

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio	*	
Appellant,	*	Case No. 09-1572
v.	*	On Appeal from the
Kiel A. Henry	*	Seneca County Court
Appellee.	*	of Appeals, Third
		Appellate District

MERIT BRIEF OF APPELLANT STATE OF OHIO

Derek W. DeVine, Prosecuting Attorney (0062488)
 James A. Davey, Assistant Prosecuting Attorney (0078056) (Counsel of Record)
 71 South Washington Street
 Suite 1204
 Tiffin, Ohio 44883
 (419) 448-4444
 Fax No. (419) 443-7911

COUNSEL FOR APPELLANT, STATE OF OHIO

Javier H. Armengau (0069776)
 Attorney at Law
 857 South High Street
 Columbus, Ohio 43206
 (614) 443-0516
 Fax No. (614) 443-0708

COUNSEL FOR APPELLEE, KIEL A. HENRY

FILED
 FEB 12 2010
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
I. TABLE OF AUTHORITIES	iii
II. STATEMENT OF FACTS	i
III. ARGUMENT	5
A. Proposition of Law No. 1	5
<p>To determine whether an offender used the force necessary to commit gross sexual imposition, consideration of whether the 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.</p>	
B. Proposition of Law No. 2	22
<p>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.</p>	
IV. CONCLUSION	26
V. CERTIFICATE OF SERVICE	27
VI. APPENDIX	<u>Appx. Page</u>
A. Notice of Appeal to the Supreme Court of Ohio (Aug. 31, 2009)	1
B. Judgment Entry of the Court of Appeals, Third Appellate District (July 20, 2009)	3
C. Opinion of the Court of Appeals, Third Appellate District (July 20, 2009)	4
D. Judgment Entry of the Seneca County Common Pleas Court (Feb. 22, 2008)	30

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless</i> (2007), 113 Ohio St.3d 394.	22
<i>State v. Burton</i> (4th Dist.), 2007-Ohio-1660.	24
<i>State v. Byrd</i> (8th Dist.), 2003-Ohio-3958.	5, 12-13
<i>State v. Clark</i> (8th Dist.), 2008-Ohio-3358.	21, 23-24
<i>State v. DeLuca</i> (8th Dist.), 2007-Ohio-3905.	25
<i>State v. Dye</i> (1998), 82 Ohio St.3d 323.	11
<i>State v. Eskridge</i> (1988), 38 Ohio St.3d 56, 59.	5-9, 11, 14, 21, 24-25
<i>State v. Euton</i> (3d Dist.), 2007-Ohio-6704.	5, 10-12
<i>State v. Graves</i> (8th Dist.) 2007-Ohio-5430.	21
<i>State v. Henry</i> (3d Dist.), App. No. 13-08-10.	4- 5, 9-10, 20- 22, 24-25
<i>State v. Hurst</i> (10th Dist.), 2000 WL 249110.	14, 15-16
<i>State v. Labus</i> (1921), 102 Ohio St. 26.	24-25
<i>State v. Lester</i> (2009), 123 Ohio St.3d 396.	19
<i>State v. Lillard</i> (8th Dist.), 1996 WL 273781.	24
<i>State v. Martin</i> (9th Dist. 1946), 77 Ohio App. 553.	7-8, 14
<i>State v. Milam</i> (8th Dist.), 2006-Ohio-4742.	6
<i>State v. Miller</i> (3d Dist.), 1995 WL 9395.	21
<i>State v. Mitchell</i> (8th Dist.), 1991 WL 106037.	5, 12

<i>State v. Rupp</i> (7th Dist.), 2007-Ohio-1561.	14, 16-18, 23-24
<i>State v. Schaim</i> (1992), 65 Ohio St.3d 51.	15-16
<i>State v. Simpson</i> (8th Dist.), 2007-Ohio-4301.	24
<i>State v. Sullivan</i> (8th Dist.), 1993 WL 398551.	23
<i>State v. Wolfenberger</i> (2d Dist. 1958), 106 Ohio App. 322.	7-8, 14

CONSTITUTIONAL PROVISIONS AND STATUTES

R.C. 2901.01(A)(1).	6, 22-23, 25
R.C. 2901.01(A)(2).	23
R.C. 2901.21(A).	19, 21
R.C. 2905.01(B).	23
R.C. 2907.02(A)(2).	6
R.C. 2907.02(C).	21
R.C. 2907.05(A)(1).	4-6, 11-12, 22- 23, 25
R.C. 2907.05(D).	19, 20-21

LEGAL TREATISES

LEWIS R. KATZ ET AL., <i>BALDWIN'S OHIO PRACTICE CRIMINAL LAW</i> (3d ed. 2009)	19
--	----

STATEMENT OF FACTS

I. Introduction

In the early morning of August 12, 2006, Appellee Kiel A. Henry (hereinafter "Appellee") compelled the victim, K.C., to submit to sexual contact by force. (Tr. 170, 181-88.) During the forcible sexual assault, Appellee touched K.C.'s pubic area a total of five times, including four times after she removed his hand from her pubic area and, after each of the four times, stated, "no." (Tr. 181-88.) After the third time K.C. moved Appellee's hand away and stated "no," Appellee penetrated K.C.'s vagina with his finger. (Tr. 185.) Appellee stopped touching K.C. only when she was able to push him off of her bed after the fourth time she moved his hand away and stated "no." (Tr. 186-87.)

Appellee and K.C. had never been in a relationship. (Tr. 190.) They had never engaged in any physical or sexual activity together. (Tr. 190.) K.C. did not even know Appellee's name. (Tr. 187.) At the time she went to bed in the bedroom where Appellee sexually assaulted her, K.C. was unaware that Appellee was in her house. (Tr. 175, 198.) K.C. did not give Appellee permission to enter into her bedroom, to get into her bed, or to touch her. (Tr. 187, 190.) (Tr. 198.)

II. The Events Surrounding the Sexual Assault

In the hours before Appellee sexually assaulted her, K.C. had worked at a local restaurant. (Tr. 172.) When she finished her shift, she went to a house in Tiffin, Ohio she moved into earlier that day in preparation for the start of the school year at a local college she and Appellee attended. (Tr. 170-72, 223, 239.) K.C. lived with a group of women in the house who were in her college sorority. (Tr. 171.) No men lived in the house. (Tr. 171.)

The women held a sorority retreat at the house that started on the afternoon prior to the early morning sexual assault Appellee committed against K.C. (Tr. 173, 175, 180-88, 223, 239.) While women were drinking alcohol at the house and while K.C. drank a beer before leaving the restaurant after she had worked her shift, she did not drink any alcohol at any time after arriving back at the house. (Tr. 172-75, 199, 241.) After she arrived at the house, she left about five minutes later, bought food at Wendy's, returned to the house, ate the food, and went to bed a short time later. (Tr. 172-75.)

K.C. was the first woman to go to bed. (Tr. 199.) Her bedroom was on the second floor of the house. (Tr. 175-77.) There were two beds in K.C.'s bedroom, one of which was unoccupied because her roommate had not moved in yet. (Tr. 177, 261.) Both beds were several feet off the floor higher than beds typically are, as there was a large storage area under each of the beds. (Tr. 151, 178.) When K.C. went to bed, it was the first time she had ever slept in the house. (Tr. 172-75.) There were no men in the house when K.C. went to bed. (Tr. 175.)

Appellee and a group of men arrived at the house in the early morning of August 12, 2006. (Tr. 241.) They arrived after K.C. went to bed, and she was unaware that they were there. (Tr. 175, 198.) All of the men, except for Appellee, later left with some of the women to go to another residence. (Tr. 241-42.) Eventually, some of the remaining women decided to walk Appellee, who was intoxicated, to the residence where the rest of the men had gone. (Tr. 244, 248, 282.) The women went to prepare themselves to take Appellee, who was on the first floor of the house with them, out of the house. When they returned, however, Appellee was gone. (Tr. 245.)

The women looked for Appellee inside and outside the house, but could not find him. (Tr. 245.) They then resumed conversing on the first floor. (Tr. 244-45.) While they were talking, the women heard a loud “thud” from the floor above, heard K.C. scream, and saw her run downstairs. (Tr. 246.) The women, including K.C., went upstairs. (Tr. 246.) There, K.C. checked on Appellee together with the other women, pulled him into the hallway with another woman, and called 9-1-1 quickly, before Appellee had left the house. (Tr. 189, 218, 247.)

III. The Sexual Assault

It was during the time he was left alone on the first floor that Appellee went to the second floor bedroom of K.C. and sexually assaulted her. (Tr. 245-46.) Appellee was able to walk up seventeen (17) stairs, go down a hallway, enter into K.C.’s bedroom, and climb into her bed (which, because of the storage space, was significantly higher off the floor than a normal bed), while he ignored the unoccupied bed in the room. (Tr. 151, 176-78, 181.) Appellee began his sexual assault of K.C. while she was asleep, then continued to sexually assault her while she struggled to comprehend what he was doing to her after he awakened her. (Tr. 181-87.) The vulnerability of K.C. was further exacerbated because she could not see Appellee as he assaulted her because of his position behind her in bed. (Tr. 181-82.)

K.C. first realized someone was in her bed when Appellee awakened her by touching her pubic area with his hand underneath her shorts. (Tr. 181.) While she was disoriented after being unexpectedly awakened by Appellee during the first night she slept in her new house, K.C. was able to put her hand on Appellee’s lower arm, move his hand away from her pubic area, and say “no.” (Tr. 182.) Despite K.C.’s verbal and

physical resistance, Appellee moved his hand back again, this time touching her vagina under her shorts. (Tr. 183.) For a second time, K.C. moved Appellee's hand away and said "no." (Tr. 184.) Again, despite her resistance, Appellee moved his hand back and touched her vagina under her shorts. (Tr. 184-85.) For a third time, K.C. moved Appellee's hand away and said "no." (Tr. 185.) Appellee again moved his hand to K.C.'s vagina under her shorts, this time penetrating her vagina with his finger. (Tr. 185.) For a fourth time, K.C. moved Appellee's hand away and said "no." (Tr. 186.) Again, Appellee moved his hand under K.C.'s shorts to her pubic area. (Tr. 186.)

By this point, K.C. became fully aware of what was happening and realized where she was. (Tr. 186-87.) Bracing her feet against the wall her bed was up against, K.C. used her entire body to push Appellee, who was much larger than her, off the bed. (Tr. 187, 230.) Appellee landed with the loud "thud" the women on the first floor heard. (Tr. 188, 246.)

IV. Verdict and Appeal

Following a jury trial in which the jury found Appellee guilty of one count of gross sexual imposition,² the court of common pleas entered a judgment of conviction. *State v. Henry* (3d Dist. July 20, 2009), App. No. 13-08-10 at ¶¶1, 13-16. In a divided, 2-1 decision, the court of appeals reversed the conviction based on its determination that the trial court should have granted Appellee's motion for acquittal because even viewing the evidence in a light most favorable to the prosecution, no rational trier of fact could have found Appellee used force to commit the offense. *Id.* at ¶¶20, 34; *see also* J. Entry,

² Appellee was convicted of one count of gross sexual imposition in violation of R.C. 2907.05(A)(1), a felony of the fourth degree. *State v. Henry* (3d Dist. July 20, 2009), App. No. 13-08-10 at ¶¶1, 13-16.

App. 30. The case is before this Court after the State timely appealed the decision of the court of appeals and this Court granted jurisdiction.

ARGUMENT

Proposition of Law No. 1: To determine whether an offender used the force necessary to commit gross sexual imposition, consideration of whether the 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.

I. Introduction

The Court should make it clear that an offender may commit gross sexual imposition by force regardless of whether the will of a victim is overcome. At least two districts of the court of appeals have interpreted language contained in the opinion of this Court in *State v. Eskridge* (1988), 38 Ohio St.3d 56, 59, to mean that force is proven in gross sexual imposition cases only when the will of the victim is overcome. See *State v. Henry* (3d Dist.), App. No. 13-08-10, 2009-Ohio-3535, at ¶¶26, 31-32, 34-38; *State v. Euton* (3d Dist.), 2007-Ohio-6704 at ¶¶35, 43-44; *State v. Mitchell* (8th Dist.), 1991 WL 106037 at **6-7; *State v. Byrd* (8th Dist.), 2003-Ohio-3958 at ¶26.³ The Court could not have meant for its opinion to mean what the court of appeals has interpreted it to mean. Such an interpretation is contrary to the language of *Eskridge* and conflicts with public policy. *An offender may be properly found guilty of using force to commit gross sexual imposition based on the conduct of the offender regardless of the reaction of the victim to*

³ The defendant in each of these cases was convicted of gross sexual imposition in violation of R.C. 2907.05(A)(1). *Henry, supra*, at ¶¶2, 14; *Euton, supra*, at ¶¶1, 34; *Mitchell, supra*, at **1, 5; *Byrd, supra*, at ¶¶15, 18-20.

the offender's conduct. The Court, therefore, should hold expressly that there is no requirement in gross sexual imposition cases that the will of the victim must be overcome before a trier of fact may find an offender committed the offense by force.

II. Force, *Eskridge*, and the Origins of the *Eskridge* Rule

A. Force

Force is the first definition contained in the criminal title of the Revised Code. Pursuant to R.C. 2901.01(A)(1), force is “any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.” The definition of force applies to the statutes that prohibit rape and gross sexual imposition. See R.C. 2907.02(A)(2) (rape); R.C. 2907.05(A)(1) (gross sexual imposition). The force element is the same for both offenses. See *State v. Milam* (8th Dist.), 2006-Ohio-4742 at ¶27. Pursuant to R.C. 2907.05(A)(1), which the jury found Appellee guilty of violating, an offender is guilty of gross sexual imposition if the offender has “sexual contact with another, not the spouse of the offender” when the offender “purposely compels the other person . . . to submit by force or threat of force.”

B. *Eskridge*

Force was a specification of the rape the defendant committed in *Eskridge*, 38 Ohio St.3d at 56-57. In that case, the Court reinstated the conviction of the defendant for the forcible rape of his four-year-old daughter. *Id.* at 57, 59. The defendant raped the victim during the time he was babysitting her while her mother was at work. *Id.* at 56. The court of appeals had partially reversed the conviction because it had determined there was insufficient evidence to prove the force specification. *Id.* at 56-57.

The victim testified the defendant took her panties off, put his penis in her, ejaculated, and put her clothes back on. *Id.* at 57. The victim's mother testified that the victim told her the defendant had laid her on a bed, taken her panties off, and "did nasty things." *Id.* at 58. The victim's mother also testified the victim cried in her sleep for several nights after the defendant raped her, and was unwilling to go to the defendant's house. *Id.* Two pediatricians testified the victim had redness in her vaginal area. *Id.*

The Court ruled that "[t]he force . . . necessary to commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other." *Id.* at syllabus paragraph 1. Further, the Court ruled that in cases like *Eskridge* that involve a parent raping a child, because of the "filial obligation of obedience to a parent, the same degree of force . . . 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.* Based on the facts of the case, the Court held that substantial evidence existed that the defendant used force to commit the offense. *Id.* at 57.

To explain its holding that there was substantial evidence that the defendant used force to commit the offense, the Court cited a rule from earlier cases that "[a]s long as it can be shown that [a] rape victim's will was overcome by fear or duress, the forcible element of rape can be established." *Id.* at 59 (emphasis added), citing *State v. Martin* (9th Dist. 1946), 77 Ohio App. 553, 554 and *State v. Wolfenberger* (2d Dist. 1958), 106 Ohio App. 322, 323-24. As the Court explained, because a threat of punishment is implicit in every command a parent gives to a child, a defendant may overcome the will of a child of tender years through means that would not necessarily overcome the will of

an adult. *Id.* at syllabus paragraph 1, 58-59. If, therefore, the will of the child is overcome, that is sufficient to prove the defendant used force to commit the offense. *Id.*

C. *Martin*

The defendant in *Martin* impersonated a police officer and “subjected” the victim “to a series of frightful experiences, which finally culminated in sexual intercourse” such that the victim offered little resistance. *Martin*, 77 Ohio App. at 554. Despite the minimal resistance offered by the victim, the court affirmed the conviction of the defendant for having carnal knowledge of the victim forcibly and against her will. *Id.* at 553-54. To reach its decision, the court stated that:

while consent negatives rape, *where 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, intercourse under such circumstances without consent is rape, even though the victim might have used greater physical resistance or cried out, *when it is shown that her will was overcome by fear or duress.*

Id. at 554 (emphasis added).

D. *Wolfenberger*

In *Wolfenberger*, 106 Ohio App. at 323, the offender was convicted of raping his twelve-year-old daughter. The defendant threatened to whip his daughter if she did not accompany him as he drove his automobile into a field about one and one half miles away. *Id.* at 324. Once parked in the field, the defendant pushed the victim down, held her down on the rear seat, and “threatened to hit her if she did not yield.” *Id.* The court affirmed the conviction. *Id.* The court concluded that the victim “was within the power and control of the defendant, and her will and resistance were overcome by fear or duress.” *Id.*

III. Misinterpretation of *Eskridge*

A. Cases that Misinterpret *Eskridge*

Despite the clear language of *Eskridge*, several decisions of the court of appeals misinterpret the rule contained in the opinion, which permits a finding of force despite a lack of victim resistance as long as the will of the victim has been overcome. *See Eskridge, supra*, at 59. The opinions of these courts elevate the rule contained in the body of the *Eskridge* opinion⁴ from a *sufficient condition* that permits a finding of force to a *necessary condition* upon which a finding of force must be based. These opinions interpret the rule contained in *Eskridge* to mean that an offender may be guilty of a forcible sexual assault only when the will of the victim has been overcome.

In the case at bar, a jury found Appellee guilty of gross sexual imposition in violation of R.C. 2907.05(A)(1), which included the element of “force.” *Henry*, App. No. 13-08-10 at ¶¶1-2, 14, 21. On appeal, Appellee claimed the evidence was insufficient to prove he used force to commit the offense. *Id.* at ¶18. The court of appeals reversed Appellee’s conviction and held that no rational trier of fact could have found Appellee used force to commit the offense, even though Appellee persisted in touching the pubic area of K.C. four times after she had physically removed his hand from her pubic area under her shorts and said “no,” and even though Appellee stopped engaging in sexual contact with K.C. only when she pushed him out of her bed. *Id.* at ¶¶34, 38; Tr. 181-88.

The court of appeals concluded, based on its interpretation of the facts, that K.C.’s “will was not overcome by fear or duress” and, therefore, that it could not find Appellee’s

⁴ The rule is not contained in the syllabus. *See Eskridge, supra*, at 59.

actions constituted “force” as defined by the General Assembly in the Revised Code. *Id.* at ¶31. The court reached its decision based on several factors. Among the factors the court referenced to decide there was insufficient evidence of force was that K.C. “was repeatedly able to remove [Appellee’s] hand from her shorts.” *Id.* Additionally, the court determined that as soon as K.C. became aware of what Appellee was doing, she was able to push him out of her bed and jump out of the bed. *Id.*

Relying on its erroneous interpretation of *Eskridge*, the court emphasized that to constitute “force” as defined in the Revised Code, the actions of Appellee must have been “*sufficient to overcome the will of the victim*” (emphasis in original). *Id.* The majority opinion of the court further states that the dissenting opinion’s interpretation of the force requirement “fails to recognize the *requirement* that force or threat of force *must be* sufficient to overcome the will of the victim” (emphasis added). *Id.* at ¶32. The court held that “reasonable minds could not conclude” Appellee used force to commit the offense, and reversed Appellee’s conviction. *Id.* at ¶¶34, 38.

Euton, 2007-Ohio-6704 at ¶2, involved an adult defendant and a child victim. The victim, age 14, lived in a residence with several people, including his father and his brother. *Id.* at ¶5. In the hours prior to the alleged offense, the defendant went with the victim’s father and the victim’s father’s girlfriend to a bar. *Id.* The defendant returned home from the bar alone and entered into the house, apparently intoxicated. *Id.*

The victim and his brother had been playing video games, but when the defendant entered into the residence after returning from the bar, they stopped. *Id.* The victim and his brother went to their bedroom, closed the door, and laid down on a mattress on the floor together. *Id.* The defendant “stumbled” into the bedroom, where the victim and his

brother were lying on the mattress, and laid down on the floor beside the victim. *Id.* at ¶¶5-6, 8. The defendant reached under the blankets that covered the victim and rubbed the victim's penis on top of his sweat pants. *Id.* at ¶6. At that point, after whispering something briefly to his brother, the victim jumped up and ran upstairs. *Id.* at ¶8.

A jury found the defendant guilty of the same charge as Appellee in the case at bar: gross sexual imposition in violation of R.C. 2907.05(A)(1), finding the defendant purposely compelled the victim to submit to sexual contact by force or threat of force. *Id.* at ¶2. While the defendant in *Euton* was an adult, and the victim a child, the court in *Euton* declined to apply the *Eskridge* “lesser showing of force” standard that applies to parents and children because the defendant was neither a parent of the victim nor an adult with authority over the victim. *Id.* at ¶40.⁵ The court, however, did quote and rely on the rule from *Eskridge* that “[a]s long as it can be shown that the . . . victim's will was overcome by fear or duress, the forcible element . . . can be established.” *Id.* at ¶35, quoting *Eskridge, supra*, at 59.

On appeal, the defendant argued the trial court improperly denied his motion for acquittal because the evidence was insufficient to prove he used force to commit the offense. *Id.* at ¶31. The appellate court found that no rational trier of fact could have found the defendant used force to commit the offense, and reversed the defendant's conviction. *Id.* at ¶¶31, 43. The court emphasized that the victim “almost immediately jumped up and left the room, demonstrating unequivocally that his will had not been overcome.” *Id.* at ¶42. The court further emphasized that “both the trial court and the

⁵ After *Eskridge*, the Court ruled that the “lesser showing of force” standard that applies to parents who forcibly sexually assault child victims also applies to adults who are not parents but who are in a position of authority over children. *State v. Dye* (1998), 82 Ohio St.3d 323 at syllabus paragraph 1.

dissent have failed to recognize that ‘force or threat of force’ is not proven *unless and until* the State proves beyond a reasonable doubt that the will of the victim was overcome” (emphasis added). *Id.* at ¶43.

The defendant in *Mitchell* was convicted of gross sexual imposition in violation of R.C. 2907.05(A)(1) for forcibly engaging in sexual contact with his 13-year-old daughter. *Mitchell*, 1991 WL 106037 at **1, 5. The defendant in *Mitchell* had asked the victim to sit on his lap and, while she sat on his lap, tickled her, kissed her, and tried to put his tongue in her mouth. *Id.* at *1. The defendant then put his hand up the victim’s skirt and felt her buttocks, and tried to pull the victim’s underwear down. *Id.* The sexual assault for which the defendant was convicted ended when the victim jumped up and pulled her skirt down. *Id.*

The defendant appealed, and the court of appeals reversed the conviction of the defendant for gross sexual imposition, finding there was insufficient evidence of force. *Id.* at **5, 7. The court cited the rule contained in *Eskridge, supra*, and *Martin, supra*, for the proposition that “[t]he key in determining a forcible element is whether the victim’s will was overcome by fear or duress.” *Id.* at *6 (emphasis added). Based on this rule, the court concluded that a defendant uses force only if the defendant’s conduct “overcomes the victim’s will.” *Id.* at *7. The court determined, however, that there was “no evidence to show that the victim’s will was overcome,” and reversed the conviction. *Id.* at **7-8.

The defendant in *Byrd* was convicted of gross sexual imposition in violation of R.C. 2907.05(A)(1) for forcibly engaging in sexual contact with a 15-year-old victim.⁶ *Byrd*, 2003-Ohio-3958 at ¶¶2, 6-12. The victim lived with her mother across the street from the house where the defendant resided with his girlfriend and the victim's father. *Id.* at ¶6. In the hours before the alleged sexual assault, the defendant's girlfriend invited the victim over, and the victim had consumed alcohol with her father, the defendant, the defendant's girlfriend, and others. *Id.* at ¶7. The victim's mother allowed the victim to spend the night at the house, and eventually the victim had fallen asleep in a downstairs bedroom. *Id.* at ¶¶7-8. When the victim awoke, she felt someone touching her thigh and her vaginal area over her clothing. *Id.* at ¶8. The victim then jumped up and ran to the defendant's girlfriend's room. *Id.* The victim did not see who touched her, but believed it was the defendant, who had previously come into the room and talked to her before she had fallen asleep. *Id.* at ¶¶8-9.

The defendant appealed his conviction, claiming there was insufficient evidence that he had committed the offense by force. *Id.* at ¶¶13-15. The court of appeals quoted *Eskridge* for the rule that “the force . . . necessary to commit the [sexual offense] depends upon the age, size and strength of the parties and their relation to each other,” and interpreted *Eskridge* to mean that “the real test of force is whether the ‘victim’s will was overcome by fear or duress.” *Id.* at ¶26 (emphasis added). Although the State urged the court to apply the “lesser showing of force” standard from *Eskridge* that applies when adult defendants in positions of authority in relation to child victims sexually assault those victims, the court declined to apply that standard in the case because the

⁶ The defendant was also convicted of gross sexual imposition involving a 14-year-old victim, and that conviction was affirmed. *Byrd*, 2003 WL 21710795 at **3-4.

defendant did not stand in a position of authority over the victim. *Id.* The court, rather, concluded that “there was no evidence . . . that the [sexual] contact occurred due to fear or duress,” and reversed the conviction. *Id.*

B. Misinterpretation Contrary to the Language of *Eskridge*

Neither the Court in *Eskridge*, nor the courts in *Martin* or *Wolfenberger*, held that force may be proven *only if* the will of the victim is overcome. Rather, the *Martin* and *Wolfenberger* courts held that, despite a lack of evidence of victim resistance, it was permissible for a trier of fact to find a defendant used force *so long as* the evidence proved the will of the victim was overcome. The *Eskridge* court relied on the reasoning of those courts to support both its holding that the defendant in that case had used force to rape his daughter and the rule in its syllabus that the degree of force necessary in cases in which parents sexually assault their children is less than is otherwise required. *Eskridge, supra*, at syllabus paragraph 1, 58-59.

The rule referenced in Martin and Wolfenberger, and cited in Eskridge, applies to cases in which victims offer little resistance because their will has been overcome by fear or duress. See Martin, supra; Wolfenberger, supra; State v. Hurst (10th Dist.), 2000 WL 249110 at **1, 3-4; *State v. Rupp* (7th Dist.), 2007-Ohio-1561 at ¶¶1-17, 41-57. The rule is consistent with the provision in both the rape and gross sexual imposition statutes that offenders may be guilty of rape or gross sexual imposition based on their own forcible acts against victims *even when there is no evidence that the victims physically resisted. See R.C. 2907.02(C), R.C. 2907.05(D).*

In *Hurst, supra*, at **1-4, the court found there was sufficient evidence to support the defendant’s convictions for rape and gross sexual imposition, both of which included

a force element. The defendant subjected the victim to multiple forms of sexual activity, including digital penetration of her anus and vagina, penetration of her vagina with a beer bottle and a flashlight, and cunnilingus. *Id.* at *1. The defendant also fondled the victim's breasts and genitals, and forced her to perform fellatio on him. *Id.*

Prior to the defendant forcing the victim to engage in this sexual activity, the victim had been sleeping in her bedroom. *Id.* She was awakened by her bedroom door opening. *Id.* She then saw the defendant standing near her bed wearing rubber gloves. *Id.* The defendant removed the bedcovers and began to sexually assault her. *Id.* The defendant spoke "sternly and emphatically," which, according to the victim "was the equivalent of him brandishing a weapon." *Id.* The defendant indicated he would not hurt the victim; however, "she thought she was going to be killed and did not physically resist [his] attacks because she feared for her life." *Id.* The victim "testified that, because of the fear created during the situation, she did not physically resist or fight" the defendant. *Id.* at *4. The victim testified that:

[I]f you wake up and a strange man is standing over you, that person is in total control. I mean, you are just—you have no control, and my instinct was to do whatever it is that he wanted me to do to lessen any pain or torture that I might have to go through . . . doing whatever he wanted me to do, that seemed to not bring about any violence or anger from him. So I just kept in that mode and believed that I was probably sparing myself some torture and pain.

Id.

The court cited the opinion of this Court in *State v. Schaim* (1992), 65 Ohio St.3d 51, at syllabus paragraph 1, which held that force and threat of force "can be inferred from the circumstances surrounding sexual conduct." The court stated as well that "the forcible element of rape and gross sexual imposition is established where a defendant's

actions create ‘the belief that physical force will be used if the victim does not submit’ to the defendant’s actions.” *Hurst, supra*, at *3, quoting *Schaim, supra*, at syllabus paragraph 1. Further, the court stated that “the forcible element of rape and gross sexual imposition is established through a showing that the victim’s will was overcome by fear or duress brought about by the defendant.” *Id.*

Based on these rules, the court stated that “it would be reasonable for a jury to conclude that [the defendant] used force and threat of force by bringing about a feeling of fear and terror on [the victim] and placing her within his power and control such that her will was overcome.” *Id.* at *4. Further, the victim’s “failure to physically resist or fight [the defendant] does not lead us to conclude otherwise. A victim need not prove physical resistance to the offender in prosecutions for rape or gross sexual imposition. . . . Rather, such testimony highlights the frightful experiences and threat of force present during the sexual encounter.” *Id.*

In *Rupp, supra*, at ¶1, the court affirmed the defendant’s rape conviction. On appeal, the defendant challenged the jury instructions and the sufficiency of the evidence. *Id.* The court overruled the defendant’s assignments of error. *Id.*

The adult victim in *Rupp* met the defendant while she was at a classmate’s residence. *Id.* at ¶¶5-6. The defendant arrived and offered to go to the store with the victim and her child. *Id.* At the store, the victim let the defendant kiss her but, when the defendant touched her knee, she moved his hand away and told him “she ‘was not like that.’” *Id.* The defendant then told the victim “various troubling facts about his life that made her so afraid of him that she was tempted to run away from him at the store.” *Id.* at ¶¶6-7. He told her he helped a murderer elude the police, that he had been in prison for

shooting a store clerk, and that he was not sorry about shooting the clerk and would do it again. *Id.*

The victim drove the defendant to an apartment complex to drop him off. *Id.* at ¶8. There, the defendant put his hand on the victim's leg several times though the victim repeatedly pushed his hand away and told him she was "not like that." *Id.* The victim also removed the defendant's hands from her when he tried to put his hands up her skirt and started to unbutton her clothes. *Id.* at ¶9.

The defendant grabbed the victim to pull her over the console. *Id.* The victim initially pushed the defendant away, but later complied with his demands "because she feared what [he] would do to her due to his contemporaneous statements about his violent past and due to his refusal to abide by her physical and verbal protestations." *Id.* The victim ended up sitting on the defendant's lap, and he removed her pants despite her verbal protests and attempts to push him away. *Id.* at ¶10. The defendant engaged in vaginal intercourse with the victim, and pushed her head down and forced her to perform oral sex on him. *Id.* at ¶¶12-13.

The victim testified that the defendant did not threaten her during the incident. However, "she was in fear of aggressively fighting [the defendant] . . . because she was afraid of what [he] would do to her." *Id.* at ¶11. The victim did not call the police because she was afraid that the defendant would "come after" her classmate and her classmate's children. *Id.* at ¶14.

After the presentation of the evidence, the trial court instructed the jury that "[i]f the state proves beyond a reasonable doubt that the defendant overcame the victim's will by fear or duress, you may infer from those facts the element of force." *Id.* at ¶24. The

court of appeals referenced the *Martin* and *Eskridge* cases and stated that “the Court’s statement regarding overcoming the victim’s will was not specified to apply only to position of authority over children cases. It was set forth as general law.” *Id.* ¶¶26-28.

The court of appeals held that the jury instruction was proper. *Id.* at ¶43. The court stated that “force or threat of force can be inferred where the defendant purposely compelled the victim to submit by employing certain objective actions that can be found to have overcome the will of the victim by fear or duress.” *Id.* The court emphasized that “a victim need not risk physical damage or even death to later prove that she was raped. The rape statute itself specifically states that physical resistance is unnecessary.” *Id.* at ¶42.

The court also held that there was sufficient evidence of force to prove the defendant was guilty of rape. *Id.* at ¶¶55-57. The court stated that though the victim’s “lack of violence in warding off appellant was relevant, it was not case-shattering.” *Id.* at ¶55. Further, “a rational juror could find that threat of force was inferred due to objectively quantifiable behavior of [the defendant] which overcame the victim’s will by fear or duress.” *Id.*

Thus, in *Hurst*, *Rupp*, *Martin*, and *Wolfenberger*, the courts recognized that an offender may be guilty of using force to commit a sexual offense despite little or no victim resistance. While resistance by a victim is relevant,⁷ these courts held that so long as the evidence proved the will of the victim was overcome, a trier of fact may properly find an offender guilty of a forcible sexual assault. Most importantly, none of these

⁷ See *Rupp, supra*, at ¶55.

courts held that the will of the victim *must be* overcome before an offender may be found guilty of using force to commit a forcible sexual offense.

C. An Offender May Be Found Guilty of Gross Sexual Imposition Based on the Conduct of the Offender Regardless of the Victim's Reaction to the Offender's Conduct

Criminal liability in Ohio is based on the conduct of the accused, not the victim. *See* R.C. 2901.21(A); *State v. Lester* (2009), 123 Ohio St.3d 396, 399. *See also* LEWIS R. KATZ ET AL., BALDWIN'S OHIO PRACTICE CRIMINAL LAW § 85.2 (3d ed. 2009) (stating “[c]ulpability under the Anglo-American criminal law is founded upon certain basic principles,” including that an offender is guilty of committing an offense only if he or she committed a guilty act (the “actus reus”) while having the requisite guilty mind (the “mens rea”). Ohio has codified these principles in R.C. 2901.21(A). *See* KATZ ET AL., *supra*. Consistent with these over-arching principles, division (D) of the gross sexual imposition statute explicitly provides that an offender is guilty of gross sexual imposition based on the conduct of the offender, not the conduct of the victim. *See* R.C. 2907.05(D) (stating “the victim need not prove physical resistance to the offender” in order for the offender to be guilty of gross sexual imposition).

By making the guilt of an offender dependent on the reaction of a victim to the conduct of the offender, rather than on the conduct of the offender itself, the rule requiring that an offender has used force only when the will of the victim is overcome violates the principle that an offender is guilty based on the conduct of the offender, not the victim. *See* R.C. 2901.21(A); R.C. 2907.05(D); and KATZ ET AL., *supra*. As the gross sexual imposition statute provides for offender guilt even when a victim has not resisted physically, any victim resistance would be relevant evidence that an offender

used force to commit the offense. *See* R.C. 2907.05(D). However, by requiring the will of a victim to be overcome before an offender may be found to have used force, such evidence, rather than being relevant evidence of force, may be used as evidence that the offender did not use force. *See Henry*, App. No. 13-08-10 at ¶31 (stating as proof Appellee did not use force that the victim, K.C., “was repeatedly able to remove [Appellee’s] hand from her shorts”).

Further, as in the case at bar, the court of appeals interpretation of the language contained in *Eskridge* would seem to require substantial victim physical resistance before an offender may be found guilty of using force to commit gross sexual imposition. This is contrary to the gross sexual imposition statute, which states expressly that an offender may be guilty of gross sexual imposition without *any* victim physical resistance. *See* R.C. 2907.05(D). As the dissenting opinion of the court of appeals in the case at bar states, such a rule would enable an offender to “freely use whatever ‘persistence’ is reasonably required to accomplish” a non-consensual sexual offense “over moderate resistance of the victim without committing any ‘force or threat of force’ . . . as a matter of law . . . the level of *resistance put up by the victim* [would be] the primary indicator of the *force used by the defendant*.” *Henry*, App. No. 13-08-10 at ¶43 (Shaw, J., dissenting).

Other decisions of the court of appeals, however, consistent with public policy and the gross sexual imposition statute, have recognized the principle contained in the Revised Code and the gross sexual imposition statute that the *acts of the offender* are what must be considered to determine whether an offender used force against a victim to

accomplish a sexual assault, *not the victim's response to an offender's acts*.⁸ See R.C. 2901.21(A); R.C. 2907.05(D); *State v. Miller* (3d Dist.), 1995 WL 9395 at *2; *State v. Clark* (8th Dist.), 2008-Ohio-3358 at ¶¶17-21; *State v. Graves* (8th Dist.) 2007-Ohio-5430 at ¶¶15-18. In *Clark* and *Graves*, the courts affirmed convictions of offenders who engaged in forcible sexual activity with victims who were asleep and who, therefore, offered *no* resistance—verbal or physical. See *Clark, supra*; *Graves, supra*. In *Miller, supra*, at **1-4, the defendant was convicted of several sexual offenses, including a rape offense that included a force element. The court overruled the defendant's claim on appeal that there was insufficient evidence of force and stated: "we reject appellant's claim that the victim's failure to say or do anything to resist . . . supports his proposition that there was no force. There is no requirement that a victim of rape prove physical resistance. R.C. 2907.02(C). Nor does there appear to be a specific requirement that the victim prove verbal resistance." *Id.* at *2.

IV. Conclusion

The Court did not establish in *Eskridge* a mandatory condition that an offender may be found guilty of a forcible sexual assault only when the will of a victim is overcome. Rather, the Court merely explained that the will of a victim being overcome is sufficient to allow a trier of fact to find that an offender used force to commit the offense. See *Eskridge, supra* at 59. Therefore, contrary to the opinion of the court of appeals in the case at bar, the Court did not establish that an offender uses "force" as defined in the Revised Code only when the offender's actions are "*sufficient to overcome the will of the victim*" (emphasis in original), nor that there is a "*requirement* that force or threat of force

⁸ The provision that a victim need not prove physical resistance to an offender is also found in the statute prohibiting rape, R.C. 2907.02(C).

must be sufficient to overcome the will of the victim” (emphasis added). *Henry*, App. No. 13-08-10 at ¶¶31-32. The actions of the offender, not the victim’s response to an offender’s actions, are what subject an offender to criminal liability. This Court should reverse the decision of the court of appeals and reinstate the conviction of the defendant.

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.

The Court should make clear that the degree of force necessary to commit gross sexual imposition is not the same in all cases. An offender is guilty of gross sexual imposition if the offender purposely compels a victim to submit to sexual contact by force. R.C. 2907.05(A)(1). Force is “*any* violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.” R.C. 2901.01(A)(1) (emphasis added).

When the General Assembly defines terms, as it has regarding gross sexual imposition and force, it must be presumed the General Assembly meant what it said when it defined those terms. *See, e.g., Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless* (2007), 113 Ohio St.3d 394, 397-98. Thus, as the General Assembly has determined that an offender may commit gross sexual imposition so long as the offender purposely compels a victim to submit to sexual contact by using at least “*any* violence, compulsion, or constraint physically exerted by any means,” it must be presumed the General

Assembly meant what it said. R.C. 2901.01(A)(1) (emphasis added); R.C. 2907.05(A)(1).

The General Assembly did not have to specify that “force” is required to commit gross sexual imposition; it has differentiated “force” from “deadly force,” and could have required an offender to use deadly force, not merely any force, to commit gross sexual imposition. See R.C. 2901.01(A)(2) (defining “deadly force”). Alternatively, the General Assembly could have developed a standard requiring the offender to physically exert violence, constraint or compulsion that “create[s] a substantial risk of serious physical harm to the victim,” as it did for kidnapping. See R.C. 2905.01(B). Additionally, the General Assembly could have developed another definition requiring an offender to use “substantial force” or “significant force.” The General Assembly, however, did none of these things. Instead, it stated unequivocally that an offender is guilty of gross sexual imposition when the offender purposely compels the victim to submit to sexual contact by “any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.” R.C. 2901.01(A)(1) (emphasis added); R.C. 2907.05(A)(1).

The definition of force recognizes that the same degree of force is not required in every case in which force is an element of the offense. See *State v. Sullivan* (8th Dist.), 1993 WL 398551 at *4 (stating “[t]he word ‘any’ specified in the definition of ‘force’ recognizes that various crimes upon various victims require different degrees and manners of force”); *Clark, supra*, at ¶17 (stating “the use of the word ‘any’ in the definition [of force] recognizes there are different degrees of force”); *Rupp, supra*, at ¶49 (stating “the amount of force necessary is not fixed, but rather, depends upon various

factors including the age, size and strength of the parties and their relation to each other”).

Consistent with the definition of force, this Court has recognized that the force necessary to commit a forcible sexual assault is not the same in every case. In *State v. Labus* (1921), 102 Ohio St. 26, 38-39, and *Eskridge, supra*, the Court recognized that the force necessary for an adult to commit a forcible sexual assault against a child is less than would otherwise be required. *Labus*, 102 Ohio St. at 38-39; *Eskridge*, 38 Ohio St.3d at syllabus paragraph 1, 58-59. Further, as the Court stated in *Labus*, 102 Ohio St. at 38 “[t]he force and violence necessary in rape is naturally a relative term, depending upon the age, size and strength of the parties and their relation to each other.”

In addition, several districts of the court of appeals have recognized that the force an offender must use to commit a forcible sexual assault depends on the degree to which the victim is in a vulnerable position compared to the offender. For example, courts have concluded that an offender need use only minimal force in order to commit a forcible sexual assault against a victim who is asleep. See, e.g., *State v. Burton* (4th Dist.), 2007-Ohio-1660 at ¶¶41-42; *Clark, supra*, at ¶¶4-8, 17-20; *State v. Lillard* (8th Dist.), 1996 WL 273781 at **4-6; *State v. Simpson* (8th Dist.), 2007-Ohio-4301 at ¶¶48-52.

As force is “a relative term” that depends on “the age size and strength of the parties and their relation to each other,” when an offender exploits a victim at a time when any relative equality in age, size and strength does not exist, the degree of force the offender must use to facilitate the offense is not the same as would otherwise be required. See *Labus, supra*; see also *Eskridge, supra*, at syllabus paragraph 1. Such circumstances existed in the case at bar, as Appellee entered into K.C.’s bedroom and her bed when she

was asleep. (Tr. 151, 176-78, 181.) Appellee then engaged in sexual contact with K.C. while he was in a superior position of advantage and she was in the disadvantageous position of suddenly and unexpectedly being forced to comprehend what was occurring as Appellee engaged in sexual contact with her after he awakened her. (Tr. 181-87.) K.C.'s ability to comprehend what was occurring—and thus her vulnerability—was further exacerbated because she could not see who was touching her, as Appellee was behind her in bed while she faced a wall. (Tr. 181-82.) Under these circumstances, any relative equality Appellee had with the victim was eliminated. Such circumstances are distinguishable from a case in which two adults who know each other well, have been interacting for some time earlier in the day, and are both awake and both standing up; in such a case, a finding of force may not be appropriate. *See, e.g., State v. DeLuca* (8th Dist.), 2007-Ohio-3905 at ¶¶3-6, 10-19.

IV. Conclusion

Under the definition the General Assembly has provided, an offender is guilty of gross sexual imposition by force if the offender purposely compels the victim to submit to sexual contact by physically exerting “any violence, compulsion, or constraint” upon or against the victim. R.C. 2901.01(A)(1) (emphasis added); R.C. 2907.05(A)(1). Ohio courts, including this Court, have long recognized that the force necessary to commit a forcible sexual offense is not the same in every case. Particularly when the victim is a child, or is otherwise in a vulnerable position relative to the offender, the degree of force necessary to commit the offense may not be the same as would otherwise be required. Recognition of this principle by the court of appeals would have supported a finding of force in the case at bar. Appellee did not use deadly force, or even substantial force—nor

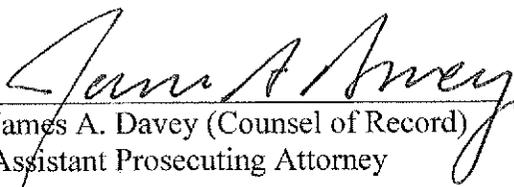
was he required to use such force to be guilty. Merely his use of “any violence, compulsion or constraint” sufficed and permitted the jury to properly find him guilty of using force to commit gross sexual imposition in the case at bar.

CONCLUSION

Had the court of appeals interpreted properly the *Eskridge* decision of this Court and recognized that an offender may be guilty of gross sexual imposition based on the offender’s own actions regardless of the reaction of a victim to the offender’s actions, it would not have decided the case at bar as it did. Furthermore, had the court of appeals recognized that the degree of force necessary in all gross sexual imposition cases in which force is an element is not the same, such recognition would have supported a finding that the offender used force in the case at bar. For these reasons, the State respectfully requests that the Court reverse the decision of the court of appeals.

Respectfully Submitted,

Derek W. DeVine
Prosecuting Attorney

BY: 
James A. Davey (Counsel of Record)
Assistant Prosecuting Attorney

COUNSEL FOR APPELLANT,
STATE OF OHIO

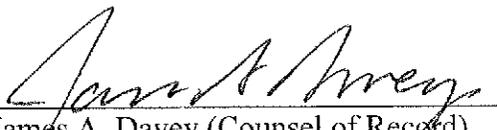
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing instrument was served upon counsel for Defendant-Appellee, **Javier H. Armengau**, by mailing said copy to his office at 857 South High Street, Columbus, Ohio 43206, and upon Assistant State Public Defender **Katherine A. Szudy**, by mailing a copy to her office at 250 East Broad Street, Suite 1400, Columbus, Ohio 43215 this 11th day of February, 2010.

Respectfully Submitted,

Derek W. DeVine
Prosecuting Attorney

BY:


James A. Davey (Counsel of Record)
Assistant Prosecuting Attorney

COUNSEL FOR APPELLANT,
STATE OF OHIO

IN THE SUPREME COURT OF OHIO

State of Ohio	*	On Appeal from the Court of Appeals, Third Appellate District
Appellant	*	
v.	*	Court of Appeals Case No. 13-08-10
Kiel A. Henry	*	
Appellee	*	09-1572

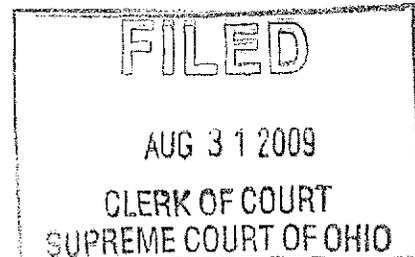
NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

Derek W. DeVine, Prosecuting Attorney (0062488)
James A. Davey, Assistant Prosecuting Attorney (0078056) (Counsel of Record)
71 South Washington Street
Suite 1204
Tiffin, Ohio 44883
(419) 448-4444
Fax No. (419) 443-7911

COUNSEL FOR APPELLANT, STATE OF OHIO

Javier H. Armengau (0069776)
Attorney at Law
857 South High Street
Columbus, Ohio 43206
(614) 443-0516
Fax No. (614) 443-0708

COUNSEL FOR APPELLEE, KIEL A. HENRY



Notice of Appeal of Appellant State of Ohio

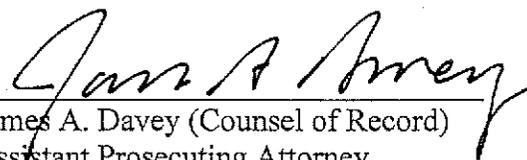
Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Court of Appeals of Ohio, Third Appellate District, entered in Court of Appeals Case No. 13-08-10 on July 20, 2009.

This case involves a felony and is one of public or great general interest.

Respectfully Submitted,

Derek W. DeVine
Prosecuting Attorney

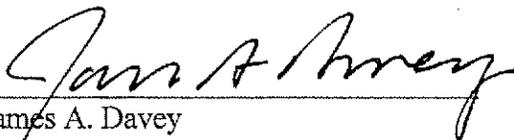
BY:


James A. Davey (Counsel of Record)
Assistant Prosecuting Attorney

COUNSEL FOR APPELLANT,
STATE OF OHIO

Certificate of Service

I hereby certify that a true and accurate copy of the foregoing instrument was served upon counsel for Defendant-Appellee, Javier H. Armengau, by mailing said copy to his office at 857 South High Street, Columbus, Ohio 43206, this 31st day of August, 2009.


James A. Davey
Assistant Prosecuting Attorney

COUNSEL FOR APPELLANT,
STATE OF OHIO

RECEIVED

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
SENECA COUNTY

JUL 22 2009

SENECA COUNTY
PROSECUTING ATTORNEY

STATE OF OHIO,

PLAINTIFF-APPELLEE, FILED IN THE COURT OF APPEALS CASE NO. 13-08-10
SENECA COUNTY

v.

JUL 20 2009

KIEL A. HENRY,

MARY K. WARD, CLERK JUDGMENT
ENTRY

DEFENDANT-APPELLANT.

For the reasons stated in the opinion of this Court, the first assignment of error is sustained and it is the judgment and order of this Court that the judgment of the trial court is reversed with costs assessed to Appellee for which judgment is hereby rendered. The cause is hereby remanded to the trial court for further proceedings and for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.



John D. Willamowski
WILLAMOWSKI, J., Concur in
Judgment Only

SHAW, J., Dissents
JUDGES

DATED: July 20, 2009

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
SENECA COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 13-08-10

v.

KIEL A. HENRY,

O P I N I O N

DEFENDANT-APPELLANT.

Appeal from Seneca County Common Pleas Court
Trial Court No. 07-CR-0242

Judgment Reversed and Cause Remanded

Date of Decision: July 20, 2009

APPEARANCES:

Javier H. Armengau for Appellant

James A. Davey for Appellee

ROGERS, J.

{¶1} Defendant-Appellant, Kiel A. Henry, appeals the judgment of the Seneca County Court of Common Pleas convicting him of gross sexual imposition, sentencing him to five years of community control, and classifying him as a sexually oriented offender. On appeal, Henry asserts that his conviction was not supported by sufficient evidence; that the trial court erred when it denied his motions for acquittal and a new trial; and, that his conviction was against the manifest weight of the evidence. Based upon the following, we reverse the judgment of the trial court and remand the matter for further proceedings consistent with this opinion.

{¶2} In September 2007, the Seneca County Grand Jury indicted Henry for two counts of gross sexual imposition in violation of R.C. 2907.05(A)(1), felonies of the fourth degree. The indictment arose from an accusation that Henry, while intoxicated, went into a Heidelberg College campus residence, entered a sleeping woman's bedroom, got into her bed, and engaged in sexual contact with her.

{¶3} In January 2008, the case proceeded to trial, at which the following testimony was heard.

{¶4} The victim, K.C., testified that, on August 12, 2006, she was a student at Heidelberg College in Seneca County; that she lived in a campus house

commonly referred to as the “CDH house” with six other women who were members of the same community service society; that the society was having a “retreat” at the house and no men were present; that she went to bed around 12:30 a.m. wearing only shorts and a sports bra; that the shorts were approximately eight inches long with an elastic waistband; and, that her bedroom was located on the second floor of the house and her bed was situated against the wall.

{¶5} K.C. continued that she was awakened during the night when she felt a man lying right behind her; that she was lying on her side, facing the wall; that she felt a hand underneath her shorts in her pubic area; that she initially thought the man was her boyfriend because she was sleepy; that she put her hand on his arm, removed it from her shorts, and said “no”; that her hand remained on his arm for the duration of the incident; that, for a second time, the man put his hand into her shorts and touched her vagina; that she again removed his hand and said “no”; that, for a third time, the man put his hand into her shorts and touched her vagina; that she again removed his hand and said “no”; that, for a fourth time, the man put his hand into her shorts, but this time penetrated her vagina with his finger; that she removed his hand again; that, for a fifth time, the man put his hand into her shorts, and, at that point, she “woke completely up” and realized that the man was not her boyfriend (trial tr., vol. II, p. 187); and, that she braced her feet against the wall and pushed the man off her bed and onto the floor, causing a loud thud.

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

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

{¶8} Rachel Goodenow, K.C.’s housemate at the time of the incident, testified that, on the night of the incident, she attended the society retreat at the CDH house; that, after K.C. went upstairs to bed, seven or eight men from the

wrestling team arrived at the house; that some of the men were acquainted with some of the women in the house; that the men visited for approximately twenty to thirty minutes, and then departed, except for Henry; that Henry “small talked” with her and two other women on the first floor of the house; that, eventually, Henry either passed out or fell asleep; that she and the other women decided to walk him back to his apartment because they did not want him to sleep on their couch; that they left him alone on the couch for approximately four minutes; and, that when they returned, he was gone, and they assumed he had left.

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

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

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

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

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

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

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

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

{¶17} It is from his conviction and sentence that Henry appeals, presenting the following assignments of error for our review.

Assignment of Error No. I

APPELLANT'S CONVICTION FOR GROSS SEXUAL IMPOSITION WAS NOT SUPPORTED BY SUFFICIENT, CREDIBLE EVIDENCE AND THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S RULE 29 MOTION FOR ACQUITTAL AND MOTION FOR A NEW TRIAL.

Assignment of Error No. II

APPELLANT'S CONVICTION FOR GROSS SEXUAL IMPOSITION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Assignment of Error No. I

{¶18} In his first assignment of error, Henry argues that his conviction for gross sexual imposition was not supported by sufficient, credible evidence, and, consequently, that the trial court erred when it denied his motions for acquittal and for a new trial. Specifically, Henry contends that the evidence did not establish beyond a reasonable doubt that he engaged in sexual contact with K.C. because there was insufficient evidence to establish that the contact was for the purpose of sexual arousal or gratification. Additionally, Henry contends that there was insufficient evidence that he compelled K.C. to engage in such contact through the use of force or threat of force. We agree that there was insufficient evidence to establish that Henry compelled K.C. to engage in such contact through the use of force or threat of force.

{¶19} Under Crim.R. 29, a trial court, on a defendant's motion or its own motion, "after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses." Crim.R. 29(A). However, a trial court shall not order an entry of judgment of acquittal under Crim.R. 29(A) if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of an offense has been proven beyond a reasonable doubt. *State v.*

Bridgeman (1978), 55 Ohio St.2d 261. A motion for acquittal tests the sufficiency of the evidence. *State v. Miley* (1996), 114 Ohio App.3d 738, 742.

{¶20} When an appellate court reviews a 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. *State v. Monroe*, 105 Ohio St.3d 384, 392, 2005-Ohio-2282, citing *State v. Jenks* (1981), 61 Ohio St.3d 259, superseded by state constitutional amendment on other grounds as stated in *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355. Sufficiency is a test of adequacy, *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, and the question of whether evidence is sufficient to sustain a verdict is one of law. *State v. Robinson* (1955), 162 Ohio St. 486, superseded by state constitutional amendment on other grounds as stated in *Smith*, supra.

{¶21} R.C. 2907.05 governs gross sexual imposition and provides, in pertinent part:

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

R.C. 2907.05(A).

{¶22} For ease of discussion, we will analyze separately Henry's arguments concerning the sexual contact element and force or threat of force element of the gross sexual imposition statute.

A. Sexual Contact

{¶23} The Revised Code defines "sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

{¶24} In determining a defendant's intent, this Court has held that "[t]he proper method is to permit the trier of fact 'to infer from the evidence presented at trial whether the purpose of the defendant was sexual arousal or gratification by his contact with those areas of the body described in R.C. 2907.01. In making its decision the trier of fact may consider the type, nature and circumstances of the contact, along with the personality of the defendant. From these facts the trier of fact may infer what the defendant's motivation was in making the physical contact with the victim.'" *State v. Huffman*, 3d Dist. No. 13-2000-40, 2001-Ohio-2221, quoting *In re Alexander*, 3d Dist. No. 9-98-19, 1998 WL 767457. Additionally, "circumstantial evidence of intent is admissible to demonstrate the sexual contact element of gross sexual imposition." *Id.*, citing *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus.

{¶25} Here, Henry argues that there was insufficient evidence to establish that his contact with K.C. was for the purpose of sexual arousal or gratification. However, testimony was heard that Henry climbed into K.C.'s bed, lay down right behind her, and touched her vagina with his hand five times, one time penetrating her vagina with his finger. We conclude that sufficient circumstantial evidence existed for a jury to conclude that Henry's intent in touching K.C. was for the purpose of sexual arousal or gratification.

B. Force or Threat of Force

{¶26} The Revised Code defines "force" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1). A victim "need not prove physical resistance to the offender" in order to demonstrate force. R.C. 2907.05(D). The Supreme Court of Ohio has addressed the issue of "force or threat of force" several times in the context of the rape statute, R.C. 2907.02. The Court stated that, under R.C. 2907.02, the amount of force necessary to commit the offense "depends upon the age, size and strength of the parties and their relation to each other." *State v. Eskridge* (1988), 38 Ohio St.3d 56, paragraph one of the syllabus. Additionally, in *Eskridge*, the Court stated that force is present where the "victim's will [is] overcome by fear or duress * * * [.]" 38 Ohio St.3d at 59; see, also, *State v. Byrd*, 8th Dist. No. 82145, 2003-Ohio-3958, ¶26. The Supreme Court of Ohio has further clarified that "[a] defendant purposely compels another to submit to sexual conduct by force or

threat of force if the defendant uses physical force against that person, or creates the belief that physical force will be used if the victim does not submit. A threat of force can be inferred from the circumstances surrounding sexual conduct * * * [.]” *State v. Schaim*, 65 Ohio St.3d 51, 1992-Ohio-31, paragraph one of the syllabus.

{¶27} The Eighth Appellate District found that force or threat of force was absent where a fifteen year-old victim awoke in her bed to find an adult defendant touching her genitals over her clothing because he did not apply any force in relation to her body or clothing; because he did not hold a position of authority over her; because, as the victim became aware of the touching, she immediately got up and left the area; and, because the contact did not occur due to fear or duress. *Byrd*, supra.

{¶28} Additionally, the Eighth Appellate District found that force or threat of force was absent where an adult defendant asked a thirteen year-old victim to sit on his lap, put his hand up her skirt, touched her buttocks, and attempted to remove her underwear. The evidence showed that the victim did not sit on the defendant’s lap due to fear or coercion; that the defendant did not say anything to the victim before or after she got up from his lap; and, that, as soon as he began touching her buttocks, she immediately jumped up and went to the phone to call her mother. Based upon this evidence, the court concluded that her will was not overcome and force was not present. *State v. Mitchell*, 8th Dist. No. 58447, 1991 WL 106037.

{¶29} In *State v. Euton*, 3d Dist. No. 2-06-35, 2007-Ohio-6704, this Court found that the force or threat of force element was absent in a similar situation. In *Euton*, this Court held that a defendant's act of slipping his hand under a blanket to touch a victim was insufficient evidence that the victim was compelled to submit by force or threat of force. This Court came to that conclusion because the defendant made no comments or threats to the victim; because the defendant did not apply any force in relation to the victim's body or clothing; because, as soon as the victim overcame the surprise of the touching, the victim jumped up and left the room; and, because there was no evidence that the defendant attempted to restrain the victim from getting up or leaving the room.

{¶30} Other districts have found that force or threat of force was not present in rape or gross sexual imposition convictions where an adult defendant removed a child victim's clothing and manipulated her body to facilitate sexual conduct and no parent-child relationship existed, *State v. Payton* (1997), 119 Ohio App.3d 694, abrogated on other grounds by *State v. Delmonico*, 11th Dist. No. 2003-A-0022, 2005-Ohio-2902; where a defendant rolled a child victim over to facilitate sexual conduct while the victim pretended to sleep, *State v. Edinger*, 10th Dist. No. 05AP-31, 2006-Ohio-1527; and, where the psychological force that was present when a victim was younger dissipated when she realized she could stop the sexual conduct because, at this point, her will was no longer overcome by fear or duress, *State v. Haschenburger*, 7th Dist. No. 05 MA 192, 2007-Ohio-1562.

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

{¶32} We acknowledge, as the dissent sets forth, that the Eighth Appellate District has long held that, where a victim is sleeping at the outset of the sexual

conduct, the burden of evidence is satisfied with the minimal force required to manipulate the victim's clothing in order to facilitate sexual conduct. See *State v. Simpson*, 8th Dist. No. 88301, 2007-Ohio-4301; *State v. Lillard*, 8th Dist. No. 69242, 1996 WL 273781; *State v. Sullivan*, 8th Dist. No. 63818, 1993 WL 398551. However, even accepting for argument's sake the dissent's inference that Henry manipulated K.C.'s shorts, we would still find that this act did not constitute force. We find that the Eighth Appellate District's and the dissent's 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. As we stated in *Euton*, "[t]o find otherwise on these facts would render the distinction between sexual imposition and gross sexual imposition meaningless * * * and essentially allow any inappropriate touching to constitute gross sexual imposition, regardless of the use of force or a threat of force." 2007-Ohio-6704, at ¶42.

{¶33} Additionally, although the dissent claims that our majority rule allows a perpetrator to impose any sexual activity upon a sleeping victim without fear of being charged with any sexual offense requiring force or threat of force, we note that such a perpetrator may properly be charged with any number of offenses not requiring force, such as sexual battery in violation of R.C. 2907.03(A)(3) or sexual imposition in violation of R.C. 2907.06(A)(3). See, e.g., *State v. Lindsay*, 3d Dist. No. 8-06-24, 2007-Ohio-4490; *State v. Antoline*, 9th Dist. No.

02CA008100, 2003-Ohio-1130; *State v. Wright*, 9th Dist. No. 03CA0057-M, 2004-Ohio-603; *Byrd*, 2003-Ohio-3958, at ¶23 (finding that “perpetrators who engage in sexual conduct with another who is asleep or otherwise unable to appraise or control the nature of his or her conduct are typically prosecuted for sexual battery in violation of R.C. 2907.03(A)(2) or (3)”). Notably absent from the dissent is any discussion of Henry overcoming the will of the victim.

{¶34} For the preceding reasons, we find that reasonable minds could not conclude that Henry compelled K.C. to submit to sexual conduct by force or threat of force, and that the trial court erred in overruling Henry’s Crim.R. 29 motion for acquittal.

{¶35} Accordingly, we sustain Henry’s first assignment of error.

Assignment of Error No. II

{¶36} In his second assignment of error, Henry argues that his conviction for gross sexual imposition was against the manifest weight of the evidence. Specifically, Henry contends that his conviction was against the manifest weight because there was conflicting testimony as to when K.C. first claimed that he had touched her, and because the weight of the evidence demonstrated that Henry did not compel her to engage in sexual contact by force or threat of force.

{¶37} Our disposition of Henry’s first assignment of error renders his second assignment of error moot, and we decline to address it. App.R. 12(A)(1)(c).

{¶38} Having found error prejudicial to the appellant herein, in the particulars assigned and argued in his first assignment of error, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

*Judgment Reversed and
Cause Remanded*

WILLAMOWSKI, J., concurs in Judgment Only.

SHAW, J., Dissents.

{¶39} The defendant in this case, a large college wrestler, climbed into the bed of a petite, sleeping female college student (K.C.) who did not know him. K.C. was lying on her side with her back to the defendant. The bed was next to a wall so that the defendant effectively had K.C. positioned between himself and the wall.

{¶40} Upon blocking K.C. against the wall in this manner, the defendant made five separate attempts to reach over K.C. from behind and digitally penetrate her vagina. Five times K.C. was required to physically remove his hand from between her legs while telling him “no.” Despite her resistance, the defendant successfully penetrated K.C. with his fingers three times out of the five attempts.

{¶41} The fifth time the defendant put his hands between her legs, K.C. suddenly became fully awake and realized it was a stranger and not her boyfriend. However, because of the defendant’s position on the bed, effectively trapping her

between himself and the wall, K.C. then had to put her feet against the wall and with her back against the defendant, push him off the bed in order to escape from the bed and run downstairs.

{¶42} The majority has concluded these facts do not constitute sufficient force or threat of force to sustain a conviction for gross sexual imposition under R.C. 2907.05. Fortunately, having been concurred with in judgment only, the lead opinion sets no precedent or binding rule of law beyond the impact upon the parties in this case. Nevertheless, I am concerned that coupled with the similar recent decision of the majority in the *Euton* case, the decision in this case will be seen as promulgating a series of legal rulings from the Third District Court of Appeals regarding sexual offenses that, in my view, do not represent a proper interpretation of the factual circumstances or the applicable law governing these offenses.

{¶43} Foremost among the unfortunate conclusions likely to be drawn from our decision today is that a defendant who commits a non-consensual sexual offense may freely use whatever “persistence” is reasonably required to accomplish the act over moderate resistance of the victim without committing any “force or threat of force” under R.C. 2907.05 as a matter of law. Implicit in this ruling is the erroneous premise that in reviewing the weight or sufficiency of the evidence in any given case, the level of *resistance put up by the victim* is the primary indicator of the *force used by the defendant*.

{¶44} If removing a stranger's hand from between your legs and/or your vagina five separate times while saying "no" - and having to put your feet against a wall to gain sufficient leverage to remove yourself from the grasp of the perpetrator - is not sufficient for anyone to infer the use of force by the perpetrator, then the message from this decision and the *Euton* case, seems to be that whether the victim is a minor child or a college student, the burden is clearly upon the victim to demonstrate a significant level of physical resistance to any non-consensual sexual act imposed upon them against their will before the appellate court will consider the perpetrator's conduct to be "forceful." Thus, as long as any stranger can find a victim who is sleeping or is otherwise too young, terrified, startled or intimidated to risk the possibility of serious injury or death by providing enough resistance to provoke a major threat or act of additional violence, the stranger would seem to be relatively free under the majority interpretation of this case to impose any nonconsensual sexual act he chooses upon the victim, using whatever force is reasonably necessary to accomplish the act, without the possibility of being charged with any sexual offense involving the use of force.

{¶45} I also take issue with the apparent determination in today's decision that the amount of force the victim is required to use to escape from the grasp or restraint of the defendant somehow does not count as resistance to the sexual act itself and/or cannot be used to infer any force or threat of force on the part of the defendant in trying to complete the sexual act. And as noted earlier, I am

particularly concerned that these erroneous legal rulings and factual interpretations have already been applied by this majority to sexual offenses involving child victims. (See *State v. Euton*, 3rd Dist. No. 2-06-35, 2007-Ohio-6704, Preston, J. dissenting.)

{¶46} Because I believe that all of these determinations (and the decision in *State v. Euton*, supra) improperly disregard the reasonable inferences to be drawn from the facts in the record and/or are contrary to law, I respectfully dissent.

{¶47} Although both the lead opinion and the dissent discuss rulings on similar cases from other districts at some length, none of those rulings are really at issue here. On the contrary, as stated at the outset, the primary issue of concern to me is the determination of the majority that there was not sufficient evidence as to the element of “force or threat of force” before the trial court *in this case*.

{¶48} Force is defined as “any violence, compulsion, or constraint physically exerted by *any means* upon or against a person or thing.” R.C. 2907.01(A)(1) (emphasis added). Moreover, we must be mindful that force need not be overt or physically brutal. *State v. Burton*, 4th Dist No. 05CA3, 2007-Ohio-1660 citing *State v. Eskridge* (1988), 38 Ohio St.3d 56, 59, 526 N.E.2d 304, and *State v. Milam*, 8th Dist No. 86268, 2006-Ohio-4742, at ¶ 9.

{¶49} In the present case, Henry began touching the victim when she was asleep. When other courts have addressed this type of conduct, they have noted

that “[w]hen the circumstances include a victim who is initially asleep when the sexual conduct begins, the state may satisfy its burden with evidence of only the minimal force required to manipulate the victim’s body or clothing to facilitate the assault.” *State v. Burton*, 2007-Ohio-1660 citing *State v. Lillard* (May 23, 1996), 8th Dist. No. 69242 (the victim awoke to find her covers removed and her robe and legs open) and *State v. Sullivan* (Oct. 7, 1993), 8th Dist. No. 63818 (the victim awoke to find her underwear pulled down and the defendant performing oral sex). See, also, *Milam* 2006-Ohio-4742 at ¶ 22; *State v. Graves*, 8th Dist. No. 88845, 2007-Ohio-5430 (the victim awoke to find her pants and underwear down and wet substance on her body); *State v. Simpson*, 8th Dist. No. 88301, 2007-Ohio-4301 at ¶ 50 (while the victim was asleep, the defendant manipulated her clothing and body to make her accessible for sex); *State v. Clark*, 8th Dist. No. 90148, 2008-Ohio-3358.

{¶50} The Eighth District Court of Appeals has repeatedly found that the insertion of the word “any” into the definition of “force,” recognizes that different degrees and manners of force are used in various crimes with various victims. Where a victim was initially asleep, the force the defendant exerted under R.C. 2902.02(B) required only minimal physical exertion. *State v. Lillard*, 8th Dist. No. 69242 and *State v. Sullivan*, 8th Dist. No. 63818. In both *Lillard* and *Sullivan*, where the victim was asleep when the conduct began, the court found that the

conduct of separating a victim's legs and moving clothing was sufficient to satisfy the element of "force."

{¶51} Finally, although the majority relies on another case from the Eighth District Court of Appeals, *State v. Byrd*, 8th Dist. No. 82145, 2003-Ohio-3958, *Byrd* only confirms the holdings in *Lillard*, *Sullivan*, *Simpson*, *Clark*, and *Graves*.¹ In *Byrd*, the court found sufficient force where Byrd manipulated the victims clothing as part of the conduct. The *Byrd* Court only declined to find force with respect to a different victim, where Byrd only touched the girl over her clothing, a scenario factually distinguishable from the case at bar.

{¶52} In the present case, on August 12, 2008, K.C. had just moved into the CDH house. It was actually her first night sleeping in the new house and, although she was to have a roommate, her roommate had not yet moved in. K.C.

¹ We note that other than *Byrd*, the majority only relies on *State v. Euton*, 3rd Dist. No. 2-06-35, 2007-Ohio-6704. The majority, without analysis, argues that *Euton* is factually analogous to the case at bar. The victim in *Euton* was a fourteen year-old boy who resided with his father at the time of the incident. Apparently, both the victim and his father had met Euton only a few days prior. The facts of the incident are summarized as follows in *Euton*:

J.D. testified that a few minutes later, Euton, an intoxicated stranger, entered the dark room, crouched next to the mattress, fell over, reached under the blanket, and fondled J.D.'s penis on top of his cotton jogging pants. (*Id.* at 132-33, 152, 154-55). J.D. froze for a few moments, then turned to his older brother and said, "Kirk, he is touching me * * * what should I do?" (*Id.* at 133, 155, 158, 168). After a brief pause, Kirk replied, "just get up." (*Id.* at 158). Frightened and acting on his brother's advice, J.D. told Euton he needed to use the restroom, got up from the bed, and left the room. (*Id.* at 134, 157). Soon after, Michael, Annie's nephew, arrived at the house, and J.D. told him what happened. (*Id.* at 134-35).

State v. Euton, 2007-Ohio-6704, at ¶53 Preston, J., concurring in part; dissenting in part. Despite the majority's opinion to the contrary, I find that these circumstances are not factually analogous to those in the case at bar. Moreover, I agree with the dissent in *Euton*, both for the reasons stated in the dissent and also for the reasons articulated in *Lillard*, *Sullivan*, *Simpson*, *Clark*, and *Graves*. The manipulation of the blanket covering the victim, in *Euton*, serves as its own indication of the exertion of force.

testified that her bed, in the CDH house, was upon a small platform, high enough that she actually had to push herself up to get into her bed. (Tr.p. 178).

{¶53} K.C. testified that she moved into the CDH house early, prior to the start of the school year and that when she moved in, other CDH residents were having a retreat. When K.C. came home from work on the night of August 12, 2006, she ate dinner and then got ready for bed. K.C. testified that she wore a sports bra and a pair of cotton shorts with an elastic waistband to bed that night. (Tr.p. 180).

{¶54} K.C. went to bed and was awakened by a person in bed behind her. She was laying on her right side facing the wall, and Henry was behind her on the bed. K.C. testified that she was woken up to the feeling of a hand down her shorts.

A. His, I was laying on my side and I like half awoke to feeling a hand down my pants like in my, my like pubic areas.

Q. Was the hand on top of your shorts or underneath your shorts?

A. They were underneath my shorts.

Q. And you mentioned that the --- well, first of all, how close was this man to you in bed?

A. He was right behind me.

Q. How big did the man feel?

A. He was bigger than me.

Q. What were you thinking when you were awakened and felt the man behind you touching your pubic area?

A. Well, when I first, it was like I half awoke and what my first thought was that it was my boyfriend at the time who I spent a lot of time with. I thought it was him, just kind of thinking, oh, it's Mike. He wants to kind of, you know, getting a little frisky or something.

Q. And you said pubic area before. Would you please describe what you mean by your pubic area?

A. Just like the outside of my private parts.

(Tr.p. 181-182).

{¶55} K.C. further testified that when she felt the hand down her shorts, she put her hand on his lower arm and removed his arm from her shorts. However, Henry tried again, putting his hand back down K.C.'s shorts, but this time "he went further in. He went to like the inside area of my private parts." (Tr.p. 183). When asked to describe what she meant, K.C. explained that "[l]ike he went, he went inside the lips of my pubic area." (Tr.p. 183). K.C. stated that when she removed Henry's hand from her shorts, she said "no." (Tr.p. 184).

{¶56} Henry again put his hand back down K.C.'s shorts "back down in like the vaginal area inside the lips." (Tr.p. 185). K.C. again removed Henry's hand from her shorts and said "no." (Id.). Henry again put his hand down K.C.'s shorts and K.C. testified that he "fully put his finger -- he penetrated me." (Id.). Again, K.C. removed Henry's hand from her shorts and said "no." (Tr.p. 186).

When Henry put his hands down K.C.'s shorts again, she realized that the man behind her was not her boyfriend. (Tr.p. 187).

{¶57} After realizing that Henry was not her boyfriend K.C. stated that she “put my feet against the wall and kicked back and pushed the man off the bed behind me.” (Tr.p. 187). After ejecting Henry from her bed K.C. ran downstairs for the living room. (Tr.p. 188). When K.C. returned to the bedroom, Henry was still there.

{¶58} Based on this testimony, I would find Henry's conviction was supported by sufficient evidence. First, based on the law as articulated by the Fourth and Eighth District Courts of Appeals, Henry's manipulation of K.C.'s shorts is sufficient to meet the definition of force. As the Ohio Supreme Court stated in *Eskridge*, force need not be overt or physically brutal.

{¶59} Second, even without relying on the manipulation of the clothing, I would find that there was sufficient evidence introduced to the element of force. Here, the victim was much smaller than Henry, described as very petite, while Henry was a larger wrestler. In addition, despite K.C.'s repeated attempts to stop Henry from touching her, he continued to try again each time she moved his hand away.

{¶60} Henry put K.C. in a situation where she was literally trapped between the wall and Henry. As a result, K.C. had to plant her feet against a wall and shove Henry to the floor with such force that a large thud was heard. The

IN THE COURT OF COMMON PLEAS, SENECA COUNTY, OHIO

FILED COURT
COMMON PLEAS, OHIO
SENECA COUNTY, OHIO
2008 FEB 26 A 10:11 AM
MARY K. WARD
CLERK

STATE OF OHIO : Case No. 07-CR-0240
Plaintiff : Criminal
vs. : JUDGE MICHAEL P. KELBLEY
KIEL A. HENRY :
Defendant :

JUDGMENT ENTRY

This matter came before the Court on the 22nd day of February, 2008 for hearing upon defendant's Motion for Acquittal or in the Alternative Motion for a New Trial. Defendant was present in open court accompanied by his attorney, Mr. Javier H. Armengau. The State of Ohio was represented by Mr. James A. Davey, Assistant Seneca County Prosecuting Attorney.

The Court heard the arguments of counsel and the matter was taken under advisement. The Court has reviewed the file, the arguments of counsel and the pleadings and, based thereon, the Court finds defendant's motion not to be well-taken.

It is therefore **ORDERED** that defendant's Motion for Acquittal or in the Alternative Motion for a New Trial is **DENIED** in its entirety.

Bond continued.



JUDGE MICHAEL P. KELBLEY

TO THE CLERK: You are instructed to serve a copy of the foregoing upon the Prosecuting Attorney, Attorney Javier Armengau and Victim Assistance.

Chapter 2901: GENERAL PROVISIONS

2901.01 General provisions definitions.

(A) As used in the Revised Code:

(1) "Force" means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.

(2) "Deadly force" means any force that carries a substantial risk that it will proximately result in the death of any person.

(3) "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration.

(4) "Physical harm to property" means any tangible or intangible damage to property that, in any degree, results in loss to its value or interferes with its use or enjoyment. "Physical harm to property" does not include wear and tear occasioned by normal use.

(5) "Serious physical harm to persons" means any of the following:

(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

(b) Any physical harm that carries a substantial risk of death;

(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

(6) "Serious physical harm to property" means any physical harm to property that does either of the following:

(a) Results in substantial loss to the value of the property or requires a substantial amount of time, effort, or money to repair or replace;

(b) Temporarily prevents the use or enjoyment of the property or substantially interferes with its use or enjoyment for an extended period of time.

(7) "Risk" means a significant possibility, as contrasted with a remote possibility, that a certain result may occur or that certain circumstances may exist.

(a) Evidence other than the testimony of the victim was admitted in the case corroborating the violation;

(b) The offender previously was convicted of or pleaded guilty to a violation of this section, rape, the former offense of felonious sexual penetration, or sexual battery, and the victim of the previous offense was less than thirteen years of age.

(D) A victim need not prove physical resistance to the offender in prosecutions under this section.

(E) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(F) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(G) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

Effective Date: 03-10-1998; 08-03-2006; 2007 SB10 01-01-2008