

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

REPLY BRIEF OF APPELLANT STATE OF OHIO

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## ARGUMENT

### I. INTRODUCTION.

Appellee and the Public Defender argue incorrectly that the court of appeals properly applied this Court's decisions in two prior cases regarding forcible sexual assaults, even though the decision of the court of appeals is contrary to both. Appellee and the Public Defender also argue incorrectly that the court of appeals properly concluded the State failed to prove Appellee purposely compelled the victim to submit to sexual contact by force, even though the decision of the court of appeals ignores the well-established understanding of the actions that constitute force. Contrary to the arguments of Appellee and the Public Defender, the decision of the court of appeals has stricken a blow to prior decisions of this Court. The Court, therefore, should reverse the decision of the court of appeals in order to prevent other appellate districts from similarly misinterpreting the same long-established legal principles.

### II. AN OFFENDER MAY BE GUILTY OF GROSS SEXUAL IMPOSITION EVEN IF THE WILL OF THE VICTIM IS NOT OVERCOME.

#### A. Introduction.

Appellee and the Public Defender argue the court of appeals correctly applied the decisions of this Court in *State v. Eskridge* (1988), 38 Ohio St.3d 56, and *State v. Schaim* (1992), 65 Ohio St.3d 51 regarding whether the will of a victim must be overcome in forcible sexual assault cases before it may be found that an offender used force to commit the offense. Appellee's Br. 10; Public Defender's Br. 1. The Public Defender even argues that if the Court reverses the decision of the court of appeals, it would be reversing its previous decisions in those cases. Public Defender's Br. 1, 6. The opposite is true:

reversing the decision of the court of appeals would reaffirm *Eskridge* and *Schaim*, and prevent further misinterpretation of them.

B. *Schaim* and *Eskridge*.

In *Schaim*, 65 Ohio St.3d at syllabus paragraph one, the Court explained that there are two kinds of forcible rape cases: (1) those in which an offender uses physical force against the victim, and (2) those in which the offender does not use physical force, but through his or her actions creates the belief in the victim that physical force will be used if the victim does not submit. *Id.* The Court in *Schaim* built upon its decision four years earlier in *Eskridge*, in which it held that in cases in which a parent rapes a child and in which force is an element of the offense, because of “the filial obligation of obedience to a parent,” a lesser degree of force may be sufficient to prove the parent committed the offense. *Eskridge*, 38 Ohio St.3d 56 at syllabus paragraph one.

As rationale for its holding in *Eskridge*, the Court explained that it recognized “the coercion inherent in parental authority,” and that in cases in which parents rape children “[f]orce need not be overt and physically brutal, but can be subtle and psychological.” *Id.* at 58. Therefore, even absent physical force, in cases in which parents rape children, “[a]s long as it can be shown that the rape victim’s will was overcome by fear or duress, the forcible element of rape can be established.” *Id.* at 59.

C. The court of appeals erroneously applied *Schaim* and *Eskridge*.

The court of appeals misapplied both *Schaim* and *Eskridge* to reach its decision. The court of appeals misapplied *Eskridge* when it truncated the rule this Court referenced in that case. As stated previously, the Court stated in *Eskridge* that in certain rape cases “[a]s long as it can be shown that the rape victim’s will was overcome by fear or duress,

the forcible element of rape can be established.” *Id.* The court of appeals initially quoted the entire rule. *State v. Henry* (3d Dist.), App. No. 13-08-10 at ¶26. Five paragraphs later, however, the court eliminated the “by fear or duress” portion of the rule, leaving a truncated rule according to which “force or threat of force” under the gross sexual imposition statute is proven only if the force or threat of force exerted by the offender is “sufficient to overcome the will of the victim.” *Id.* at ¶31 (emphasis in original). The court reiterated its truncated portion of the *Eskridge* rule in the next paragraph of its decision. *Id.* at ¶32.

On its face, the court of appeals decision misinterprets *Eskridge* because the truncated rule the court of appeals advanced is not what this Court stated in *Eskridge*. Once truncated, the rule is pliable and susceptible to being misapplied, which is exactly what the court of appeals did. The court of appeals’ truncated *Eskridge* rule mandates that before an offender may be found guilty of using force to commit gross sexual imposition, it must first be found that the will of the victim was overcome, which is not what this Court stated in *Eskridge*. See *Henry, supra*, at ¶¶31-32. Rather, what this Court stated in *Eskridge* was that even if an offender did not use physical force, force may still be found “[a]s long as it can be shown that the . . . victim’s will was overcome by fear or duress.” *Eskridge, supra*, at 59. By truncating the *Eskridge* rule, the court of appeals transformed a rule that permits a finding of force absent evidence of physical force as long as the will of a victim is overcome by fear or duress into a rule that bars a finding of force unless the will of the victim is overcome.

In misinterpreting *Eskridge*, the decision of the court of appeals also directly conflicts with *Schaim*. As stated previously, the Court held in *Schaim* that force or threat

of force may be proven when an offender either (1) uses physical force or (2) creates the belief that physical force will be used if the victim does not submit. *Schaim, supra*, at syllabus paragraph one. In the first category of cases, it is irrelevant what beliefs, *including fear or duress*, a victim has. However, the beliefs of a victim, including fear or duress, are particularly relevant—possibly even determinative—when an offender has not used physical force but has acted in such a way that the victim believes the offender will use physical force if the victim does not submit.

According to the rule the court of appeals has advanced, however, the beliefs of a victim are determinative *in both categories of cases* because an offender may never be found guilty of using force unless the offender's actions are "*sufficient to overcome the will of the victim.*" *Henry, supra*, at 31 (emphasis in original). The effect of the court of appeals rule is to impose a judicially-created mandate contained neither in the force statute, the gross sexual imposition statute, the rape statute, nor any prior decision of this Court that directly conflicts with this Court's decision in *Schaim*. See R.C. 2901.01(A)(1), R.C. 2907.05(A)(1), R.C. 2907.02(A)(2).

D. The arguments of Appellee and the Public Defender in support of the decision of the court of appeals are flawed.

The truncated *Eskridge* rule the court of appeals has advanced lends itself to being conveniently grafted onto an element of the gross sexual imposition statute to which it does not apply, as proven by the arguments of Appellee and the Public Defender. While the actual *Eskridge* rule and the decisions cited by the parties in the case at bar examine whether the will of the victim was overcome by fear or duress under the "force or threat of force" element of the gross sexual imposition and rape statutes, Appellee and the Public Defender re-characterize the truncated *Eskridge* rule as a synonymous "short

form” of the “purposely compel the victim to submit” elements of those statutes. Appellee’s Br. 5, Public Defender’s Br. 7; *see also* R.C. 2907.02(A)(2); R.C. 2907.05(A)(1); *see also, e.g., Eskridge, supra*, at syllabus paragraph one, 58-59; *Henry, supra*, at ¶¶26, 31-32. The arguments of Appellee and the Public Defender prove how pliable and susceptible to misinterpretation the truncated *Eskridge* rule advanced by the court of appeals is. Appellee and the Public Defender interpret the truncated *Eskridge* rule as applying to a different element of the offense than the Court in *Eskridge* understood its actual rule to apply. In addition, the Court should look skeptically at these arguments as the Public Defender, in particular, cites no authority for its argument that the truncated rule applies to the submission element of the gross sexual imposition statute.

E. Conclusion.

The Court should reverse the decision of the court of appeals because it is contrary to this Court’s precedent in *Eskridge* and *Schaim*. The decision of the court of appeals imposes a judicially-created mandate in all forcible gross sexual imposition cases according to which an offender may not be found to have used force unless the will of the victim was overcome, regardless of how horribly violent the offender’s actions. Such a rule has the unfortunate consequence of making the guilt of an offender completely dependent on the reaction of a victim to the offender’s actions in all cases, rather than on the offender’s actions themselves.

**III. THE DEGREE OF FORCE REQUIRED IN EACH GROSS SEXUAL IMPOSITION CASE DEPENDS ON THE FACTS OF EACH CASE.**

Despite evidence that Appellee repeatedly touched the victim’s pubic area after she continuously expressed—verbally and physically—that she did not wish to engage in sexual contact, Appellee and the Public Defender argue the court of appeals decided

correctly that there was insufficient evidence of force in the case at bar. *See* Tr. 181-88; Public Defender's Br. 1-2; Appellee's Br. 5. Appellee argues the State failed to prove he used "even minimal" physical force to compel the victim to submit and failed to prove the will of the victim was overcome by fear or duress. Appellee's Br. 11-12. The Public Defender agrees with Appellee, and argues the State failed to prove the victim "[felt] compelled to submit to the sexual contact." Public Defender's Br. 6. The General Assembly and this Court, however, have previously spoken as to what constitutes force, and the force Appellee used falls well within the established understanding of force. Had the court of appeals decided the case at bar in a way that comports with the established understanding of force, it would not have reached the conclusion it did.

Appellee and the Public Defender are correct when they argue there was no evidence that Appellee either threatened the victim or caused her to "feel compelled" to submit to sexual contact. *See* Appellee's Br. 11; Public Defender's Br. 6. The evidence, however, did not require the State to prove either *because Appellee actually used physical force* to compel the victim to submit to sexual contact. Thus, pursuant to *Schaim, supra*, at syllabus paragraph one, the beliefs of the victim are irrelevant, as are Appellee's arguments that he did not threaten the victim and the Public Defender's arguments that the victim did not "feel compelled" to submit. Further, pursuant to the statutory definition of force, which defines force as "*any* violence, compulsion, or constraint physically exerted by any means," though the physical force Appellee exerted was not horribly violent, it was force nonetheless. *See* R.C. 2901.01(A)(1) (emphasis added).

The case at bar resembles several previous cases in which courts, including this Court, have held that when an offender is in a superior position compared to a victim, the

same degree of force as would otherwise be required is not required. *See, e.g., State v. Eskridge, supra*, at syllabus paragraph one, 58-59 (involving parent raping child); *State v. Dye* (1998), 82 Ohio St.3d 323, syllabus paragraph one (involving authority figure raping child); *State v. Clark* (8th Dist.), 2008-Ohio-3358 at ¶¶17-19 (involving sleeping victim); *State v. Graves* (8th Dist.), 2007-Ohio-5430 at ¶¶15-18 (involving sleeping victim); *State v. Martin* (9th Dist. 1946), 77 Ohio App. 553, 554 (involving offender purporting to be authority figure). The particular facts of these cases are symptoms of an underlying concern the courts in those cases addressed: an offender in a superior position compared to a victim exploiting the particular vulnerability of the victim in order to facilitate forcible sexual activity.

In the same way, Appellee in the case at bar exploited the victim at a time when she was particularly vulnerable. Appellee entered into the victim's bedroom and her bed when she was *asleep*. (Tr. 151, 176-78, 181.) Appellee then engaged in sexual contact with the victim while she was suddenly and unexpectedly forced to comprehend what was occurring as Appellee engaged in sexual contact with her after he awakened her. (Tr. 181-87.) The victim'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.) Appellee eliminated any equality based on age, mental ability, size, or strength through the manner in which he assaulted the victim.

Appellee relies on cases that are clearly distinguishable from the case at bar in support of his position that the court of appeals decided correctly that there was insufficient evidence that he used force to compel the victim to submit to sexual contact.

Appellee cites *State v. DeLuca* (8th Dist.), 2007-Ohio-3905 at ¶¶1, 3-6, 10-19, a case in which the court vacated the defendant's gross sexual imposition conviction where the evidence established the alleged victim and the defendant knew each other well, were interacting for an extended period of time earlier on the day of the alleged sexual assault, and were both awake and standing up when the defendant touched the alleged victim underneath her clothing. The facts of *DeLuca* are completely different from the facts of the case at bar, in which the victim and Appellee did not know each other well (in fact, the victim did not even know Appellee's name) and had never been in a relationship or engaged in any sexual activity; in which the victim did not know Appellee was in the house in which he sexually assaulted her, had no interaction with him prior to the sexual assault, was asleep when he began to sexually assault her, and was forced to comprehend both what was happening and who was touching her without her consent during the sexual assault. (Tr. 175, 181-88, 190, 198.)

Appellee's reliance of *Dye, supra*, is equally misplaced. Appellee relies on *Dye* for the proposition that "in order to prove the element of force necessary . . . the statute requires that some amount of force must be proven beyond that force inherent in the crime itself." *Id.* at 327. What Appellee leaves out through his ellipses is the key part of the Court's sentence and what makes *Dye* distinguishable from the case at bar. The full quotation is:

However, in order to prove the element of force necessary *to sentence the defendant to life imprisonment*, the statute requires that some amount of force must be proven beyond that force inherent in the crime itself.

*Id.* (Emphasis added.) In *Dye*, the defendant had been convicted of raping a nine-year-old boy. *Id.* at 325-26. Under the rape statute, the defendant was guilty of rape based

solely on the age of the victim. *Id.* at 326. However, in order to enhance the penalty to life imprisonment, the State had to prove the *additional* element that the defendant “purposely compel[led] the victim to submit by force or threat of force.” *Id.* Therefore, it makes sense that, as the Court held, “in order to prove the element of force necessary to sentence the defendant to life imprisonment, the statute requires that some amount of force must be proven beyond that force inherent in the crime itself.” *Id.* at 327.

The *Dye* rationale has no application to the case at bar because there was no additional force element the State was required to prove. Rather, the force element was part of the elements of the crime itself. Therefore, it was not necessary to prove Appellee exerted an additional amount of force beyond that inherent in the force he exerted in committing the crime itself.

This Court has stated that “[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.” *State v. Labus* (1921), 102 Ohio St. 26, 38-39 (emphasis added). Further, as previously stated, the statutory definition of force allows for varying degrees of force depending on the facts of each case. *See* R.C. 2901.01(A)(1). The court of appeals should have recognized these legal principles and, if it had, would not have reached the conclusion it did. The Court should now explicitly recognize that the same degree of force is not required in all gross sexual imposition cases in which force is an element, especially when an offender exploits a position of advantage over a victim to facilitate sexual contact.

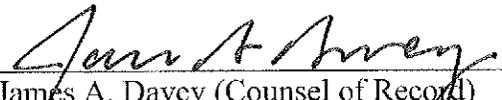
CONCLUSION

The decision of the court of appeals is contrary to established precedent and fails to recognize that when an offender uses physical force to compel a victim to submit to sexual contact, the beliefs of the victim, including any fear or duress, are irrelevant. Further, the decision of the court of appeals fails to recognize that the same degree of force is not required in all gross sexual imposition cases, but that the degree of force depends on the facts of each case. Therefore, the State respectfully requests that the Court reverse the decision of the court of appeals and reinstate the jury verdict of guilty.

Respectfully Submitted,

Derek W. DeVine  
Prosecuting Attorney

BY:

  
James A. Davcy (Counsel of Record)  
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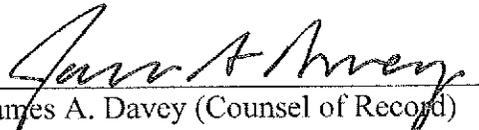
COUNSEL FOR APPELLANT,  
STATE OF OHIO

**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 22nd day of April, 2010.

Respectfully Submitted,

Derek W. DeVine  
Prosecuting Attorney

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

COUNSEL FOR APPELLANT,  
STATE OF OHIO