ORIGINAL

NO. 2009-1619

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR SUMMIT COUNTY, OHIO
NO. 21906

STATE OF OHIO,
Plaintiff-Appellant

-vs-

DENNY ROSS,
Defendant-Appellee

MERIT BRIEF OF APPELLANT

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TABLE OF CONTENTS

STATEMENT OF THE CASE AND RELEVANT FACTS 1

1. First trial and subsequent double jeopardy litigation. 1

2. Visiting judge denies three-year old motion for acquittal, then reconsiders three months later. 3

3. Visiting judge hears argument about new evidence never admitted in first trial. 4

4. State appeals Judge Cirigliano's decision to Ninth District. 7

5. Ninth District upholds Judge Cirigliano's reconsideration of acquittal, holding that Crim. R. 29(C) rulings are "interlocutory" and "subject to reconsideration at any time." 7

LAW AND ARGUMENT 8

Proposition of Law: The Court of Common Pleas lacks jurisdiction to grant an untimely Crim. R. 29(C) motion for acquittal because Crim. R. 45(B) bars "any action" not expressly provided for by Crim. R. 29(C), and any order purporting to grant acquittal outside of the confines of Crim. R. 29(C) is void and unenforcable. 8

1. The State may appeal an invalid and void judgment of acquittal because the trial court lacked authority to grant a Crim. R. 29(C) motion outside of the time limits of the rule. 9

2. The trial court had no authority to grant a post-verdict motion for acquittal filed outside of the 14-day time limit. 9

3. The plain language of Crim. R. 29(C) and Crim. R. 45(B) demonstrate that the denial of a motion for post-verdict acquittal is not interlocutory, and cannot be reconsidered "at any time." 11

4. A re-captioned "supplemental memoranda" does relate back to a timely filed motion for post-verdict acquittal. 15

5. Sidestepping the fourteen-day time limit for post-verdict acquittal severely undermines for need for finality in criminal cases. 16

CONCLUSION 20

CERTIFICATE OF SERVICE 21

Appendix

Notice of Appeal to the Supreme Court of Ohio A1

July 22, 2009 Judgment of the Ninth District Court of Appeals, Case No. 21906... A2

December 22, 2003 Judgment of the Summit County Court of Common Pleas, Case No. 1999-05-1098A A3

TABLE OF AUTHORITIES

Cases

Baldwin v. Traveling Men's Assn. (1931), 283 U.S. 522, 525, 51 S.Ct. 517.....16
Carlisle v. United States, (1996), 517 U.S. 416, 116 S.Ct. 1460... 9, 11, 12, 13, 14, 15, 16, 18, 19
Hart Steel Co. v. RR. Supply Co. (1917), 244 U.S. 294, 299, 37 S.Ct. 506.....16
In re Disqualification of Cirigliano (2004), 105 Ohio St.3d 1223, 826 N.E.2d 287, at ¶¶ 7-12 2
In re Wolfe (Feb. 16, 2001), Greene App. No.2000-CA-60, 2001 WL 128884.....17
Pitts v. Ohio Dep't of Transp., 67 Ohio St.2d 378, 379, 423 N.E.2d 1105 (1981).12, 14
Ross v. Petro (C.A. 6, 2008), 515 F.3d 653.....2
Ross v. Petro (N.D.Ohio, 2005), 382 F.Supp.2d 967.....2
Ross v. Rogers (2009), 129 S.Ct. 906, 173 L.Ed.2d 109.....3
State ex rel. Yates v. Court of Appeals for Montgomery County (1987), 32 Ohio St.3d 30, 512 N.E.2d 343.....9
State v. Abboud, Cuyahoga App. Nos. 80318, 80325, 2002-Ohio-4437.....11, 12
State v. DeHass (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212 17
State v. Drayer, 159 Ohio App.3d 189, 2004-Ohio-6120.....17
State v. Ross, 184 Ohio App.3d 174, 920 N.E.2d 162, 2009-Ohio-3561 7
State v. Ross, 98 Ohio St.3d 1567, 2003-Ohio-2242.....2
State v. Ross, Summit App. No. 20890, 2002-Ohio-7317..... 1, 2, 3,
State v. Ross, Summit App. No. 21906, 2009-Ohio-3561, at ¶ 27. ... .2, 4, 5, 7, 8, 10, 12, 14, 15
State v. Szefcyk (1996), 77 Ohio St.3d 93, 95 671 N.E.2d 233.....16
State v. Tucker, Cuyahoga App. No. 90799, 2008-Ohio-5746.....18
States v. Hasting, 461 U.S. 499, 505, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983)...10
United States v. Custodio (C.A. 10, 1998), 141 F.3d 965, 966.....15
United States v. Henning (C.A. 6, 1999), 198 F.3d 247 15
United States v. Smith, 331 U.S. 469, 67 S.Ct. 1330, 91 L.Ed. 1610 (1947).....10, 18
Waifersong Ltd., Inc. v. Classic Music Vending (C.A.6, 1992), 976 F.2d 290, 292....16

Statutes

R.C. §2945.67(A).....8, 10

Rules

Civ. R. 54(B) 13
Crim. R. 29(C)..... 1, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 18
Crim. R. 45(B).....7, 10, 11, 12, 13, 14, 18
Federal Crim. R. 29(c).....10

Other Authorities

28 U.S.C. § 2255 17

STATEMENT OF THE CASE AND RELEVANT FACTS

1. First trial and subsequent double jeopardy litigation.

Akron Police found 18 year-old Hannah Hill's partially nude, decomposing body in the trunk of her car on May 26, 1999. Following an investigation, the Summit County Grand Jury indicted defendant Denny Ross with murder, aggravated murder with capital specifications, rape, kidnapping, tampering with evidence, and abuse of a corpse in connection with the incident. Trial commenced on September 28, 2000 before Summit County Court of Common Pleas Judge Jane Bond.[1] At the close of the State's case, Judge Bond granted Ross' motion for judgment of acquittal on the kidnapping charge. After Ross rested without presenting evidence, he made a second motion for judgment of acquittal as to the remaining counts. Judge Bond denied Ross' second motion for acquittal and the jury began deliberating on October 27, 2000.

During deliberations on Saturday, September 28, 2000, Judge Bond received a note from the foreperson. Although not directly relevant for purposes of this appeal, the foreperson's note resulted in Judge Bond declaring a *sua sponte* mistrial later that day on the remaining counts. On November 9, 2000, Ross filed a "Motion to Bar Retrial of this Case on Double Jeopardy Grounds." That same day, Ross filed a "Renewed Motion for Judgment of Acquittal" pursuant to Crim. R. 29(C).

Ross also sought and obtained Judge Bond's removal due to her status as a witness in the double jeopardy litigation. *In re Disqualification of Bond,* 94 Ohio

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[1]For purposes of clarity, the State refers to the multiple judges serving as the "trial court" by their individual names.

St.3d 1221, 2001-Ohio-4102. Retired Stark County Court of Common Pleas Judge Richard Reinbold briefly presided over the case before recusing himself, and Retired Lorain County Court of Common Pleas Joseph Cirigliano, was then assigned as a visiting judge. *In re Disqualification of Cirigliano* (2004), 105 Ohio St.3d 1223, 826 N.E.2d 287, at ¶¶ 7-12.

In the interim, the newly-elected Summit County Prosecuting Attorney, Sherri Bevan Walsh, recused herself and her entire office due to a conflict of interest. On the motion of Prosecuting Attorney Walsh, all of the judges of the Summit County Court of Common Pleas assigned Cuyahoga County Prosecuting Attorney William D. Mason as the special prosecutor on March 16, 2001. *Id.*, at ¶ 11.

On February 15, 2002, Judge Cirigliano granted defendant's Motion to Bar Retrial on Double Jeopardy Grounds. The State appealed and the Ninth District Court of Appeals reversed Judge Cirigliano's decision to bar retrial. *State v. Ross,* Summit App. No. 20890, 2002-Ohio-7317, discretionary jurisdiction declined, *State v. Ross,* 98 Ohio St.3d 1567, 2003-Ohio-2242. Ross then sought federal habeas review in the United States District Court for the Northern District of Ohio. The District Court granted Ross' writ of habeas corpus on double jeopardy grounds. *Ross v. Petro* (N.D.Ohio, 2005), 382 F.Supp.2d 967. On appeal, however, the Sixth Circuit U.S. Court of Appeals reversed the district court and held that double jeopardy did not bar retrial. *Ross v. Petro* (C.A. 6, 2008), 515 F.3d 653, rehearing

and rehearing en banc denied July 5, 2008, cert. declined *Ross v. Rogers* (2009), 129 S.Ct. 906, 173 L.Ed.2d 109.

2. Visiting judge denies three year-old motion for acquittal, then reconsiders three months later.

On July 29, 2003 Ross filed a "Request to Have Remaining Motions Ruled Upon by the Court" in which he asked the court to rule upon the Motion for Judgment of Acquittal and a Motion to Perfect the Jury Verdicts filed in 2001. Judge Cirigliano conducted an unrecorded hearing in chambers Cleveland Ohio on July 30, 2003. On September 10, 2003, Judge Cirigliano issued a journal entry (1) denying Ross' Motion for Judgment of Acquittal, (2) denying Ross' Motion to Perfect Verdicts, (3) set a final pretrial on October 15, 2003, and (4) set a trial date on November 17, 2003.

Despite Judge Cirigliano's September 10, 2003 judgment denying Ross' motion for acquittal, Ross then filed a "Supplemental Memorandum in Support of His Motion to Perfect the Three Unanimous Verdicts of Acquittal" two days later, on September 12, 2003. On October 3, 2003, Judge Cirigliano then issued a journal entry addressing "the Motion of Defendant filed, September 12, 2003, for this Court to reconsider its Order filed September 10, 2003." In his October 3, 2003 journal entry, Judge Cirigliano gave the State until October 20, 2003 to respond, and "permit[ted] oral argument and a hearing on the merits of Defendant's original Motion to Perfect Verdicts." (October 3, 2003 journal entry). On October 22, 2003, the State filed a Brief in Opposition to Ross' supplemental acquittal memorandum.

On November 6, 2003, Ross filed yet another brief requesting judgment of acquittal (captioned "Defendant Ross' Supplemental Memorandum in Support of Renewed Motion for Judgment of Acquittal Pursuant to Ohio Crim. Rule 29"). On November 26, 2003, Ross again filed another brief requesting judgment of acquittal (captioned "Second Supplemental Memorandum in Support of Renewed Motion for Judgment of Acquittal Pursuant to Ohio Crim. R. 29"). In his November 6 and November 26, 2003 acquittal briefs, Ross began including argument about evidence the State had recently turned over to Ross in preparation for retrial, but which had not been presented during the first trial. Specifically, the State had disclosed potentially exculpatory new evidence that raised a question over whether bite mark evidence introduced during Ross' first trial had been accurate.

3. Visiting judge hears argument about new evidence never admitted in first trial.

Judge Cirigliano held a hearing on November 12, 2003 where it heard Ross' arguments in favor of his renewed requests for acquittal. During the hearing, the prosecutor objected to Judge Cirigliano revisiting the acquittal decision after his September 10, 2003 decision to deny Ross' motion for acquittal under Crim. R. 29(C). "On September 10th, 2003, [the court] overruled both of the defendant's motions. Judge, the basis of my objection is now we have a full month after that, well past the 14 – initial 14 day period, another motion that seems to rely heavily on the previous law and previous facts they offered to you initially on November 9th of 2000, but also brings forth new allegations and new evidence that the judge that was never present at any trial whatsoever should rule." (November 12, 2003

Hearing Transcript, "HTR," at 39). The prosecutor continued: "[the Court] denied their motions. The chance to rehash this on a later subsequent date, Judge, is without any basis in the rule and well beyond the scope of anything that has been offered before thee Court today." (HTR. 40).

During the November 12, 2003 hearing, defense counsel intermingled the new facts about the bite-mark evidence which had the special prosecutor had only uncovered *after the first trial.* "[T]he bite mark was not a bite mark. One of the big arguments made by the prosecution in the prior trial was that Mr. Ross had bitten the [victim], suggesting an attack." (HTR. 36). The prosecutor objected strenuously to defendant relying new evidence which had not been before the original factfinder. "For [defense counsel] to sit here and argue about subsequent dental tests, the way the State proceeds on the case, how we'll handle it is wrong. This is not any evidence that you can consider in this case, Judge." (HTR. 40).

On December 22, 2003, Judge Cirigliano issued a journal entry granting defendant acquittal under Crim. R. 29(C). In that order, Judge Cirigliano explained that "[t]his matter comes before the Court on Defendant Denny Ross' Motion to Reconsider the Court's Previous Ruling." (Dec. 22, 2003 order at 1). Judge Cirigliano's December 22, 2003 judgment then granted Ross judgment of acquittal as to the Rape count and Aggravated Murder Specifications of the Indictment. Although the bulk of Judge Cirigliano's December 22, 2003 judgment analyzed evidence that was contained in transcripts of Ross' first trial, Judge Cirigliano also included a discussion of the new bite mark evidence in his ruling. "As part of his

discussion of that evidence, he included a paragraph about the testimony regarding the bite mark. He then added a footnote in which he mentioned that, since the time of trial, the State had hired additional experts who concluded that the mark on Ms. Hill's arm was not a bite mark." *State v. Ross,* Summit App. No. 21906, 2009-Ohio-3561, at ¶ 27. Rejecting the State's claim that Judge Cirigliano had engaged in pretrial summary judgment of a criminal case by incorporating new evidence, the Ninth District explained that. "As is so often true of footnotes, it was an aside. Such asides should probably not be included in opinions or briefs * * *." *Id.,* at ¶ 27

A careful review of Judge Cirigliano's order, however, discloses that he treated the new evidence as more than an "aside," but as a material probative fact that negated substantive evidence from the first trial:

> During the autopsy, Dr. Platt requested Dr. Marshall, a forensic odontologist, review markings on the victims'[sic] body to determine if a bite mark was present. Upon review under an alternative light source, Dr. Marshall determined there was a pattern of marks consistent with a human bite mark. Dr. Marshall was then given access to the Defendant and [the victim's boyfriend] Brad O'Born[37] so that impressions of their teeth could be made and he could compare them with the bite mark on the victims elbow area.[38] Dr. Marshall ultimately eliminate Brad O'Born as the potential "biter", but was unable to eliminate the defendant.[39]
> * * *
> [37]At that point in time, Mr. O'Born, the decedent's boyfriend, was still a suspect.
> [38]The mark is on the underside of the elbow, forward of the joint.
> [39]Trial Testimony, Page 900; 907. Dr. Marshall could not identify the Defendant as the biter, but could not exclude him either. **Since the time of trial, the State has hired additional forensic odontologists to review the evidence. The State's experts have concluded that the alleged "bite mark" is not a bite mark, and that the Defendatn did not bite the victim. Therefore, the State has since conceded that Dr. Marshall's testimony, cited above, is inaccurate.**

(December 22, 2003 Journal Entry at pp. 11-12, emphasis added).

4. **State appeals Judge Cirigliano's decision to Ninth District.**

The State filed its notice of appeal on January 20, 2004. Although the facts culminating in this appeal took place in 2003, this case was not ripe for review until the Sixth Circuit U.S. Court of Appeals overturned the District Court's decision to grant Ross's writ of habeas corpus on double jeopardy grounds. The case had been stayed by the federal court since 2004. The Ninth District Court of Appeals heard oral argument on April 28, 2009.

5. **Ninth District upholds Judge Cirigliano's reconsideration of acquittal, holding that Crim. R. 29(C) rulings are "interlocutory" and "subject to reconsideration at any time."**

On July 22, 2009, the Ninth District Court of Appeals journalized its decision affirming Judge Cirigliano's December 22, 2003 decision granting Ross' renewed motions for acquittal on the rape count and capital specification. The Ninth District based its affirmance on the proposition that "the visiting judge's initial denial [of Crim. R. 29(C) acquittal] was an interlocutory order, and he had authority to reconsider and grant that motion at any time before final judgment." *State v. Ross,* 184 Ohio App.3d 174, 920 N.E.2d 162, 2009-Ohio-3561, at ¶ 1. The Ninth District also concluded that the State's argument that Judge Cirigliano had engaged in improper pretrial summary judgment of a criminal case was "frivolous." *Id.*, at ¶ 25.

On September 10, 2009, the State filed before this Honorable Court its notice of appeal from the judgment of Summit County Court of Appeals judgment, as well

as a motion for leave to file delayed appeal. This Honorable Court granted the State's motion for leave to file a delayed appeal on November 4, 2009, and on February 10, 2010, accepted the State's appeal.

LAW AND ARGUMENT

PROPOSITION OF LAW: THE COURT OF COMMON PLEAS LACKS JURISDICTION TO GRANT AN UNTIMELY CRIM. R. 29(C) MOTION FOR ACQUITTAL BECAUSE CRIM. R. 45(B) BARS "ANY ACTION" NOT EXPRESSLY PROVIDED FOR BY CRIM. R. 29(C), AND ANY ORDER PURPORTING TO GRANT ACQUITTAL OUTSIDE OF THE CONFINES OF CRIM. R. 29(C) IS VOID AND UNENFORCABLE.

Ohio's Criminal Rule 29(C), like its federal counterpart, imposes a strict time limit on a criminal defendant who files a post-verdict motion for acquittal. Ohio Criminal Rule 45(B) expressly forbids the court from extending the time for taking *any action* not expressly provided for by Rule 29. These rules couldn't be clearer. When the Ninth District held that a 29(C) acquittal is "interlocutory" in nature and subject to reconsideration at "any time before final judgment" it abrogated Criminal Rule 45(B) . See *Ross, supra,* at ¶ 1. The *Ross'* Court's open-ended holding removes any functional limit on a trial court's authority to render a post-verdict acquittal, in direct contravention of 29(C)'s express time limit. As more fully explained below, the State submits that the Ninth District Court of Appeals misapplied Ohio Law, creating a harmful legal precedent that threatens finality in thousands of criminal cases.

1. **The State may appeal an invalid and void judgment of acquittal because the trial court lacked authority to grant a Crim. R. 29(C) motion outside of the time limits of the rule.**

Ordinarily, the State of Ohio may not appeal from a trial court's decision to acquit a criminal defendant pursuant to Crim. R. 29. In the typical case, R.C. §2945.67(A) bars the State of Ohio from seeking leave to appeal a final verdict. Generally, a valid judgment of acquittal constitutes a final verdict. *State ex rel. Yates v. Court of Appeals for Montgomery County* (1987), 32 Ohio St.3d 30, 512 N.E.2d 343. As explained below, the State's appeal does not run afoul of R.C. 2945.67(A) because the trial court's judgment, rendered without authority, was not a verdict at all.

2. **The trial court had no authority to grant a post-verdict motion for acquittal filed outside of the 14-day time limit.**

The United States Supreme Court has clearly held that a trial court has no authority to grant a post-verdict Crim. R. 29(c) motion for acquittal made outside of the time limits of the rule. *Carlisle v. United States,* (1996), 517 U.S. 416, 116 S.Ct. 1460. "A rule permitting a party to submit and prevail on an untimely motion for judgment of acquittal is 'inconsistent' (or not 'consistent') with Rule 29's 7-day filing limit; and the question of when a motion for judgment of acquittal may be granted does not present a case 'not provided for' by Rule 29; and Rule 29 is the 'controlling law' governing this question." *Id.,* at 517 U.S. 425, 116 S.Ct. 1460.

In *Carlisle,* the high court explicitly held that the trial court lacked authority to grant Crim. R. 29(c) acquittal outside of the time limits of the rule, regardless of

whether the defendant made the untimely motion or the trial court moved for acquittal *sua sponte*:

> Petitioner's proposed reading would create an odd system in which defense counsel could move for judgment of acquittal for only seven days after the jury's discharge, but the court's power to enter such a judgment would linger. In *United States v. Smith,* 331 U.S. 469, 67 S.Ct. 1330, 91 L.Ed. 1610 (1947), we declined to read former Federal Rule of Criminal Procedure 33, which placed a 5-day limit on the making of a motion for new trial, as "permit[ting] the judge to order retrial without request and at any time," 331 U.S., at 473, 67 S.Ct., at 1332. "[I]t would be a strange rule," we said, "which deprived a judge of power to do what was asked when request was made by the person most concerned, and yet allowed him to act without petition," and such an arrangement "would almost certainly subject trial judges to private appeals or application by counsel or friends of one convicted," id., at 474, 475, 67 S.Ct., at 1333, 1333. The same is true here. In addition, petitioner's reading makes a farce of subdivision (b) of Rule 29, which provides that a court may reserve decision on the motion for judgment of acquittal and decide it after submission to the jury. There would be no need for this procedure if, even without reserving, the court had continuing power to grant judgment of acquittal on its own. In sum, even without the captions (and a fortiori with them) it is clear that subdivisions (a) and (b) of Rule 29 pertain to motions made before submission, and subdivisions (c) and (d) to motions made after discharge.
> * * *
> As alternative authority for the District Court's action, petitioner invokes courts' "inherent supervisory power." Brief for Petitioner 9. We have recognized that federal courts "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting,* 461 U.S. 499, 505, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983). Whatever the scope of this "inherent power," however, it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure.

Id., at 1464, 1466.

In its decision in this case, the court below explained that Crim. R. 29(c) and its federal counterpart were materially identical, apart from the Ohio's fourteen-day time limit (the federal rule has a seven-day window). *Ross, supra,* at ¶ 7. Given

that the Ohio and Federal Crim. R. 29(c) are materially indistinguishable, it follows that *Carlisle* precludes the trial court's authority to grant a Crim. R. 29(C) motion for acquittal outside of the confines of the rule. Because the trial court in this case granted acquittal under Crim. R. 29(C) approximately three years after the mistrial, and over two months after it had already denied acquittal under Crim. R. 29(C), *Carlisle* holds that the trial court's acted without authority and its judgment should have no legal effect.

3. The plain language of Crim. R. 29(C) and Crim. R. 45(B) demonstrate that the denial of a motion for post-verdict acquittal is not interlocutory, and cannot be reconsidered "at any time."

The Court of Appeals below, however, erroneously distinguished *Carlisle* on the ground that orders entered under Ohio Crim. R. 29(C) are "interlocutory" in nature, and therefore subject to reconsideration. Relying on a 2002 decision from Cuyahoga County, *State v. Abboud,* Cuyahoga App. Nos. 80318, 80325, 2002-Ohio-4437, the Court below explained its reasoning:

> The situation in *Abboud* was, in all material respects, identical to that in this case. A jury found the defendant guilty of coercion and kidnapping with a gun specification. Within the time following the return of a verdict allowed by Rule 29(C) of the Ohio Rules of Criminal Procedure, the defendant moved for acquittal. The trial court initially denied his motion, but later reconsidered and acquitted him on the gun specification. The State appealed and argued, just as it has in this case, that the trial court's order reconsidering its earlier denial of the defendant's motion for acquittal was "a nullity." The appellate court determined that, because the trial court's initial denial was an interlocutory order, it was free to reconsider and change its mind: "While motions for reconsideration are not expressly or impliedly allowed in the trial court after a final judgment, interlocutory orders are subject to motions for reconsideration.... The denial of a motion for judgment of acquittal prior to final sentencing is an interlocutory order. Accordingly, the trial court was permitted to 'revisit' the order

> that denied [the defendant's] motion for acquittal." *Abboud,* 2002-Ohio-4437, at ¶ 8 (citing *Pitts v. Ohio Dep't of Transp.,* 67 Ohio St.2d 378, 379, 423 N.E.2d 1105 (1981)).

Ross, supra, at ¶ 14. The *Abboud* decision, however, does not even mention *Carlisle,* or analyze whether the fourteen-day time limit in Crim. R. 29(C) is advisory or mandatory. Nevertheless, the court below concluded that the "interlocutory" nature of a Crim. R. 29(C) verdict meant that it was subject to reconsideration outside of the fourteen-day window contained in the rule:

> {¶ 17} The Ohio Rules of Criminal Procedure neither specifically authorize nor prohibit a trial court from reconsidering interlocutory orders, regardless of whether that reconsideration is as the result of a motion or sua sponte. Rule 57(B) of the Ohio Rules of Criminal Procedure, however, authorizes trial courts to "look to the rules of civil procedure ... if no rule of criminal procedure exists." And, as noted by the Ohio Supreme Court in *Pitts v. Ohio Dep't of Trans.,* 67 Ohio St.2d 378, 379 n. 1, 423 N.E.2d 1105 (1981), Rule 54(B) of the Ohio Rules of Civil Procedure "allows for a reconsideration or rehearing of interlocutory orders." Accordingly, unless orders denying motions for acquittal are different from other interlocutory orders, a trial court has authority to reconsider them.
>
> {¶ 18} As mentioned above, the State pointed out in its "Notice of Supplemental Authority" that motions for acquittal following a guilty verdict or mistrial must be filed within 14 days after the jury is discharged. That is true regardless of whether the defendant earlier moved for acquittal at the close of the State's case or at the close of all the evidence. An interlocutory order denying a motion for acquittal at the close of the State's case or at the close of all the evidence, therefore, is different from other interlocutory orders because the trial court can't reconsider them at any time until a final judgment is entered unless the defendant renews them within 14 days after the jury is discharged. But, again, the question before this Court is not whether a trial court can reconsider a motion for acquittal that it denied during trial. Rather, the question before us is whether it can reconsider its initial denial of a timely post-mistrial motion for acquittal.

Ross, supra, at ¶¶ 17-18.

The State submits that the Criminal Rules themselves directly contradict the Court of Appeals' erroneous conclusion that that Rule 29(C) orders are interlocutory and subject to reconsideration at any time. The Court below omitted Crim. R. 45(B) from its opinion, which expressly bars extending the time for taking *any action* under Crim. R. 29(C). Crim.R. 45(B) states as follows:

> [W]hen an act is required or allowed to be performed at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefore is made before expiration of that period originally prescribed or as extended by a previous order; or (2) upon motion permit the act to be done after expiration of the specified period, if the failure to act on time was the result of excusable neglect or would result in injustice to the defendant. ***The court may not extend the time for taking any action under Rule 23, Rule 29, Rule 33, and Rule 34 except to the extent and under the conditions stated in them.***

(Emphasis added). "These rules are plain and unambiguous." *Carlisle, supra,* at 421. Crim. R. 45(B) expressly prohibits trial courts from acting far well outside of Crim. R. 29(C)'s fourteen-day window. The prohibition against taking "*any action*" (unless specifically stated in the rule) simply cannot be read to allow a Rule 29(C) denial to become "interlocutory" and subject to reconsideration. As the *Carlisle* Court explained, "[t]here is simply no room in the text of Rules 29 and 45(b) for the granting of an untimely postverdict motion for judgment of acquittal, regardless of whether the motion is accompanied by a claim of legal innocence, is filed before sentencing, or was filed late because of attorney error." *Id.*

In *Carlisle* itself, Justice Ginsberg used her concurring opinion to explain the identical interplay between Fed. R. Crim. Pro. 45(b) and 29(c). "Carlisle's counsel

was not misled by any trial court statement or action; rather, he neglected to follow plain instructions. Rule 29(c) clearly instructs that a motion for a judgment of acquittal be filed 'within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period.'" *Carlisle, supra,* at 436 (Ginsburg, J., concurring). "Just as clearly, Rule 45(b) excludes motions for enlargement once seven days have run." *Id.*

Nor does the rules of civil procedure allow give the trial court authority that it lacks under the criminal rules. The Ninth District explained that "Crim.R. 57(B) * * * authorizes trial courts to "look to the rules of civil procedure * * * *if no rule of criminal procedure exist."* *Ross, supra,* at ¶ 17. The Ninth District, however, bypassed Crim. R. 45(B) to reach the conclusion that "Civ. R. 54(B) 'allows for a reconsideration or rehearing of interlocutory orders.'" *Id.*, citing *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d at 379, 423 N.E.2d 1105, fn. 1. The civil rule look-over provision in Crim. R. 57(B) is wholly inapplicable where the criminal rules expressly forbid extending the time to take any action under Crim. R. 29 apart from what is specified in the rule itself. Civil Rule 45(B) does not say "except under the conditions stated in the civil rules." By their barest terms, Ohio's Rules of Criminal Procedure forbid the type of open-ended reconsideration of acquittal *at any time* sanctioned by the Ninth District in this case.

Applying Criminal Rule 45(B) to these facts (and assuming it was proper for Judge Cirigliano to decide an acquittal motion three years after the mistrial), Judge Cirigliano lost jurisdiction to take any action under Crim. R. 29(C) after he denied

Ross' motion for judgment of acquittal on September 10, 2003. During the November 12, 2003 Hearing, the prosecutor stated that "the reason I object to this is very simple. Criminal Rule 29(C) provides that all motions before the Court will be filed with regards to 29(C) motion within 14 days o the filing of this case." (HTR. p. 38). There is absolutely no reasonable interpretation of Crim. R. 45(B) that would make the denial of acquittal as "interlocutory" and subject to reconsideration outside of the rule, particularly three months after denying the motion. Just as the one-day breach in *Carlisle* was "one day later than justice and equity demand," the three months between Judge Cirigliano's decision to deny acquittal and his subsequent reconsideration plainly violated the rule.

4. **A re-captioned "supplemental memoranda" does not relate back to a timely filed motion for post-verdict acquittal.**

Ross' decision to caption his late 2003 pleadings seeking acquittal as "renewed memoranda" or "supplemental" does not evade the strict time limits imposed by Crim. R 29(C) against untimely motions. "Untimely 'renewed' or 'supplemental' motions do not relate back to timely filed motions." *United States v. Henning* (C.A. 6, 1999), 198 F.3d 247, citing *United States v. Custodio* (C.A. 10, 1998), 141 F.3d 965, 966 (which held that the district court had no authority to consider an untimely "supplement" to a Fed.R.Crim.P. 33 motion that raised new issues).

Accordingly, the State respectfully submits that the Court of Appeals erroneously interpreted Ohio Law when it held that Crim. R. 29(C)'s fourteen-day window for post-verdict motions for acquittal did not apply to "reconsideration" of

previously-denied motions. Ohio's criminal rules mirror the federal criminal rules, and *Carlisle* clearly holds that trial judges have no authority to take any action outside the rule. The irreconcilable discrepancy between the plain text of Crim. R. 29(C), Crim. R. 45(B), and the Court of Appeals' judgment below makes this case worthy of Supreme Court Review.

5. Sidestepping the fourteen-day time limit for post-verdict acquittal severely undermines for need for finality in criminal cases.

The State further submits that that post-trial acquittal decisions should be decided close to the time of trial, as Crim. R. 29(C) explicitly requires, by the trial judge who heard the evidence and in whose mind the issues remain fresh. In *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 95 671 N.E.2d 233, this Honorable explained the need for finality in criminal cases. "Our holding today underscores the importance of finality of judgments of conviction. 'Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." * * * "It is a rule of fundamental and substantial justice * * *." ' *Id.*, quoting *Baldwin v. Traveling Men's Assn.* (1931), 283 U.S. 522, 525, 51 S.Ct. 517, and *Hart Steel Co. v. RR. Supply Co.* (1917), 244 U.S. 294, 299, 37 S.Ct. 506. The same public policy favoring finality of judgments is recognized in the federal courts. *Waifersong Ltd., Inc. v. Classic Music Vending* (C.A.6, 1992), 976 F.2d 290, 292. If a trial court can reopen a Crim. R. 29(c) acquittal decision months or years after the time limit for such a ruling expired, criminal cases will never be final.

It is also important that the judge who granted the Crim. R. 29(C) ruling was not the same judge who presided over the trial. Just as an appellate court must be mindful that the original trier of fact was in the best position to judge the credibility of the witnesses and the appropriate weight to be given the evidence, the State submits that the original judge was in the best position to weigh the evidence, having been heard the evidence first-hand. See *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212.

An appellate court must bear in mind the trier of fact's superior, first hand perspective in judging the demeanor and credibility of the witnesses. *State v. Drayer,* 159 Ohio App.3d 189, 2004-Ohio-6120. An appellate court is ill suited to assess witness credibility, as the demeanor and attitude of witnesses do not translate well into the written record. *See In re Wolfe* (Feb. 16, 2001), Greene App. No.2000-CA-60, 2001 WL 128884. Just as an appellate court is ill-suited to evaluate a cold-trial record in the same fashion as the fact-finder who hears the evidence, it necessarily follows that a successor judge is also generally ill-suited to the same task based on the same cold record. When, as here, the review of trial evidence occurs years after the actual trial, the Judge Cirigliano simply did not have the same firsthand experience with the case as Judge Bond.

The State lodged repeated objections to Judge Cirigliano conducting a Crim. R. 29(C) review so many years after the fact, without the benefit of having witnesses the testimony firsthand. "How can this Honorable Court overrule the

decision of the first trial judge and reverse its own September 10, 2003 ruling denying the defendant's

Crim. R. 29(C) motion when it has not heard a shred of evidence that would justify such an extraordinary reversal." (December 10, 2003 State's Response to Defendant's Second Supplemental Rule 29 Motion, at p. 15).

Indeed, in *State v. Tucker,* Cuyahoga App. No. 90799, 2008-Ohio-5746, the Eighth District Court of Appeals criticized a successor trial judge whose rulings were contingent upon an evaluation of trial testimony adduced before a predecessor court. "[T]he judge reviewing D.R.'s affidavit was not the same judge who presided at trial, so she had no opportunity to evaluate D.R.'s affidavit in the context of other trial testimony." *Id.*, at ¶ 30. Although decided in the context of a post-conviction petition, *Tucker's* cautionary instruction applies with equal force to the facts of this case.

In *Carlisle* itself, the high court strongly cautioned against an interpretation of Crim. R. 29(C) that would allow successor judges to revisit a predecessor's verdicts long afterward. "[I]t would be a strange rule," we said, "which deprived a judge of power to do what was asked when request was made by the person most concerned, and yet allowed him to act without petition," and such an arrangement "would almost certainly subject trial judges to private appeals or application by counsel or friends of one convicted * * * the same is true here." *Carlisle, supra,* at 422, quoting *United States v. Smith* (1947), 331 U.S. 469, 67 S.Ct. 1330. During the November 12, 2003 hearing, the prosecutor in this case echoed these concerns when

he objected to a successor judge ruling on a motion for post-verdict acquittal that should have been heard by the original trial judge:

> All the evidence was presented to the Court. The Court had the opportunity to hear from the mouth and words of the witnesses themselves, Judge, and I think that plays a powerful part in considering the legitimacy of a 29(C).
>
> They are asking you to decide whether reasonable minds could differ as to each and ever[y] element of the offense, and Judge, you were in a position to hear the evidence with regard to that.
>
> * * *
>
> But, Judge, in the event this Court, as the State firmly believes, will hear the evidence in this case again, that is a decision you can make at a later date, if you so choose, and to rush into something today, three, three and a half years after the initial trial, attempt to replicate the evidence and review a sterile record without having heard the other stuff, Judge, would be a great disservice to the State's case and would not give the fundamental fairness the system is supposed to have.

(HTR. pp. 48-9).

Of course, as the concurring opinion in *Carlisle* notes, inmates do have other mechanisms to seek relief without resorting to improper acquittals. "It bears emphasis, finally, that the Government recognizes legal avenues still open to Carlisle to challenge the sufficiency of the evidence to warrant his conviction: on appeal (subject to "plain error" standard); and through a postconviction motion, under 28 U.S.C. § 2255, asserting ineffective assistance of counsel." *Carlisle, supra,* at 436 (Ginsburg, J., concurring).

CONCLUSION

The State submits that the Court of Appeals misapplied very clear and unambiguous language in Crim. R. 29(C) and Crim. R. 45(B) to hold that the denial of a Crim. R. 29(C) acquittal motion is "interlocutory" and subject to reconsideration at any time. The Ohio Criminal Rules simply do not support that interpretation and the decision below should not be allowed to become precedent. The State of Ohio therefore respectfully requests that this Honorable Court overrule the decision of the Ninth District Court of Appeals below.

Respectfully submitted,

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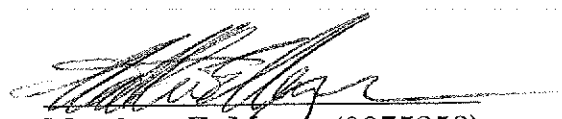
CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellant was sent by regular U.S. mail this 30TH day of April, 2010 to Lawrence J. Whitney, Esq., 137 South Main Street, Suite 201, Akron, Ohio 44308, and Jacob A. Cairns, Esq., 1720 Zollinger Road, Suite 202, Upper Arlington, Ohio 43221.



Matthew E. Meyer (0075253)
Assistant Prosecuting Attorney

ORIGINAL

NO. 09-1619

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR SUMMIT COUNTY, OHIO
NO. 21906

STATE OF OHIO,
Plaintiff-Appellant

-vs-

DENNY ROSS,
Defendant-Appellee

NOTICE OF APPEAL

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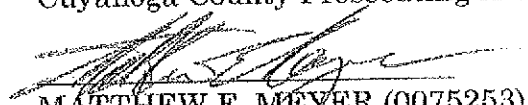
FILED
SEP 10 2009
CLERK OF COURT
SUPREME COURT OF OHIO

Now comes the State of Ohio and hereby gives Notice of Appeal to the Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Summit County, Ohio, Ninth Judicial District, journalized July 22, 2009 which affirmed the decision of the trial court.

Said cause did not originate in the Court of Appeals and involves a felony.

Respectfully submitted,
WILLIAM D. MASON
Cuyahoga County Prosecuting Attorney



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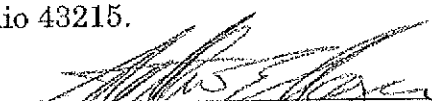
CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was sent by regular U.S. Mail this 10th day of September to Lawrence J. Whitney, Esq., 137 South Main Street, Suite 201, Akron, Ohio 44308 and the Office of the Ohio Public Defender, 250 East Broad St., 14th Floor, Columbus, Ohio 43215.



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COURT OF APPEALS
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SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

DENNY F. ROSS

Appellant

C. A. No. 21906

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 1999-05-1098A

DECISION AND JOURNAL ENTRY

Dated: July 22, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} It's now been over ten years since someone murdered Hanna Hill, put her partly-naked body in the trunk of her car, and parked that car in an Akron neighborhood. Denny Ross was indicted and tried for aggravated murder, murder, kidnapping, rape, tampering with evidence, and abuse of a corpse. His trial ended in a mistrial and confusion. Within a week following the mistrial, he moved for, among other things, acquittal on the rape charge, arguing that the State had failed to present sufficient evidence at the trial on that charge. A visiting judge, appointed after the original trial judge was removed, initially denied that motion. But upon reconsideration, he determined that the State had failed to present evidence at the trial that, if believed, could have convinced the jury beyond a reasonable doubt that Mr. Ross had raped Ms. Hill, and acquitted him on the rape charge and the resulting capital specification. The State has conceded that the question of whether there was sufficient evidence on the rape charge

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presented at trial is not before us. But the issue that is before us is whether the visiting judge had authority, after having initially denied the motion for acquittal, to reconsider and grant it. We affirm because the visiting judge's initial denial was an interlocutory order and he had authority to reconsider and grant that motion at any time before final judgment.

WHY WE'RE STILL TALKING ABOUT
THE AFTERMATH OF THE MISTRIAL

{¶2} As mentioned above, Mr. Ross was tried on charges of aggravated murder, murder, kidnapping, rape, tampering with evidence, and abuse of a corpse. That trial took place during 2000. At the close of the State's case in that trial, Mr. Ross moved for acquittal on the charges against him. The trial judge granted his motion on the kidnapping charge, but denied it on the other charges. Mr. Ross did not present any evidence in defense and renewed his motion for acquittal on the remaining charges. The trial court again denied it.

{¶3} During jury deliberations, the jury foreperson wrote the trial judge a note expressing concerns about statements and actions of one of the jurors, including that juror's reference to a polygraph test supposedly taken by Ms. Hill's boyfriend. After considering and rejecting other ways of handling the situation, the trial judge declared a mistrial and set a date on which a retrial would begin. Following her declaration of a mistrial, the trial court learned that the jury had, before the mistrial, completed verdict forms finding Mr. Ross not guilty on the aggravated murder, murder, and rape charges.

{¶4} Seven days after the trial judge journalized her declaration of a mistrial, Mr. Ross moved to bar a retrial, arguing that there had not been a manifest necessity for the mistrial. Significantly, for purposes of this appeal, at that same time, Mr. Ross renewed his motion for acquittal, arguing that the State had failed to present sufficient evidence at trial on the remaining

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charges against him. Mr. Ross also sought removal of the trial judge based on an argument that she would likely be called to testify about her mistrial decision.

{¶5} The Chief Justice granted Mr. Ross's request for removal of the trial judge and appointed a visiting judge in her place. The visiting judge eventually held an evidentiary hearing on Mr. Ross's motion to bar his retrial and granted it, holding that a retrial was barred by the constitution's protection against double jeopardy. The State appealed that decision to this Court, which reversed, and the Ohio Supreme Court refused jurisdiction over Mr. Ross's attempted appeal to that court. *State v. Ross*, 9th Dist. No. 20980, 2002-Ohio-7317, jurisdiction refused, *State v. Ross*, 98 Ohio St. 3d 1567 (2003).

{¶6} With this case back in the trial court, the visiting judge, on September 10, 2003, filed an order that, among other things, denied Mr. Ross's renewed motion for acquittal. That order contained no analysis.

{¶7} Despite the fact that the trial court had denied his renewed motion for acquittal, Mr. Ross, on November 6, 2003, filed a brief captioned, "Defendant Ross' Supplemental Memorandum in Support of Renewed Motion for Judgment of Acquittal Pursuant to Ohio Crim. Rule 29." On November 26, 2003, he filed another brief, this one captioned, "Second Supplemental Memorandum in Support of Renewed Motion for Judgment of Acquittal Pursuant to Ohio Crim. Rule 29." The State filed a response to Mr. Ross's first "Supplemental Memorandum" on December 3, 2003, and a response to his "Second Supplemental Memorandum" on December 10, 2003.

{¶8} On December 22, 2003, the visiting judge entered an Order in which he treated Mr. Ross's supplemental memoranda in support of his motion for acquittal as a motion for reconsideration of the denial of that motion. In a 13-page order that reviewed the evidence that

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had been presented at trial, it granted Mr. Ross's "Motion for Reconsideration for Criminal Rule 29 Acquittal as to the charge of Rape and its' capital specification and deni[ed] [his] Motion for Reconsideration for a Criminal Rule 29 Acquittal as to all other charges . . . ."

{¶9} The State sought leave to appeal the visiting judge's order acquitting Mr. Ross on the rape charge and its' capital specification, and this Court, on March 29, 2004, granted it leave to do so. But before we could hear argument on the State's appeal, Mr. Ross filed a petition for habeas corpus in the federal district court. This Court stayed its proceedings while he pursued his federal remedies.

{¶10} The federal district court granted Mr. Ross's petition for habeas corpus. *Ross v. Petro*, 382 F. Supp. 2d 967 (N.D. Ohio 2005). On appeal, however, the United States Court of Appeals for the Sixth Circuit reversed. *Ross v. Petro*, 515 F.3d 653 (6th Cir. 2008). Mr. Ross then sought certiorari, which the United States Supreme Court denied. *Ross v. Rogers*, __ U.S. __, 129 S. Ct. 906 (2009). This Court thereupon lifted its stay and held oral argument on the State's appeal from the trial court's reconsideration of Mr. Ross's renewed motion for acquittal on the rape charge against him and the resulting capital specification.

THE TRIAL COURT'S RECONSIDERATION OF ITS
DENIAL OF MR. ROSS'S RENEWED MOTION FOR ACQUITTAL

{¶11} The State's first assignment of error is that the trial court did not have authority to reconsider its denial of Mr. Ross's renewed motion for acquittal because "a motion to reconsider is a nullity, and any order granting a motion to reconsider is a nullity." In its opening brief in this Court, which was filed in March 2004, the State correctly asserted that a motion for reconsideration of a final judgment is a nullity, without presenting any analysis of whether the visiting judge's initial denial of Mr. Ross's renewed motion for acquittal was a final judgment. It did assert, at one place in its brief, that it had relied on the trial court's "journal entry as a final

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order denying Judgment of Acquittal." And, at another place in its brief, it directly asserted that the trial court had spoken through its journal entry, "issuing a final order denying defendant's Motion for Judgment of Acquittal." Simply asserting that the trial court's initial denial was a final order, however, does not make it one.

{¶12} In fact, the trial court's initial denial of Mr. Ross's renewed motion for acquittal was not a final judgment. It did not, "in effect[,] determine[] the action and prevent[] a judgment." R.C. 2505.02(B)(1). Nor did it fall within any of the other subparts of Section 2505.02(B) of the Ohio Revised Code. Rather, the trial court's initial denial of Mr. Ross's renewed motion for acquittal was an interlocutory order. Most of what the State said in its opening brief in support of its first assignment of error, therefore, was not helpful.

{¶13} Before Mr. Ross filed his brief in response to the State's opening brief, the State apparently woke up and realized that its argument in support of its first assignment of error missed the point. Accordingly, purportedly under Rule 21(H) of the Ohio Rules of Appellate Procedure, it filed a document captioned "Notice of Supplemental Authority," which addressed *State v. Abboud*, 8th Dist. Nos. 80318, 80325, 2002-Ohio-4437 and *State v. Ward*, 4th Dist. No. 03CA2, 2003-Ohio-5650.

{¶14} The situation in *Abboud* was, in all material respects, identical to that in this case. A jury found the defendant guilty of coercion and kidnapping with a gun specification. Within the time following the return of a verdict allowed by Rule 29(C) of the Ohio Rules of Criminal Procedure, the defendant moved for acquittal. The trial court initially denied his motion, but later reconsidered and acquitted him on the gun specification. The State appealed and argued, just as it has in this case, that the trial court's order reconsidering its earlier denial of the defendant's motion for acquittal was "a nullity." The appellate court determined that, because

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the trial court's initial denial was an interlocutory order, it was free to reconsider and change its mind: "While motions for reconsideration are not expressly or impliedly allowed in the trial court after a final judgment, interlocutory orders are subject to motions for reconsideration. . . . The denial of a motion for judgment of acquittal prior to final sentencing is an interlocutory order. Accordingly, the trial court was permitted to 'revisit' the order that denied [the defendant's] motion for acquittal." *Abboud*, 2002-Ohio-4437, at ¶8 (citing *Pitts v. Ohio Dep't of Transp.*, 67 Ohio St. 2d 378, 379 (1981)).

{¶15} In *State v. Ward*, 4th Dist. No. 03CA2, 2003-Ohio-5650, the trial court found the defendant guilty of domestic violence following a bench trial. *Id.* at ¶8. The defendant moved the court to reconsider its finding of guilt, and the trial court declined to do so. On appeal, the defendant argued that the trial court should have granted his motion for reconsideration. The State responded that the appellate court should affirm because his motion for reconsideration was not timely. In reliance upon *Abboud*, the appellate court held that the motion for reconsideration was properly before the trial court: "Prior to the final sentencing determination, a guilty verdict is not a final order. Accordingly, the trial court was permitted to reconsider its verdict." *Id.* at ¶11 (citing *State v. Abboud*, 8th Dist. Nos. 80318, 80325, 2002-Ohio-4437). On the merits, the appellate court determined that the trial court had properly denied the motion for reconsideration.

{¶16} In its "Notice of Supplemental Authority," the State argued that this Court should not follow *Abboud* because the "court's cursory analysis is flawed and does not merit reliance." It then, in a cursory manner, pointed out that the court in *Abboud* had relied upon *Pitts v. Ohio Dep't of Trans.*, 67 Ohio St. 2d 378 (1981), which was a civil case rather than a criminal case. It further pointed out that Rule 29(C) of the Ohio Rules of Criminal Procedure provides that a motion for acquittal following a mistrial must be filed within 14 days after the jury is discharged.

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Neither the fact that *Pitts* is a civil case nor that a motion for acquittal must be filed 14 days after the jury is discharged addresses the question before this Court, which is whether, once a trial court has denied a motion for acquittal that was properly filed within 14 days after the jury was discharged following a mistrial, does the trial court have authority to reconsider that denial.

{¶17} The Ohio Rules of Criminal Procedure neither specifically authorize nor prohibit a trial court from reconsidering interlocutory orders, regardless of whether that reconsideration is as the result of a motion or sua sponte. Rule 57(B) of the Ohio Rules of Criminal Procedure, however, authorizes trial courts to "look to the rules of civil procedure . . . if no rule of criminal procedure exists." And, as noted by the Ohio Supreme Court in *Pitts v. Ohio Dep't of Trans.*, 67 Ohio St. 2d 378, 379 n.1 (1981), Rule 54(B) of the Ohio Rules of Civil Procedure "allows for a reconsideration or rehearing of interlocutory orders." Accordingly, unless orders denying motions for acquittal are different from other interlocutory orders, a trial court has authority to reconsider them.

{¶18} As mentioned above, the State pointed out in its "Notice of Supplemental Authority" that motions for acquittal following a guilty verdict or mistrial must be filed within 14 days after the jury is discharged. That is true regardless of whether the defendant earlier moved for acquittal at the close of the State's case or at the close of all the evidence. An interlocutory order denying a motion for acquittal at the close of the State's case or at the close of all the evidence, therefore, is different from other interlocutory orders because the trial court can't reconsider them at any time until a final judgment is entered unless the defendant renews them within 14 days after the jury is discharged. But, again, the question before this Court is not whether a trial court can reconsider a motion for acquittal that it denied during trial. Rather, the

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question before us is whether it can reconsider its initial denial of a timely post-mistrial motion for acquittal.

{¶19} The bulk of the State's reply to Mr. Ross's appellate brief is a discussion of *United States v. Carlisle*, 517 U.S. 416 (1996), a case that the State had not mentioned in its opening brief and that Mr. Ross did not cite in his brief to this Court. By the time of the reply brief, however, according to the State, "[b]ecause *Carlisle* controls the outcome of this case, defendant Ross' arguments against this appeal have no merit." Not surprisingly, *Carlisle* does not compel a conclusion that Mr. Ross's "arguments against this appeal have no merit." In fact, to the extent it is relevant, it implicitly supports the trial court's ability to reconsider its initial denial of Mr. Ross's renewed motion for acquittal.

{¶20} *Carlisle* addressed Rule 29(c) of the Federal Rules of Criminal Procedure, which, except for providing that a motion for acquittal following a guilty verdict or mistrial must be filed within seven days instead of fourteen days, is, in all material ways, identical to Rule 29(C) of the Ohio Rules of Criminal Procedure. The defendant in *Carlisle* was convicted of conspiracy to possess with intent to distribute marijuana. He moved for acquittal one day beyond the seven days permitted under Rule 29(c). The trial court initially denied his motion, but, when the defendant appeared for sentencing, reconsidered its earlier denial and acquitted him, concluding that there was insufficient evidence to prove that he had knowingly and voluntarily joined the conspiracy. The United States Court of Appeals for the Sixth Circuit reversed, and the United States Supreme Court granted certiorari.

{¶21} The Supreme Court affirmed the Sixth Circuit's decision. It held, among other things, that "[t]here is simply no room in the text of Rule[ ] 29 . . . for the granting of an untimely postverdict motion for judgment of acquittal, regardless of whether the motion is accompanied

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by a claim of legal innocence, is filed before sentencing, or was filed late because of attorney error." *Carlisle*, 517 U.S. at 421. The Supreme Court also rejected the defendant's argument that Rule 29(a) provides a trial court authority to sua sponte acquit a defendant after a guilty verdict.

{¶22} *Carlisle* would be persuasive authority for reversal of the trial court's action in this case if Mr. Ross had not timely renewed his motion for acquittal following the mistrial. But he did. It, therefore, does not support the State's position. In fact, if anything, it undercuts the State's argument that the visiting judge acted without authority in reconsidering his initial denial of Mr. Ross's renewed motion.

{¶23} As mentioned above, the trial court in *Carlisle* initially denied the defendant's late motion for acquittal and reconsidered and granted it when the defendant showed up for sentencing. Neither the majority opinion nor either concurring opinion, however, includes a suggestion that, regardless of whether the trial court could have granted the defendant's post-verdict motion for acquittal at the time it was filed, it was without authority to reconsider it once it had denied that motion. Admittedly, it is dangerous to read too much into things not said in United States Supreme Court decisions, but if such a suggestion were there, it would lend credence to the State's position, but it is not.

{¶24} The State has further argued that, since Rule 29(C) specifically provides that a motion for acquittal may be made or renewed within 14 days following discharge of a jury, the trial court was without authority to reconsider its initial denial of Mr. Ross's motion 1145 days following the jury's discharge. The time limit imposed by Rule 29(C), however, only relates to when the defendant must move for acquittal. It does not relate to when the trial court must rule on that motion. In fact, as pointed out by the State, because of the previous appeal in this case,

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the visiting judge's initial denial of Mr. Ross's renewed motion for acquittal did not come until 1041 days after the jury was discharged. As mentioned previously, under Rule 54(B) of the Ohio Rules of Civil Procedure, a trial court may reconsider an interlocutory order at anytime before final judgment.

{¶25} Mr. Ross timely renewed his motion for acquittal on the rape charge within 14 days after the jury was discharged. The visiting judge's initial denial of that renewed motion was an interlocutory order, which he was free to reconsider up until entry of a final judgment. Accordingly, the trial court had authority to acquit Mr. Ross of the rape charge against him and the resulting capital specification, and the State's first assignment of error is overruled.

THE STATE'S FRIVOLOUS SUMMARY JUDGMENT ARGUMENT

{¶26} The State's second assignment of error is that the trial court erroneously granted partial summary judgment to Mr. Ross "before the information upon which it relied had been admitted." Although the State has acknowledged that the merits of the trial court's determination that Mr. Ross was entitled to acquittal on the rape charge are not before this Court, by its second assignment of error, it has attempted to get us to review those merits.

{¶27} At the trial that ended in a mistrial, the State presented expert testimony about a supposed bite mark in the area of the underside of Ms. Hill's elbow. According to the expert, the bite mark did not match Ms. Hill's boyfriend's teeth, but Mr. Ross could not be eliminated as the "biter." In his order reconsidering and granting Mr. Ross's renewed motion for acquittal on the rape charge, the visiting judge reviewed in detail the evidence regarding the rape charge that had been presented at the trial that had ended in a mistrial. As part of his discussion of that evidence, he included a paragraph about the testimony regarding the bite mark. He then added a footnote in which he mentioned that, since the time of trial, the State had hired additional experts who

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concluded that the mark on Ms. Hill's arm was not a bite mark. From that footnote, the State has argued that, in acquitting Mr. Ross on the rape charge, the visiting judge was anticipating evidence that would be submitted at the retrial and, based on that evidence, granting him summary judgment on the rape charge.

{¶28} The State has argued that summary judgment is not appropriate in a criminal case. That, of course, is true. E.g., *State v. Barsic*, 9th Dist. No. 94CA005883, 1995 WL 283770 at *1-2 (May 10, 1995). As with most of the arguments it presented in support of its first assignment of error, however, this rule of law has nothing to do with this case. The visiting judge did not anticipate what evidence the State would or would not present at Mr. Ross's retrial, it determined that the evidence that was presented at his original trial on the rape charge was insufficient.

{¶29} In the footnote about which the State has complained, the visiting judge wrote that the State had conceded that the "bite mark" evidence "is inaccurate." He did not conclude, however, that he should not consider it in determining whether the State had presented sufficient evidence at the original trial. As is so often true of footnotes, it was an aside. Such asides should probably not be included in opinions or briefs, but it is a bad habit that the legal profession can't seem to break.

{¶30} It is clear from the concluding paragraph of the visiting judge's order granting acquittal on the rape charge, that his decision to do so was based on an analysis of the evidence that was presented at the original trial: "In sum, although the [victim] was horribly beaten, this Court cannot say after reviewing the transcript in its' entirety that such beating was done during or after the Defendant was engaged in intercourse or penetration of the victim. Based upon this evidence, the Court finds that reasonable minds can come to but one conclusion, and that is that

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the State has failed to prove that the victim was subjected to unwanted sexual conduct. Therefore, the Court finds, after construing the evidence in a light most favorable to the State, that reasonable minds could not reach different conclusions as to whether each material element of rape has been proven. Therefore, the court grants the Defendant's Motion for a Criminal Rule 29 Acquittal on the indicted offense of rape and the death specification."

{¶31} Even if the visiting judge had improperly excluded the "bite mark" evidence from his analysis of the evidence presented at the original trial based on the State's acknowledgment that that evidence was inaccurate, his doing so would have been a mistake on the merits of his acquittal decision. It would not have magically turned that decision into an improper summary judgment. As the State has conceded, the merits of the visiting judge's acquittal decision are not before us.

{¶32} The trial court's order acquitting Mr. Ross on the rape charge did not grant him partial summary judgment in a criminal case. The State's second assignment of error is overruled.

CONCLUSION

{¶33} The State's assignments of error are overruled. The judgment of the trial court acquitting Mr. Ross on the rape charge and resulting death specification is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

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We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

LAWRENCE J. WHITNEY, attorney at law, for appellant.

WILLIAM D. MASON, Cuyahoga County special prosecutor, JOHN R. MITCHELL, and MATTHEW E. MEYER, assistant prosecuting attorneys for appellee.

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DIANA ZALESKI

2003 DEC 22 PM 2:17

SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO	)	**CASE NO. CR 1999-05-1098 A**
Plaintiff,	)	
	)	**JUDGE JOSEPH CIRIGLIANO**
-VS-	)	
	)	
	)	
DENNY F. ROSS	)	
	)	
Defendant	)	**ORDER**

This matter comes before the Court on Defendant Denny Ross' Motion to Reconsider the Court's Previous Ruling. On September 10, 2003, the Court denied Defendant's Motion for a Criminal Rule 29 Acquittal on the charges of aggravated murder, murder, rape, tampering with evidence and gross abuse of a corpse and denied Defendant's Motion to Perfect the Verdicts. The Court has been advised, having reviewed Defendant's Motion for Reconsideration, memoranda in support, pleadings, transcripts and applicable law and hereby grants Defendant's Motion for Reconsideration for Criminal Rule 29 Acquittal as to the charge of Rape and its' capital specification, and denies Defendant's Motion for Reconsideration for a Criminal Rule 29 Acquittal as to all other charges and as to his Motion to Perfect the Verdicts.

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FACTS

Defendant, Denny Ross, was arrested on May 27, 1999, and charged with aggravated murder, rape, kidnapping, tampering with evidence and gross abuse of a corpse. In December 1999, the defendant was also charged with murder and two specifications were added to the indictment making the defendant eligible for the death penalty.

Trial began in Summit County Court of Common Pleas, with jury selection on September 28, 2000. Prior to seating and swearing in the jury on October 17, 2000, the court twice asked the defendant if he wished to strike the existing jury pool and start the trial proceedings over at a later date. Both times the defendant declined.

Opening arguments at trial were presented on October 17, 2000. The prosecution rested its' case on October 25, 2000. The court at the close of the prosecution's case-in-chief pursuant to Ohio Criminal Rule 29 dismissed the kidnapping offense and the kidnapping special circumstance allegation. The defense additionally made Ohio Criminal Rule 29 motions for each count that were subsequently denied by the court. The defense then rested without calling any witnesses and renewed its' motion for Criminal Rule 29 acquittals on each count which were again denied by the court.

The jury was instructed on October 26, 2000, and began its deliberations at 9:00 a.m. on Friday October 27, 2000. The trial ended in a mistrial declaration on Saturday, October 28, 2000, due to "corruption of a juror". [1]

On Monday, October 30, 2000, when recorded proceedings commenced again, the court indicated that it would set a new trial date of January 8, 2001, and that Mr. Ross

[1] The mistrial declaration and its' consequences have been the subject of a tremendous amount of litigation, but it is a peripheral issue to the pending motion; and therefore, the Court will not address that issue.

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would again face each and every count, including aggravated murder, murder, and rape. Mr. Ross would again face the death penalty. Mr. Ross indicated that he would be filing a motion to recuse Judge Bond as she was a witness to all of the events of October 28, 2000, and subsequently she was recused from this case.

Defendant filed an Affidavit of Disqualification with the Supreme Court of Ohio alleging that the trial judge would be called as a witness to attest to the events that had transpired. The Supreme Court agreed, and on January 7, 2003, disqualified Judge Jane Bond from taking any further action on this case.[2]

On November 9, 2000, Ross filed a number of motions in the Summit County Court of Common Pleas including: Defendant Ross' Motion to Perfect the Three Unanimous Verdicts Returned By The Jury On October 28, 2000; Defendant Ross' Motion to Bar Retrial on this Case on Double Jeopardy Grounds; Defendant Ross' Renewed Motion for Judgment of Acquittal; and Defendant Ross' Motion to Set Reasonable Bail. All of these motions, except that seeking reasonable bail, requested an evidentiary hearing.[3]

The Court, on August 24, 2001, ruled on Defendant's Motion to Set Reasonable Bail, and on September 12, 2001, the Court ordered the Summit County Clerk of Court to accept bail in the amount of one million dollars as posted by Corporate Surety. The Court granted defendant's Motion to Bar Retrial on Double Jeopardy Grounds on February 15, 2002. The State appealed, and the Ninth District Court of Appeals reversed

[2] The undersigned was subsequently assigned to the above captioned case as trial judge pursuant to Article IV Section 6 of the Ohio Constitution to preside over the case to completion.
[3] An evidentiary hearing was held on May 22, 2001, and the testimony proffered was for all three of the pending motions. Judge Jane Bond was called as a witness to testify as to the events of October 28, 2000, as anticipated in the Supreme Court's order recusing Judge Bond from the case.

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the Court's decision on December 31, 2002. *State v. Ross* 2002 Ohio 7317; *cert denied* 2002 Ohio 2242.

DISCUSSION

In determining whether it is appropriate for a trial court to grant a Criminal Rule 29(a) acquittal, the trial judge must determine whether "the evidence is insufficient to sustain a conviction of such offense or offenses." *State v. Yates* 2003 Ohio 2956 P5. If the record demonstrates that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt, a Criminal Rule 29(A) acquittal may not be granted. "When making this determination, all evidence must be construed in a light most favorable to the prosecution. In essence, sufficiency is a test of adequacy." *Id.* In other words, the test for sufficiency is "whether the state has met its burden of production at trial." *Id* at P6. Evidentiary conflicts and the credibility of witnesses are functions reserved for the trier of fact, and the court will not take either into account when determining the sufficiency of evidence. *State v. Tobias* 2003 Ohio 2336 citing *State v. Willard* (2001), 144 Ohio App. 3d 767, 777-778.

The Defendant was also charged with kidnapping the victim and a kidnapping special (death) specification. The kidnapping charge in the indictment reads that "on or about the 19th through on or about the 26th day of May, 1999, in the County of Summit and State of Ohio, [the Defendant] did commit the crime of Kidnapping, in that he did by force, threat, or deception, remove Hannah Hill from the place where found and/or restrain the liberty of such person, in violation of Section 2905.01(A) of the Ohio Revised Code, a felony of the first degree***." At the close of evidence, the defense made a motion for acquittal on the kidnapping charge and special specification. The court

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granted the defense motion for acquittal as to the charge of kidnapping.[4] The prosecution claimed that the motion as to the death specification did not also have to be granted, but the court indicated that as a matter of law if the court found there was insufficient evidence to allow the jury to consider the underlying charge, it is not proper to allow the jury to consider the same charge as a death specification.[5] "It is the Court's conclusion that as at the aggravating specification, the elements of kidnapping having been directed-- the count having been directed by the Court are eliminated from the specification as well."[6]

Both kidnapping and rape require the State prove that the Defendant used force or threat of force.[7] As this Court has noted, when a motion for acquittal is granted, it means by law that after construing the evidence in a light most favorable to the State, "the evidence is insufficient to sustain a conviction of such offense or offenses." *State v. Yates* 2003 Ohio 2956P5. The Court recognizes that rape and kidnapping are two separate and distinct charges although they contain a similar element. As the Court in *Floyd v. Marshall* (1982) 538 F. Supp. 381 noted, "while force or the threat of force is common to both kidnapping and rape, each crime requires proof of a fact not present in the other." *Id. At 385*. However, the Court also recognizes that by granting a motion for acquittal on the charge of kidnapping, Judge Bond found that the evidence presented at trial was insufficient to sustain a conviction, including the evidence presented on the common element of force, or threat of force.

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[4] Trial Transcript page 1050, lines 12-13
[5] Trial Transcript page 1050, lines 22-25
[6] Trial Transcript page 1052, lines 10-14
[7] The Court recognizes that in the case of kidnapping, the State may also prove that deception was used, although in the instant case, there was no allegation or inference of deception, only force due to the beaten state of the victim's body.

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The material elements of rape pursuant to R.C. 2907.02(A)(2) as applied to this case are that from on or about the 19th through the 26th day of May, 1999, the defendant: (1) engaged in sexual conduct; (2) with another by purposely compelling submission by force or threat of force; (3) in Summit County, Ohio.

"Sexual conduct" means vaginal intercourse between a male and female. Penetration, however slight, is sufficient to complete vaginal intercourse. "Force" means any violence, compulsion or constraint physically exerted by any means upon or against a person or a thing.[8]

Whether the prosecution met its' burden of production as to the issue of rape involves a two-step analysis. First, was sexual contact shown so that reasonable jurors could differ on the potential outcomes, and second, was the element of force was shown according to the same standard.

At trial, the State presented evidence that the Defendant's semen was present on the panties of the victim.[9] Dr. Platt, the medical examiner, testified that the victim had "occasional sperm heads in the vaginal vault and in the area of her cervix or her uterus",[10] and an elevated level of acid phosphatase in the vaginal cavity indicated a seminal

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[8] OJI 507.02(A)(2)

[9] DNA report from Labcorp statihg "there is a match in the profile obtained from the sperm fraction of the panties with the reference sample of Mr. Ross." Trial Testimony of Meghan Clement, Page 502, Lines 10-13. The Court notes that the lab "ran out of DNA" and was unable to complete testing on the last three systems. Trial Testimony Meghan Clement, Page 500-501; Lines 16-25; Lines 1-6.

[10] Trial Testimony Dr. Platt, Page 566, Lines 3-5. The occasional sperm heads on the smears were never subjected to DNA testing by BCI. Trial Testimony Cynthia Shannon, Page 638, Lines 20-21; Page 640, Line 16. The vaginal, cervical, rectal and oral swabs taken by Dr. Platt were subjected to testing, and did not reveal the presence of sperm. Trial Testimony Cynthia Shannon, Page 463, Lines 11-25; Page 464 Lines 1-7.

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emission prior to death.[11] Dr. Platt also testified that although there was increased redness in the anal region, it was due to lividity as the decedent was found lying on her back.[12] In addition, the victim was found nude from the breasts down, but appeared to have been disrobed post-mortem as purge material was present on her clothing.[13]

"Penetration is the essence of rape." *State v. Hurley* 1988 Ohio App LEXIS 2122 (2nd Dist., Clark Cty.), pg. 4. In the instant case, there is only evidence that at some point prior to death the victim engaged in sexual intercourse. The victim had sperm heads in her vaginal vault and an elevated level of acid phosphatase, but no tearing, bleeding, scarring, ripping or redness due to trauma from sexual intercourse or assault.[14] The Defendant's sperm was found on the victim's panties, but the occasional sperm heads in the victim's vaginal vault were never tested and the cervical, vaginal, rectal and oral swabs that were tested did not reveal the presence of sperm.[15] Although the victim was found nude from the breasts down, her pants, panties, socks, and shoes were covered with purge material indicating that she had been disrobed post-mortem.

The Court in *State v. Powell* (1990) 49 Ohio St. 3d 255 held that a defendant cannot be convicted of attempted rape *solely* on evidence that he removed the victim's clothing. "There must be other evidence indicating purpose to commit rape instead of

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[11] The Doctor opined that due to the levels, the victim had penetration and seminal omission the night of her death. Trial Testimony Page 566-567, Lines 19-25; Lines 1-2; Page 658, Lines 12-13; 15-17.
[12] Trial Testimony Page 553-554; Doctor Platt also testified on direct examination that there was no tearing of the vaginal or anal cavities. P587 lines 21-25 (cross)
[13] The victim's purge stained pants, panties, socks and shoes were found in a trash bag under the Defendant's residential window.
[14] There was redness around the victim's anus; however, Dr. Platt testified that this was due to lividity as the victim was found laying on her back, and specifically testified about a lack of tearing of the vaginal and anal cavities.
[15] Trial Testimony of Cynthia Shannon, Page 463, Lines 11-25; Page 464 Lines 1-7

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some other sex offense, such as gross sexual imposition, R.C. 2907.05, which requires only sexual contact. See *State v. Hennish* (1990), 50 Ohio St. 3d 231, 238-239. The Court in *Powell* found that there was insufficient evidence to prove attempted rape even though just prior to death the victim pushed the defendant away, she was found nude and had possible finger marks on her thigh. The instant case is similar in that the victim was found partially nude and beaten. However, other than the Defendant's statement that he had been fooling around with the victim earlier in the evening on the date that she allegedly disappeared, no one can place the victim and the defendant together the evening on which she went missing. In addition, the charge in *Powell* was attempted rape whereas here it was rape. The difference in proof is sexual conduct, ie. penetration.

The Court in *Hennish* found that a victim's partial nudity combined with saliva on the crotch of her blue jeans was insufficient to show intent to rape. Similar to *Hennish*, the victim in the instant case was found partially nude; however, the clothing of the victim was removed post-mortem, not pre-mortem as in *Hennish*. The victim in the *Hennish* case had saliva on the crotch of her blue jeans while the victim in instant case had the defendant's semen on her panties. Unlike the victim in *Powell*, the victim in the instant case did not have possible finger marks on her thighs, but did have other physical injuries, which will be subsequently detailed. In contrast to *Hennish and Powell*, the victim in the instant case did have indicators of a seminal emission prior to death and occasional sperm heads in her vaginal cavity; however, neither were conclusively linked to the defendant, and there was no evidence of vaginal trauma indicating nothing more than sexual intercourse some time prior to death. Finally, the cervical, vaginal, rectal and oral swabs tested did not indicate a presence of semen.

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The Court, construing the evidence most favorably for the State, cannot find that sexual conduct, including penetration, however slight, occurred. Although the victim was found partially nude, her clothing was found covered in purge material indicating that it had been removed post-mortem. Defendant's semen was on the victim's panties, but the court in *Hennish* indicates that this in conjunction with partial nudity is not enough for a rape conviction. Finally, the victim's vaginal vault did contain "occasional sperm heads" and an increased level of acid phosphatase, however, this indicates only sexual intercourse prior to death. Since the sperm heads were never tested, it is unknown to whom they belong; and, the lack of sperm present in the victim's vaginal, cervical, rectal and oral cavities indicates a lack of sexual contact. Therefore, the Court cannot conclude that the State proved that sexual conduct, including penetration, between the Defendant and victim took place.

As to the element of force, the State offered the testimony of Dr. Platt that the victim's ante-mortem injuries to her head and face included: a 4.5 centimeter laceration in the area of the right occiput,[16] a subgaleal hemorrhage, [17] a brown-purplish contusion in the midline of the forehead between the eyes, [18] hemorrhage of the conjunctiva of the lateral aspect of the right globe (eye),[19] petechiae on the lower right conjunctiva,[20] a 3 x 2 centimeter purple contusion on the right upper eyelid, [21] a 1.2 by 0.2 centimeter laceration below and medial to the right eye into which a probe extends 0.6 centimeters with soft tissue hemorrhage around the globe, but not fracture of the orbit,[22] a 2 x 1.5

[16] Trial Testimony of Dr. Platt Page 530
[17] Trial Testimony of Dr. Platt Page 531
[18] Trial Testimony of Dr. Platt Page 538
[19] Trial Testimony Dr. Platt Page 539
[20] Trial Testimony of Dr. Platt Page 540
[21] Trial Testimony of Dr. Platt Page 541
[22] Id.

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centimeter tan abrasion of the right cheek in front of the ear,[23] and a 5 x 3 centimeter tan abrasion on the right cheek behind the right eye with hemorrhage underneath.[24] In addition, Dr. Platt testified the victim suffered ante-mortem injuries including: an abrasion of the right lateral neck,[25] an abrasion on the left side of the neck,[26] a hemorrhage of the sternoceidomastoid muscle, hemorrhage of the jugular vein, and soft tissue adjacent to the jugular vein on both the left and right side,[27] a hemorrhage at the midline junction of tissue surrounding the thyroid and hyoid bone.[28] Dr. Platt opined that the abrasions on the neck contained patterns consistent with the necklace the victim was wearing at the time of her death, and "it is my medical opinion that the necklace was pulled in a fashion to cause the abrasions in the neck, caused compression of the jugular vein, caused the hemorrhage of the sternocleidomastoid muscle, caused a hemorrhage of the area of the junction of the hyoid and thyroid bones."[29]

Dr. Platt also testified to ante-mortem wounds on the back of the decedent including a 2 x 2 centimeter abrasion of the left scapula,[30] two 1.5 x 1.5 centimeter oval abrasions and purple contusions of the midline of the posterior thoracic-lumbar spine with green-gray fungus on their surface,[31] a 3 x 2 centimeter purple contusion of the right paramedial posterior lumbar region,[32] and a 5 x 2 centimeter purple contusion of the

[23] Trial Testimony of Dr. Platt Page 542
[24] Trial Testimony of Dr. Platt Page 543
[25] Trial Testimony of Dr. Platt Page 544
[26] Trial Testimony of Dr. Platt Page 545
[27] Trial Testimony of Dr. Platt Page 546-547
[28] Trial Testimony Dr. Platt page 547
[29] Trial Testimony of Dr. Platt Page 548
[30] Trial Testimony of Dr. Platt Page 550
[31] Trial Testimony of Dr. Platt Page 551
[32] Trial Testimony of Dr. Platt Page 551-552

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midline posterior sacral spine.[33] Finally, Dr. Platt testified to scratches and bruises on the decedent's arms and legs, some ante-mortem and some post-mortem.[34]

Dr. Platt took a swab from the victim's lip which was later analyzed by Dr. Siddharth M. Patel, a senior research chemist from Goodyear Corporate Research. Around the time of the victims' death, the Defendant had a splint on his left arm.[35] Dr. Patel was supplied with cast material from the hospital where the defendant's splint was applied and the unknown swab taken from the victim's lip. In Dr. Patel's expert opinion, "the unknown material in the swab is identical to the – one of the materials in the cast material."[36]

During the autopsy, Dr. Platt requested Dr. Marshall, a forensic odontologist, review markings on the victims' body to determine if a human bite mark was present. Upon review under an alternative light source, Dr. Marshall determined there was a pattern of marks consistent with a human bite mark. Dr. Marshall was then given access to the Defendant and Brad O'Born[37] so that impressions of their teeth could be made and he could compare them with the bite mark on the victims elbow area.[38] Dr. Marshall

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[33] Trial Testimony of Dr. Platt Page 552

[34] Dr. Platt opined that at some point the victim had been pulled or dragged, possibly post-mortem, probably by her ankles, and that is what caused some of the scratches and bruises.

[35] The State presented testimony from Dr. Sargeant who applied the original splint on May 14, 1999, and James E Voyk, P.A. who reapplied a second cast on May 21, 1999, when the Defendant re-appeared at the emergency room and requested a new cast. The first splint, applied May 14, 1999, was never found by the State.

[36] Trial Testimony, Page 674

[37] At that point in time, Mr. O'Born, the decedents boyfriend, was still a suspect.

[38] The mark is on the underside of the elbow, forward of the joint.

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ultimately eliminated Brad O'Born as the potential "biter", but was unable to eliminate the Defendant.[39]

The Court in *State v. Martin* 1995 Ohio App. LEXIS 2078 (9th Dist.) held that "a defendant purposely compels his victim to submit by force or threat of force when he uses physical force against the victim, or creates the belief that physical force will be used if the victim does not submit." *Citing State v. Schaim* (1992), 65 Ohio St. 3d 51, 55. The element of force can be inferred from the circumstances surrounding the sexual conduct and is established if it is shown that the victim's will was overcome by fear or duress. *Id; State v. Smeicer* (1993), 89 Ohio App. 3d 115, 126. In the instant case, the State also offered testimony from Jennifer Edwards, one of the victims friends, that the victim would not have submitted to sex with the defendant as the victim had previously told Miss Edwards, "Don't hook anybody up with Denny because he has herpes."[40]

The Court in *State v. Durr* (1991) 58 Ohio St. 3d 86, 93 found sufficient probative evidence that a reasonable fact finder could have found a defendant guilty of rape when the victim was found nude from the waist down except for a pair of tennis shoes and there was testimony that when a witness saw the victim tied up in the back of the defendant's car and the defendant indicated he would kill the victim because she (the victim) would tell. *Durr* is distinguishable from the instant case as the victim and defendant were never seen together although by the defendant's own admission, he had "fooled around" with the victim the night she allegedly disappeared.[41]

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[39] Trial Testimony, Page 900; 907. Dr. Marshall could not identify the Defendant as the biter, but could not exclude him either. Since the time of the trial, the State has hired additional forensic odontologists to review the evidence. The State's experts have concluded that the alleged "bite mark" is not a bite mark, and that the Defendant did not bite the victim. Therefore, the State has since conceded that Dr. Marshall's testimony, cited above, is inaccurate.

[40] Trial Testimony from Jennifer Edwards, Page 123, Lines 3-4

[41] Defendant maintains that the victim left his apartment alive.

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In sum, although the dependent was horribly beaten, this Court cannot say after reviewing the transcript in its' entirety that such beating was done during or after the Defendant was engaged in intercourse or penetration of the victim. Based upon this evidence, the Court finds that reasonable minds can come to but one conclusion, and that is that the State has failed to prove that the victim was subjected to unwanted sexual conduct. Therefore, the Court finds, after construing the evidence in a light most favorable to the State, that reasonable minds could not reach different conclusions as to whether each material element of rape has been proven. Therefore, the Court grants the Defendant's Motion for a Criminal Rule 29 Acquittal on the indicted offense of rape and the death specification.

IT IS SO ORDERED.

Joseph E. Cirigliano
JUDGE JOSEPH CIRIGLIANO

cc: Attorney John R. Mitchell
Attorney Lawrence Whitney
Attorney David Z. Chesnoff
Attorney David Nickerson
Attorney Michael Pancer