

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2009-1572
	:	
Plaintiff-Appellant,	:	
	:	On Appeal from the
v.	:	Seneca County Court of Appeals,
	:	Third Appellate District
KIEL A. HENRY,	:	
	:	Court of Appeals Case
Defendant-Appellee.	:	No. 13-08-10
	:	

MERIT BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO

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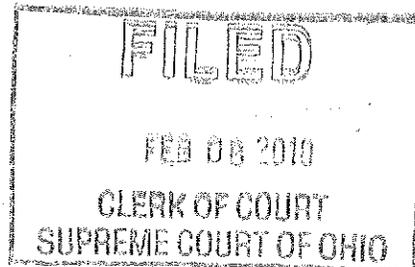
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INTRODUCTION

In its decision below, the Third District created a startling new rule for sexual offenses that include an element of “force or threat of force”: Even where an offender uses physical acts to abuse his victim, the offender must *also* overcome his victim’s will to resist for “force” to exist. In other words, it is not enough for a sex offender to control his victim’s body physically—he must also break her will. Neither the relevant statutes nor settled caselaw supports this rule, which improperly combines the two distinct concepts in the term “force or threat of force” and creates a dangerous loophole for offenders to exploit. As such, this Court should reverse the lower court’s decision.

To commit the type of gross sexual imposition at issue here, an individual must compel the victim to submit to “sexual contact” by “force or threat of force.” R.C. 2907.05(A)(1). When a sex offense includes this requirement, the State must prove that the defendant used or threatened to use some “violence, compulsion, or constraint” to accomplish the criminal act. R.C. 2901.01(A)(1). “Force or threat of force” can have different meanings, depending on the relative statures of the parties involved, the circumstances in which they interact, and the relationships between them. See *State v. Labus* (1921), 102 Ohio St. 26, 38.

To resolve this case, the Third District relied on this Court’s decision in *State v. Eskridge* (1988), 38 Ohio St. 3d 56, which states that, in the context of parent/child sexual abuse, “[f]orce need not be overt and physically brutal, but can be subtle and psychological,” and *can* be established if “it can be shown that the rape victim’s will was overcome by fear or duress.” *Id.* at 58–59 (quotation omitted). Following that rule, the Third District held that force depends *in all cases* on whether the offender overcomes his victim’s will to resist. Thus, the court concluded that no “force” existed when the defendant got into the bed of his sleeping victim and

repeatedly touched her pubic area beneath her clothes, because he neither broke her will to fight him nor successfully prevented her from escaping.

In reaching this conclusion, the lower court conflated the two distinct concepts in the term “force or threat of force”: physical force used to accomplish a sexual act and threats of force designed to overcome the victim’s will to resist the sexual act. For the former, the victim’s will is irrelevant—the key factor is that the offender overpowered her physically and used this control to perpetrate a sexual assault. By contrast, a threat of force is only effective if it creates enough psychological pressure to break the victim’s will to stop the attack. Though courts have not always clearly distinguished these concepts, a close review reveals that the force discussed in *Eskridge*, which requires the State to prove that the victim’s will was overcome by fear or duress, falls solely within the “threat of force” rubric. See *State v. Schaim* (1992), 65 Ohio St. 3d 51, 55 (“*Eskridge* is based solely on the recognition of the amount of control that parents have over their children, particularly young children.”). As such, the lower court erred in applying *Eskridge* to this case, which turns exclusively on whether sufficient physical force existed to support the charge of gross sexual imposition.

If the Third District’s decision was animated by the different, but unarticulated, concern that the relatively minimal physical force used here did not rise to the level prohibited by the gross sexual imposition statute, then the court should have reversed on that ground alone. The problem with the approach the appeals court took instead is that it ignores the difference between “force” and “threat of force” and distorts the statutory scheme beyond the point of recognition. This improper interpretation needs to be corrected.

Indeed, requiring the State to establish psychological control in a case where the offender used actual, physical force to perpetrate an assault enlarges the “victim’s will” concept beyond

its logical bounds. Taking the focus off of the offender's tactics and placing it on the victim's actions in fighting off her attacker gives offenders a free pass to use whatever force they want, however brutal, as long as their victims continue to struggle or eventually escape.

For these and other reasons, this Court should reverse the Third District's decision.

STATEMENT OF AMICUS INTEREST

Ohio Attorney General Richard Cordray is Ohio's chief law officer. See R.C. 109.02. Accordingly, he has a strong interest in ensuring that Ohio's criminal laws are correctly interpreted. The definition of "force or threat of force" in R.C. 2901.01(A)(1), as applied in the context of gross sexual imposition, is carefully designed to apply to those offenders who heighten their criminal conduct with some element of "violence, compulsion, or constraint." The Attorney General has a manifest interest in maintaining the integrity of the system devised by the General Assembly and in safeguarding the powers of the state's law enforcement officers to prosecute fully those offenders who perpetrate such wrongs.

STATEMENT OF THE CASE AND FACTS

A. Henry entered his sleeping victim's bedroom, crawled into bed with her, and repeatedly touched her sexually before she fully awoke and escaped.

In August 2006, appellee Kiel A. Henry and his victim, K.C., were students at Heidelberg College. *State v. Henry*, 2009-Ohio-3535, ¶ 4. Henry was a member of the wrestling team and was described as a "larger wrestler" and "at least twice the size of K.C." *Id.* at ¶¶ 7-9, 12. K.C., a petite female, was living in a campus residence with six other women. *Id.* at ¶¶ 4, 9. Before the incident, she and Henry did not know each other. *Id.* at ¶ 6.

On the night in question, K.C. went to bed at approximately 12:30 a.m. *Id.* at ¶ 4. Henry spent the night drinking at various bars, then went to K.C.'s residence with several other members of the wrestling team to talk with the other women who lived there, arriving after K.C.

went to bed. *Id.* at ¶¶ 8, 10–11. By all accounts, Henry was intoxicated at the time. *Id.* at ¶¶ 7, 11. He remained in the house after his friends left and entered K.C.’s second-floor bedroom when the other residents left him unattended. *Id.* at ¶¶ 4–5, 8.

K.C.’s bed was situated against the wall, and she was sleeping facing the wall. *Id.* at ¶¶ 4–5. At some point, she awoke to feel Henry lying immediately behind her (pinning her between him and the wall) with his hand underneath her shorts and on her pubic area. *Id.* at ¶ 5. In her semi-conscious state, K.C. thought Henry was her boyfriend, and gently removed his hand and said “no.” *Id.* Henry persisted, though, returning his hand to her pubic area underneath her shorts four more times, both touching her and penetrating her vagina with his finger. *Id.* Each time, K.C. removed his hand and said “no,” still oblivious to his true identity. *Id.*

Eventually, though, K.C. fully awoke and realized that she did not know who Henry was. *Id.* At that point, she braced her feet against the wall and pushed him off the bed, then ran out of the room screaming. *Id.* at ¶¶ 5–6. The other residents dragged Henry out of the bedroom, and he eventually left the house on his own accord. *Id.* at ¶¶ 7, 9.

B. Henry was convicted of gross sexual imposition, but the court of appeals reversed, finding that he did not exercise sufficient force to overcome the victim’s will.

A jury convicted Henry of one count of gross sexual imposition under R.C. 2907.05(A)(1), *Henry*, 2009-Ohio-3535, at ¶ 14, which prohibits an individual from having “sexual contact” with another when “the offender purposely compels the other person . . . to submit by force or threat of force.” The trial court sentenced Henry to five years of community control and classified him as a sexually oriented offender. *Id.* at ¶ 16.

The Third District Court of Appeals reversed, holding that there was insufficient evidence of force to support the conviction. *Id.* at ¶ 34. Citing *Eskridge* and several lower court cases involving child victims who were abused by authority figures, the court of appeals concluded

that force exists only when the offender overcomes the victim's will through fear or duress. *Id.* at ¶ 26–30. Given this definition, the court concluded that Henry did not use “force” because K.C. was able to escape as soon as she realized what Henry was doing to her. “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.*” *Id.* at ¶ 31 (emphasis sic). The court also noted that, although other appeals courts had found that even the minimal force needed to manipulate clothing can constitute force when the victim is asleep, that interpretation “fails to recognize the requirement that force or threat of force must be sufficient to overcome the will of the victim, and blurs the distinction between sexual imposition and gross sexual imposition.” *Id.* at ¶ 32.

This Court accepted jurisdiction over the State’s discretionary appeal. 123 Ohio St. 3d 1507, 2009-Ohio-6210.

ARGUMENT

Amicus Curiae Attorney General Richard Cordray’s Proposition of Law No. 1:

When an individual uses physical force to accomplish an act of sexual abuse, the “force” element defined in R.C. 2901.01(A)(1) exists, regardless of whether the victim’s will to resist was overcome.

Henry was charged with gross sexual imposition under R.C. 2907.05(A)(1), which prohibits an individual from compelling his victim to submit to “sexual contact” by “force or threat of force.” See also R.C. 2907.02(A)(2) (referencing “force or threat of force” in the context of rape); cf. R.C. 2907.03 (sexual battery) and 2907.06 (sexual imposition) (setting forth crimes that are functionally equivalent to rape and gross sexual imposition, respectively, except that they lack a force element). “Force” is defined for this and related offenses as “any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.” R.C. 2901.01(A)(1). The term “force or threat of force” is a fluid concept that can vary based on

the relative statures of the parties involved, the circumstances in which they interact, and the relationships between them. See *Labus*, 102 Ohio St. at 38.

In concluding that Henry did not use “force” sufficient to support the charge of gross sexual imposition because the physical force he used did not overcome his victim’s will to resist him and ultimately escape, the Third District conflated the two wholly separate types of behaviors covered by the term “force or threat of force.” The appeal court’s approach—that an offender must overcome his victim’s will, regardless of whether the physical force alone was sufficient to accomplish the abuse—runs contrary to the statutory scheme and the case law, and it creates a dangerous loophole for offenders to exploit. This Court should reverse the lower court’s decision.

A. Physical force used to accomplish an act and psychological force used to overcome the victim’s will to resist are distinct types of “force,” and either one is sufficient to meet the “force or threat of force” standard.

As this Court has noted, two different types of acts will satisfy the “force or threat of force” standard: “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.” *Schaim*, 65 Ohio St. 3d at 55. In other words, a defendant uses “force or threat of force” when he either (1) overpowers his victim physically to further his sexual misconduct or (2) employs psychological pressures, through either explicit or implicit threats, that overcome the victim’s will to resist the offender’s sexual advances. See also *State v. Rupp* (7th Dist.), 2007-Ohio-1561, ¶ 33 (noting that “force or threat of force” may be shown “either through direct evidence of such or by inference where the defendant overcame the victim’s will by fear and duress. Thus, if the defendant created the belief that physical force will be used in the absence of submission, then threat of force can be inferred.”). Although courts often discuss these concepts together (largely because offenders often use a combination

of physical force and threats of further force in concert), they are distinct ideas that are realized through different, equally unlawful behaviors.

Pure physical force can take many different forms. Some offenders use brutal, violent acts to overpower their victims and complete sexual assaults, see, e.g., *State v. Williams*, 99 Ohio St. 3d 493, 2003-Ohio-4396, ¶¶ 55–81; *State v. Ellis* (8th Dist.), 2008-Ohio-6283, ¶ 23; others physically restrain their victims to accomplish the crimes, see, e.g., *State v. Craig*, 110 Ohio St. 3d 306, 2006-Ohio-4571, ¶ 44; *State v. Bush* (4th Dist.), 2009-Ohio-6697, ¶¶ 28–31. More subtle physical force may suffice when, as here, the offender preys upon a sleeping or unconscious victim. In those circumstances, the victim’s vulnerability obviates the need for the offender to act violently, which is why courts of appeals have held that even the minimal force needed to move articles of clothing out of the way or to reposition the sleeping victim’s body satisfies the statutory standard. See, e.g., *State v. Simpson* (8th Dist.), 2007-Ohio-4301, ¶¶ 49–52; *State v. Burton* (4th Dist.), 2007-Ohio-1660, ¶ 42.

In any event, the bare use of physical force above and beyond that inherent in the act itself qualifies as “force” under sexual assault statutes like R.C. 2907.05(A)(1). See *State v. Dye* (1998), 82 Ohio St. 3d 323, 327. In pure physical force cases, courts do not examine the impact that these actions have on the victim’s will, because her mental state is irrelevant. The offender is punished for overpowering his victim physically, not psychologically, and for using this physical advantage to commit a sexual assault.

By contrast, the victim’s will is highly relevant in “threat of force” cases, as a sexual assault predicated on a threat can only proceed when the threat terrifies the victim into submission. “[W]here a woman is affected by terror or is in fear of great bodily injury and harm, brought into being by an accused, who has placed his victim within his power and control,” the

forcible element exists if “her will was overcome by the fear or duress.” *State v. Martin* (9th Dist. 1946), 77 Ohio App. 553, 554. In other words, lacking control over the victim’s body, the offender must break his victim’s will to resist him.

As with physical force, psychological force can take numerous forms. The offender may brandish a weapon and threaten to use it against the victim if she does not submit, see, e.g., *State v. Walker* (8th Dist.), 2006-Ohio-6188, ¶¶ 51–58; he may threaten to use direct physical violence against her, see, e.g., *State v. Fields* (9th Dist.), 2009-Ohio-1053, ¶¶ 9–10; or he may take advantage of a reputation for toughness or a terrifying appearance to discourage his victim from fighting back, see, e.g., *State v. Pordash* (9th Dist.), 2004-Ohio-6081, ¶ 12 (“[E]ach victim knew of Appellant’s extensive background in martial arts” and “feared that any resistance would lead to serious bodily harm.”); *State v. Hurst* (10th Dist. 2000), No. 98AP-1549, 2000 Ohio App. Lexis 816, *9–12. Even a threat to a third person close to the victim may be enough to satisfy this standard. See *State v. Johnson*, 112 Ohio St. 3d 210, 2006-Ohio-6404, ¶¶ 270–74. These varied tactics share a common thread—they are designed to break the victim’s will to resist the offender’s sexual advances, so that the offender can more easily carry out the sexual assault. In that regard, they have the same impact on the victim as actual physical force, and are separately prohibited under the sex offense statutes.

The Third District combined these distinct concepts by holding that an offender who uses physical force must *also* overcome his victim’s will to resist his advances, purportedly on the basis of this Court’s opinion in *Eskridge. Henry*, 2009-Ohio-3535, at ¶¶ 26, 31–32. *Eskridge* provides no support for that approach. Rather, *Eskridge* reinforces the idea that physical force and psychological pressures are separate acts and recognizes a form of implicit threat that arises when an adult abuses a child over whom he has authority.

The defendant in *Eskridge* was charged with the forcible rape of his four-year-old daughter. 38 Ohio St. 3d at 57–58. In examining whether sufficient evidence existed to support the conviction, the Court first noted some minor evidence of physical force in that case, including that the defendant removed his daughter’s underwear and laid her on the bed before engaging in sexual act, and it found that both were “acts of compulsion and constraint that are independent of the act of rape.” *Id.* at 58. The Court did not consider whether these acts overcame the victim’s will to resist; it simply noted them as independent acts of physical force: “R.C. 2907.02(B) requires only that minimal force or threat of force be used in the commission of a rape. As noted above, *Eskridge* used at least minimal force in committing the rape against the victim.” *Id.*

After discussing those examples of physical force, the Court “*also* recognize[d] the coercion inherent in parental authority when a father sexually abuses his child.” *Id.* (emphasis added). In those circumstances, the sheer psychological power of this authority *may* take the place of more traditional notions of force, “[a]s long as it can be shown that the rape victim’s will was overcome by fear or duress.” *Id.* (quotation omitted). The idea behind this alternative is clear. Children, especially those of tender years, are vulnerable, and depend wholly on their parents for care, support, and guidance. This complete dependence, coupled with the power to discipline, gives adults significant power over children that offenders can exploit without turning to the common notions of force discussed above: “The 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* (N.C. 1987), 352 S.E. 2d 673, 681); see also *Dye*, 82 Ohio St. 3d at 327–29 (extending this rule to other authority figures).

Though the Court discussed this situation as an exception to both the “force” and “threat of force” requirements, in that neither physical force nor an explicit threat of harm is required in these circumstances, other cases have clarified that such authority serves as an implicit threat to the child victim—that the refusal to submit will result in some sort of punishment. See *Schaim*, 65 Ohio St. 3d at 55 (refusing to apply *Eskridge* to an adult victim of incest because, while “[a] threat of force can be inferred from the circumstances surrounding sexual conduct . . . 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”); see also *Dye*, 82 Ohio St. 3d at 327. Such psychological pressures are identical to those arising in threat of force cases, see *Rupp*, 2007-Ohio-1561, at ¶¶ 32–33, which is why the Court noted in *Eskridge* that such circumstances will satisfy the force element as long as they overcome the child’s will to resist; again, lacking control over the child’s body through physical force, the offender must break her will.

Such inquiries into the victim’s mental state are simply inapplicable when the offender physically forces himself onto his victim. Because this case involved pure physical force, the Third District erred in engrafting an additional “victim’s will” requirement onto the State’s case, and its decision in that regard should be reversed. The issue in this case is solely whether the physical force Henry used against his sleeping victim (including his repeated acts of moving her clothes out of the way so that he could touch her sexually) was sufficient to satisfy the conviction for gross sexual imposition. Because his acts show that he used at least minimal physical force to take advantage of his sleeping victim’s vulnerability, his conviction should be upheld.

B. Requiring the State to prove that an offender both used physical force and overcame his victim's will to resist would allow offenders to escape criminal liability in all but the most egregious instances of force.

It is possible that the Third District reached its decision here simply because it believed that the physical force Henry used was not sufficient enough to meet the standard for "force" under the circumstances. If that was the case, though, the court should have explicitly said so, instead of holding that cases allowing minimal force to suffice in certain circumstances "fail[] to recognize the requirement that force or threat of force must be sufficient to overcome the will of the victim." *Henry*, 2009-Ohio-3535, at ¶ 32.

Tying all cases of physical force to the victim's will in this matter would significantly undermine the State's ability to punish offenders who use actual physical force to perpetrate sexual assaults. Indeed, because this case featured only minimal physical force, it does not reveal the full range of issues associated with the Third District's combined physical force/psychological domination rule. Applying this rule in practice would effectively give offenders a free pass to use whatever brutality they want, as long as the victim continues to struggle or eventually escapes. Such a result is impossible to square with the statute, or with common sense.

Suppose that, in addition to manipulating K.C.'s clothing and performing other minimally forceful acts, Henry punched or stabbed her incident to accomplishing the same sexual contact, and that K.C. was then able to escape using the same strategies employed in this case (bracing her feet against the wall, pushing him off the bed, and running out of the room). Under the Third District's rule, Henry would not have used "force" in that instance, as his brutal physical acts, though sufficient to accomplish the sexual assault, would not have overcome her will to resist him and escape.

The Third District's approach does not provide any way to distinguish such instances of brutality from the minimal force used here; if the test hinges on whether the victim's will was overcome, any level of violence could be permissible, as long as the victim does not give up hope of escape. In essence, this rule would allow offenders to prey on their victims' natural instinct to resist and escape, and would place those victims in an unconscionable position—stop resisting so that the offender will face more serious charges if he is caught, or keep resisting and know that he will receive a lighter sanction for his crime. Such absurd results must be avoided in construing statutes. See *In re: T.R.*, 120 Ohio St. 3d 136, 2008-Ohio-5219, ¶ 16.

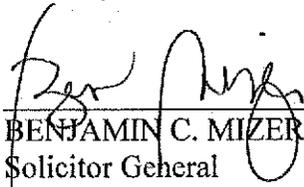
The Third District's rule runs contrary to the established statutory scheme and would create myriad loopholes for offenders to exploit. In sexual offense statutes like R.C. 2907.05(A)(1), the General Assembly prohibited the use or threat of “any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing” in such offenses. R.C. 2901.01(A)(1) (emphasis added). As soon as an offender uses physical methods to force himself sexually on an unwilling victim, he has met this standard. See also R.C. 2907.05(D) (providing that the victim's physical resistance to the offender need not be proven to establish gross sexual imposition); R.C. 2907.02(C) (providing the same for rape offenses). This Court should reject the Third District's rule to the contrary, and reverse the decision below.

CONCLUSION

For the above reasons, the Attorney General respectfully asks this Court to reverse the Third District's decision.

Respectfully submitted,

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I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Richard Cordray in Support of Plaintiff-Appellant State of Ohio was served by U.S. mail this 8th day of February 2010, upon the following counsel:

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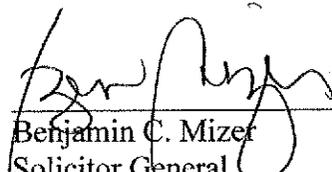
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