

IN THE SUPREME COURT OF OHIO

10-0155

ANTHONY JOHNSON )

Defendant-Appellant, )

vs. )

STATE OF OHIO )

Plaintiff-Appellee. )

On Appeal from the  
Mahoning County Court  
of Appeals, Seventh  
Appellate District

Court of Appeals  
Case No. 08MA-144

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT ANTHONY JOHNSON

J. DEAN CARRO (003229) (COUNSEL OF RECORD)  
Appellate Review Office  
The University of Akron  
School of Law  
Akron, Ohio 44325-2901  
(330) 972-7751  
Fax No. (330) 972-6326  
carrol@uakron.edu

COUNSEL FOR APPELLANT, ANTHONY JOHNSON

On Memorandum:  
Sara A. Gasser  
Third-Year Law Student

PAUL J. GAINS (0020323)  
Mahoning County Prosecutor  
RALPH RIVERA (0082063) (COUNSEL OF RECORD)  
Mahoning County Assistant Prosecutor  
21 W. Boardman Street  
Youngstown, Ohio 44503  
(330) 740-2330  
Fax No. (330) 740-2008

COUNSEL FOR APPELLEE, STATE OF  
OHIO

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EXPLANATION OF WHY THIS CASE INVOLVES A MATTER OF  
PUBLIC OR GREAT GENERAL INTEREST

This Court should accept this case as involving a great general interest because the State failed to meet its constitutional burden of proof beyond a reasonable doubt, in violation of the due process clause of the Fourteenth Amendment, when it failed to introduce sufficient evidence to show that Appellant Johnson purposely compelled the victim to submit by force or threat of force for the first two counts of rape. The Seventh District Court of Appeals upheld the first two rape convictions, believing that the evidence the State presented provided sufficient evidence to prove that T.B.'s will was overcome by fear or duress. (Court of Appeals Decision and Journal Entry, hereinafter, Opinion at ¶49, 50 Appendix, hereinafter, App. at A).

R.C. 2907.02(A)(2) (App. C) states, "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." The standard used to determine whether the State proved the element of force beyond a reasonable doubt, where there were no threats, commands, or physical force, differs depending on the claimant's age.

The State had the burden to prove that Mr. Johnson purposely compelled T.B. to have sexual intercourse by force or threat of force. The record reflects that Mr. Johnson did not use threats, commands, or physical force to make T.B. have sexual intercourse with him. The State argued that Mr. Johnson could be convicted of rape without evidence of express threat of harm or evidence of significant physical restraint because he was the stepfather of T.B. However, this Court has made clear that it is not appropriate to imply force when the victim is a teenager or an adult. T.B. was a mature young woman when the two incidents occurred. At ages fourteen (14) and seventeen (17) she had the physical and mental capability to refuse Mr.

Johnson's requests. However, T.B. chose not to refuse Mr. Johnson's requests because she worried about punishment and social restriction, neither of which rose to the level of force or threat of force. Although Judge Franken stated, "In rape ... I have to have force, and it's not automatically there" (TR. Vol. III,p. 380), the trial court did not resolve this issue.

The Court should accept this case because R.C. 2907.02(A)(1)(b) requires evidence of that the Appellant purposely compelled the victim to submit by force or threat of force. The State relied on the proposition that, "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 are not necessary to effect the abuser's purpose." *Eskridge*, 38 Ohio St.3d at 59. However, this proposition is inapplicable to both incidents because of T.B.'s age.

WHEREFORE, Appellant Johnson prays that this Court will grant review, reverse the decision of the Seventh District Court of Appeals and enter a judgment of acquittal or remand for a new trial.

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

April Johnson met Anthony Johnson in May of 1988 when T.B. was four years old. [Opinion at ¶2, App. A]. April and Anthony married shortly after in 1991. [Opinion at ¶2, App. A]. Over the years, Mr. Johnson developed a father-daughter relationship with T.B. [Opinion at ¶2, App. A]. T.B. considered Mr. Johnson her father, and the two had a close relationship. [Opinion at ¶2, App.A]. Mr. Johnson was a strict father who supervised T.B.'s social interactions. [Opinion at ¶16, App. A]. For example, Mr. Johnson was upset when he learned that T.B. kissed a man five (5) years older than her. [Opinion at ¶18, App. A]. On another occasion, Mr. Johnson disapproved of a phone call from a man six (6) years older than T.B. [Opinion at ¶21, App. A]. In general, Mr. Johnson discouraged T.B. from associating with

friends that he felt were inappropriate. During a time when there were several shootings and the neighborhood was considered dangerous, Mr. Johnson walked T.B. to school. Although T.B. had strong parental oversight, she was involved in several extra-curricular activities. She played several sports including volleyball and softball. She was also a member of band and ROTC.

During the trial, family acquaintances testified about their view of Mr. Johnson and T.B.'s relationship. Hillary Smith testified that Mr. Johnson spoke to T.B. as a father spoke to a daughter.[Opinion at ¶29, App. A]. Marsha Lewis testified that in the time that she spent with the family, Mr. Johnson never yelled at or hit T.B. An acquaintance, Marsha Lewis, also testified about a similar occurrence. Ms. Lewis stated that Mr. Johnson was "keeping tabs" on T.B. [Opinion at ¶83, App. A]. A defense objection immediately followed.

T.B. testified that Mr. Johnson sexually abused her on three occasions when she was a teenager and extending into her adult life. [Opinion at ¶17, App. A]. In particular, T.B. testified that Mr. Johnson had sexual intercourse with her when she was ages fourteen (14), seventeen (17), and twenty-two (22). [Opinion at ¶18, 20, 21, App. A]. T.B. testified that on every occasion, Mr. Johnson asked her if she wanted to have sexual intercourse and she did not say no. [Opinion at ¶ 19, 20, 21, App. A]. She also testified that Mr. Johnson did not say anything to her during or after sexual intercourse. Mr. Johnson did not threaten T.B. on any occasion.[Opinion at ¶24, App. A]. In addition to no verbal coercion, T.B. reported to police and later testified that Mr. Johnson did not physically attempt to make her have sexual intercourse with him. [Opinion at ¶ 24, App. A]. Nor did she attempt to physically fight him off during the incidents.[Opinion at ¶ 23, App. A].

Although Mr. Johnson did not verbally or physically threaten T.B., T.B. testified that Mr. Johnson was "controlling, domineering, and manipulative." T.B. could not do whatever

she wanted. T.B. asserted that she did not refuse Mr. Johnson's sexual advances because she was "afraid his mentality toward [her] would change." [Opinion at ¶19, 20, 21, App. A]. T.B. told the trial court, "I knew it was wrong, but I would do anything to make him happy because I loved him that much." She also claimed that she was afraid Mr. Johnson would get violent with her. [Opinion at ¶23, App. A.]. However, T.B. only described one alleged act of violence during their eighteen (18) year relationship, which occurred when Mr. Johnson placed a cell phone in her mouth. [Opinion at ¶20 at App. A].

Law enforcement officers learned of these incidents on July 29, 2007 when T.B.'s mother, April Johnson, called the police for an unrelated incident. [Opinion at ¶27, App. A]. On July 29, 2007, T.B. was in the hospital because she recently gave birth to Mr. Johnson's child.[Opinion at ¶27, App. A] Mrs. Johnson, who was at the hospital with her daughter, planned to move out of the home with T.B. and her brother, Diamond, the same day. [Opinion at ¶26, App. A]. The prosecutor asked Mrs. Jones why she called the police, and a defense objection immediately followed. Mrs. Johnson responded that she called the police because she feared that Mr. Johnson may become violent with her if she returned home to get her son. [Opinion at ¶27, App. A]. However, Mrs. Johnson did not interact with Mr. Johnson that day. She did not return home nor did she communicate her plans to Mr. Johnson about moving out of the home. Neither Mrs. Johnson nor T.B. reported the incidents prior to this day.

On direct appeal, Mr. Johnson presented four (4) assignments of error for review. The Seventh District Court of Appeals affirmed Mr. Johnson's first two rape convictions and sentences while Mr. Johnson's third rape conviction is reversed.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. I:** The State failed to meet its constitutional burden of proof beyond a reasonable doubt, in violation of the due process clause of the Fourteenth Amendment, when it failed to introduce sufficient

evidence to show that Appellant Johnson purposely compelled the victim to submit by force or threat of force for the first two counts of rape.

The Court of Appeals upheld the first two rape convictions because it opined that the evidence the State presented provided sufficient evidence to prove that T.B.'s will was overcome by fear or duress. [Opinion at ¶ 70, App. A]. The Court of Appeals failed to consider the different amount of evidence needed to prove force or threat of force based on the victim's ages.

There are different standards for determining whether the State proved the element of force beyond a reasonable doubt where there were no threats, commands, or physical acts. For children thirteen (13) and under, a person in a position of authority over a young child may be convicted of rape in violation of R.C. 2907.02(A)(1)(b) (App. C) without evidence of express threat of harm or physical restraint. *See Eskridge* and *State v. Dye*, 82 Ohio St.3d 323, 1998-Ohio-234. For adults, the appropriate inquiry is whether the complainant believed the defendant would use physical force if he or she did not submit. *See State v. Schaim*, (1992), 65 Ohio St.3d 51.

In Mr. Johnson's case, T.B. testified that Mr. Johnson engaged in sexual conduct with her when she was ages fourteen (14) and seventeen (17). [Opinion at ¶18, 19, App. A]. There were no threats, commands, or physical acts to effect force. As stated *supra*, Mr. Johnson asked and T.B. agreed on every occasion to have sexual intercourse. [Opinion at ¶18, 19, App. A]. Mr. Johnson did not say anything before or after sexual intercourse to make T.B. believe that he would use physical force against her. In addition, Mr. Johnson did not physically attempt to make T.B. have sexual intercourse with him. [Opinion at ¶18, 19, App. A]. Nor did she attempt to physically fight him off during the incidents. [Opinion at ¶19, App. A].

The State relied on the proposition that, “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 are not necessary to effect the abuser’s purpose.” *Eskridge*, 38 Ohio St.3d at 59. However, this proposition is inapplicable to both incidents because of T.B.’s age. At ages fourteen (14) and seventeen (17), the appropriate inquiry is whether T.B. was overcome with fear or duress as stated in *Haschenburger* and *Jordan*. The record does not support a finding of duress. First, Mr. Johnson did not use threats or commands to make T.B. have sexual intercourse with him. Rather, he gave T.B. a choice, and she acquiesced. Second, Mr. Johnson did not have a history of violence against T.B. T.B. recalled only one incident where Mr. Johnson put a cell phone in her mouth. Finally, the record only supports a finding that T.B. feared punishment through social restriction, which does not rise to the level of fear of violence as stated in *Schaim*. In addition, at age fourteen (14) and seventeen (17), T.B. was not required to submit to her parents as she was required to do when her mother first met Mr. Johnson. Rather, she was independent, involved in many activities, and capable of exercising her free will. Absent a finding of duress, the State did not prove the element of force beyond a reasonable doubt.

The State of Ohio used the concept of implied force to prove the element of force and legitimate a life imprisonment specification. Both applications of the concept were in error. First, the trial court applied the incorrect rule regarding force to counts one and two. This error is discussed above. In addition, the trial court incorrectly relied on implied force to sentence Mr. Johnson to life imprisonment. This Court has stated that, “in order to prove the element of force necessary to sentence the defendant to *life* imprisonment, the statute requires that some amount of force must be proven *beyond* that force inherent in the crime itself.” *Dye*, 82 Ohio St.3d at 327 (emphasis added). The record does not reflect any amount of force beyond that

inherent in the crime. As stated above, Mr. Johnson did not use threats, commands, or physical force to make T.B. have sexual intercourse with him. Also, T.B. agreed to engage in sexual conduct with Mr. Johnson and did not fight back during any of the incidents. Absent a finding that Mr. Johnson used anything other than his stepparent-child relationship to purposely compel T.B. to have sexual intercourse with him, a sentence of life imprisonment is contrary to law.

**Proposition of Law No. II:** The trial court erred when it made impermissible findings of fact prior to imposing Appellant Johnson's sentence in violation of the Sixth Amendment Right to a Fair Trial.

The Court of Appeals held that the trial court properly considered the sentencing factors thus the first assignment of error was without merit. [Opinion at ¶ 70, App. A.]. The trial court erred when it made impermissible findings of fact because these findings were made contrary to the landmark cases of *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490 and *Blakely v. Washington* (2004), 542 U.S. 296 and the Court of Appeals erred when it affirmed the trial court's decision. The Court of Appeals determined that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 and *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855 did not find the R.C. 2929.11 and R.C. 2929.12 factors to be unconstitutional. [Opinion at ¶62, App.A]. The Court of Appeals erred when it found that Judge Fanken did not make additional findings of fact that the jury did not find. Judge Franken found four additional findings of fact that the jury did not find. They include: T.B.'s injury was exacerbated by her age; T.B. suffered serious mental harm; the relationship with Mr. Johnson facilitated the offense; and the child of T.B. will be burdened. [Opinion at ¶61, App. A].

A Mahoning County jury convicted Mr. Johnson of three (3) counts of Rape in violation of R.C. 2907.02(A)(2) (App. C) and three (3) counts of Sexual Battery in violation of R.C. 2907.03(A)(5)( App. D). R.C. 2907.02(A)(2) (App. C) states, "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.” R.C. 2907.03(A)(5) (App. D) states, “No person shall engage in sexual conduct with another, not the spouse of the offender, when ... the offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person.” The jury found that the State proved all elements beyond a reasonable doubt as reflected by its guilty verdicts. During the sentencing hearing, Judge Franken made additional findings of fact regarding the R.C. 2929.12(B) seriousness factors. [Opinion at ¶61, App. A].

The chart below compares the findings of fact made by the jury and those made by the trial court. The findings of fact in the right column represent permissible findings of fact made by the jury. The findings of fact in the left column represent impermissible findings of fact made by the trial court. As reflected in the chart, the trial court’s findings of facts do not match the jury’s findings of fact. The Sixth Amendment of the United States Constitution prohibits a judge from issuing findings of fact and imposing a sentence greater than that allowed by the jury verdict. *Blakely v. Washington* (2004), 542 U.S. 296, and *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Judge Franken violated Mr. Johnson’s Sixth Amendment right to a fair trial when he made additional findings of fact at the sentencing hearing.

<b>Findings of Fact: Jury</b>	<b>Findings of Fact: Trial Court</b>
<p>Elements of R.C. 2907.02(A)(2):</p> <ol style="list-style-type: none"> <li>1. Engage in sexual conduct</li> <li>2. With another by purposely compelling submission by force or threat of force</li> <li>3. Venue</li> </ol>	<p>Seriousness Factors of R.C. 2929.12(B):</p> <ol style="list-style-type: none"> <li>1. T.B.’s injury was exacerbated by her age</li> <li>2. T.B. suffered serious mental harm.</li> <li>3. The relationship with Mr. Johnson facilitated the offense.</li> <li>4. The child of T.B. will be burdened. (Tr. Vol. III, p. 477).</li> </ol>

Elements of R.C. 2907.03(A)(5):

1. Engage in sexual conduct
2. With a person not the spouse of the offender when
3. The offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person
4. Venue

In response to *Apprendi* and *Blakely*, this Court considered whether Ohio's felony sentencing statute violated the Sixth Amendment. *Foster*, 109 Ohio St.3d at ¶1. The Court held that, "Because R.C. 2929.14(B) and (C) and 2929.19(B)(2) require judicial fact-finding before imposition of a sentence greater than the maximum term authorized by a jury verdict or admission of the defendant, they are unconstitutional." *Foster*, 109 Ohio St.3d at paragraph one of the syllabus. In addition, the Court applied a *Booker* remedy and held, "R.C. 2929.14(B) and (C) and 2929.19(B)(2) are capable of being severed. After the severance, judicial fact-finding is not required before a prison term can be imposed within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant." *Foster*, 109 Ohio St.3d at paragraph two of the syllabus. Following *Foster*, the remedy "leaves courts with full discretion to impose a prison term within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant without the mandated judicial findings that *Blakely* prohibits." *Foster*, 109 Ohio St.3d at ¶102.

In this case, defense counsel anticipated the *Foster* violation by stating, "under Ohio guidelines for sentencing for the Court to run maximum consecutive, the Court would have to determine this to be the worst form of the offense in addition to the nature of the offense. It's combined with other factors ...I'm asking the Court to impose sentences other than the

maximum.” Despite the cautionary objection, the trial court made several findings of fact in reference to R.C. 2929.12(B). As stated *supra*, Judge Franken considered R.C. 2929.12(B) seriousness factors and found 1) T.B.’s injury was exacerbated by her age; 2) T.B. suffered serious mental harm; 3) the relationship with Mr. Johnson facilitated the offense; and 4) the child of T.B. will be burdened. [Opinion at ¶ 61, App. A]. The jury did not render an independent decision nor did Mr. Johnson admit any of the preceding four factors. Rather, each factor was a separate finding of fact made by the trial court. Regardless of whether the trial court’s fact finding increased Mr. Johnson’s sentence, it violated Mr. Johnson’s Sixth Amendment right to a fair trial. Therefore, Mr. Johnson’s sentence should be reversed and remanded for resentencing.

**Proposition of Law No. III:** The Court erred in overruling defense counsel’s objection and allowing into evidence witness testimony regarding motive that was irrelevant and more prejudicial than probative in violation of evidence Rules 402 and 403.

The Court of Appeals held that the trial court did not abuse its discretion in allowing April Johnson to testify as to why she called the police because the evidence was relevant, the court instructed the state not to use the term “domestic violence” and no one used this term, and it was offered to lend credence to T.B.’s fears. [Opinion at ¶ 45 and 47, App. A].

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evid. R. 401. “Evidence which is not relevant is not admissible.” Evid. R. 402. “Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.” Evid. R. 403(A). In addition, “evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity

therewith.” Evid. R. 404(B).

During the trial, defense counsel and counsel for the State of Ohio met in chambers with Judge Franken to discuss whether to admit testimony on why Mrs. Johnson called the police the day that Mr. Johnson was arrested. Defense counsel sought to prevent testimony suggesting that Mrs. Johnson filed a domestic violence complaint. Judge Franken instructed the parties not to use the term “domestic violence.” [Opinion at ¶37, at App. A]. However, Judge Franken permitted the parties to discuss Mr. Johnson’s violent character in general because Mrs. Johnson’s testimony would corroborate T.B. On the record, Mrs. Johnson stated that Mr. Johnson had been violent with her in the past and that was her motive for calling the police. [Opinion at ¶73, at App. A]. Defense counsel’s timely objection was overruled.

Overruling this objection and permitting testimony of Mr. Johnson’s violent character was error for several reasons. First, the testimony was not relevant. The ultimate question was whether T.B. believed that Mr. Johnson would use violence against her if she did not have sexual intercourse with him. Mrs. Johnson’s testimony does not reveal any violent acts as between T.B. and Mr. Johnson. Nor does her testimony corroborate T.B. because other witnesses testified Mr. Johnson did not use violence against T.B. Second, even if the testimony is relevant, it should have been excluded because it is more prejudicial than probative. The testimony may have led the jury to believe that Mrs. Johnson called the police and filed a domestic violence complaint. The jury could have easily inferred from the testimony that Mr. Johnson was arrested and charged with domestic violence although that never happened. This information could have changed the outcome of the trial if the jury factored an arrest for domestic violence into whether the State proved the element of force. Finally, Mrs. Johnson’s testimony was inadmissible character evidence in violation of Evid. R. 404(B) because Mr. Johnson’s alleged violent acts against Mrs. Johnson cannot be used to prove that Mr. Johnson

engaged or would have engaged in violent acts against T.B. because they are not the same person.

**Proposition of Law No. IV:** The Trial Court erred in overruling defense counsel's objection and allowing into evidence testimony that was not within the witness's personal knowledge in violation of Evidence Rule 602.

The Court of Appeals held that the trial court did not abuse its discretion in allowing Marsha Lewis's testimony on testimony that was not within her personal knowledge because Lewis gave her opinion and did not purport to know for sure that appellant was keeping tabs on April. [Opinion at ¶86, App. A]. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." Evid. R. 602.

Marsha Lewis testified that she would run errands with Mrs. Johnson. In particular, Ms. Lewis testified that when the two went shopping, "the phone would just constantly ring." [Opinion at ¶83, App. A]. In her opinion, Ms. Lewis determined that Mr. Johnson was "keeping tabs" on Mrs. Johnson. [Opinion at ¶83, App. A]. After she gave her opinion, defense counsel's timely objection was overruled. [Opinion at ¶83, App. A]. Ms. Lewis did not testify about who made each phone call, the duration of phone calls, or the subject matter of phone calls. She did not have personal knowledge about whether Mr. Johnson made the phone calls or the specific discussion between Mr. and Mrs. Johnson. Her opinion about whether Mr. Johnson was "keeping tabs" on Mrs. Johnson was pure speculation. More importantly, Ms. Lewis did observe Mr. Johnson and T.B. Her observations of Mrs. Johnson do not give her personal knowledge of how Mr. Johnson treated T.B. Introduction of such evidence may have led the jury to believe that Mr. Johnson was controlling although Ms. Lewis' testimony did not disclose any warranted reasons for this conclusion.

**CONCLUSION**

WHEREFORE, for the above stated reasons, this Court should enter a judgment of acquittal or remand the case for a new trial.

Respectfully Submitted,



J. Dean Carro (0003229)  
Counsel for Appellant Johnson

**CERTIFICATE OF SERVICE**

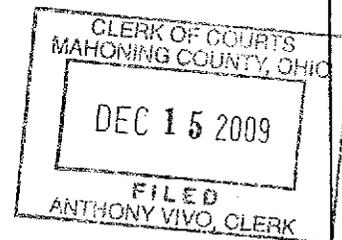
I hereby certify that a true copy of the foregoing Memorandum in Support of Jurisdiction was sent via regular U. S. mail to Ralph M. Rivera, Assistant Prosecuting Attorney, Office of Mahoning County Prosecutor, 21 W. Boardman Street, Youngstown, Ohio 44503 on this ~~20th~~ day of January, 2010.

26th



J. Dean Carro (0003229)  
Counsel for Appellant Johnson

STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT



STATE OF OHIO, )  
)  
PLAINTIFF-APPELLEE, )  
)  
VS. )  
)  
ANTHONY JOHNSON, )  
)  
DEFENDANT-APPELLANT. )

CASE NO. 08-MA-144

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from Court of Common  
Pleas of Mahoning County, Ohio  
Case No. 07CR968

JUDGMENT:

Affirmed in part  
Reversed and Remanded in part

APPEARANCES:

For Plaintiff-Appellee

Paul Gains  
Prosecutor  
Ralph M. Rivera  
Jennifer McLaughlin Smith  
Assistant Prosecutors  
21 W. Boardman Street, 6<sup>th</sup> Floor  
Youngstown, Ohio 44503-1426

For Defendant-Appellant

Attorney J. Dean Carro  
Appellate Review Office  
The University of Akron School of Law  
Akron, Ohio 44325-2901

JUDGES:

Hon. Gene Donofrio  
Hon. Joseph J. Vukovich  
Hon. Mary DeGenaro

Dated: December 15, 2009

DONOFRIO, J.

{¶1} Defendant-appellant, Anthony Johnson, appeals from a Mahoning County Common Pleas Court judgment convicting him of three counts of rape and three counts of sexual battery following a jury trial and the resulting sentence.

{¶2} When T.B. was four years old, her mother, April, began dating appellant. Appellant and April married a few years later. T.B. referred to appellant as her dad as he was the only father she had known. The two had a close relationship while T.B. was growing up. However, according to T.B., when she turned 14, her relationship with appellant changed. She stated that appellant became controlling, domineering, and manipulative.

{¶3} T.B. stated that when she turned 14, appellant began having sex with her. T.B. did not refuse appellant's advances because she was afraid of him and afraid that his mentality toward her would change. According to T.B. and April, appellant had gotten violent with them in the past. T.B. recalled three specific times appellant had sex with her, occurring when she was ages 14, 17, and 22. As a result of the last sexual encounter, T.B. became pregnant with appellant's baby.

{¶4} After T.B. gave birth to the baby, April called the police. She did so because she and T.B. were going to move out of the house they shared with appellant. They were going to take April and appellant's son with them and April was afraid that appellant would become violent with her. When the police arrived, April also told them that appellant had been having sex with his step-daughter, T.B.

{¶5} A Mahoning County grand jury indicted appellant on three counts of rape, first-degree felonies in violation of R.C. 2907.02(A)(2)(B), and three counts of sexual battery, third-degree felonies in violation of R.C. 2907.03(A)(5)(B), with violent sexual predator specifications.

{¶6} The court granted appellant's motion to have the court try the specifications and the jury try the charges. The case proceeded to a jury trial on the charges on June 30, 2008. The jury returned guilty verdicts on all counts.

{¶7} The trial court then tried the specifications. It found that appellant is a violent sexual predator. The court also conducted a sentencing hearing and sentenced appellant to ten years to life on each of the three counts of rape, to be served consecutively, for a total of 30 years to life. The court found that the sexual battery counts merged with the rape counts.

{¶8} Appellant filed a timely notice of appeal on July 9, 2008.

{¶9} Appellant raises four assignments of error, the first of which states:

{¶10} "THE STATE FAILED TO MEET ITS CONSTITUTIONAL BURDEN OF PROOF BEYOND A REASONABLE DOUBT, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, WHEN IT FAILED TO INTRODUCE SUFFICIENT EVIDENCE TO SHOW THAT APPELLANT JOHNSON PURPOSELY COMPELLED THE VICTIM TO SUBMIT BY FORCE OR THREAT OF FORCE."

{¶11} Appellant argues that his convictions were not supported by sufficient evidence. Specifically, he alleges that plaintiff-appellee, the State of Ohio, failed to introduce evidence that he purposely compelled T.B. to submit by force or threat of force. He asserts that the evidence demonstrated that he did not use threats, commands, or physical force to compel T.B. to have sex with him. Appellant argues that given T.B.'s age at the times of the incidents, ages 14, 17, and 22, T.B. could have refused his advances.

{¶12} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict. *State v. Smith* (1997), 80 Ohio St.3d 89, 113. In essence, sufficiency is a test of adequacy. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* In reviewing the record for sufficiency, 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. *Smith*, 80 Ohio St.3d at 113.

{¶13} The jury convicted appellant of three counts of rape in violation of R.C. 2907.02(A)(2), which provides:

{¶14} "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."

{¶15} We will examine the evidence in light of these elements to determine if the state produced evidence going to each element.

{¶16} T.B. testified first. She stated that she is now 24 years old. T.B. testified that she has one child whom appellant fathered. (Tr. 228). T.B. stated that she was four years old when she met appellant. (Tr. 229). She referred to him as her dad, as he was the only father she ever knew. (Tr. 229). T.B. testified that at first she and appellant had a loving relationship. (Tr. 231). However, she stated that after she turned 14, appellant became "controlling," "domineering," and "manipulative." (Tr. 231).

{¶17} T.B. stated that appellant began sexually abusing her when she was 14 years old. (Tr. 228-29). Although she testified that there were more instances, T.B. specifically recalled three times. (Tr. 229, 239-40).

{¶18} The first instance that T.B. recalled occurred when she was 14. (Tr. 232). T.B. testified that appellant read in her diary that she had kissed an older boy. (Tr. 232). She stated that he became very upset with her and told her that he did not want her to end up pregnant. (Tr. 232). According to T.B., appellant asked her to have sex with him and she did not say no. (Tr. 232). She stated that the two then had sexual intercourse. (Tr. 233). T.B. stated that appellant told her he was doing it out of love because he did not want her to go out and have sex with other men. (Tr. 232).

{¶19} T.B. stated that she did not say no to appellant because she "was afraid that his mentality towards me would change." (Tr. 232). When asked what she meant by that, T.B. stated that appellant had a tendency to get angry and violent. (Tr. 233). She testified that appellant has been violent with her and with her mother in the past. (Tr. 233). T.B. testified that she did not tell anyone, including her mother,

because she did not want to break up the family. (Tr. 234). T.B. stated that her relationship with appellant subsequently changed. (Tr. 235). She testified that appellant became more controlling, he scared her friends away, and she did not leave the house except to go to school. (Tr. 235).

{¶20} The second instance occurred when T.B. was 17. (Tr. 235). T.B. recalled that on this particular occasion, a male friend of hers called the house. (Tr. 237). She stated that appellant answered the phone and when the boy told appellant who he was, appellant became very angry. (Tr. 237). T.B. stated that appellant shut the phone off and put it in her mouth. (Tr. 237). T.B. testified that she was scared. (Tr. 237). T.B. stated that is when appellant had sex with her again. (Tr. 237). Once again, she stated that she did not tell him no. (Tr. 238). She stated that she did not refuse him because she was afraid that his mentality toward her would change, she was afraid he would take it out on her mother, and she was afraid that he would become violent with her. (Tr. 238). T.B. testified that she did not attempt to fight appellant off because she was scared. (Tr. 239).

{¶21} The third instance that T.B. recalled occurred when she was 22. (Tr. 244-45). Once again, T.B. testified that appellant asked her to have sex with him and she did not say no. (Tr. 245). And again, she stated that she did not say no because she feared appellant's mentality and how violent he would become. (Tr. 245). T.B. testified that she would do anything to make appellant happy because she "loved him that much." (Tr. 246). T.B. stated that five months later she found out that she was pregnant. (Tr. 246-47).

{¶22} T.B. stated that after she turned 18, she still lived at home with appellant. (Tr. 250). She testified that she went to school and worked, but other than that she did not leave the house because appellant did not allow her to go out. (Tr. 250).

{¶23} As to appellant's violent nature, T.B. stated that appellant had slapped her in the face a couple of times. (Tr. 252). Additionally, she stated that she had seen him choke her mother when she was pregnant. (Tr. 252). T.B. testified that

she was afraid that appellant would do that to her if she refused him. (Tr. 252). And T.B. stated that she did not tell anyone about what was going on with appellant because she was afraid and did not want to cause any more trouble. (Tr. 282). When asked if she ever tried to fight appellant away from her. T.B. responded "no." (Tr. 251-52). T.B. stated that she was scared to try. (Tr. 252). She also stated that appellant had told her that he was a boxer or a fighter and that was intimidating to her. (Tr. 252).

{¶24} On cross-examination, T.B. admitted that she reported to police that on these three occasions, appellant did not use force and did not physically attempt to make her have sex with him. (Tr. 260-61). She further stated that appellant did not threaten her in order to make her have sex with him. (Tr. 261).

{¶25} T.B.'s mother, April, testified next. April testified that she met appellant when T.B. was four years old. (Tr. 287). She married him three years later and T.B. referred to appellant as her dad. (Tr. 287). April stated that T.B. and appellant were very close and spent a lot of time together. (Tr. 288). She stated that when T.B. reached age 14, T.B.'s relationship with appellant changed. (Tr. 288). April stated that appellant became very strict and controlling. (Tr. 288).

{¶26} April stated that when she learned that T.B. was pregnant with appellant's baby, she and T.B. stayed living in the house with appellant because she was afraid to leave him and she was afraid that he would try to take the son they shared away from her. (Tr. 292). However, she stated that once the baby was born, she, her son, T.B., and the baby all moved out. (Tr. 293).

{¶27} April stated that she contacted the police on July 29, 2007, right after T.B. gave birth to the baby and was still in the hospital. (Tr. 293). April stated that she waited that long to call the police due to fear. (Tr. 293). And when she called the police, it was not to report that appellant had been having sex with T.B. (Tr. 305-306). Instead, it was because she was moving their son out of the house and she was afraid that appellant would get violent with her for taking their son. (Tr. 318-19). April testified that appellant had been violent with her in the past. (Tr. 319).

{¶128} Vanessa McClain, April's sister, testified next. She stated that appellant's relationship with T.B. was "very dominating." (Tr. 331). According to McClain, whenever T.B. was around appellant T.B. was very quiet and subdued. (Tr. 331). McClain further testified that on the day T.B. gave birth, appellant repeatedly called April and April was very frightened. (Tr. 338-39).

{¶129} Marsha Lewis, a family friend, testified that T.B. seemed intimidated by appellant. (Tr. 346). And Hillary Charles Smith, another friend, testified that T.B. and appellant appeared to have a father-daughter relationship. (Tr. 350-51). Finally, Russell Edelheit, a forensic scientist at the Bureau of Criminal Identification and Investigation, testified that based on the submitted DNA samples, there was a 99.999 percent probability that appellant was the father of T.B.'s baby. (Tr. 370).

{¶130} In order to determine whether this evidence demonstrated that appellant used force or the threat of force to compel T.B. to have sex with him, we must examine several cases on the subject regarding the various tests to apply.

{¶131} In *State v. Eskridge* (1988), 38 Ohio St.3d 56, the Ohio Supreme Court affirmed the defendant's conviction for raping his four-year-old daughter where he used force or the threat of force to compel her submission. The Court held:

{¶132} "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. 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." *Id.* at paragraph one of the syllabus.

{¶133} Quoting a North Carolina case, the Court noted, "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." *Id.* at 59, quoting *State v. Etheridge* (1987), 319 N.C. 34, 47. The Court concluded that the

defendant held a position of authority over the daughter that did not require any explicit threats or displays of force. *Id.*

{¶34} The next significant case dealing with force or threat of force in a rape was *State v. Schaim* (1992), 65 Ohio St.3d 51. In *Schaim*, the defendant was convicted of forcibly raping his 20-year-old daughter. The court of appeals reversed the defendant's conviction. The state appealed. Relying on *Eskridge*, *supra*, the state argued that the defendant's alleged pattern of sexual abuse of his daughter was sufficient to uphold his conviction for forcible rape even though the victim admitted that the defendant did not use physical force or the threat of physical force.

{¶35} The Court disagreed. It stated that *Eskridge* was based solely on the recognition of the amount of control that parents have over their children, particularly young children. *Id.* at 55. It further stated, "[e]very 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." *Id.* The Court then distinguished the case before it:

{¶36} "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)."

{¶37} In finding that the state did not prove the elements of forcible rape, the Court then held:

{¶38} "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. (*State v. Eskridge* [1988], 38 Ohio St.3d 56, 526 N.E.2d 304, distinguished.)” *Id.* at paragraph one of the syllabus.

{¶139} The third significant Supreme Court case is *State v. Dye* (1998), 82 Ohio St.3d 323. In *Dye*, the defendant was convicted of forcibly raping a nine-year-old child. The Court expanded its holding in *Eskridge*, holding:

{¶140} “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.” *Id.* at the syllabus.

{¶141} This court later addressed the *Eskridge* and *Dye* holdings. In *State v. Haschenburger*, 7th Dist. No. 05-MA-192, 2007-Ohio-1562, the defendant appealed his convictions for numerous counts of rape. His victim was between the ages of 14 and 16 when the rapes occurred. On appeal, the defendant argued, among other things, that the trial court erred in using the *Eskridge* definition of force in instructing the jury. He contended that because his victim was over the age of 13, *Eskridge* did not apply to his case.

{¶142} This court disagreed stating:

{¶143} “We agree with the holding of our sister district [in *State v. Milam*, 8th Dist. No. 86268, 2006-Ohio-4742 (appeal not accepted for review in 112 Ohio St.3d 1472)] and find that *Dye* does not preclude an instruction on the *Eskridge* psychological force instruction when the victim is still a minor but is 13 years or older. We agree with *Milam* 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. We note that other appellate districts would also find as such. 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)." *Id.* at ¶44.

{¶44} Given these holdings, we must examine appellant's rape convictions under two separate standards. Because two counts of rape occurred when T.B. was still a minor, we will examine them based on the *Eskridge/Dye* definition of force. However, because the third count of rape occurred when T.B. was 22, we will examine it based on the *Schaim* definition of force.

{¶45} As to the first two counts, the state presented sufficient evidence to prove that T.B.'s will was overcome by fear or duress. Appellant was T.B.'s stepfather. T.B. testified that appellant was the only father she had ever known and he had been in her life since she was four. Thus, appellant held a position of parental authority over T.B. T.B. testified that appellant was dominating, controlling, and manipulative. T.B. also testified that appellant had a violent nature. She stated that appellant slapped her in the face several times and she had seen him choke her mother. She further stated that immediately prior to the sexual encounter when she was 17 years old, appellant put a phone in her mouth when he was unhappy about the person who had called her. Furthermore, T.B. stated that appellant had told her that he was a boxer and fighter and this intimidated her. She stated that she was afraid to refuse appellant's advances because she feared for herself and her mother. April corroborated T.B.'s testimony as to appellant's violent nature and stated that she too feared appellant.

{¶46} Additionally, both of these instances of sex occurred when appellant became angry with T.B. The first instance occurred after appellant read in T.B.'s diary that she had kissed an older boy. The second instance occurred after T.B. received a phone call from an older man. These things angered appellant and he had sex with T.B. immediately after on both occasions. Thus, appellant was already angry when he initiated sex with T.B.

{¶47} This evidence, if believed, was sufficient to support the jury's finding that appellant compelled T.B. to submit to sex by threat of force.

{¶48} As this court previously held, the issue in this type of case is whether the victim's will was overcome by fear or duress. *Haschenburger*, 7th Dist. No. 05-MA-192, at ¶44. This showing of the victim's will being overcome by fear or duress satisfies the element of force or threat of force in this type of case. In *Haschenburger*, the victim was 14, 15, and 16 years old when the alleged rapes occurred. Here, T.B. was 14 and 17 years old. T.B.'s testimony was sufficient to establish that her will was overcome by fear of appellant and his violent nature and what he might do if she refused him.

{¶49} The evidence as to the third count, given the fact that more was required to prove force or threat of force since T.B. was now an adult, is not as convincing. T.B. was 22. Although she still lived at home, she was well over the age of majority. She would have been more evenly matched with appellant in terms of strength and she would no longer be as vulnerable as when she was only 14 and 17. Appellant would no longer be in parental control of her as he was when she was a minor. T.B. did testify that she feared that appellant's mentality would change toward her, as she did with the other two instances, but the difference here is that T.B. was no longer obligated to reside with appellant and submit to his parental authority as she was when she was a minor. Thus, the threat here is not as great as when she was a minor. Also relevant is the fact that appellant never threatened T.B. Given these details and the fact that the state's burden was higher since T.B. was now an adult, the evidence was insufficient to convict appellant on this third count of rape.

{¶50} While the evidence was not sufficient to support the rape conviction for this instance of sex, it nonetheless clearly supports appellant's conviction for sexual battery as to this instance. In addition to finding him guilty of rape, the jury found appellant guilty of sexual battery pursuant to R.C. 2907.03(A)(5), which provides: "No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply \* \* \* The offender is the other person's \* \* \*

stepparent." The trial court merged this conviction with the rape conviction for sentencing purposes.

{¶151} Thus, although the evidence was insufficient to support the third count of rape, appellant was still guilty of sexual battery for the third instance of sex.

{¶152} Appellant also raises an issue as to his sentence in this assignment of error. Appellant argues that in order to sentence him to life, the trial court was required to find that he used force beyond that inherent in the offense itself. Because there was no additional force other than the force inherent in the crime, appellant contends that his sentence is contrary to law.

{¶153} Appellant is mistaken here. R.C. 2971.03 provides the required sentences for those offenders who are convicted of sexually violent predator specifications, as was appellant. R.C. 2971.03(A)(3)(d)(ii) specifically provides:

{¶154} "Except as otherwise provided \* \* \* if the offense for which the sentence is being imposed is rape for which a term of life imprisonment is not imposed under division (A)(2) of this section or division (B) of section 2907.02 of the Revised Code, it shall impose an indefinite prison term as follows:

{¶155} " \* \* \*

{¶156} "(ii) If the rape is committed prior to January 2, 2007, \* \* \* it shall impose an indefinite prison term consisting of a minimum term fixed by the court that is not less than ten years, and a maximum term of life imprisonment."

{¶157} That is what the trial court did here. On each of appellant's rape counts, the court sentenced him to ten years to life. Thus, appellant's sentence is not contrary to law as he alleges.

{¶158} Accordingly, appellant's first assignment of error has merit as to the third count of rape.

{¶159} Appellant's second assignment of error states:

{¶160} "THE TRIAL COURT ERRED WHEN IT MADE IMPERMISSIBLE FINDINGS OF FACT PRIOR TO IMPOSING APPELLANT JOHNSON'S SENTENCE IN VIOLATION OF THE SIXTH AMENDMENT RIGHT TO A FAIR TRIAL."

{¶61} Appellant contends here that the trial court engaged in impermissible fact-finding in sentencing him. He takes issue with four specific findings the court made: (1) T.B.'s injury was exacerbated by her age; (2) T.B. suffered serious mental harm; (3) T.B.'s relationship with appellant facilitated the offense; and (4) T.B.'s child will be burdened. Appellant contends that these findings do not match the jury's findings, which constituted only the elements of the offenses and no more. Appellant contends that the court was not permitted to make findings as to the seriousness factors set out in R.C. 2929.12(B).

{¶62} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Ohio Supreme Court held that several of Ohio's sentencing statutory sections that required judicial fact-finding were unconstitutional. The Court severed these unconstitutional statutory sections and left the remaining sentencing statutes in tact. In addition to *Foster*, the Court decided the sentencing case of *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855. In *Mathis*, the Court held that a sentencing court need only consider "R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender." *Id.* at ¶38. The Court did not find the R.C. 2929.12 factors to be unconstitutional in either *Foster* or *Mathis*. In fact, it specifically instructed sentencing courts to consider these factors.

{¶63} So pursuant to *Foster* and *Mathis*, a sentencing court is to consider the R.C. 2929.12 seriousness and recidivism factors in sentencing offenders. Included in the seriousness factors are:

{¶64} "(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

{¶65} "(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

{¶66} " \* \* \*

{¶167} "(6) The offender's relationship with the victim facilitated the offense."  
R.C. 2929.12(B).

{¶168} Thus, the trial court properly considered these factors in sentencing appellant.

{¶169} Additionally, R.C. 2929.12(A) instructs that the court may consider "any other factors that are relevant to achieving those purposes and principles of sentencing." The trial court did just this when it considered the factor that T.B.'s child would be burdened.

{¶170} Hence, the trial court properly considered the sentencing factors that appellant now takes issue with. Accordingly, appellant's second assignment of error is without merit.

{¶171} Appellant's third assignment of error states:

{¶172} "THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S OBJECTION AND ALLOWING INTO EVIDENCE WITNESS TESTIMONY REGARDING MOTIVE THAT WAS IRRELEVANT AND MORE PREJUDICIAL THAN PROBATIVE IN VIOLATION OF EVIDENCE RULES 402 AND 403."

{¶173} During April's testimony, the court instructed the parties that April could refer to her reason for calling the police but without using the term "domestic violence." (Tr. 312). April testified that on the day she was moving out of her home with appellant, she went to pick up their son. (Tr. 318-19). April testified that appellant had been violent with her in the past and that she called the police because she was frightened. (Tr. 319). Appellant objected. (Tr. 319).

{¶174} Appellant now argues that April's statement was inadmissible because it was irrelevant, having nothing to do with what went on between appellant and T.B. He further contends that its probative value was outweighed by the danger of unfair prejudice because it may have caused the jury to believe that he was arrested for domestic violence. And appellant asserts that this statement was inadmissible character evidence in violation of Evid.R. 404(B).

{¶75} A trial court has broad discretion in determining whether to admit or exclude evidence and its decision will not be reversed absent an abuse of discretion. *State v. Mays* (1996), 108 Ohio App.3d 598, 617. Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶76} "Relevant evidence" is any evidence that tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. Generally, all relevant evidence is admissible. Evid.R. 402. Relevant evidence may be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. Evid.R. 403.

{¶77} Appellant first contends that the reason April called the police was irrelevant. However, this fact was relevant. One of the main issues in this case was whether T.B. feared that appellant would become violent with her if she refused his advances. T.B. testified that she had seen appellant act violently in the past, especially toward April. April's testimony that she, too, feared appellant, enough to call the police, helped to substantiate T.B.'s fears. Thus, April's testimony that she called the police because she was afraid appellant would react violently when she left with their son was relevant.

{¶78} Appellant also expresses concern that the jury may have concluded that he was arrested for domestic violence. However, the court was careful to instruct the state that it could not use the term "domestic violence" and no one used this term.

{¶79} Appellant next contends that this evidence was not admissible to prove his character. Evid.R. 404(B) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." But the evidence of April's call to police was not an attempt to prove that appellant acted violently on that occasion or that he acted violently in

committing the rapes. Instead, it was offered to lend credence to T.B.'s fears that appellant *could* become violent. And more simply, it was also offered to explain to the jury what transpired when April and T.B. finally left appellant and moved out of the house.

{¶180} For all of these reasons, the trial court did not abuse its discretion in allowing April to testify as to why she called the police regarding appellant. Accordingly, appellant's third assignment of error is without merit.

{¶181} Appellant's fourth assignment of error states:

{¶182} "THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S OBJECTION AND ALLOWING INTO EVIDENCE TESTIMONY THAT WAS NOT WITHIN THE WITNESS' PERSONAL KNOWLEDGE IN VIOLATION OF EVIDENCE RULE 602."

{¶183} Marsha Lewis testified regarding her observations during shopping trips with April. Lewis testified that April's cellular phone rang constantly. (Tr. 346). Based on April's ringing phone, Lewis determined that appellant was "keeping tabs" on April. (Tr. 346). Appellant objected. (Tr. 346). The court overruled the objection. (Tr. 346).

{¶184} Appellant argues that Lewis's testimony may have caused the jury to believe that he is controlling or manipulative. He further argues that Lewis had no specific information on which to base her conclusion because she did not know whether appellant was the caller or what the subject of the phone calls was.

{¶185} As stated above, whether to admit or exclude evidence is within the trial court's discretion. *Mays*, 108 Ohio App.3d at 617.

{¶186} Here Lewis testified that she believed appellant was keeping tabs on April. She drew this conclusion from the fact that April's phone constantly rang when the two went shopping. Lewis did not testify that she knew for a fact it was appellant calling April or that she knew for a fact that appellant was keeping tabs on April. Instead, she stated that was the impression she got from the phone calls. Given that Lewis simply gave her opinion, and did not purport to know for sure that appellant

was keeping tabs on April, it was within the trial court's discretion to allow this evidence.

{¶87} Accordingly, appellant's fourth assignment of error is without merit.

{¶88} For the reasons stated above, appellant's first two rape convictions and sentences are hereby affirmed. Appellant's third rape conviction is reversed. The matter is remanded so that the trial court can sentence appellant for his sexual battery conviction that it originally merged with the third rape conviction.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.

APPROVED:

  
Gene Donofrio, Judge