

ORIGINAL

NO. 2011-0619

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 94616

STATE OF OHIO

Plaintiff-Appellant/Cross-Appellee

-vs-

JASON WILLIAMS

Defendant-Appellee/Cross-Appellant

**MEMORANDUM IN RESPONSE TO MEMORANDUM IN SUPPORT OF
CROSS-APPEAL**

Counsel for Plaintiff-Appellant/Cross-Appellee

WILLIAM D. MASON (#0037540)
CUYAHOGA COUNTY PROSECUTOR

KATHERINE MULLIN (#0084122)

Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Defendant-Appellee/Cross-Appellant

JONATHAN N. GARVER, ESQ. (#0031009)

4403 St. Clair Avenue
The Brownhoist Building
Cleveland, Ohio 44103

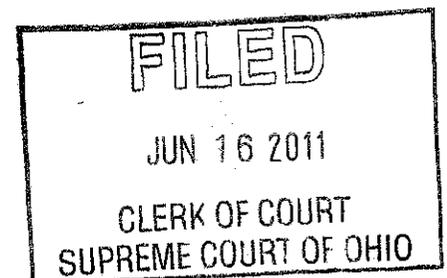


TABLE OF CONTENTS

WHY THIS FELONY CASE IS NOT A CASE OF GREAT PUBLIC OR GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION..... 1

STATEMENT OF THE CASE..... 2

STATEMENT OF THE FACTS..... 3

LAW AND ARGUMENT 4

Proposition of Law No. I (As Formulated By Appellee/Cross-Appellant): The use of a flawed jury instruction on the issue of credibility, which invades the province of the jury, constitutes plain error. 4

Proposition of Law No. II (As Formulated By Appellee/Cross-Appellant): A trial court commits plain error by giving jury instructions on the offenses of rape, gross sexual imposition, and kidnapping which invade the province of the jury and are tantamount to a directed verdict on at least one essential element of each offense.5

Proposition of Law No. III (As Formulated By Appellee/Cross-Appellant): 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. 6

Proposition of Law No. IV (As Formulated By Appellee/Cross-Appellant): Testimony of the mother of the complainant in a rape case regarding nightmares the complainant is allegedly experiencing as a result of the alleged sexual assault is inadmissible hearsay and its admission constitutes plain error.7

Proposition of Law No. V (As Formulated By Appellee/Cross-Appellant): 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. 8

<u>Proposition of Law No. VI (As Formulated By Appellee/Cross-Appellant):</u> The evidence was insufficient to support the charge of gross sexual imposition under Count III (alleged kissing on the neck).	9
<u>Proposition of Law No. VII (As Formulated By Appellee/Cross-Appellant):</u> The evidence was insufficient to support the charge of Rape under Count I (digital penetration of victim’s vagina).	9
<u>Proposition of Law No. VIII (As Formulated By Appellee/Cross-Appellant):</u> The evidence was insufficient to support the charge of Rape under Count II (placement of mouth on victim’s vagina).	9
<u>Proposition of Law No. IX (As Formulated By Appellee/Cross-Appellant):</u> Appellee’s convictions for rape (Count I) and gross sexual imposition (Count V) are improper under Ohio R.C. §2941.25 and constitute plain error.	10
<u>Proposition of Law No. X (As Formulated By Appellee/Cross-Appellant):</u> Appellee’s convictions are against the manifest weight of the evidence.	10
<u>Proposition of Law No. XI (As Formulated By Appellee/Cross-Appellant):</u> Appellee was deprived of his right to the effective assistance of counsel.	11
<u>Proposition of Law No. XII (As Formulated By Appellee/Cross-Appellant):</u> Appellee’s convictions should be reversed because of the cumulative effect of the errors committed by the trial court violated Appellee’s right to a fair trial.	11
CONCLUSION	12
CERTIFICATE OF SERVICE	13

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

Williams does not present this Honorable Court with either a substantial constitutional question or a matter of great public interest. The Eighth District Court of Appeals (hereinafter “the Eighth District”) analyzed the issues and affirmed William’s convictions while concluding that some of his offenses were subject to merger. *State v. Williams*, Cuyahoga App. No. 94616, 2011-Ohio-925. The Eighth District’s merger analysis is the subject of the State’s appeal.

A jury convicted Williams of sexually assaulting his eight year old niece. The victim’s account was corroborated by DNA evidence and testimony from other witnesses. Williams took a direct appeal in which he raised sixteen assignments of error, many of which have been repeated here as propositions of law. The Eighth District properly applied controlling precedent and overruled Williams’s arguments.

Williams’s propositions can be broken down into clusters. In his first three propositions of law, Williams’s claims that defects in the jury instructions amounted to plain error. Williams’s fourth and fifth propositions of law allege that the trial court erred in admitting certain testimony. In propositions six through eight and ten, Williams’s argues that his convictions are not supported by either sufficient evidence or the manifest weight of the evidence. In proposition nine, Williams’s claims that his conviction for rape and gross sexual imposition are allied offenses of similar import. In his final two propositions-numbers eleven and twelve-Williams’s argues that his trial counsel was ineffective and that the cumulative errors at trial warrant reversal.

Each one of these claims were previously raised and correctly decided. The State of Ohio respectfully submits that Williams’s arguments do not warrant the jurisdiction

of this Court. No aspect of this case presents this Honorable Court with either a substantial constitutional question or a matter of general or great public interest, and leave to appeal should not be granted.

STATEMENT OF THE CASE

On May 1, 2009, a Cuyahoga County Grand Jury issued a six-count indictment charging Williams with the following: two counts of Rape in violation of R.C. 2907.02(A)(1)(b) which further alleged that the act was committed with force and that the victim was under the age of ten at the time of the offense, each count also contained a sexually violent predator specification; three counts of Gross Sexual Imposition in violation of R.C. 2907.05(A)(4); and one count of Kidnapping in violation of R.C. 2905.01(A)(5) with sexual motivation and sexually violent predator specifications.

Williams elected to bifurcate the sexually violent predator specifications to the trial court but exercised his right to a jury on the remaining charges. The trial court dismissed the sexual motivation specification attached to the kidnapping charge as "legally irrelevant." The jury convicted Williams of all charges and specifications and the trial court found Williams not guilty of the sexually violent predator specifications. Williams was sentenced to life in prison with parole eligibility after 25 years. The trial court imposed a sentence on each count and the sentences were run concurrently.

Williams appealed and raised numerous assignments of error. The Eighth District affirmed Williams's convictions and most of his sentence. The Court, however, found that Williams's convictions for Rape and Kidnapping were allied offenses noting that "[t]he indictment alleged that the kidnapping was sexually motivated and therefore [Williams's] animus for the kidnapping and the rape was the same or, stated differently, the rape and the kidnapping were a single act, committed with a single state of mind."

State v. Williams, Cuyahoga App. No.94616, 2011-Ohio-925, ¶61. The Eighth District remanded the matter for proceedings consistent with its decision.

The State filed a memorandum in support of jurisdiction requesting that this Honorable Court provide guidance of the applicable standard of review for merger analysis. Williams subsequently cross-appealed raising twelve propositions of law which the State respectfully argues does not warrant the jurisdiction of this Court.

STATEMENT OF THE FACTS

In its opinion affirming Williams's convictions, the Eighth District provided a summary of the facts presented at trial as follows:

“At trial, the victim, who was at the time appellant's eight year old niece, testified at trial describing events she alleged had occurred at her residence on June 22, 2009. According to her, she was alone outside with appellant when he told her to sit down on his lap; then, he pulled up her skirt and underwear and put his mouth on her ‘private.’ [footnote omitted]. They were behind her grandmother's car in the backyard. Then appellant pulled her by the arm between two houses. At that point, he picked her up and put her on the ground and put his “private” on her “private” and was bouncing on top of her. When the victim's aunt called for her, the victim went inside of the house and told her grandmother and aunt what had transpired.

The victim testified that appellant did not try to kiss her or try to touch her neck. However, the medical records, that were created on the night of the incident, reflect that while appellant was being examined by the Sexual Assault Nurse Examiner (the “SANE nurse”), she told the nurse that appellant's hand went inside the lips of her vagina. The victim also reported that appellant had kissed her genitalia and neck. The SANE nurse noted redness to the labia minora that was consistent with the victim's story.

The victim's underwear and skin stain swabs tested positive for amylase, a component of saliva. Appellant's DNA was consistent with the DNA profile obtained from the victim's underwear.

The State also presented the testimony of the victim's grandmother and aunt, who were present in the house when the victim entered and reported the incident that had occurred with appellant. Neither the grandmother nor the aunt had witnessed the incident. Both women confronted

appellant who denied it. The women described the victim as nervous, shaking, with dirt on the back of her clothing.

The State also presented the testimony of a police officer who had responded to the report of a sexual assault and the detective who was assigned to the case. The state's exhibits included photographs, drawings, the victim's clothing, medical records, the rape kit, and laboratory reports.

The appellant presented the testimony of his wife. Appellant's wife was inside the victim's home with her own children on the night of the incident. They had stopped by so that appellant could assist his step-mother by moving items into the basement. She did not observe appellant and the victim while they were alone outside. According to appellant's wife, the two were only alone for a few seconds after which the victim entered the house. The victim did not appear to be upset. She spoke with the victim on the phone after returning home that night who accused appellant of taking her by the side of the house, pulling down her underwear and kissing her.”

State v. Williams, Cuyahoga App. No.94616, 2011-Ohio-925, ¶¶2-7.

During sentencing, the trial court heard the parties' merger arguments. The trial court found that the offenses were not allied offenses of similar import subject to merger. Williams was sentenced on each count.

LAW AND ARGUMENT

Proposition of Law No. I (As Formulated By Appellee/Cross-Appellant): The use of a flawed jury instruction on the issue of credibility, which invades the province of the jury, constitutes plain error.

Williams argues that the trial court erred when it instructed the jury as follows: “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 does not necessarily mean that you should disbelieve a witness, as people commonly forget facts or recollect them erroneously after the passage of time.” (Tr. 637). Having failed to object, Williams argues that this instruction constitutes plain error.

This Court previously affirmed the use of a similar jury instruction in *State v. Cunningham*, 105 Ohio St.3d 197, 824 N.E.2d 504, 2004-Ohio-7007, ¶¶51-56. Williams argues that the instruction in *Cunningham* varies in that the trial court in *Cunningham* further instructed the jury “***in considering the discrepancy in a witness [sic] testimony, you should consider whether such discrepancy concerns an important fact or a trivial fact.” *Id.* at ¶54. The omission of this additional sentence is not outcome determinative. Rather, both this Court and the Eighth District noted that jury instructions have to be viewed as a whole.

In this case, the trial court instructed the jury that they were to decide the credibility of witnesses. (Tr. 671). The court provided factors for the jury to consider and made it clear that they could believe or disbelieve all or any part of a witness’s testimony. The Eighth District properly applied *Cunningham* and overruled Williams’s argument. Because the Eighth District did not err, the State respectfully requests this Honorable Court decline to accept jurisdiction of Williams’s cross-appeal.

Proposition of Law No. II (As Formulated By Appellee/Cross-Appellant): A trial court commits plain error by giving jury instructions on the offenses of rape, gross sexual imposition, and kidnapping which invade the province of the jury and are tantamount to a directed verdict on at least one essential element of each offense.

Williams next argues that the trial court erred when it provided the victim’s date of birth in the jury instructions. Williams contends that doing so invaded the fact finding role of the jury with respect to an element of the offense; the victim’s age. As the Eighth District found, Williams’s interpretation is not supported when the instructions are considered as a whole. “The trial court clearly instructed the jury that it had to find that the victim was under the age of thirteen years old before they could find him guilty

under count one. Likewise, the trial court instructed the jury it had to find that the victim was under the age of ten years old before they could find him guilty of other offenses.” *Williams*, 2011-Ohio-925, ¶41.

Because Williams’s argument lacks merit, this Court should decline to grant jurisdiction over his second proposition of law.

Proposition of Law No. III (As Formulated By Appellee/Cross-Appellant): 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.

In his third proposition of law, Williams argues that the trial court improperly shifted the burden of proof for two elements of his rape charge. The trial court provided lengthy and thorough jury instructions. At one point the trial court momentarily misspoke regarding the burden of proof on the issue of force. However, the court immediately clarified and corrected itself on the record to the jury with regard to the further findings burden by stating:”If you are not convinced, the State didn’t provide it, and you will put did not.” (Tr. 688). The trial court also explained the burden of proof during jury selection and at the close of the evidence. (Tr. 72, 76, 208, 199-200, 678).

In reviewing this claim, the Eighth District noted that Williams “ignores the balance of the jury instructions where the trial court clearly advised the jury that the State bore the burden of proof, that the appellant did not have to prove anything, and that appellant did not have the burden of proof.” *Williams*, 2011-Ohio-925, ¶42. When viewed as a whole, the Eighth District found that trial courts “isolated misstatement” was not plain error. *Id.*

Because the Eighth District properly reviewed Williams’s argument, this Court should decline to grant jurisdiction over his third proposition of law.

Proposition of Law No. IV (As Formulated By Appellee/Cross-Appellant): Testimony of the mother of the complainant in a rape case regarding nightmares the complainant is allegedly experiencing as a result of the alleged sexual assault is inadmissible hearsay and its admission constitutes plain error.

Williams next argues that the trial court erred when it admitted testimony from the victim's grandmother that the victim was having nightmares after the sexual assault. Williams contends that the grandmother's testimony is inadmissible hearsay. Williams failed to object and waived all but plain error. Williams's argument is premised on the following testimony:

"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 [Williams] was over her and that she told her brother to jump into the water. He was holding onto [Williams] by the leg so he can jump in to save him and her alone. That's the only one she really talked about." (Tr. 439).

As the State previously argued and the Eighth District found, the grandmother's testimony about the victim's nightmares was not offered for the truth of the matter asserted. Rather, it was offered to show a change in the victim's state of mind following the sexual assault. Williams's argument lacks merit as the testimony was not hearsay. As such, this Court should decline to accept jurisdiction over Williams's fourth proposition of law.

Proposition of Law No. V (As Formulated By Appellee/Cross-Appellant): 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.

In his fifth proposition of law, Williams argues that the trial court erred in admitting drawings made by the victim during her interview with the investigating detective as well as an anatomical drawing containing notes from the detective's interview with the victim.

Contrary to Williams's assertion, the victim's drawings were relevant to this case. The victim's drawings depicted events leading up to the sexual assault and were testified to at trial. The drawings were relevant to corroborate the victim's testimony. They were also not prejudicial to Williams as they did not depict the sexual assault. *Williams*, 2011-Ohio-925, ¶ 26. Similarly, the anatomical drawing with the investigating detective's notes was also admissible. The detective merely recorded the victim's terminology for various body parts onto a drawing in order to better communicate with the child victim. The drawing is not hearsay. It did not establish that Williams sexually assaulted the victim and it was not admitted for that purpose.

The Eighth District agreed and properly overruled Williams's argument. Because his claim lacks merit, the State respectfully requests this Court decline to accept jurisdiction of Williams's cross-appeal.

Proposition of Law No. VI (As Formulated By Appellee/Cross-Appellant): The evidence was insufficient to support the charge of gross sexual imposition under Count III (alleged kissing on the neck).

Proposition of Law No. VII (As Formulated By Appellee/Cross-Appellant): The evidence was insufficient to support the charge of Rape under Count I (digital penetration of victim's vagina).

Proposition of Law No. VIII (As Formulated By Appellee/Cross-Appellant): The evidence was insufficient to support the charge of Rape under Count II (placement of mouth on victim's vagina).

Williams's sixth, seventh, and eighth propositions of law all allege that his convictions are not supported by sufficient evidence. The Eighth District applied the proper standard of review for this issue when decided below. *Williams*, 2011-Ohio-925, ¶ 48 citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541.

The Eighth District relied upon the following facts in overruling Williams's argument:

“The victim testified that appellant pulled down her underwear and put his mouth on her private. While the victim initially indicated that appellant did not use his hand on her or touch her private with his hands, she stated in other testimony that he did. The SANE nurse testified that the victim reported that appellant had kissed her on the neck and had put his hand inside the lips of her vagina. The medical records corroborate this fact. The SANE nurse further observed redness to the labia minora that would be consistent with the victim's report. Laboratory reports and testimony indicate that a component of saliva was detected on the swabs taken from the victim's neck. There was sufficient evidence, that if believed, would support each of the challenged convictions.”

Williams, 2011-Ohio-925, ¶ 49.

Williams's convictions were supported by the victim's testimony, physical evidence including DNA, and corroborating witnesses. As such, the State respectfully requests this Honorable Court decline to accept jurisdiction over William's claims.

Proposition of Law No. IX (As Formulated By Appellee/Cross-Appellant): Appellee's convictions for rape (Count I) and gross sexual imposition (Count V) are improper under Ohio R.C. §2941.25 and constitute plain error.

In his ninth proposition of law, Williams's argues that his convictions for rape and gross sexual imposition are allied offenses of similar import. The Eighth District's merger analysis is the topic of the State's appeal. However, the Eighth District did not err when it found that William's convictions for rape and gross sexual imposition were not subject to merger. The offenses involved separate conduct. The rape count involved the digital penetration into the victim's vagina whereas the gross sexual imposition count involved touching the victim's thigh.

The State respectfully submits that while this Court should grant review of the Eighth District's allied offense analysis in this case, Williams's argument lacks merit as his convictions are not allied offenses of similar import.

Proposition of Law No. X (As Formulated By Appellee/Cross-Appellant): Appellee's convictions are against the manifest weight of the evidence.

Williams next argues that the Eighth District erred when it found that his convictions were supported by the manifest weight of the evidence. The Eighth District properly applied controlling precedent and overruled Williams's claim. *Williams*, 2011-Ohio-925, ¶ 51-52.

Williams seeks to have this Court review his convictions, asking not that this Court review a legal issue, but to determine the application of his case to well established law; in essence he seeks to have this case determine factual error. He has recast his assignment of error made to the appellate court as his propositions of law. Because the appellate court correctly applied the law to the facts of the case, Williams

has not presented any constitutional question that requires review by this Court, nor has he presented an issue that is one of great public interest. For these reasons, the State asks that this court deny jurisdiction and review of Williams's tenth proposition of law.

Proposition of Law No. XI (As Formulated By Appellee/Cross-Appellant): Appellee was deprived of his right to the effective assistance of counsel.

In Williams's eleventh proposition of law he again asks this Court to find that the trial court erred when it overruled his claim that he was denied effective assistance of counsel. William's claim is premised upon trial counsel's failure to object to some of the previously discussed propositions of law. The standard of review for a claim of ineffective assistance of counsel is well-established and was applied in this case. *Williams*, 2011-Ohio-925, ¶ 63 citing *Strickland v. Washington* (1984), 466 U.S. 668, 204 S.Ct. 2052; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

The Eighth District found that because Williams's underlying arguments lacked merit, he was unable to show that defense counsel was ineffective. *Williams*, 2011-Ohio-925, ¶ 64. The Eighth District performed a thorough review of the underlying issues and reached the correct result. Williams's eleventh proposition of law does not present this Court with a substantial constitutional question or a matter of great public interest. As such, the State requests this Honorable Court decline to accept jurisdiction of this properly decided issue.

Proposition of Law No. XII (As Formulated By Appellee/Cross-Appellant): Appellee's convictions should be reversed because of the cumulative effect of the errors committed by the trial court violated Appellee's right to a fair trial.

In Williams's final proposition of law, he claims that the multiple errors that occurred during trial cumulatively denied him his right to a fair trial. This issue was also

previously raised as an assignment of error and rejected by the Eighth District. *Williams*, 2011-Ohio-925, ¶ 66. The only error that the Eighth District found was that Williams's convictions for Kidnapping and Rape are allied offenses of similar import. The cumulative error doctrine does not apply unless there were multiple errors throughout the trial. As there was no error, Williams's argument lacks merit. Williams's final proposition of law does not warrant this Court's review and the State respectfully requests this Court decline to accept jurisdiction over Williams's cross-appeal.

CONCLUSION

Williams has simply reiterated his brief, conclusory arguments that were made to the Appellate court. That court properly overruled these assignments of error where the record and established law did not show error on the part of the trial court. The arguments herein do not demonstrate any error in the appellate court's opinion or treatment of the case. More importantly, they do not display any error in law or the application of law to the facts underlying Williams's convictions. For these reasons, the State respectfully requests that this Court decline to accept jurisdiction upon Williams's propositions of law.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

BY:


KATHERINE MULLIN (0084122)
Assistant Prosecuting Attorney
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
216.443.7800

CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing Memorandum in Response to Memorandum in Support of Cross-Appeal was sent by regular United States Mail on this 15th day of June 2011 to the following:

JONATHAN N. GARVER, ESQ.
4403 St. Clair Avenue
The Brownhoist Building
Cleveland, Ohio 44103


Assistant Prosecuting Attorney