

ORIGINAL

In the
Supreme Court of Ohio

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

REPLY BRIEF OF *AMICUS CURIAE*
OHIO ATTORNEY GENERAL RICHARD CORDRAY
IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO

DEREK W. DeVINE (0062488)
Seneca County Prosecutor

RICHARD CORDRAY (0038034)
Attorney General of Ohio

JAMES A. DAVEY* (0078056)
Assistant Prosecuting Attorney
**Counsel of Record*
71 South Washington Street
Suite 1204
Tiffin, Ohio 44883
419-448-4444
419-443-7911 fax

BENJAMIN C. MIZER* (0083089)
Solicitor General
**Counsel of Record*

BRANDON J. LESTER (0079884)
Deputy Solicitor
WILLIAM J. COLE (0067778)
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@ohioattorneygeneral.gov

Counsel for Plaintiff-Appellant
State of Ohio

Counsel for *Amicus Curiae*
Ohio Attorney General Richard Cordray

JAVIER H. ARMENGAU (0069776)
857 South High Street
Columbus, Ohio 43206
614-443-0516
614-443-0708 fax

Counsel for Defendant-Appellee
Kiel A. Henry

FILED
APR 21 2010
CLERK OF COURT
SUPREME COURT OF OHIO

DONALD W. WHITE (0005630)
Clermont County Prosecutor

DAVID H. HOFFMAN* (0005384)
Assistant Prosecuting Attorney
**Counsel of Record*
123 North Third Street
Batavia, Ohio 45103
513-732-7313
513-732-7592 fax

Counsel for *Amicus Curiae*
The Ohio Prosecuting Attorneys Association

KATHERINE A. SZUDY (0076729)
Assistant State Public Defender
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614-466-5394
614-752-5167 fax

Counsel for *Amicus Curiae*
Ohio Public Defender

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT.....	2
A. The victim’s will is not relevant in a prosecution for forceful sexual abuse when the offender used pure physical force to commit the crime.....	2
B. The physical force required to establish a forceful sexual offense is minimal when the victim is sleeping at the outset of the crime.....	4
CONCLUSION.....	9
CERTIFICATE OF SERVICE	unnumbered

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Jackson v. Virginia</i> (1979), 443 U.S. 307	6
<i>O’Toole v. Denihan</i> , 118 Ohio St. 3d 374, 2008-Ohio-2574	3
<i>State ex rel. Hulls v. State Teachers Ret. Bd.</i> , 113 Ohio St. 3d 438, 2007-Ohio-2337	3
<i>State v. Burton</i> (4th Dist.), 2007-Ohio-1660	6
<i>State v. Byrd</i> (8th Dist.), 2003-Ohio-3958	6
<i>State v. Clark</i> (8th Dist.), 2008-Ohio-3358	6
<i>State v. DeLuca</i> (8th Dist.), 2007-Ohio-3905	7
<i>State v. Eskridge</i> (1988), 38 Ohio St. 3d 56	4, 5
<i>State v. Graves</i> (8th Dist.), 2007-Ohio-5430	6
<i>State v. Green</i> (5th Dist.), 2002-Ohio-3949	6
<i>State v. Henry</i> (3d Dist.), 2009-Ohio-3535	2, 6
<i>State v. Jenks</i> (1991), 61 Ohio St. 3d 259	6
<i>State v. Labus</i> (1921), 102 Ohio St. 26	2, 5
<i>State v. Lillard</i> (8th Dist. May 23, 1996), 1996 Ohio App. Lexis 2150	7
<i>State v. Rutan</i> (10th Dist. Dec. 16, 1997), 1997 Ohio App. Lexis 5728	7

<i>State v. Schaim</i> (1992), 65 Ohio St. 3d 51	3, 4, 8
<i>State v. Simpson</i> (8th Dist.), 2007-Ohio-4301	6
<i>State v. Sullivan</i> (8th Dist. Oct. 7, 1993), 1993 Ohio App. Lexis 4859.....	7
<i>State v. Walker</i> (8th Dist.), 2006-Ohio-6188.....	4
Statutes, Rules and Constitutional Provisions	
R.C. 2901.01(A)(1).....	5
R.C. 2907.05(A)(1).....	3, 5, 8
R.C. 2907.05(D).....	8

INTRODUCTION

For an individual to be convicted of a forcible sexual crime like gross sexual imposition or rape, the State must prove that the individual either used physical force against the victim or threatened to do so in the commission of the act. The lower court erred when it turned a method of proving “threat of force” (showing that the defendant overcame the victim’s will to resist his advances) into a mandatory condition for all force cases, even those where the offender used actual physical force to commit the crime.

Appellee Kiel Henry and his amicus, the Ohio Public Defender, defend the Third District’s decision below, raising two primary points. First, they argue that the lower court’s rule is correct because the “consideration of whether the will of the victim was overcome is always relevant. An offender commits gross sexual imposition in cases only when the will of the victim is overcome.” Henry Br. at 5. This claim is at odds with both the plain language of the relevant statutes and this Court’s jurisprudence: “Force” and “threat of force” are independent concepts that serve separate purposes, and only the latter turns on the effect the offender’s actions had on the victim’s will. Requiring the State to prove both that the offender used physical force to commit a crime and *also* overcame his victim’s will to resist conflates these concepts and creates a loophole for offenders to exploit.

Second, Henry and the Public Defender claim that, regardless of the language that the Third District used in reaching its decision, the evidence of physical force here is insufficient to support a conviction, seemingly because Henry’s actions—crawling into bed with his sleeping victim so that she was situated between him and a wall, repeatedly touching her beneath her clothing, and continually countering her groggy attempts to rebuff him—were not overtly violent. The Public Defender even goes so far as to claim that the issue here is whether one can

be convicted of gross sexual imposition without a showing of force or threat of force. See Public Defender Br. at 2.

No one disputes that some physical force or threat thereof must support a conviction, but it is also well-settled that the degree of force required can vary based on the circumstances. See *State v. Labus* (1921), 102 Ohio St. 26, 38–39. Indeed, once the Third District’s novel rule is discarded, this case features a straightforward question of fact: Were Henry’s acts, though minimally forceful, sufficient to meet the statutory definition of “force” in view of the fact that his victim was asleep when the crime began? Because Henry’s victim was extraordinarily vulnerable, the degree of force necessary to commit the crime is substantially lessened, and Henry’s actions qualify as “force” under this lower threshold.

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

ARGUMENT

A. The victim’s will is not relevant in a prosecution for forceful sexual abuse when the offender used pure physical force to commit the crime.

In its opinion, the Third District combined the two distinct, alternative ways to prove forceful sexual offenses (showing that the offender either used “force” or the “threat of force”), requiring the State to demonstrate in all physical force cases that the offender both overpowered his victim physically *and* overcame her will to resist his advances. *State v. Henry* (3d Dist.), 2009-Ohio-3535, ¶¶ 31–33 (noting, in each paragraph, that any force used to commit a sexual assault must be “sufficient to overcome the will of the victim”). But only “threat of force” cases hinge on whether the victim’s will to resist has been overcome. Recognizing the separate nature of “force” and “threat of force” is vital to understanding the scheme established by the General Assembly. The Third District’s approach, which Henry and the Public Defender seek to uphold, is misguided on several counts.

First, that approach adds a requirement not present in the statutes. To prove gross sexual imposition under R.C. 2907.05(A)(1) (the charge of which Henry was convicted), the State must show, among other things, that the offender purposely compelled his victim to submit to sexual contact “by force or threat of force.” As this Court has noted, this requirement prohibits two different types of conduct: “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.” *State v. Schaim* (1992), 65 Ohio St. 3d 51, 55; see Attorney General Br. at 6–10 (tracing the differences between the ideas of “force” and “threat of force” as they apply to sexual offenses like gross sexual imposition).

Because these ideas are joined with the term “or,” the State is not required to prove that the offender *both* compelled his victim to submit by physical force *and* used a threat of force to overcome her will to resist his advances. See *O’Toole v. Denihan*, 118 Ohio St. 3d 374, 2008-Ohio-2574, ¶ 51 (noting that the word “or” is a disjunctive term, and that the terms connected by it should be afforded different meanings). Requiring the State to prove the existence of both concepts to secure a conviction injects a new element into the statute, which courts may not do. See *State ex rel. Hulls v. State Teachers Ret. Bd.*, 113 Ohio St. 3d 438, 2007-Ohio-2337, ¶ 35.

Yet that is exactly what Henry and his amicus ask of this Court. “The State is asking this Court hold that a defendant may be convicted of gross sexual imposition when the State cannot prove that the alleged victim *did not feel compelled to submit to the sexual contact by means of a defendant’s use of force* or threatened use of force.” Public Defender Br. at 6 (emphasis added). Quite simply, it does not matter whether a victim “feels” compelled to submit when the offender uses actual physical force—if an offender physically overpowers his victim and performs sexual acts upon her, he has committed a forceful sexual assault, regardless of the victim’s feelings on

the matter. The victim's will is only relevant in threat of force cases, since the offender can only commit the crime in those instances when the threat he poses is convincing enough that the victim feels that she has no choice but to submit. Such threats may be explicit and violent, see, e.g., *State v. Walker* (8th Dist.), 2006-Ohio-6188, ¶¶ 51–55, or more implicit, situational threats like those arising from the parent-child relationship, see, e.g., *Schaim*, 65 Ohio St. 3d at 55; *State v. Eskridge* (1988), 38 Ohio St. 3d 56, 58–59, as long as they are sufficient to overcome the victim's will to resist. Preserving this distinction would not, as the Public Defender claims, require this Court to reverse its decisions in *Eskridge* and *Schaim*. Rather, it would reaffirm the core holdings of those cases, which recognized fully the differences between actual physical force and the type of psychological pressures that can be used to compel victims to submit.

Moreover, combining these concepts makes no practical sense. What does it matter whether the offender has broken his victim's will when he has already used his physical might to abuse her sexually? To suggest that the crime has not been committed unless the offender, having physically dominated the victim, also eliminates her will to fight back is to add an element to the crime that the General Assembly did not include, and to dilute the statute's protections.

This Court should accordingly reject the Third District's rule and hold that, to prove a forceful sexual assault like gross sexual imposition, the State must demonstrate either that the defendant physically overpowered his victim or that he overcame her will to resist through some explicit or implicit threat of harm, but need not prove both.

B. The physical force required to establish a forceful sexual offense is minimal when the victim is sleeping at the outset of the crime.

When the Third District's improper approach is removed, this case becomes a straightforward question of whether Henry's physical actions meet the statutory definition of

“force.” Though this question is a purely factual one, remand alone is improper here given the Third District’s failure to follow the core guiding principle in this inquiry—that force is a fluid concept that has different meanings in different circumstances. Despite Henry’s protestations that his physical actions in this case are not the types of shockingly violent actions often seen in these cases, the fact that he preyed on a vulnerable victim means that the force that he used is sufficient to support a conviction for gross sexual imposition.

The force element for sexual assault crimes like rape and gross sexual imposition encompasses a broad range of conduct, prohibiting offenders from using *any* form (or threat) of “violence, compulsion, or constraint physically exerted by any means upon or against a person or thing” to perpetrate a sexual assault. R.C. 2901.01(A)(1); see R.C. 2907.05(A)(1); *Eskridge*, 38 Ohio St. 3d at 58 (noting that this element “requires that only that minimal force or threat of force be used”). And this low bar can be moved even lower in certain circumstances. As this Court recognized long ago, “[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.” *Labus*, 102 Ohio St. at 38. In other words, the amount of force necessary to meet the statutory standard can be adjusted downward when the offender takes advantage of some physical or situational advantage over his victim. See *Eskridge*, 38 Ohio St. 3d at 58 (holding that the defendant’s actions of laying the victim on a bed and removing her underwear were sufficiently forceful in view of the fact that the victim was the defendant’s four-year-old daughter).

Such a variable definition of force makes sense. When an offender preys on a victim when she is most vulnerable, such that only minimal force is required to accomplish an assault, he should not escape full responsibility for his actions merely because he did not use more force than was necessary. Conversely, an individual who performs only minimal physical acts that are

not sufficient to control a fully coherent person should not be punished for a forcible sexual assault. The issue is properly weighed in full view of the totality of the circumstances. And a conviction in this regard should be affirmed on appeal when, “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. Jenks* (1991), 61 Ohio St. 3d 259, syll. ¶ 2 (following *Jackson v. Virginia* (1979), 443 U.S. 307) (emphasis added).

Here, Henry entered the bedroom of a sleeping woman, someone undeniably in a vulnerable state. *Henry*, 2009-Ohio-3535, at ¶ 5. He crawled into bed behind her, pinning her between himself and a wall. *Id.* He moved her clothes out of his way and touched her pubic area. *Id.* As his victim slowly awoke and groggily removed Henry’s hand (thinking, in her semi-conscious state, that Henry was her boyfriend), he shook off her rebukes and persisted, continually moving his hand underneath her clothes and back to her vagina a total of four more times, once penetrating her. *Id.* When the victim finally reached full consciousness and realized that she did not know Henry, she was only able to escape by bracing her feet against the wall, pushing him off of the bed, and running out of the room. *Id.* at ¶¶ 5–6.

In cases where the victim is asleep at the outset of the attack, courts of appeals have consistently held that, given the victim’s vulnerability, even the minimal force needed to move articles of clothing out of the way or to reposition the sleeping victim’s body satisfies the statutory standard. See *State v. Clark* (8th Dist.), 2008-Ohio-3358, ¶¶ 17–19 (“In the situation where the victim is sleeping and thus not aware of the defendant’s intentions, only minimal force is necessary to facilitate the act.”); *State v. Graves* (8th Dist.), 2007-Ohio-5430, ¶¶ 17–18; *State v. Simpson* (8th Dist.), 2007-Ohio-4301, ¶¶ 49–52; *State v. Burton* (4th Dist.), 2007-Ohio-1660, ¶ 42; *State v. Byrd* (8th Dist.), 2003-Ohio-3958, ¶¶ 23–24; *State v. Green* (5th Dist.), 2002-Ohio-

3949, ¶¶ 60–61; *State v. Rutan* (10th Dist. Dec. 16, 1997), 1997 Ohio App. Lexis 5728, at *32–33 (“[E]xtremely little force is required when one’s victim is asleep.”); *State v. Lillard* (8th Dist. May 23, 1996), 1996 Ohio App. Lexis 2150, at *15–16; *State v. Sullivan* (8th Dist. Oct. 7, 1993), 1993 Ohio App. Lexis 4859, at *9 (noting that the acts of moving the sleeping victim’s legs and pulling down her clothes, “although not of the same degree as a blow or continuous restraint, are without question within the definition of ‘force’”). Henry and the Public Defender cite no court, except for the one below, that has held to the contrary.

Applying this sensible rule, a rational trier of fact could easily find that Henry met that minimal level of force here, as he repeatedly moved his victim’s clothing out of the way to facilitate the assault, not to mention constrained her against the wall such that she had to exercise a significant amount of resistance to escape. While these actions may not be sufficiently forceful to sustain a conviction when the adult victim is fully awake, see *State v. DeLuca* (8th Dist.), 2007-Ohio-3905, ¶¶ 17–18 (finding that sliding hands under the clothes of an awake adult victim does not constitute force), the sleeping victim’s vulnerability permits a lesser degree of force to suffice. As such, Henry’s conviction for gross sexual imposition should stand.

Henry’s numerous arguments to the contrary are unavailing. He repeatedly notes that he did not threaten his victim. Henry Br. at 6, 8, 9. This argument is irrelevant given that this case concerns pure physical force, not a threat, and in any event a threat would not have done much considering that his victim was asleep when he began the assault. Next, he claims that he did not resist the victim’s attempts to remove his hand. *Id.* at 6. This claim ignores the fact that even the first intrusion alone would have been sufficient to support the conviction. And it is at best a dubious characterization of the events—while Henry may not have resisted when the victim moved his hand away, he immediately resumed the contact each time she did so. He then argues

that he did not stop her from resisting him and ultimately leaving the room, *id.*, but (1) the victim's physical resistance to the offender is irrelevant in prosecutions for this offense, see R.C. 2907.05(D); (2) whatever Henry allowed her to do *after* assaulting her is irrelevant to his guilt on the charge itself; and (3) it is again suspect to claim that Henry did not do anything to restrain his victim when she had to brace her feet against a wall and push hard to free herself.

Henry also cites *Schaim* for the rule that "more must be shown to establish force or the threat of force when the alleged offense involves an adult victim." Henry Br. at 7. While it is true that the degree of physical force (and, likewise, the severity of a threat of force) necessary to assault an adult will generally be greater than that needed to abuse a child, that rule does not govern when the adult victim is asleep, a complicating factor not at issue in *Schaim*. Henry then curiously claims that he "was not in a superior position, nor did he use any alleged position to commit any offense," *id.* at 8, but this claim similarly ignores the fact that the victim was sleeping at the outset, something that gave Henry the easy opportunity to assault her.

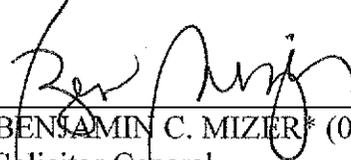
Because none of these arguments change the fact that Henry seized the opportunity to assault a sleeping victim, using at least minimal force to move her clothing out of the way so that he could repeatedly molest her until she fully awoke and escaped, this Court should reverse the lower court's decision and reinstate Henry's conviction for gross sexual imposition under R.C. 2907.05(A)(1).

CONCLUSION

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

Respectfully submitted,

RICHARD CORDRAY (0038034)
Attorney General of Ohio



BENJAMIN C. MIZER* (0083089)
Solicitor General

**Counsel of Record*

BRANDON J. LESTER (0079884)
Deputy Solicitor

WILLIAM J. COLE (0067778)
Assistant Solicitor

30 East Broad Street, 17th Floor
Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

benjamin.mizer@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*

Ohio Attorney General Richard Cordray

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of *Amicus Curiae* Ohio Attorney General Richard Cordray in Support of Plaintiff-Appellant State of Ohio was served by U.S. mail this 21st day of April 2010, upon the following counsel:

Derek W. Devine
Seneca County Prosecutor
James A. Davey
Assistant Prosecuting Attorney
71 South Washington Street
Suite 1204
Tiffin, Ohio 44883

Counsel for Plaintiff-Appellant
State of Ohio

Javier H. Armengau
857 South High Street
Columbus, Ohio 43206

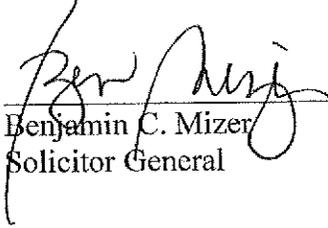
Counsel for Defendant-Appellee
Kiel A. Henry

Donald W. White
Clermont County Prosecutor
David H. Hoffmann
Assistant Prosecuting Attorney
123 North Third Street
Batavia, Ohio 45103

Counsel for *Amicus Curiae*
The Ohio Prosecuting Attorneys
Association

Katherine A. Szudy
Assistant State Public Defender
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215

Counsel for *Amicus Curiae*
Ohio Public Defender


Benjamin C. Mizer
Solicitor General