

IN THE SUPREME COURT OF OHIO

Original

STATE OF OHIO,	)	Case No. 2011-0619
	)	
Appellant/Cross-Appellee	)	On Appeal from the Cuyahoga
	)	County Court of Appeals.
vs.	)	Eighth Appellate District
	)	
JASON WILLIAMS,	)	Court of Appeals
	)	Case No. 94616
Appellee/Cross-Appellant	)	

---

**APPELLEE/CROSS-APPELLANT JASON WILLIAMS'  
COMBINED MEMORANDUM IN RESPONSE AND  
MEMORANDUM IN SUPPORT OF JURISDICTION**

---

JONATHAN N. GARVER (#0031009) (COUNSEL OF RECORD)  
 The Brownhoist Building  
 4403 St. Clair Avenue  
 Cleveland, Ohio 44103  
 (216) 391-1112 (Telephone)  
 (216) 881-3928 (Fax)  
 E-mail: jgarver100@aol.com

COUNSEL FOR APPELLEE  
 JASON WILLIAMS

WILLIAM D. MASON  
 Prosecuting Attorney for Cuyahoga County  
 Katherine Mullin (#0084122) (COUNSEL OF RECORD)  
 Assistant Prosecuting Attorney for Cuyahoga County  
 The Justice Center - 9th Floor  
 1200 Ontario Street  
 Cleveland, Ohio 44113  
 216-443-7800 (Telephone)

COUNSEL FOR APPELLANT  
 STATE OF OHIO

**RECEIVED**  
 MAY 18 2011  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

**FILED**  
 MAY 18 2011  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

## Table of Contents

<b>Memorandum in Response to Jurisdiction</b>	1
A. EXPLANATION OF WHY THIS CASE DOES <u>NOT</u> INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND WHY THIS IS <u>NOT</u> A CASE OF PUBLIC OR GREAT GENERAL INTEREST	1
B. ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITION OF LAW	
Response to Appellant's Proposition of Law No. 1: The trial court's determination that offenses should not merge under <i>Ohio Rev. Code §2941.25</i> presents a question of law, requiring de novo review on appeal. Even if the decision of the trial court is subject to review under an abuse of discretion standard, the Court of Appeals was correct in ordering a merger in this case because the decision of the trial court constituted an abuse of discretion.	2
C. CONCLUSION	7
<b>Memorandum in Support of Jurisdiction (Appellee's Cross-Appeal)</b>	7
A. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	9
B. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	9
<u>Appellee's Proposition of Law No. 1:</u> The use of a flawed jury instruction on the issue of credibility, which invades the province of the jury, constitutes plain error.	9
<u>Appellee's Proposition of Law No. 2.</u> A trial court commits plain error by giving jury instructions on the offenses of rape, gross sexual imposition, and kidnaping which invade the province of the jury and are tantamount to a directed verdict on a least one essential elements of each offense.	10
<u>Appellee's Proposition of Law No. 3.</u> A trial court commits plain error by improperly shifting the burden of proof to the defendant on two of the essential elements of the offense of rape.	13
<u>Appellee's Proposition of Law No. 4.</u> Testimony of the mother of the	

complainant in a rape case regarding nightmares the complainant allegedly experiencing as a result of the alleged sexual assault is inadmissible hearsay and its admission constitutes plain error. 14

Appellee's Proposition of Law No. 5. Drawings made by the alleged victim when she was interviewed by a detective, but which do not contain any information relevant to the case, and a drawing made by the detective, purporting to document what the complainant allegedly told him are inadmissible hearsay and their admission constitutes plain error.. 14

Appellee's Proposition of Law No. 6. The evidence was insufficient to support the charge of gross sexual imposition under Count III (alleged kissing on the neck). 15

Appellee's Proposition of Law No. 7. The evidence was insufficient to support the charge of rape under Count I (digital penetration of victim's vagina). 17

Appellee's Proposition of Law No. 8. The evidence was insufficient to support the charge of rape under Count II (placement of mouth on victim's vagina). 18

Appellant's Proposition of Law No. 9. Appellee's convictions for rape (Count I) and gross sexual imposition (Count V) are improper under *Ohio Rev. Code §2941.25* and constitute plain error. 18

Appellee's Proposition of Law No. 1 Appellee's convictions are against the manifest weight of the evidence. 19

Appellee's Proposition of Law No. 11. Appellee was deprived of his right to the effective assistance of counsel. 21

Appellee's Proposition of Law No. 12. Appellee's convictions should be reversed because the cumulative effect of the errors committed by the trial court violated Appellee's right to a fair trial. 22

C. CONCLUSION 23

Certificate of Service 24

## Memorandum in Response

### EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This is an appeal brought by the State of Ohio from the decision of the Court of Appeals of Cuyahoga County, Eighth Appellate District, affirming Appellee Jason Williams ("Appellee")'s convictions for rape (two counts), gross sexual imposition (three counts) and kidnaping, but also held that the same conduct constituted the offenses of rape and kidnaping and that both offenses were committed with a single animus and, therefore, subject to merger. The Court of Appeals remanded the case to the trial court, pursuant to *Ohio Rev. Code §2941.25*, for Appellee to choose which of the offenses it wishes to pursue on resentencing.

The opinion issued by the Court of Appeals indicates that it followed the analysis approved by this Court in *State v. Johnson*, 128 Ohio St. 3d 153, 2010 Ohio 6314, 942 N.E. 2d 1061, its most recent decision interpreting *Ohio Rev. Code §2941.25*. The Court of Appeals held, "[t]he indictment alleged that the kidnaping was sexually motivated and therefore [Williams's] animus for the kidnaping and the rape was the same or, stated differently, the rape and the kidnaping were a single act, committed with a single state of mind." *State v. Williams*, Cuyahoga App. No. 94616, 2011 Ohio 925, ¶61.

The decision of the Court of Appeals on this issue is a straight forward application of the law set forth in *Johnson* and there is nothing about the decision on this issue that merits review by this Court. Indeed, since the kidnaping charge contained a sexual motivation specification, Appellant is hard-pressed to claim that the two offenses were committed with a separate animus.

The sole proposition of law advanced by Appellant would limit the power of the courts of

appeals in connection any appeals predicated on *Ohio Rev. Code §2941.25*. As Appellee demonstrates below, this is a bad thing, not a good thing.

### ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITION OF LAW

- 1. Response to Appellant's Proposition of Law No. 1: The trial court's determination that offenses should not merge under *Ohio Rev. Code §2941.25* presents a question of law, requiring de novo review on appeal. Even if the decision of the trial court is subject to review under an abuse of discretion standard, the Court of Appeals was correct in ordering a merger in this case because the decision of the trial court constituted an abuse of discretion.**

*Ohio Rev. Code §2941.25(A)* prohibits duplication of convictions where two crimes are motivated by a single purpose and where both convictions rely upon identical conduct and the same evidence. *Ohio Rev. Code §2941.25(A)* provides:

Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

*Ohio Rev. Code §2941.25* essentially codifies the judicial merger doctrine. *State v. Cabrales*, 118 Ohio St. 3d 54, 2008-Ohio-1625, ¶23. Merger is “the penal philosophy that a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime.” *Maumee v. Geiger* (1976), 45 Ohio St. 2d 238, 243-244, 344 N.E. 2d 133.

Last year, in *State v. Johnson*, *supra*, this Court reconsidered its earlier decisions dealing with the determination of whether offenses qualify as allied offenses subject to merger pursuant to *Ohio Rev. Code §2941.25*. After several previous failed attempts to articulate a workable standard, the Court announced that it was establishing a new standard, returning the focus to the plain language and meaning of the statute.

The Court stated,

"R.C. 2941.25 itself instructs us to look at the defendant's conduct when evaluating whether his offenses are allied. As Justice Lanzinger explained in her dissenting opinion in *Williams*: "In spite of the . . . [statutory] language emphasizing the importance of the defendant's conduct, our current cases analyzing allied offenses instruct us to jump immediately to the abstract comparison of offenses charged without first considering the defendant's actual conduct as established by the evidence." *Williams*, 124 Ohio St.3d 381, 2010 Ohio 147, 922 N.E.2d 937, at P 34 (Lanzinger, J., dissenting).

We have consistently recognized that the purpose of R.C. 2941.25 is to prevent shotgun convictions, that is, multiple findings of guilt and corresponding punishments heaped on a defendant for closely related offenses arising from the same occurrence. *Geiger*, 45 Ohio St.2d at 242, 74 O.O.2d 380, 344 N.E.2d 133. This is a broad purpose and ought not to be watered down with artificial and academic equivocation regarding the similarities of the crimes. When "in substance and effect but one offense has been committed," the defendant may be convicted of only one offense. *Botta*, 27 Ohio St.2d at 203, 56 O.O.2d 119, 271 N.E.2d 776.

. . . When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Johnson*, ¶¶42-44.

The Court continued,

. . . Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger.

[P48] In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. *Blankenship*, 38 Ohio St.3d at 119, 526 N.E.2d 816 (Whiteside, J., concurring) ("It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses *can be* committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both [\*163] offenses." [Emphasis sic]). If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

[P49] If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." *Brown*, 119 Ohio St.3d 447, 2008 Ohio 4569, 895 N.E.2d 149, at P 50 (Lanzinger, J., dissenting).

[P50] If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

P51] Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge. *Id.*, ¶¶47-51.

In the present case, the Court of Appeals cited the *Johnson* decision and used the analysis adopted by this Court in *Johnson*. See, *State v. Williams*, supra, ¶¶53-61. The Court of Appeals concluded, "... we find the same conduct supports appellant's rape and kidnaping conviction. The indictment alleged that the kidnaping was sexually motivated and therefore appellant's animus for the kidnaping and the rape was the same or, stated differently, the rape and the kidnaping were a single act, committed with a single state of mind." *Id.*, ¶61.

In its memorandum in support of jurisdiction, Appellant argues that the decision of the Court of Appeals should be reversed because the scope of review in such cases should be limited to determining whether the trial court committed an abuse of discretion. This argument was not raised by Appellant in the Court of Appeals. Accordingly, it should not be addressed by this Court.

This Court has rendered many decisions in cases involving allied offenses under *Ohio Rev. Code §2941.25*. See, e.g. *State v. Johnson*, supra; *State v. Winn*, 121 Ohio St. 3d 413, 2009 Ohio 1059; *State v. Harris*, 122 Ohio St. 3d 373, 2009 Ohio 3323; *State v. Cabrales*, 118 Ohio St. 3d 54, 2008-Ohio-1625; *State v. Rance* (1999), 85 Ohio St. 3d 632, 710 N.E. 2d 699. Those

cases were disposed of without an abuse of discretion standard.

The determination that offenses should not merge under *Ohio Rev. Code §2941.25* presents a question of law, requiring *de novo* review on appeal. *De novo* review will promote uniformity and consistency under *Ohio Rev. Code §2941.25*. It will provide the lower courts with meaningful guidance. Mistakes and bad calls will be corrected, not condoned. Chief Justice Renquist's defense of *de novo* review in Fourth Amendment cases is equally applicable in this context:

Independent review is, therefore, necessary if appellate courts are to maintain control of, and to clarify the legal principles . . .

Finally, *de novo* review tends to unify precedent and will come closer to providing law enforcement officers with a defined "set of rules which, in most instances, make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." *Ornelas v. United States* (1996), 517 U.S. 690.

There is no justification for the use of an abuse of discretion standard when reviewing merger determinations under *Ohio Rev. Code §2941.25*. The trial court did not assess the witnesses' demeanor and credibility and weigh the evidence before making its determination. Those functions were performed by the jury, not the court. Nor can a determination under *Ohio Rev. Code §2941.25* be equated with decisions made by the trial court involving the conduct of a trial or evidentiary rulings. Accordingly, there is no reason for an appellate court to show deference to the trial court's determinations under *Ohio Rev. Code §2941.25*.

Even if this Court were to adopt an abuse of discretion standard of review of determinations under *Ohio Rev. Code §2941.25*, the decision of the Court of Appeals should be affirmed because the decision of the trial court in this case constitutes an abuse of discretion. A

trial court abuses its discretion when it fails or refuses to properly apply the law to conceded or undisputed facts. *Clemons v. Board of Education* (CA6 Ohio), 228 F 2d 853, cert. den 350 U.S. 1006. In this case, for purposes of merger, the facts were undisputed. Furthermore, while the record does disclose the trial court's reasoning for not merging some offenses, it does not disclose the trial court's reasoning for its determination that the kidnaping and rape charges should not be merged. See, T. 815-822.

Other courts have examined the question of whether kidnaping and rape charged merge under *Ohio Rev. Code §2941.25* and concluded that the two charges merge. See, *State v. Gibson*, 2009 Ohio 4984.

Finally, the analysis of the facts and the law embraced by Appellant is unpersuasive. Appellant argues, "Williams raped his niece behind her mother's car. He then pulled her by the arm between two houses where he picked up the 8 year old, put her on the ground, and raped." Appellant's MSJ, p. 9. Appellant continues, "In reality, there were three kidnapings. One when the victim was bring raped behind the vehicle, one while she was forcibly being transported to another location, and one when she was being raped between two houses." *Id.* Of course, there was *only one* kidnaping charge in the present case and there was *only one* kidnaping. The kidnaping began with the first rape and did not end until after the second rape was committed. At no time was there any interruption in the control allegedly exerted over the victim. No matter how you dissect it, the sole purpose of the kidnaping was to facilitate the sexual assaults. Appellant argues that "the substantial and prolonged movement" of the victim justifies a separate punishment for the kidnaping. But the record does not reveal any "substantial and prolonged movement" of the victim. All of the events occurred in the backyard of the residence. The victim

was moved a very short distance before the second rape. And all of this took place over just a few minutes.

## **CONCLUSION**

For the foregoing reasons, the Court should decline to accept jurisdiction over Appellant's sole proposition of law.

### **Memorandum in Support of Jurisdiction**

(Appellee's Cross-Appeal)

#### **EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

It is of great importance that this Court consider the propositions of law related to the issues raised by Appellee's other assignments of error. Appellee's propositions of law concern both substantive and procedural issues which impact on the right of the accused to a fair trial.

Appellee has always maintained his innocence. Wrongfully convicted, he is now serving a 25 year to life sentence. His convictions for rape, gross sexual imposition, and kidnaping of his 8-year old niece should be overturned because of the cumulative effect of the many errors committed by the trial court.

Appellee's first proposition of law challenges the use of a special jury instruction on the issue of credibility. Without question, the flawed jury instruction given in this case invaded the province of the jury. Since instruction given in this case was modeled after an instruction approved by this Court, but omitted key language from the approved instruction, it is important that the Court address this issue in order to maintain the integrity of the instruction approved by this Court.

Appellee's second proposition of law attacks the way in which the trial court instructed the jury when defining the offenses charged in the indictment. Once again, the court invaded the province of the jury. This time, however, the court's instructions were tantamount to a directed verdict on two of the essential elements of the offense of rape, one of the essential elements of the offense of gross sexual imposition, and one of the essential elements of the offense of kidnaping.

Amazingly, the trial court made yet another important error in its instructions to the jury. Appellee's third proposition of law arose out of an instruction which improperly shifted the burden of proof to the defendant on two of the essential elements of the offense of rape.

Appellee's fourth and fifth propositions of law arise out of the prosecution's use inadmissible hearsay testimony. The trial court committed plain error in admitting the testimony of the complainant's mother regarding nightmares the complainant was allegedly experiencing as a result of the alleged sexual assault. The trial court committed more plain error by admitting drawings made by the alleged victim when she was interviewed by a detective and by admitting a drawing made by the detective.

Appellee's sixth, seventh, and eighth propositions of law focus on the insufficiency of the evidence in support of the charge of gross sexual imposition under Count III (alleged kissing on the neck), the charge of rape under Count I (digital penetration of victim's vagina), and the charge of rape under Count II (placement of mouth on victim's vagina).

Appellees' ninth proposition of law raises a challenge to the convictions for rape (Count I) and gross sexual imposition (Count V) under *Ohio Rev. Code §2941.25*

Appellee's tenth proposition of law demonstrates that his convictions are against the

manifest weight of the evidence.

Appellee's tenth proposition of law was deprived of his right to the effective assistance of counsel.

In his eleventh proposition of law, Appellee appeals for a reversal of his convictions based upon the cumulative effect of the errors committed by the trial court.

**B. ARGUMENT IN SUPPORT OF APPELLEE'S PROPOSITIONS OF LAW**

**Appellee's Proposition of Law No. 1: The use of a flawed jury instruction on the issue of credibility, which invades the province of the jury, constitutes plain error.**

In the present case, the trial court gave the following instruction to the jury:

"Remember that the testimony of one witness believed by you is sufficient to prove any fact. Discrepancies in a witness' testimony or between his or her testimony and that of another witness does not necessarily mean that you should disbelieve a witness, as people commonly forget facts or recollect them erroneously after the passage of time." (781)

Determining the credibility of the witnesses is the sole and exclusive province of the jury. The above-quoted jury instruction improperly invades the province of the jury. It encourages the jury to disregard inconsistencies and contradictions in the testimony. Since it is universally accepted that such inconsistencies and contradictions bear on a witness' credibility, this instruction improperly invades the province of the jury.

This instruction differs in one important respect from the instruction approved by this Court in *State v. Cunningham*, 105 Ohio St. 3d 197, 2004 Ohio 7007, 824 N.E. 2d 504. In *Cunningham*, the instruction included one critical additional sentence that was not included in the instruction given by the trial court in this case:

"In considering a discrepancy in a witness [sic] testimony, you should consider whether such discrepancy concerns an important fact or a trivial fact." Id., at ¶54.

Without that additional sentence, it is doubtful that this Court would have concluded:

"When the credibility instruction is viewed in its entirety, it is clear that the trial court did not instruct the jury to disregard discrepancies in the evidence. Rather, the court charged the jury to consider discrepancies and weigh their significance when determining credibility." Id., at ¶57.

The instruction given in the present case was clearly prejudicial to Appellee. Unlike the instruction given in *Cunningham*, the instruction given in the present case discouraged the jury from considering inconsistencies, contradictions, and omissions in the testimony. Since all but one of the witnesses in this case had been called by the State, an instruction which excuses defects or shortcomings in the testimony of witnesses benefits the State. This instruction also inured to the benefit of the State because there were inconsistencies and contradictions in the testimony of the State's witnesses.

The incomplete, unbalanced jury instruction given by the trial court in the present case actively discouraged the jury from considering important life experiences in evaluating the evidence, to wit: the significance of discrepancies in the witnesses' testimony. As such, it deprived Appellee of his constitutional right to an impartial jury.

The giving of an improper jury instruction constitutes plain error under Crim.R. 52(B) if, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Long* (1978), 53 Ohio St. 2d 91, 372 N.E.2d 804, paragraph two of the syllabus; *State v. Hernandez*, 2000 Ohio App. LEXIS 658, Cuyahoga App. No. 74757. See also, *Taylor v. Sisto*, Case No. 09-15341 (9th Cir., May 25, 2010).

**Appellee's Proposition of Law No. 2. A trial court commits plain error by giving jury instructions on the offenses of rape, gross sexual imposition, and kidnaping which invade the province of the jury and are tantamount to a directed verdict on a least one essential elements of each offense.**

In *State v. Hernandez*, 2000 Ohio App. LEXIS 658, Cuyahoga App. No. 74757, the defendant was convicted of possession of cocaine in an amount exceeding 1,000 grams and conspiracy to possess cocaine in an amount exceeding 1,000 grams. The trial court gave the following instruction to the jury:

"Exhibits 1-B, 2-B, 3-B, 4-B, 5-B and 6-B are packages of cocaine, a Schedule II drug. These will not follow you to the jury room. You are instructed that these exhibits have been admitted as evidence in the case.

You are further instructed that: Exhibit 1-B is a package of cocaine, a Schedule II drug, in the amount of 777.26 grams; Exhibit 2-B is a package of cocaine, a Schedule II drug, in the amount of 803.50 grams; Exhibit 3-B is a package of cocaine, a Schedule II drug, in an amount of 796.80 grams; Exhibit 4-B is a package of cocaine, a Schedule II drug, in the amount of 786.20 grams; Exhibit 5-B is a package of cocaine, a Schedule II drug, in the amount of 499.52 grams.

Additionally, you are instructed that you may consider these exhibits as evidence during your deliberations."

Even though the defense did not contest the testimony of the witness who identified the substance as cocaine and testified as to the quantities involved, this Court found that the above-quoted jury instructions invaded the province of the jury and constituted plain error "because it effectually relieved the state from proving beyond a reasonable doubt two of the four elements of both the possession and conspiracy charges."

In the present case, in its charge on the offense of rape, as charged in Count I of the indictment, the trial court gave the following instruction to the jury:

"The defendant, Jason Williams, is charged in count 1 of the indictment with rape in violation of 2907.02(A)(1)(b). Before you can find the defendant guilty of rape

in count 1, you must find beyond a reasonable doubt that on or about June 22, 2009, in Cuyahoga County, Ohio, that the defendant engaged in sexual conduct with Ja'nyia Williams, a person who was not his spouse and whose age at the time of the sexual conduct was under 13 years, namely, date of birth: August 1, 2000, whether or not the defendant knew the age of Ja'nyia Williams." (682)

This instruction invades the province of the jury. The transgression here stems from the inclusion of the alleged victim's date of birth *in the jury instruction*. There was testimony related to the victim's age and date of birth. Her age and/or date of birth were facts to be determined by the jury. Her date of birth should not have been included in the jury instructions. This is no different than the court in *Hernandez* telling the jury that the substance involved was cocaine or referencing the weight of the various exhibits in its jury instructions, and simply asking the jury to do the math and determine whether the amount of cocaine exceeded 1,000 grams. In effect, the trial court told the jury: "Ja'nyia Williams was born on August 1, 2000. Before you can find the defendant guilty of rape in count 1, you must find beyond a reasonable doubt that on or about June 22, 2009 . . . Ja'nyia Williams was under 13 years of age." This instruction was tantamount to a directed verdict on that element of the offense. It relieved the jury of its duty to determine, *based upon the evidence* (not a jury instruction) whether she was under 13 years of age.

This instruction similarly contaminated the jury's consideration of another element of the offense of rape, to wit: the requirement that the State prove that the victim was under 10 years old at the time of the offense. In both instances, the trial court treated the alleged victim's date of birth as if it was a proven fact, thereby usurping the fact-finding function of the jury.

Similar instructions were given with respect to the charge of rape under Count II of the indictment (689); gross sexual imposition under Counts III, IV, and V (692, 694); and kidnaping under Count VI (696). Accordingly, since substantial rights of Appellee were affected, this

constitutes plain error and Appellant's convictions on all counts must be reversed. See, *Hernandez*, supra.

An essential element of each offense included that the victim be of a certain age. reference to the definition of each offense, the court told the jury that the victim was born on

**Appellee's Proposition of Law No. 3. A trial court commits plain error by improperly shifting the burden of proof to the defendant on two of the essential elements of the offense of rape.**

Proof beyond a reasonable doubt as to each of the essential elements of an offense charged in a criminal prosecution is required by statute and as a matter of due process of law. *Ohio Rev. Code §2901.05; Fourteenth Amendment, Constitution of the United States; Article I, Section 16, Constitution of the State of Ohio.* See, *State v. Brown* (1982), 7 Ohio App. 3d 113, 454 N.E.2d 596 (An accused in a state criminal prosecution has a constitutional right to expect that all the facts necessary for his conviction will be established by proof beyond a reasonable doubt, and it is error for the trial court to instruct the jury on any other burden of proof).

In the present case, the trial court gave the following instruction pertaining to the charge of rape, under Count I of the indictment:

If you find the defendant guilty as to rape in count 1, you will go on to consider and render verdicts on the two additional issues charged in this count. The first additional issue is whether the defendant purposely compelled the victim to submit by force or threat of force. The defendant has to prove this issue beyond a reasonable doubt . . . (685-86) (Emphasis Added)

Of course, it is the State, not the defendant, who has to prove these essential elements of the offense of rape.

The use of this instruction constitutes plain error under *Crim. R. 52(B)*. See, *State v. Black* (1991), 78 Ohio App. 3d 130, 604 N.E.2d 171 (an erroneous instruction on the burden of proof may be noticed as plain error).

**Appellee's Proposition of Law No. 4. Testimony of the mother of the complainant in a rape case regarding nightmares the complainant allegedly experiencing as a result of the alleged sexual assault is inadmissible hearsay and its admission constitutes plain error.**

Under *Evid. R. 802*, hearsay is inadmissible.

In the present case, the trial court allowed the prosecution to elicit hearsay from the complainant's mother regarding nightmares the complainant allegedly experienced after the alleged sexual assault. Even though Nadine Davis testified that Ja'nyia talked in her sleep, this testimony was obviously based upon what Ja'nyia had told her about her alleged nightmares. Nadine described in vivid details the contents of Ja'nyia's alleged nightmares:

"Q: So you noticed that she has these nightmares because she is sleeping with you?

A: Yes. She talks in her sleep now, too.

Q: Does she ever talk about what happened then?

A: She be saying no. *I know she says* she had a dream that Jason was over her and that she told her brother to jump into the water. He was holding onto Jason by the leg so he can jump in to save him and her alone. That's the only one she really talked about." (439) (Emphasis Added)

This evidence of what Ja'nyia allegedly told her grandmother about her nightmares is rank hearsay. It was highly prejudicial because it provided arguably compelling corroboration for Ja'nyia's claim that she was sexually assaulted by Appellee.

**Appellee's Proposition of Law No. 5. Drawings made by the alleged victim when she was interviewed by a detective, but which do not contain any information relevant to the case, and a drawing made by the detective, purporting to document what the complainant allegedly told him are inadmissible hearsay and their admission constitutes plain error.**

Among the exhibits introduced by the State and admitted into evidence by the trial court, over objection, were drawings made by the alleged victim when she was interviewed by Det. Berg (Exhibit 2) and an anatomical drawing made by Det. Berg containing notations of the words Ja'nyia used to describe various parts of the body. (Exhibit 14)

The drawings made by Ja'nyia were of no evidentiary value whatsoever. They depict only the "good things" that took place at Nadine's house on the evening of June 22nd and none of the "bad things." This trial was about the bad things that allegedly happened that evening; not the good things. The admission of these drawings violated *Evid. R. 402*, which provides, "Evidence which is not relevant is inadmissible. These cute little drawings made by a child were prejudicial because they appealed to the sympathy of the jury, emphasizing the innocent nature of the alleged victim, while providing no relevant evidence.

The anatomical drawing containing Det. Berg's notations of the terminology used by Ja'nyia in reference to various parts of the body during her interview with Ja'nyia constitutes hearsay and is inadmissible under *Evid. R. 802*. This exhibit was prejudicial because it was prepared by an agent of the State and it uses inadmissible hearsay to provide corroboration for the story told by Ja'nyia.

**Appellee's Proposition of Law No. 6. The evidence was insufficient to support the charge of gross sexual imposition under Count III (alleged kissing on the neck).**

In analyzing the evidence adduced at trial on a claim that the evidence was legally insufficient, an appellate court's function is, "... to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the

defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St. 3d 259, 273, 574 N.E. 2d 492.

A conviction based on legally insufficient evidence constitutes a denial of due process of law, guaranteed by the *Fourteenth Amendment* to the Constitution of the United States. *Tibbs v. Florida* (1982), 457 U.S. 31, 45; *Article I, §16*, Ohio Constitution.

Under Count III of the indictment, Appellee was charged with gross sexual imposition. This charge was based upon the allegation that Appellee kissed the victim on her neck. Yet the testimony elicited from the victim, herself, was that she had not been kissed on the neck. She testified:

"Q: Did he ever try to kiss you?  
A: No.  
Q: Did he ever touch you on your neck?  
A: No." (342)

Ja'nyia was nine years old at the time she testified. The alleged offenses occurred only five months earlier. On the witness stand, she displayed a remarkable ability to communicate, an excellent recall of the events, and an appreciation of the obligation to tell the truth. Here, we are dealing with much more than a mere omission or oversight in her testimony, this is an explicit denial. Here, we are dealing with an explicit denial, under oath, of the conduct alleged to constitute the offense of gross sexual imposition under Count III.<sup>1</sup> Ja'nyia's in-court testimony on the issue trumps any hearsay evidence to the contrary. The finding of amylase on Ja'nyia's neck

---

<sup>1</sup> Although the trial court denied Appellee's motion for judgment of acquittal on Count III, the trial court expressed "grave concerns" about the sufficiency of the evidence. (625)

doesn't override her explicit denial either. First, Rausch, the forensic scientist, testified that amylase is found in a number of bodily fluids, not just saliva. (542, 545) Second, the State did not present any DNA evidence showing that Appellee was the source of the amylase found on her neck. After all, this was a large family gathering. Virtually, anyone could have greeted Ja'nyia with a kiss, thereby accounting for the presence of amylase on her neck. Indeed, Ja'nyia, herself, could have been the source of the amylase found on her neck. If Ja'nyia had touched her neck after putting her fingers in her mouth, amylase would have been deposited on her neck..

**Appellee's Proposition of Law No. 7. The evidence was insufficient to support the charge of rape under Count I (digital penetration of victim's vagina).**

The problem with the sufficiency of the evidence in support of the charge of rape under Count I of the indictment (digital penetration of victim's vagina) is twofold. The first problem is similar to the problem discussed under the preceding proposition of law -- the alleged victim expressly denied it during her testimony:

- Q: And did he ever use his hand on you while all this happened?  
A: No.  
Q: And do you remember if he touched your private parts with his hand?  
A: No. (342)

Once again, we are dealing with a nine-year old girl who demonstrated throughout her testimony an excellent ability to communicate and to recall details of the events at the time of the occurrence, as well as an appreciation of the meaning of the oath. Her explicit denial under oath trumps any hearsay evidence to the contrary.

The second problem with this charge involves the finding of redness on the *outside* of her vagina. First, since the redness was on the outside of the vagina, it does not prove that penetration of the vagina occurred and penetration into the vagina is essential to prove sexual

conduct under Ohio law. Second, the SANE nurse who examined Ja'nyia acknowledged that there are other things that can cause redness, including a child rubbing herself or contact with clothing worn by the victim or another person. (521, 526, 528) Hence, it is entirely possible that the redness was caused by Appellee rubbing his private parts against hers and "bouncing" up and down, as described by Ja'nyia.

**Appellee's Proposition of Law No. 8. The evidence was insufficient to support the charge of rape under Count II (placement of mouth on victim's vagina).**

The problem with the sufficiency of the evidence in support of the charge of rape under Count II of the indictment (placement of mouth on victim's vagina) is similar to the problem discussed under the two preceding propositions of law -- the victim expressly denied it during her testimony:

- Q: Did her ever use his mouth on any other part of your body when all this stuff happened?  
A: No. (342)

Once again, Ja'nyia's explicit denial under oath trumps any hearsay or circumstantial evidence to the contrary.

**Appellant's Proposition of Law No. 9. Appellee's convictions for rape (Count I) and gross sexual imposition (Count V) are improper under Ohio Rev. Code §2941.25 and constitute plain error.**

The analysis for determining merger under *Ohio Rev. Code §2941.25* adopted by this Court in *State v. Johnson*, supra, is discussed under Appellee's response to Appellant's sole proposition of law. Appellee submits that the Court of Appeals erred in failing to order a merger of Appellee's convictions for rape (Count I) and gross sexual imposition (Count V).

In the present case, Appellee was convicted of rape (placement of his finger in the victim's vagina), in violation of *Ohio Rev. Code §2907.02(A)(1)(b)*, as charged in Count I of the indictment; and gross sexual imposition (placement of his hand on the victim's thigh and genital area), in violation of *Ohio Rev. Code §2907.05(A)(4)*, as charged in Count V of the indictment.

A comparison of the elements of the offenses charged in the indictment reveals an undeniable similarity. Both offenses require sexual activity, the former requiring sexual conduct, the latter requiring sexual contact. In the context of a rape based upon digital penetration, the difference between these offenses lies in the extent of the touching. Thus, both offenses are allied offenses of similar import.

An examination the alleged facts in the present case demonstrates that the offenses were not committed separately or with a separate animus, thereby satisfying the second step in the analysis required under *Ohio Rev. Code §2941.25(A)*. The two charges arise out of the same conduct, i.e. the placement of a hand under the victim's skirt and touching her thighs and genitalia (gross sexual imposition) culminating in penetration of her vagina with a finger (rape). These two offenses were part and parcel of the same alleged conduct and were not committed separately or with a separate animus.

**Appellee's Proposition of Law No. 10. Appellee's convictions are against the manifest weight of the evidence.**

In analyzing the evidence adduced at trial on a claim that the verdict is against the manifest weight of the evidence, a court of appeals must review the evidence *de novo* to determine whether any reasonable trier of fact could have made the finding beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492. In making this determination,

a court of appeals must consider the factors set forth in *State v. Mattison* (1985), 23 Ohio App. 3d 10, 490 N. E. 2d 926.

A weight of the evidence review considers all of the evidence, not only that which supports the verdict, as well as the credibility of the witnesses. *Id.* Although a court of appeals may determine that a judgment is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the manifest weight of the evidence. *Id.* When a court of appeals reverses a judgment of a trial court on the basis that the judgment is against the weight of the evidence, the court of appeals sits as a “thirteenth juror” and disagrees with the fact finder’s resolution of the conflicting testimony. *Id.*

In the present case, the verdicts are against the manifest weight of the evidence. The alleged victim was nine years old at the time of trial. On the witness stand, she demonstrated an excellent ability to communicate, to recall the events of June 22, 2009 -- just five months before the trial, and an understanding of the obligation to tell the truth. At trial, she expressly denied digital penetration of her vaginal, the factual basis for the charge of rape under Count I of the indictment; she expressly denied placement of Appellee’s mouth on her vagina, the factual basis for the charge of rape under Count II; and she expressly denied being kissed on the neck, the factual basis for the charge of gross sexual imposition under Count III. These explicit denials under oath certainly trump any out-of-court statements made by the alleged victim. They also trump the ambiguous medical evidence. The SANE nurse testified that the redness seen near the alleged victim’s vagina was consistent with causes other than digital penetration. Hence, redness alone is insufficient to establish the requirement of penetration under Ohio law.

The inconsistencies in the various accounts given by the alleged victim undermine her credibility and thereby cast doubt upon her allegations.

**Appellee's Proposition of Law No. 11. Appellee was deprived of his right to the effective assistance of counsel.**

The Supreme Court has developed a two part test for determining whether the accused received ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the *Sixth and Fourteenth Amendments* to the Constitution of the United States and *Article I, §10*, of the Constitution of the State of Ohio. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v. Washington*, (1984), 466 U.S. 668.

**A. Failure to object to violations of Appellant's constitutional rights.**

Defense counsel has a duty to safeguard the constitutional rights of the accused. The failure of defense counsel to object to the admission of testimony related to Appellant's custodial status and post-arrest silence in violation of Appellee's rights to due process of the law, equal protection of the laws, and the privilege against self-incrimination constituted deficient performance. For the sake of brevity, here, and in the succeeding sections of the argument related to Proposition of Law No. 11, the discussion of prejudice appears under the corresponding proposition of law and will not be repeated in the discussion of this proposition of law.

**B. Failure to object to the introduction of inadmissible evidence.**

**C. Failure to object to defects in jury instructions.**

Defense counsel has a duty to request necessary and appropriate jury instructions and to object to any improper jury instructions. Defense counsel's failure to request jury instructions and to object to improper jury instructions in this case constituted deficient performance.

**D. Failure to object to trial court's rulings on merger of offenses.**

Defense counsel has a duty to object to any adverse rulings on the merger of offenses. Defense counsel's failure to object to such rulings in this case constituted deficient performance.

See, Appellant's thirteenth and fourteenth assignments of error for a more detailed discussion of these issues and the prejudice related thereto.

**Appellee's Proposition of Law No. 12. Appellee's convictions should be reversed because the cumulative effect of the errors committed by the trial court violated Appellee's right to a fair trial.**

Under the cumulative error doctrine, courts have recognized that the combined effect of multiple errors, which individually may not require reversal, may violate the defendant's right to a fair trial and, therefore, require reversal. *State v. Madrigal*, 87 Ohio St. 3d 378, 397, 2000 Ohio 448; *State v. Brown*, 115 Ohio St. 3d 55, 2007 Ohio 4837; *State v. DeMarco* (1987), 31 Ohio St. 3d 191, 509 N.E. 2d 1256. To affirm a conviction in spite of multiple errors, the court must determine that the cumulative effect of the errors is harmless beyond a reasonable doubt. *DeMarco*, supra, at 195. The errors may be considered harmless if there is overwhelming evidence of guilt, if Appellee's substantial rights were not affected, or if there are other indicia that the errors did not contribute to the conviction. *State v. Martin*, 103 Ohio St. 3d 385, 2004 Ohio 5471.

that the errors did not contribute to the conviction. *State v. Martin*, 103 Ohio St. 3d 385, 2004 Ohio 5471.

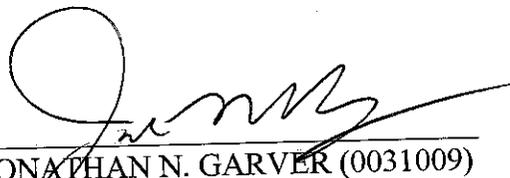
Appellee has demonstrated that the evidence in this case is insufficient and that the verdicts are against the manifest weight of the evidence. On this record, no court could conclude that there is overwhelming evidence of Appellee's guilt.

Appellee has also demonstrated that the errors at his trial affected his substantial, constitutional rights, e.g. the right to a fair trial; the right to a trial by jury; the right to have the jury properly instructed on the law; the right not to be convicted on the basis of hearsay; and the right not to suffer multiple punishments for similar offenses. There can be no doubt that Appellee's substantial rights were affected by the multiple errors which occurred at his trial.

Nor can there be any doubt that these errors contributed Appellee's convictions. Appellee has demonstrated that the State's proof was weak to non-existent and Appellee has further demonstrated the prejudice resulting from each of his assignments of error.

### CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction over Appellee's cross-appeal.

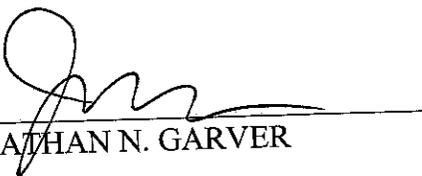


JONATHAN N. GARVER (0031009)  
The Brownhoist Building  
4403 St. Clair Avenue  
Cleveland, Ohio 44103  
(216) 391-1112 (Telephone)  
(216) 881-3928 (Facsimile)  
[jgarver100@aol.com](mailto:jgarver100@aol.com) (E-mail)

Attorney for Appellee

## Certificate of Service

A true copy of the foregoing brief was mailed to Kathleen Mullin, Assistant Prosecuting Attorney, The Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, this 17th day of May, 2011.



JONATHAN N. GARVER

jng27092.wpd