

IN THE SUPREME COURT OF OHIO

ORIGINAL

State of Ohio, : Case No. 2009-1572
 Appellant, :
 :
 v. : On Appeal from the
 : Seneca County Court of Appeals,
 Kiel A. Henry, : Third Appellate District
 Appellee. :

MERIT BRIEF OF AMICUS, THE OHIO PROSECUTING ATTORNEYS ASSOCIATION
 IN SUPPORT OF APPELLANT THE STATE OF OHIO

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STATEMENT OF FACTS

Amicus, The Ohio Prosecuting Attorneys Association, will rely upon the statement of facts set forth in the brief of the Appellant.

ARGUMENT

Proposition of Law No. 1:

The offense of gross sexual imposition under R.C. 2907.05(A)(1) may be committed despite the fact that the will of the victim was not overcome.

This case involves the element of force as it applies to section (A), subsection (1) of R.C. 2907.05, Ohio's gross sexual imposition statute. According to that statute, one commits gross sexual imposition by having "sexual contact with another, not the spouse of the offender *** when *** [t]he offender purposely compels the other person, or other persons, to submit by force or threat of force." The term "force" is defined in R.C. 2901.01(A)(1) as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."

Half asleep and laboring under the misapprehension that Appellee Kiel Henry was her boyfriend, K.C. objected only nonchalantly to Henry's placing his hand under her shorts and near

her pubic region. Like a person who does not realize that they are handling a poisonous snake, she even rested her hand on his arm after pulling his hand away. Henry persisted, repeatedly placing his hand in K.C.'s pubic area, each time after she repeatedly told him "no" and removed it. Only upon feeling him penetrate her during his fourth advance did she realize that he was a stranger, and then she... engaged in a struggle to remove him from her bed, her room and her college residence.

With these facts, the Court of Appeals for Seneca County found that Henry did not purposely compel K.C. to submit by force. In doing so it improperly required proof that Henry overcame K.C.'s will, a "domination test," as follows:

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.*

(italics in the original) *State v. Henry*, Seneca App. No. 13-08-10, 2009-Ohio-3535 at ¶31. As will be demonstrated in the discussion that follows, the court of appeals erred in applying the domination test

under the facts of this case.

Although this case involves gross sexual imposition, cases involving rape apply, because both offenses share the force-or-threat-of-force element and the offense of gross sexual imposition is a relatively recent statute.

At common law, force was required to be proven together with the fact that the offender was acting contrary to the victim's will. *Smith v. State* (1861), 12 Ohio St. 466, 470. With Ohio's adoption of rape shield, the express requirement of resistance by the victim was eliminated and the focus moved to compulsion, "which plainly implies non-consent." *State v. Tamer El-Berri*, 8th Dist. No. 89477, 2008-Ohio-3539 at ¶54, discretionary appeal not allowed, 2009-Ohio-361 (Feb. 4, 2009); Model Penal Code, Section 213.1, comment, at 301-306. Thus, Ohio's rape and gross-sexual-imposition statutes explicitly require only evidence of force. In 1953, with the codification of the offense of rape in the Ohio Revised Code, only force; not the threat of force, was an express requirement of the statute. Former R.C. 2905.01. In 1974, with the reorganization of R.C. Title 29 as a criminal code, the force

requirement of the rape statute was relaxed to include a threat of force. Former R.C. 2907.02; Am.Sub.H.B. No. 511, 134 Ohio Laws, Part II, 1866. In 1988, this Court announced the domination test as a means by which the element of force could be fulfilled in the context of a rape committed by a parent or adult in a position of authority against a child. The domination test arose from a recognition that under those circumstances, a rape can be “inevitably forcible.” *State v. Eskridge* (1988), 38 Ohio St.3d 56, 58, 526 N.E.2d 304. The domination test recognizes force when the evidence consists of subtle and psychological influence derived from a position of power and influence. Thus, under the domination test, force will be present where the “victim’s will [is] overcome by fear or duress *** [.]” *Id.* at 59.

The court of appeals both unnecessarily and improperly applied the domination test. The domination test was unnecessary, because the sexual contact to which K.C. was subjected took place in the face of her repeated verbal expressions of non-consent and her removal of Henry’s hand. Thus, the application of the domination test was

improper, because force was demonstrated irrespective of whether K.C.'s will was overcome. The evidence of force was also improperly negated by evidence that K.C.'s will was not overcome, i.e., her objections and subsequent struggle. *State v. Henry* at ¶31. In effect, the domination test turned the common law requirement of resistance for a prosecution for sexual assault on its head. See *State v. Schwab* (1924), 109 Ohio St. 532, 143 N.E.2d 29.

Applying the domination test to negate evidence of force by means of the victim's verbal objections or struggle to resist could create a disincentive for victims to stop sexual advances. That a victim of a sex offense should resist has been an integral part of Ohio jurisprudence from the common law. *Smith v. State* at 470. The unnecessary use of the domination test creates a built-in disincentive for victims to physically resist sexual assaults involving slight physical force.

The court of appeals unnecessarily and improperly applied the domination test in *State v. Eskridge* by using it in an instance where the force does not involve subtle or psychological influence of an adult

offender over a child. The domination test was formulated for that limited application, and using it outside that context to sideline evidence that the victim verbally announced her lack of consent is dangerously wrong.

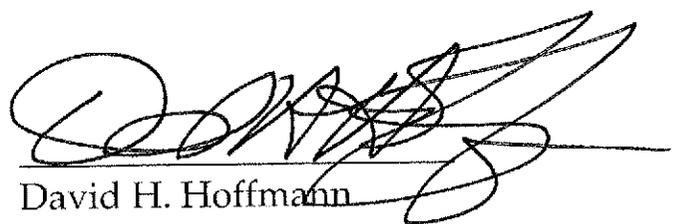
The court erred in holding that the jury verdict finding him guilty of gross sexual imposition was not supported by sufficient evidence.

CONCLUSION

For the above reasons, the Ohio Prosecuting Attorneys Association respectfully asks this Court to reverse the Third District's decision.

Respectfully submitted,

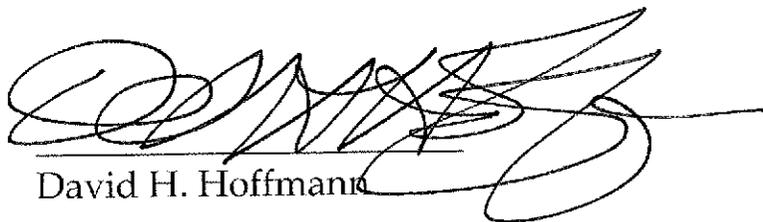
By:


David H. Hoffmann

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PROOF OF SERVICE

I certify that a copy of the above has been sent by ordinary U.S. mail, postage prepaid, to James Davey, Assistant Prosecuting Attorney, at his address of 71 South Washington Street, Suite 1204, Tiffin, Ohio 44883; Javier Armengau, Counsel for the Appellee, at his address of 857 S. High Street, Columbus, Ohio 43206; Katherine A. Szudy, Assistant State Public Defender, and Counsel for the Amicus Curiae, The Ohio Public Defender, at her address of 250 East Broad Street, Suite 1400, Columbus, Ohio 43215; and Benjamin C. Mizer, Solicitor General, at his address of 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, on February 12, 2010.

A handwritten signature in black ink, appearing to read "David H. Hoffmann", is written over a horizontal line. The signature is highly stylized and cursive.

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ATTORNEYS ASSOCIATION