied this Court's ruling to the facts of this case. The Court of Appeals did not create new law and did not misapply or misinterpret this Court's ruling in *Eskridge*. The element of force separates the crime of gross sexual imposition from sexual imposition or sexual battery. Force is an essential element of the offense of gross sexual imposition and the State failed to meet its burden. The Third District Court of Appeals applied the law as it exists in the State of Ohio and correctly concluded Mr. Henry's conviction for gross sexual imposition was not supported by sufficient, credible evidence as the State failed to meet its burden of proof on the element of force. This Court should decline jurisdiction and dismiss the State of Ohio's appeal.

## **STATEMENT OF THE CASE AND FACTS**

On September 20, 2007, Mr. Kiel Henry, was indicted on two (2) counts of gross sexual imposition in violation of Ohio Revised Code Section 2907.05. On January 25, 2008, the case proceeded to jury trial. On January 28, 2008, the jury returned a verdict of not guilty to Count One (1) [Gross Sexual Imposition] of the indictment and a verdict of guilty to Count Two (2) of the indictment [Gross Sexual Imposition]. The same facts formed the basis for both counts and Mr. Henry appealed the jury's verdict to the Court of Appeals.

On July 20, 2009, the Third District Court of Appeals rendered its opinion and in a 2-1 decision reversed Mr. Henry's conviction for gross sexual imposition. The Court found insufficient evidence was presented to the jury establishing that Mr. Henry used force or the threat of force to such a degree that the victim's will was overcome out of fear or duress.

The Court of Appeals was presented with the following facts: On August 11, 2006, students were returning to the campus of Heidelberg College in Tiffin, Ohio, including Kiel Henry, and the alleged victim, KC. Mr. Henry was moving into the senior apartments while KC was moving into the CDH house in Tiffin, Ohio with several of her sorority sisters.

Throughout the day while moving, Mr. Henry consumed approximately six (6) to eight (8) beers. Around 8:00 p.m., he and several friends left the apartments and patronized several area bars. KC and her friends had previously planned a retreat or party at the CDH house for August 11, 2006. KC left the retreat for work but returned about 11:00 p.m. to 11:30 p.m. Within a couple of hours after returning to the CDH house, KC retired to bed.

Around 2:00 a.m., Mr. Henry and his companions observed lights on at the CDH house

and stopped in to visit. The males, with the exception of Mr. Henry, left the CDH house after 20 or 30 minutes to return to their apartments.

Shortly thereafter, Mr. Henry passed out on a couch in the living room at the CDH house. Several females decided they would walk Mr. Henry back to his apartment rather than have him spend the night on their couch. The women briefly exited the room and on their return, they discovered Mr. Henry was gone. The women checked the second floor of the house for Mr. Henry but neither saw nor heard him so they returned to the living room, assuming he had left the house.

Within the hour, the women heard a loud thud coming from the second floor of the house. They heard a woman screaming and saw KC running down the stairs yelling that there was a man in her room. The women did not hear any noises coming from the second floor so they ventured back up and went into KC's room where they observed Mr. Henry lying unconscious on the floor next to the bed. KC believing that Mr. Henry was dead, checked his pulse. Realizing that Mr. Henry was alive, the women began carrying and dragging him from the room while yelling at him to leave the house.

Mr. Henry was eventually roused from his stupor and left the home. KC called the Tiffin Police Department reporting an unwanted male in the house. There was no report of a sexual assault during the initial call. Sergeant Marquis of the Tiffin Police Department was responding to the call when he observed Mr. Henry and two (2) female companions walking towards the senior apartments. Sergeant Marquis and Officer Demonte stopped and spoke with Mr. Henry. Both officers noted Mr. Henry was cooperative but very intoxicated. Both officers relying on the information they had received from dispatch from the initial 911 call, were unaware that more serious allegations were

being levied against Mr. Henry by KC, and allowed Mr. Henry to continue back to his apartment.

Officer McClure arrived at the CDH house and spoke with KC. KC advised him she had been asleep in her bed facing the wall when she stirred from her sleep. She said she was awakened after feeling a man's hand touching her pubic area. KC stated she was half-awake and thought the man behind her was her boyfriend. She placed her hand on his arm and removed his hand from under her shorts. Four (4) more times, KC claimed she felt the man place his hand inside her shorts, and on one (1) occasion insert his finger in her vagina. Each time, KC, whose hand had remained on the man's arm the entire time, removed his hand and told him no. On the fifth occasion, KC stated she became fully awake, gained her bearings, and realizing the man behind her was not her boyfriend, she pushed the man off the bed and ran from the room.

Based on these accusations, officers returned to Mr. Henry's apartment. Mr. Henry agreed to accompany them and gave a statement at the police station. Mr. Henry advised he could not recall anything from the time he passed out in the living room of the CDH house until he was awakened by several women standing over him screaming. He did advise officers he had lived in the house earlier in the year and that his bedroom was the room now occupied by KC.

KC repeatedly advised officers and testified at trial that Mr. Henry did not threaten her; that he did not resist her when she removed his hand from her shorts; that he did not stop her from leaving the bed or the bedroom. KC acknowledged she could and did remove Mr. Henry's hand from her shorts on each occasion and that she could have left the bed or the bedroom at any time. In fact when she realized it was not her boyfriend lying behind her, she immediately pushed Mr. Henry off the bed, climbed over him and exited the room. She testified Mr.

Henry did not resist her efforts to push him out of the bed or her efforts to leave the room.

Further, she reiterated that Mr. Henry did not exert any force over her to cause her to submit to sexual contact. Further, there was no evidence that KC's will was overcome by fear or duress compelling her to submit to sexual contact. Mr. Henry never spoke to her; never threatened her verbally or physically or by other means of intimidation; he never interfered with her when she removed his hand from her shorts or when she shoved him from the bed or when she exited the room.

## **ARGUMENT IN RESPONSE TO STATE'S PROPOSED PROPOSITIONS OF LAW**

State's Proposition of Law No. 1: To determine whether an offender used the force necessary to commit gross sexual imposition, consideration of whether will of the victim was overcome may be relevant. An offender, however, may commit gross sexual imposition in cases in which the will of the victim is not overcome.

The Third District Court of Appeals in its opinion recognized that a sexual offense may be committed without any showing of force or the threat of force to sustain a conviction. Specifically, the Court of Appeals noted the crimes of sexual imposition and sexual battery do not contain the element of force or threat of force, and it is not necessary for the State to show such to obtain a conviction for these crimes. The use of force or the threat of force is the key element distinguishing the crime of gross sexual imposition from other lesser crimes, including sexual imposition and sexual battery.

The State argues the elements of the crime of gross sexual imposition can be established without a showing that the victim's will was overcome by the threat of force. Here, KC testified that Mr. Henry did not exert any force over her in engaging in sexual contact. KC also testified that Mr. Henry did not threaten her, verbally, physically or by some other means of intimidation; he did not restrain her; and did not interfere with her leaving the bed or the bedroom.

In considering Mr. Henry's assignment of errors, the Third District Court of Appeals looked to this Court's holdings in *Eskridge* and *State v. Schaim* (1992), 65 Ohio St. 3d 51. *Eskridge* concerned the rape of a four (4) year old child victim by her father. No evidence of

force or the threat of force was admitted at trial. However, this Court found that a special relationship exists between a parent and his child and that “force [in such circumstances] need not be overt and physically brutal, but can be subtle and psychological.” *Id* at 59. In *Schaim*, however, this Court noted more must be shown to establish the use of force or the threat of force when the offense involves an adult victim. *Schaim* concerned the incestuous relationship between a father and a 20 year old victim who had been subjected to years of sexual abuse by her father. This Court wrote in *Schaim*:

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 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 paragraph one of the syllabus.

*Schaim* clearly distinguished its earlier holding in *Eskridge* concerning proof of force or threat of force in the commission of certain sexual offenses involving adult victims. The Third District Court of Appeals’ decision is consistent with *Eskridge* and *Schaim* and with decisions rendered by other jurisdictions throughout this State applying this Court’s holdings in *Eskridge* and *Schaim*. In particular, the Third District Court of Appeals noted that the Eighth District Court of Appeals in *State v. Byrd*, 8<sup>th</sup> Dist. No. 82145, 2003-Ohio-3958 ¶26 found the State failed to establish the force element of gross sexual imposition when the facts of the case established that the fifteen (15) year old victim woke up to find an adult touching her genitals over her clothing. The *Byrd* Court found the defendant did not exert force or the threat of force as he did not apply any force in relation to her body or clothing; did not hold a position of

authority over her; and the victim was able to immediately leave the area on waking and discovering the defendant touching her. *Henry* at ¶27.

Likewise, the Third District Court of Appeals noted the Eighth District Court of Appeals' decision in *State v. Mitchell*, 8<sup>th</sup> Dist. No. 58477, 1991 WL 106037 where the Court held the element of force or threat of force was not established in the State's prosecution. In *Mitchell*, an adult asked a thirteen (13) year old victim to sit on his lap. He placed his hand under her skirt, touched her buttocks and attempted to remove her underwear. The evidence established the victim did not sit on the defendant's lap out of fear, coercion or duress; that the defendant did not say anything to the victim after she sat on his lap; and that as soon as he began touching her, the victim got up off of his lap and telephoned her mother. *Henry* at ¶28. The Third District Court of Appeals also considered its sister jurisdictions' treatment of the *Eskridge* and *Schaim* holdings in the decisions rendered in *State v. Payton* (1997), 119 Ohio App. 3d 694, abrogated on other grounds by *State v. Delmonico*, 11<sup>th</sup> Dist. No. 2003-A-0022, 2005-Ohio-2902; *State v. Edinger*, 10<sup>th</sup> Dist. No. 05AP-31, 2006-Ohio-1527; *State v. Haschenburger*, 7<sup>th</sup> Dist. No. 05 MA 192, 2007-Ohio-1562. *Henry* at ¶30. Like the Third District Court of Appeals' holding in the instant case, these Courts concluded there must be a showing of some threat of force that the victim's will was overcome by fear or duress when dealing with an adult victim to establish the essential element of force.

The Third District Court of Appeals did not err in its decision and did not shift the burden onto the victim to show she exerted enough resistance to establish force was used or the threat of force was used that it overcame her will. KC repeatedly advised law enforcement and testified at trial that Mr. Henry did not use force when touching her; that he did not threaten her with

physical harm; that he did not interfere with her removing his hand from her shorts; that he did not interfere with her leaving the bed or the bedroom.

The State chose to proceed with a prosecution against Mr. Henry for gross sexual imposition. As the Third District Court of Appeals noted most cases with similar fact patterns are prosecuted as sexual imposition or sexual battery offenses because it is not necessary to show the element of force. The State disagrees with the Court of Appeals' reasoning, but the Court of Appeals applied the correct analysis and concluded the State failed to meet its burden of proof on the element of force.

State's Proposition of Law No. 2: The force necessary to commit the crime of gross sexual imposition depends, in part, on the relative positions of equality or inequality of the offender and the victim. When an offender exploits a superior position relative to a victim to facilitate sexual contact, the force necessary to commit the offense may not be the same as would otherwise be required.

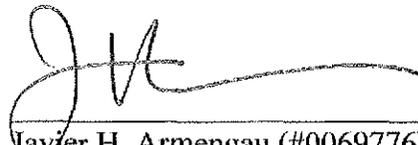
In its second proposition of law, the State asks that this Court use the facts of this case to expand on the definition of force. Specifically, the State asks this Court to find force can be established if the victim is initially sleeping or cannot see the perpetrator. Ohio Revised Code Section 2901.01(A) defines "'force' as any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." The State seeks a definition of force beyond that set forth by statute.

There was no evidence that Mr. Henry exploited a superior position to engage in sexual contact with the victim. Although the victim was situated on the bed between the wall and Mr. Henry, Mr. Henry did not place her there; he did not keep her there; and he did not interfere with KC leaving either the bed or the bedroom. KC, in fact, testified that Mr. Henry did not use any

force against her. She testified he did not make any threats; he did not attempt to kiss her; he did not attempt to remove her clothing or his clothing; he did not push her against the wall in an effort to keep her on the bed; he did not interfere with her leaving the bed; and he did not interfere with her leaving the room. The fact that he climbed into the bed occupied by the alleged victim and the fact the victim could not see him is not sufficient to constitute a finding that he used force against KC.

### CONCLUSION

The Third District Court of Appeals engaged in a proper analysis of this case. It analyzed Mr. Henry's sufficiency of the evidence test under the proper standard and considered both this Court's holdings in *Eskridge* and *Schaim* and decisions rendered in other jurisdictions considering similar fact patterns. The Third District Court of Appeals' decision does not shift the burden onto the victim to exert extraordinary measures of resistance so the State can show the use of force or the threat of force in sexual offenses. There are various sexual crimes, each with varying elements. The fact remains the State chose to proceed on a prosecution for gross sexual imposition when the evidence was clearly lacking as to the essential element of force.

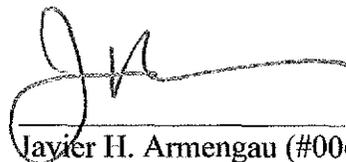


---

Jayler H. Armengau (#0069776)  
Attorney for Appellee  
857 South High Street  
Columbus, Ohio 43206  
Telephone: 614/443-0516

**CERTIFICATE OF SERVICE**

I hereby certify a copy of the foregoing Memorandum in Opposition of Jurisdiction of Appellee Kiel Henry was served upon Derek DeVine, Prosecuting Attorney for Seneca County, Ohio, and James Davey, Assistant Prosecuting Attorney for Seneca County, Ohio, 71 South Washington Street, Suite 1204, Tiffin, OH 44883 and upon David H. Hoffmann, Counsel for Amicus, The Ohio Prosecuting Attorneys Association, 123 North Third Street, Batavia, OH 45103-3033 by sending a true copy of the same by regular U.S. mail this 29<sup>th</sup> day of September, 2009.

A handwritten signature in black ink, appearing to read 'J. Armengau', written over a horizontal line.

Javier H. Armengau (#0069776)  
Attorney for Appellee