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Decision and Journal Entry of the Ninth District Court of Appeals (dated August 13, 2012, journalized August 14, 2012)

**EXPLANATION OF WHY LEAVE SHOULD BE GRANTED THIS DISCRETIONARY APPEAL, WHY THIS CASE IS A CASE OF GREAT PUBLIC INTEREST, AND WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case should be heard and considered by the Supreme Court of Ohio.

**Insufficiency of the Evidence**

When addressing sufficiency of the evidence, “the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any reasonable 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, paragraph two of the syllabus.

The Appellant’s due process rights have been violated by woefully insufficient evidence. The testimony of the two complaining witnesses, “K.C.” and “J.H.,” was simply not to be believed. Indeed, the jury acquitted Appellant of the most serious charges involving “J.H.”

**Manifest Weight of the Evidence**

“In judging the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered.” State v. Otten, 33 Ohio App.3d 339.340 (1986).

In the instant case, Appellant submits that an overall review of the case, the prosecution’s relentless pursuit of Appellant, and its presentation of inflamed allegations by alleged victims who were admitted juvenile delinquents, forced the jury to lose its way. Here, Appellant’s conviction was against the manifest weight of the evidence. There was no evidence that the alleged sexual conduct occurred with anyone and no credible evidence that Appellant had

contributed to the delinquency or unruliness of any child.

The testimony of the alleged victims (both juvenile delinquents and admitted liars) was fraught with inconsistencies. The jury lost its way and the verdicts rendered constitute a manifest miscarriage of justice.

**Prosecution's Failure to Provide Specificity as to Dates and Times of Alleged Misconduct**

In the instant case, the State of Ohio failed to provide Appellant with any dates, and times when the alleged events of sexual conduct and/or the alleged contributing to the delinquency occurred. Such failure and refusal was purposeful and in violation of Appellant's Constitutional rights to due process and against double jeopardy. Not only did the State of Ohio's refusal to provide specific dates and times prevent Appellant from defending herself at trial, she was also left unprotected from future counts and charges that would otherwise be prohibited through application of the Double Jeopardy clause.

**STATEMENT OF THE CASE**

On April 21, 2010, Appellant Kelly Covic was Indicted in Medina County Case No.: 10CR0161 for conduct which was alleged by the State of Ohio as: one (1) count of Sexual Battery and one (1) count of Contributing to the Unruliness or Delinquency of a Minor.

Thereafter, on May 20, 2010, a Supplemental Indictment charging Appellant with two (2) additional counts of Sexual Battery and two (2) counts of Child Endangering was filed.

On June 23, 2010, Appellant filed a Motion for Bill of Particulars. On July 8, 2010, the State of Ohio filed a Bill of Particulars wherein it recited the exact same broad and non-specific time-frame set forth in its Indictments. The State's Bill of Particulars further lacked any specific location(s) for any of the six (6) criminal counts contained in the initial Indictment and

Supplemental Indictment. As to time-frame, each count only stated: “[t]hat on or about the 1<sup>st</sup> day of May through the 30<sup>th</sup> day of June, 2009, within the County of Medina . . .” On July 29, 2010, Appellant filed a Motion for a Meaningful Bill of Particulars.

On August 13, 2010, the trial court held a hearing on all pending motions, including Appellant’s Motion for a Meaningful Bill of Particulars. During the hearing, the State of Ohio indicated that since Ohio Criminal Rule 16 had recently been amended, the State of Ohio could not provide further information to the defense unless and until the defense filed a new Motion for Discovery. As reflected on the court’s entry (dated August 17, 2010), based upon the representations of the prosecution, the trial court delayed ruling on Appellant’s Motion for a Meaningful Bill of Particulars “until [Appellant] files a second Motion for Discovery under new provisions of Crim Rule 16” (which rule was amended by the Ohio legislature on July 1, 2010).

On August 16, 2010, Appellant filed a Supplemental Demand for Discovery, however, no Meaningful Bill of Particulars, other details, or more specific information - concerning the otherwise 'non-specific' dates, time- frame, and/or lack of particular location for any of the six (6) offenses charged in the Indictments - was ever provided by the State of Ohio.

Appellant was tried by a Medina County jury before the Honorable Christopher Collier beginning February 7, 2011. On February 15, 2011, the jury returned its verdicts in the case. The jury acquitted Appellant of both counts of Sexual Battery (against “JH”) and both counts of Child Endangering (against Appellant’s own children), but convicted Appellant of one Count of Sexual Battery (against “KC”) in violation of Revised Code Section 2907.03(A)(7) and one (1) Count of Contributing to the Unruliness or Delinquency of a Minor (against “JH”) in violation of Revised Code Section 2919.24 (A)(1).

On March 28, 2011, Appellant filed post-trial motions including: a Motion for New Trial pursuant to Criminal Rule 33; a Motion for Acquittal pursuant to Criminal Rule 29, and a Motion for Arrest of Judgment pursuant to Criminal Rule 29. Each of these motions was denied.

On April 4, 2011, the trial court sentenced Appellant to a term of three (3) years in prison for the Sexual Battery conviction and six (6) months for the Contributing to the Unruliness or Delinquency of a Minor conviction and ordered the sentences to run concurrent. Additionally the trial court found Appellant to be a Tier III Sexual Offender.

Appellant filed a timely Notice of Appeal and the matter and issues raised herein are now before this Honorable Court for review.

On August 14, 2012, the Ninth District Court of Appeals affirmed Appellant's convictions.

#### STATEMENT OF FACTS

On August 4, 2009, just prior to the start of fall classes, Appellant received several disturbing and extortionate text messages from one of her former middle school students ("JH"). The text messages (Exhibits X through X-13) from "JH" (who had been in trouble in the past and had previously been adjudicated a juvenile delinquent) were disturbing, quite explicit, and demanded \$4,000.00 from Appellant. The text messages threatened that if Appellant did not pay "JH," he would tell the police that Appellant had "raped" him. Appellant responded telling "JH" that he should not make such threats and must stop. Immediately upon receiving the underlying text messages from "JH" Appellant called her friend and neighbor, Tadeusz Kiernozeck, a City of Brunswick police officer, for advice. Officer Kiernozeck advised Appellant that she should take pictures of the text messages and also told her to contact her teachers' union representative for

advice about what else to do (Tr. p. 430).

The following day, Appellant received a message online *via* "MySpace" from "JH" which indicated that he was sorry about sending the text messages, and that he was "f'd" up last night." (Tr. p. 986) Also, as instructed by Officer Kiernozek, Appellant called her union representative, who essentially advised Appellant that since "JH" was going to start high school not be under the middle school's jurisdiction, the best thing to do was to "let sleeping dogs lie."

In mid-August, just before the beginning of the 2009 – 2010 school year, Edwards' principal Kent Morgan learned from an Edwards teacher, Laura Mann, that Appellant had received a number of threatening text messages from a former Edwards student (Tr. 448-449). At the time, Mr. Morgan did nothing substantive to follow up on that report. Thereafter, news about the extortionate text messages to Appellant and various rumors began to spread around quickly as Edwards' teachers and staff members started to return to school from summer break.

On August 19, 2009, Mr. Morgan received a report from Cassandra Shepard, another Edwards teacher, that she had heard a rumor that during the summer there was some sort of overnight "gathering" at a teacher's vacation trailer in Catawba, in which Appellant and fellow teachers Janet Dooling, Lori Wagner, and Tiffany Young participated. The rumor indicated that during this gathering, which admittedly involved games and a great deal of alcohol consumption (several pitchers of margaritas and at least three bottles of wine), Appellant supposedly revealed to the other teachers that she had done something "inappropriate." In fact, what Appellant said to her friends at the Catawba trailer was that she had "crossed certain boundaries" and "broken the trust" that she had with a student ("KC") (Tr. p. 1067) because she had met that student's older/adult brother for a drink even though she was married. As illustrated below, the three

teachers' disparate and varied recollections about what Appellant supposedly said during this drunken "girls' night out" at the Catawba trailer are confounded, less than credible, and cannot be reconciled.

At trial, Mr. Morgan did not testify that his investigation revealed anything substantive about what had supposedly happened at the trailer, but his interview notes and the statements taken by the police readily evidenced that every time teachers Janet Dooling, Lori Wagner, and Tiffany Young were interviewed by school administration or law enforcement personnel, their stories about what Appellant said at the Catawba trailer changed, expanding with more and more detail. When each teacher was initially interviewed, they denied that anything inappropriate had ever happened / ever been discussed. Later, these teachers drastically changed their accounts of what had supposedly happened. These teachers were obviously under increasing pressure by school officials to "report" that something had happened and to "give details".

At trial, another teacher, Christina Buchfellner, who was a long-term substitute teacher working at Edwards at the beginning of the 2009 school year, and who had previously had experience observing and teaching with Appellant, testified that Mr. Morgan made it very clear she was not to discuss her opinion about the situation and her disbelief about the allegations against Appellant. (Tr. p. 908) It was made very clear to her that if she wanted to keep her job, she was to keep her mouth shut. (Tr. p. 909)

The teachers' increasingly-detailed and exponentially detrimental statements about Appellant's supposed 'admission' to them at the Catawba trailer were undoubtedly the result of the administration's demands that they implicate Appellant or face sanctions for failing to initially "report" that something had been said (admitted) by Appellant which involved

misconduct on her part concerning a student. There is no other possible explanation. Indeed, the teachers' collective trial testimony concerning Appellant's supposed "admission" in July at the Catawba trailer was so disparate as to erase all credibility from each of their separate reports. Moreover, as illustrated below, **each** one of them testified that during Appellant's alleged "admission" [about doing something inappropriate] **she** either: could not remember, went blank, blacked out, or otherwise "created her own world in her head."

Lori Wagner testified, "I – all I remember – and I don't remember much from this night – is hearing Kelly say the name "KC", or "K". I just remember the name." (Tr. p. 789-798).

Janet Dooling testified, "As soon as she said she had done something very inappropriate, quite honestly, I went blank." (Tr. p. 606-607).

Tiffany Young testified, "And I was kind of starting to create my own world in my head. I guess I was kind of blacking out, like trying to figure it out myself, asking questions of myself." (Tr. p. 757-758).

The three teachers' individual accounts of what had supposedly happened were not believable. If something had been "confessed" to them, they failed to fulfill their obligations as "first responders" to report child abuse. It was not until these three teachers met with Principal Morgan that the story about Appellant began to *develop* and fall in line.

Another interesting and contradictory point which casts doubt on the testimony of teacher Lori Wagner is the fact that the Catawba trip occurred about two (2) weeks after Appellant had supposedly "confessed" to Lori Wagner that she had sex with "KC." (Tr. p. 785.) Lori Wagner testified that this "confession" supposedly took place on the way to (or in) a bar at the beginning

of July 2009. On cross examination, Lori Wagner testified from her own personal notes, however, that, "[t]he sounds in the bar and (Appellant's) low volume made for non-specific details" about this confession (Tr. p. 804). During her testimony, Lori Wagner went on to review additional notes she had prepared after she met with Principal Morgan, which notes contained specifics - including short hand notes of Appellant's alleged admission that she "did it" with "KC." (See, Tr. 805). Appellant submits that this "*developing*" testimony fully enunciates the pressures placed upon Lori Wagner and the other teachers by school administrators - as well as illustrating the teachers' hasty efforts to comply - to protect themselves (and perhaps the school) from any adverse consequences for "failing to report" what was later deemed "suspicious" or "reportable" information concerning a student.

It is simply inconceivable that Lori Wagner, a responsible adult and teacher, would invite Appellant to an intimate "girls' night out" of fun, drinking, and games at her vacation trailer in Catawba, just two weeks after she had supposedly confessed to having had sex with a student, a child. This fact belies reason.

In connection with the charges concerning "KC," the testimony given by "KC" at trial was without any support. "KC" (like the other alleged victim "JH") was an admitted juvenile delinquent, who had been truant in grade school and who was truant from high school. "KC's" testimony was inconsistent with every other witness. KC testified - without any proof or ring of credibility - that he had been to Appellant's home so often - *after May of 2009* - he couldn't even count the number of times. (Tr. p. 723) He guessed that he had been to Appellant's home 30-40 times with his friend "TH" and that they consumed alcohol each time they were there. (Tr. p. 723) On cross examination "KC" was forced to admit that he had previously lied to the Grand

Jury and that he later came back and changed his testimony after he had left the Grand Jury room to talk to his mother (*See*, Testimony of "KC", pp. 737-741). "KC" admitted that he also lied to Principal Morgan when he was interviewed (Tr. pp. 735-736, 748) and also admitted that he lied to the police and to the Medina County Job and Family Services when they interviewed him (Tr. p. 748). "KC" did admit that his older brother had met with Appellant, and that he had reported that fact to Detective Klopfenstein of the Brunswick Hills Police Department (Tr. p. 742)

Concerning "JH", Appellant submits that the sum of "JH's" testimony (Tr. p. 506-600) lacks credibility. Indeed, the majority of indicted charges concerned "JH" who admitted writing the extortionate texts identified and referenced above. "JH's" manner and appearance in court made clear to the jury that his story about alleged sexual conduct with Appellant was false. The jury saw through the state's allegations relative to "JH" but was obviously left confused and inundated by the overlapping nature of the remaining allegations against Appellant.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

### Proposition of Law No. I

An Individual Has Been Denied Due Process of Law When Her Conviction Was Not Supported by Sufficient Evidence

In considering the sufficiency of evidence "sufficiency" is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support [a] jury verdict as a matter of law." *See*, State v. Thompkins (1997), 78 Ohio St. 3d 380, citing Black's Law Dictionary (6 Ed. 1990) 1433. *See also*, Crim. R. 29(A) (motion for judgment of acquittal can be granted by the trial court if the evidence is insufficient to sustain a conviction).

In essence, “*sufficiency*” is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. State v. Robinson (1955), 162 Ohio St. 486. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. Tibbs v. Florida (1982), 457 U.S. 31, 45, citing Jackson v. Virginia (1979), 443 U. S. 3070.

Upon review of the sufficiency of the evidence to support a criminal conviction, an appellate court must determine whether the evidence presented at trial would convince the average mind of the defendant’s guilt. 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. *See also*, State v. Thompkins, *supra*.

A challenge to the sufficiency of evidence supporting a conviction requires a reviewing court to determine whether the State has met its **burden of production** at trial. On review for sufficiency, courts are to assess not whether the State’s evidence is to be believed, but whether, if believed, the evidence against the defendant would support a conviction. If a defendant’s conviction is reversed based upon the sufficiency of the evidence, the defendant’s conviction is reversed *with prejudice*. Thompkins, *supra* at 387. In the instant case, the evidence presented by the State of Ohio did not support a conviction for Sexual Battery or Contributing to the Unruliness or Delinquency of a Child.

The State of Ohio failed to present sufficient evidence that sexual conduct occurred between Appellant and any of her students and in particular "KC". Furthermore, there was no credible evidence presented that Appellant had given any child any alcoholic beverage. Indeed, the evidence presented at trial was disparate, impossible, confusing, and contradictory.

To prove the crime of Sexual Battery as charged against Appellant in the instant case, the State of Ohio was required to present sufficient evidence that sexual conduct occurred between her and her students. Here, the State's case consisted of testimony from several juvenile delinquents who were forced to admit previous lies and misstatements to law enforcement, plus three (3) separate accounts by Appellant's fellow teachers of her alleged "admission" of having had done something "inappropriate" with a student. None of this testimony made sense. None of the teachers' accounts were credible and each testified that they either **could not remember** or **blacked out** or **went blank** when Appellant made the supposed admission during the drunken "girls' night out" at Lori Wagner's Catawba trailer. Clearly the state did not meet its burden of proof through the presentation of such testimony.

In the instant case, Appellant submits that even after viewing the evidence presented in a light most favorable to the prosecution, no rational trier of fact could or would believe the testimony of "KC" or "JH" to prove her guilt beyond a reasonable doubt. Accordingly, based upon the State of Ohio's failure to present credible evidence of the offenses charged, and the lack of sufficient evidence to support any conviction, Appellant herein requests and prays that this Honorable Court reverse the jury's verdict and the judgments of the trial court *with prejudice*.

### **Proposition of Law No. II**

An Individual Has Been Denied Due Process of Law When Her Conviction Was Against the Manifest Weight of the Evidence

Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of evidence. State v. Robinson (1955), 162 Ohio St. 486. Weight of the evidence concerns "the

inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief'. (emphasis added.) Black's *supra*, at 1594. In the instant case, the weight of the evidence supports Appellant's innocence.

In determining whether a conviction is against the manifest weight of the evidence, the reviewing court is not supposed to view the evidence in the light most favorable to the State to determine whether the State has met its **burden of persuasion**. See, State v. Love, 9<sup>th</sup> Dist. No. 21654, 2004-Ohio-1422.

In judging the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered." State v. Otten, 33 Ohio App.3d 339. 340 (1986).

In the instant case, Appellant submits that an overall review of the case, the prosecution's relentless pursuit of Appellant, and its presentation of inflamed allegations by alleged victims who were admitted juvenile delinquents, forced the jury to lose its way. A summary review of this case requires this Court to overturn and reverse Appellant's conviction and sentence. Here, Appellant's conviction was clearly against the manifest weight of the evidence. There was no

evidence that the alleged sexual conduct occurred with anyone and no credible evidence that Appellant had contributed to the delinquency or unruliness of any child.

### **Proposition of Law No. III**

**An Individual Has Been Denied Due Process of Law She Was Denied Her Fifth Amendment Rights and Was Further Denied Her Ability to Present a Defense Based upon the Prosecution's Failure to Provide Specificity as to the Times of the Alleged Misconduct**

In the instant case, the State of Ohio failed and refused to provide Appellant with any specific dates or times when the alleged events of sexual conduct and/or the alleged contributing to the delinquency occurred. Such failure and refusal was in violation of Appellant's statutory and Constitutional rights to due process and against double jeopardy. Not only did the State of Ohio's refusal to provide specific dates, times, and locations prevent Appellant from defending herself at trial, she was also left unprotected from future counts and charges which would otherwise be prohibited through application of the Double Jeopardy clause.

Indeed, the charges filed against Appellant were vague and non specific. There were no dates or times, no distinctions between victims; and no distinguishing factors presented. Even after the State of Ohio's promise on August 13, 2010, that it would provide more detailed discovery information to the defense concerning the dates, times, and locations of the alleged offense conduct [when the defense filed a supplemental request for discovery], the prosecution breached such promise and refused to provide any further or additional detail and specificity of the charges alleged. Such failures on the part of the prosecution deprived Appellant of her ability to prepare and present an adequate defense and, if appropriate, file a Notice of Alibi.

As noted *supra.*, in the "Bill of Particulars" provided by the prosecution, every single charges begins: "That on or about the 1st day of May through the 30th day of June 2009, within

the County of Medina, State of Ohio... "Absolutely no effort was made by the prosecution to provide any date, location, or temporal specificity. In failing to provide such information, the State of Ohio purposefully deprived Appellant of her ability to present a defense and further prevented her from filing any Notice of Alibi, if such would have been appropriate.

Appellant repeatedly asked for specificity of the charges so she could defend herself. She filed a Motion for Bill of Particulars which - once provided - proved no more adequate that the Original and Supplemental Indictments filed. Appellant later asked for more specificity in filing her request for a Meaningful Bill of Particulars. As noted *supra.*, a ruling on that request was held in abeyance at the request of the prosecution until Appellant's counsel filed a new (post July 1, 2010) discovery request. After Appellant's counsel filed its Supplemental Demand for Discovery, the State continued to hold back details about the dates, times, and locations of the offense conduct charged. Concerning Appellant's denial of her ability to prepare and present a defense, the question is whether the inexactitude of temporal information truly prejudices the accused's ability fairly to defend against the charges alleged. State v. Sellards (1985) 17 Ohio St.3d 169; State v. Gingell (1982), 7 Ohio App.3d 364, 368; State v. Kinney (1987), 35 Ohio App.3d 84, 519 N.E.2d 1386. Here, there can be little doubt that Appellant was prejudiced having had no idea when the alleged misconduct was supposed to have taken place.

In Sellards, the Supreme Court of Ohio recognized that there was also danger in allowing inexactitude of an indictment where "the defendant had been imprisoned or was indisputably elsewhere during part but not all of the intervals of time set out in the indictment. Again, under such circumstances, the inability of the state to produce a greater degree of specificity would unquestionably prejudice the defense." Id.

Here, Appellant submits that the inexactitude of dates, times, and locations denied her and her counsel the ability to prepare an adequate defense against the charges against her. Appellant submits that the prosecution's failure and refusal to provide specific details to the defense and Appellant's resulting convictions are a manifest miscarriage of justice. Accordingly, Appellant prays this Honorable Court reverse her convictions.

#### CONCLUSION

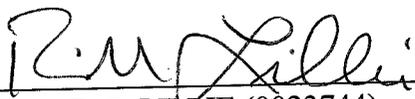
This case involves substantial constitutional questions relative to Appellant's Due Process rights. Accordingly, Appellant requests this Honorable Court grant and accept jurisdiction and allow this case to go forward so that the issues presented will be reviewed and decided on their merits.

Respectfully submitted,

  
\_\_\_\_\_  
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#### CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support was sent via regular U.S. Mail this 17th day of September, 2012, upon, Dean Holman, Medina County Prosecutor and Michael McNamara, Assistant County Prosecutor, 72 Public Square, Medina, Ohio 44256

  
\_\_\_\_\_  
RICHARD G. LILLIE (0023744)  
GRETCHEN A. HOLDERMAN (00585508)

## **APPENDIX**

STATE OF OHIO  
COUNTY OF MEDINA

COURT OF APPEALS  
IN THE COURT OF APPEALS  
)ss: NINTH JUDICIAL DISTRICT  
) 12 AUG 14 AM 9:55

STATE OF OHIO

FILED  
DAVID B. WADSWORTH  
MEDINA COUNTY C.A. No. 11CA0055-M  
CLERK OF COURTS

Appellee

v.

KELLY L. COVIC

Appellant

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF MEDINA, OHIO  
CASE No. 10-CR-0161

### DECISION AND JOURNAL ENTRY

Dated: August 13, 2012

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DICKINSON, Judge.

#### INTRODUCTION

{¶1} Two middle school students in Brunswick accused their teacher, Kelly Covic, of inviting them to her house to play poker, drink alcohol, and engage in sexual conduct with her. A jury convicted her of one count of sexual battery and one count of contributing to the delinquency of a minor. Ms. Covic has appealed. This Court affirms because her convictions are supported by sufficient evidence, are not against the manifest weight of the evidence, and the State's failure to provide additional details regarding the dates and times of the alleged conduct did not prejudice Ms. Covic's ability to defend herself.

#### BACKGROUND

{¶2} Ms. Covic was indicted for three counts of sexual battery, two counts of endangering children, and one count of contributing to the delinquency of a minor. The sexual battery and contributing to the delinquency charges stemmed from allegations that Ms. Covic

invited groups of students to her house to drink alcohol and play poker late at night when her husband was not home. Two male students, J.H. and K.C., testified that, when they went to her house, Ms. Covic gave them alcohol and engaged in sexual conduct with them. The child endangering charges stemmed from allegations that Ms. Covic left her own young daughters home alone at night while she drove the students back to their homes.

{¶3} During the 2008-2009 school year, Ms. Covic was teaching a special program for at-risk kids at Edwards Middle School in Brunswick. She obtained permission from the principal to give out her personal cell phone number to her students so that she could stay in touch by text messaging regarding homework assignments and truancy issues. In August 2009, Ms. Covic received a series of text messages from J.H., a male student who had graduated from Edwards Middle School that spring.

{¶4} Via text message, J.H. demanded that Ms. Covic “leave 4000 dollars at hunington school in the next hour” or he would tell police that she had raped him. Over the next hour, J.H. repeatedly texted Ms. Covic similar threats about her going to prison if she did not give him the money he demanded. Ms. Covic testified that she called a neighbor who works as a police officer for advice on how to handle the situation. The police officer testified that he told her to photograph the text messages, file a report with her local police department, and contact her principal.

{¶5} Ms. Covic testified that she contacted her union representative the next morning regarding the texts from J.H. According to Ms. Covic, she followed the representative’s recommendation to leave the matter alone unless and until a formal complaint was filed against her. The police officer Ms. Covic told about the text messages also testified that Ms. Covic later

told him that J.H. had sent her a message via computer the next day apologizing for his texts as he had been “f’d up” the previous night.

{¶6} A couple of weeks later, the principal of Edwards Middle School, Kent Morgan, asked Ms. Covic to meet with him to discuss allegations that she had engaged in an inappropriate relationship with a student. Mr. Morgan testified that a teacher told him in early August 2009 that Ms. Covic had received a series of texts from J.H. and had consulted the teachers’ union and police about them. Shortly thereafter, another teacher told Mr. Morgan that she had heard about something happening with Ms. Covic at an overnight party attended by several Edwards Middle School teachers at Catawba that summer. Mr. Morgan interviewed the other teachers who were at the party at Catawba and learned that Ms. Covic had admitted to them that she had done “something very wrong, or very inappropriate” with a student. When Mr. Morgan confronted Ms. Covic with that information, she told him that she had damaged her relationship with K.C., a former student, by going on a date with K.C.’s older brother despite the fact that she was married. Mr. Morgan interviewed various students, including K.C. and J.H., and later called the police.

{¶7} Lori Wagner, a teacher at Edwards Middle School, testified that she had been driving home with Ms. Covic from a party in early July 2009 when Ms. Covic began crying, asked her not to think less of her, and told her that she had done something horrible. According to Ms. Wagner, Ms. Covic said, “I did it with [K.C.]” They stopped at a bar to talk about it, and while there, Ms. Covic spent time on the phone texting and talking to K.C. about the fact that she had told Ms. Wagner that they had had sex. Ms. Wagner testified that Ms. Covic told her that K.C. was angry with her for telling Ms. Wagner. She said that Ms. Covic was crying and saying that “it felt . . . like a high school breakup.” Ms. Wagner also testified that Ms. Covic told her

that, if someone ever questioned her about her relationship with K.C., she would say “that this all happened with [K.C.]’s brother.”

{¶8} Ms. Wagner further testified that, two weeks after that conversation with Ms. Covic, she and Ms. Covic went to Ms. Wagner’s trailer at Catawba for a girls’ night out with two other teachers from Edwards Middle School. She testified that she shared a couple of bottles of wine with Ms. Covic that evening and she does not remember details of the conversation. She recalled only that Ms. Covic mentioned K.C.’s name while the group was sitting together at the table.

{¶9} At trial, Ms. Young testified that she was among the teachers present at the party at Catawba when Ms. Covic tearfully admitted to doing “something very inappropriate.” According to her, Ms. Covic said, “I’ve slept with someone.” After hearing that, Ms. Young said that she was confused and “was kind of blacking out, like trying to figure it out myself.” Then she heard Ms. Dooling ask Ms. Covic if she was planning to tell her husband about it and Ms. Covic said, “No, I’m not going to tell Sonny. I would lose everything.” Ms. Young explained that she did not understand what was going on, she did not know the other teachers well, and she quickly left the table and went to bed.

{¶10} Janet Dooling identified herself as a close friend of Ms. Covic and her fellow teacher at Edwards Middle School. She testified that she was present at the party at Catawba. She said that everyone was drinking wine and margaritas and playing games when Ms. Covic looked tearfully at Ms. Wagner and said, “I think I should tell them.” According to Ms. Dooling, Ms. Covic told the group that she had “done something very inappropriate and please don’t think less of her.” Ms. Dooling testified that she “went blank” after that and she stopped processing what Ms. Covic was saying. She said that, although she had hoped that she had misunderstood, a

few minutes after they had left the table, Ms. Covic approached her and “told me that it didn’t work that well because he was so well-endowed, and she named [K.C.]”

{¶11} K.C. testified that he went to Ms. Covic’s house at least 30 times from May to August 2009. He said that he always took a friend with him to play poker and drink alcohol and that they would often stay at the Covic house all night. He also said that Ms. Covic had sex with him during his second visit to her house. J.H. testified that Ms. Covic invited him to her house to drink alcohol and play poker with his friends. He described four trips to her house and said that they engaged in sexual conduct on two of those occasions. He said that he always went to her house with one or more friends including J.S., T.S., and T.H. He also testified that he sent the text messages asking Ms. Covic for money just “for fun” because he wanted some money and thought she might give it to him.

{¶12} Three other former students testified that they went with J.H. to Ms. Covic’s house to drink alcohol and play poker. They said they saw J.H. drink alcohol that Ms. Covic had supplied. One of the boys, T.S., said that he once saw Ms. Covic kissing J.H. in the garage. Another former student, T.H., testified that he went to Ms. Covic’s house once with J.H. and maybe 50 times with K.C. He said they would all play poker and drink alcohol on each occasion. He explained that, during one visit to Ms. Covic’s house with K.C., Ms. Covic and K.C. spent the night alone upstairs.

{¶13} Ms. Covic testified that she never had sex with any of her students, she never gave any students alcohol, and neither K.C. nor J.H. had ever been inside her house. The jury acquitted her of child endangering and sexual battery in relation to J.H., but convicted her of contributing to the delinquency of J.H. and sexual battery of K.C. The trial court sentenced her

to serve three years in prison for sexual battery and a concurrent six months for contributing to the delinquency of a minor. Ms. Covic has appealed.

#### SUFFICIENCY

{¶14} Ms. Covic's first assignment of error is that her convictions are not supported by sufficient evidence. Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, ¶ 33. We must determine whether, viewing the evidence in a light most favorable to the prosecution, it could have convinced the average finder of fact of Ms. Covic's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991).

{¶15} Ms. Covic has argued that there was insufficient evidence to support her convictions because there was no evidence that either J.H. or K.C. had ever been to her home, that she had ever given any student alcohol, or that she had engaged in sexual conduct with any student. Ms. Covic has argued that "there was no credible evidence" to support the convictions and that the evidence presented was "disparate, impossible, confusing, and unbelievable."

{¶16} Under Section 2907.03(A)(7) of the Ohio Revised Code, "[n]o person shall engage in sexual conduct with another, not the spouse of the offender, when . . . [t]he offender is a teacher . . . employed by or serving in a school for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code, the other person is enrolled in or attends that school, and the offender is not enrolled in and does not attend that school." Under Section 2919.24(A)(1) of the Ohio Revised Code, "[n]o person . . . shall . . . [a]id, abet, induce, cause, encourage, or contribute to a child . . . becoming an unruly child, as defined in section 2151.022 of the Revised Code, or a delinquent child, as defined in

section 2152.02 of the Revised Code.” Ms. Covic has acknowledged that her convictions were based on the first-hand accounts of J.H. and K.C. and the testimony of several fellow teachers who testified that Ms. Covic tearfully admitted doing something inappropriate with K.C. She has argued, however, that the State did not meet its burden of proof because the testimony was not credible. Therefore, Ms. Covic’s argument challenges the manifest weight rather than the sufficiency of the evidence.

{¶17} J.H. testified that, when he was a 14-year-old student of Ms. Covic, she took him to her house, gave him beer, and had sex with him. He testified that this happened several times near the end of his eighth-grade school year in May and June of 2009. K.C. testified that Ms. Covic was his teacher in eighth grade and she first invited him over to her house near the end of that school year in May 2009. According to K.C., he and a friend went to her house many times over the course of four months to drink alcohol and play poker. He said that, during his second visit to her house, Ms. Covic had sex with him. Even without the testimony of Ms. Covic’s friends and the other students, the testimony of J.H. and K.C., if believed, could have convinced the average finder of fact of Ms. Covic’s guilt beyond a reasonable doubt. *See State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991). Ms. Covic’s first assignment of error is overruled.

#### MANIFEST WEIGHT

{¶18} Ms. Covic’s second assignment of error is that her convictions are against the manifest weight of the evidence. If a defendant argues that her convictions are against the manifest weight of the evidence, we “must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest

miscarriage of justice that the conviction[s] must be reversed and a new trial ordered.” *State v. Otten*, 33 Ohio App. 3d 339, 340 (9th Dist. 1986).

{¶19} Ms. Covic has argued that J.H. and K.C. are not credible because they are both juvenile delinquents and admitted liars. Both boys were placed in Ms. Covic’s special class because they were deemed at-risk youth due to problems at home and/or school that required additional support. The evidence indicated that both boys had been on probation at different times. J.H. testified that he had sent Ms. Covic a series of threatening text messages in August 2009 in an attempt to get her to give him thousands of dollars. K.C. admitted to lying to Ms. Covic to persuade her to give him \$200 in the spring of 2010 to pay probation fees that his mother had paid for him. Both boys admitted to having lied to the school principal and/or other authorities, even police officers, when the allegations were first brought to light through teachers at the school.

{¶20} K.C. testified that after initially lying to the Grand Jury, he later told it the truth about Ms. Covic giving him alcohol as well as the sexual encounter he had with her. He said that he denied all the allegations initially because he did not want to get her in trouble, but he felt he had to tell the truth later because it was the right thing to do. He also testified that Ms. Covic had texted him after she told Ms. Wagner about their sexual encounter. He said that he was angry that Ms. Covic had told someone else about that because she had told him more than once that he should never tell anyone. When cross-examined about his testimony that he had gone to Ms. Covic’s house at least 30 times in 4 months, he said that he went to her house approximately “every third day” from May to August 2009.

{¶21} Ms. Covic has also argued that her fellow teachers’ testimony about her alleged confessions was not credible and made no sense, especially in light of comments regarding them

drinking alcohol at the party, going “blank,” and “blacking out.” According to her fellow teachers, Ms. Covic’s confession at the Catawba party was vague. Ms. Dooling testified, however, that after leaving the table, Ms. Covic approached her and made a comment that clarified that she had had sexual intercourse with K.C. Ms. Dooling also testified that, just before Ms. Covic’s confession at the table, Ms. Covic had said to Ms. Wagner, “I think I should tell them.” That seems to corroborate Ms. Wagner’s testimony that Ms. Covic had previously admitted to her that she had a sexual relationship with K.C.

{¶22} K.C.’s testimony about going to Ms. Covic’s house every third day corresponds to Ms. Covic’s testimony that her husband worked 24-hour shifts as a fireman, leaving him off for 48 hours in between. Ms. Wagner’s testimony corroborated K.C.’s testimony about Ms. Covic texting him after she told Ms. Wagner that they had had sex. Both Ms. Wagner and K.C. testified that K.C. was angry with Ms. Covic for telling someone about the incident. Ms. Wagner’s testimony about Ms. Covic’s confessions also corroborated K.C.’s testimony about having had sex with Ms. Covic. Ms. Wagner testified that she was sober when Ms. Covic first raised the topic of K.C. and she offered details about Ms. Covic’s emotional attachment to K.C., including a comment that it felt like a high school breakup. The jury did not lose its way when it convicted Ms. Covic of the sexual battery of K.C.

{¶23} The jury acquitted Ms. Covic of sexual battery in relation to J.H., but convicted her of contributing to his delinquency. In light of his admitted attempt to force Ms. Covic to pay him thousands of dollars to prevent him from accusing her of raping him, the jury may have reasonably believed that Ms. Covic had hosted alcohol parties with J.H. and his friends at her house, but disbelieved his testimony relating to the sexual battery charge. Unlike the situation involving K.C., none of Ms. Covic’s colleagues testified that she had admitted to doing anything

sexual with J.H. We have reviewed the evidence and conclude that the jury did not lose its way when it convicted Ms. Covic of contributing to the delinquency of J.H. Ms. Covic's second assignment of error is overruled.

#### BILL OF PARTICULARS

{¶24} Ms. Covic's third assignment of error is that she was prejudiced by the lack of specific dates in the bill of particulars and discovery responses provided by the State. She has argued that she was prevented from asserting an alibi defense at trial because the State failed to give her more specific information about the dates the illegal conduct allegedly occurred. Under Rule 7(E) of the Ohio Rules of Criminal Procedure, upon timely written request or court order, the State "shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charge[d] and of the conduct of the defendant alleged to constitute the offense. A bill of particulars may be amended at any time subject to such conditions as justice requires."

{¶25} In the indictment, the State charged that the conduct constituting each offense occurred "on or about the 1st day of May through the 30th day of June, 2009." In June 2010, Ms. Covic moved for discovery and moved the trial court to order the State to produce a bill of particulars including the dates and times of the conduct alleged to constitute the offenses. On July 8, 2010, the State provided a response to the discovery demand and a bill of particulars, but did not include any further information about the dates and times of the alleged conduct.

{¶26} On July 20, Ms. Covic moved the trial court for a "Meaningful Bill of Particulars," alleging that she "believes that she has a valid alibi defense." She requested, among other things, information about the precise date and time at which she had allegedly contributed to J.H.'s unruliness and engaged in sexual conduct with K.C. Following an August 13 hearing, the trial court delayed ruling on the motion for a meaningful bill of particulars until Ms. Covic

moved for discovery under the newly revised Rule 16 of the Ohio Rules of Criminal Procedure. On August 16, 2010, Ms. Covic filed a supplemental discovery demand under the new version of Rule 16.

{¶27} There is no indication in the record that the trial court ever explicitly ruled on the July 20 motion for a “Meaningful Bill of Particulars” or that Ms. Covic ever moved the court to do so after complying with the trial court’s August 13 order. There is no indication in the record that Ms. Covic followed up on her request for additional details about the timing of the alleged conduct in the six months between the August 13, 2010, hearing and the February 2011 trial.

{¶28} “In cases of child sexual abuse, young victims often are unable to remember exact dates when the offenses occurred.” *State v. Carey*, 2d Dist. No. 2002-CA-70, 2003-Ohio-2684, ¶ 8. The precise date of the offense of sexual battery is not an element of the crime. *See* R.C. 2907.03. Therefore, “a degree of inexactitude in averring the date of the offense is not necessarily fatal to a prosecution.” *Carey*, 2003-Ohio-2684, at ¶ 8 (citing *State v. Sellards*, 17 Ohio St. 3d 169, 171 (1985)). Although a specific date and time is ordinarily not required in a bill of particulars, if the State possesses such information, it must supply it in a bill of particulars or in response to a discovery request. *Sellards*, 17 Ohio St. 3d at 171. Even if the State has no more detailed information about specific dates and times, the lack of detail “may also prove fatal to prosecution . . . if the absence of specifics truly prejudices the accused’s ability to fairly defend [her]self.” *Id.* at 172. In any event, if “the inability to produce a specific time or date when the criminal conduct occurred is . . . without material detriment to the preparation of a defense, the omission is without prejudice, and without constitutional consequence.” *State v. Gingell*, 7 Ohio App. 3d 364, 368 (1st Dist. 1982).

{¶29} In this case, Ms. Covic has argued that the State must have had additional details about the dates because, at trial, its witnesses provided new details about the timing of the alleged offenses. Ms. Covic has supported this argument with two examples of the details offered at trial. First, T.S. testified that he saw J.H. drink alcohol that Ms. Covic had supplied when he went with J.H. to Ms. Covic's house on a Friday. Second, J.S. and T.H. testified that they watched the Cleveland Cavaliers play basketball on television during one or more of their visits to Ms. Covic's house. In particular, J.S. testified that, on one occasion, he watched a Cavaliers' game while J.H. drank alcohol supplied by Ms. Covic. T.H. testified that he went to Ms. Covic's house about 50 times, mostly with K.C., but one time with J.H. He said that, when they went to Ms. Covic's house, "[w]e'd hang out and watch the Cavs games or play poker." Although he testified that he saw J.H. drink alcohol supplied by Ms. Covic and had spent the night at her house while K.C. stayed upstairs alone with her, he did not testify that either of those things happened on the same night as a Cavaliers basketball game. Thus, Ms. Covic's argument is necessarily limited to the timing of the alleged conduct supporting the charge of contributing to the delinquency of a minor.

{¶30} Ms. Covic has argued that, had the State provided more specific information before trial, the dates could have been narrowed from a two-month window to the dates that the Cavaliers played in May and June 2009. Although she has argued that the State "deliberately" failed to disclose the information about the Cavaliers' game, she has not pointed to anything in the record to support that allegation. The record supports the implication that the State was not aware of any additional details regarding the dates of the conduct supporting the charges.

{¶31} Regardless of whether the State had additional details before trial, this Court must consider whether the lack of detail was materially detrimental to Ms. Covic's ability to defend

herself. *State v. Sellards*, 17 Ohio St. 3d 169, 172 (1985). Although Ms. Covic has suggested that with specific dates she may have been able to present an alibi defense, “[s]he neither attempted to assert an alibi defense at trial nor filed a notice of alibi. In other words, [Ms. Covic] did not attempt to show at trial that [s]he was indisputably elsewhere during at least part of the time when the offense allegedly occurred. Instead, [s]he simply claimed that the incident[s] never happened[.]” *State v. Carey*, 2d Dist. No. 2002-CA-70, 2003-Ohio-2684, ¶ 10; *see also State v. Lawrinson*, 49 Ohio St. 3d 238, 239 (1990) (affirming grant of new trial when State withheld information limiting gross sexual imposition of a minor from one month to one week and defendant stood “ready to submit affidavits and other evidence from his employers supporting the assertion that he can account for much of his time during the week in question.”). Ms. Covic also failed to show that the specific dates were in any other way critical to her defense. *See State v. Gingell*, 7 Ohio App. 3d 364, 368 (1st Dist. 1982) (offering hypothetical example of situation where child-victim’s age is an element of the offense).

{¶32} Further, the trial testimony that Ms. Covic has highlighted was not sufficiently focused to have supported an alibi defense. None of the witnesses testified to a specific date that the alleged conduct occurred. Even if Ms. Covic could have presented evidence that she was indisputably elsewhere during every Cavaliers’ game during the two-month indictment period, it would not have exculpated her. Although J.S. testified that the Cavaliers were playing a basketball game while Ms. Covic served J.H. alcohol, other witnesses, including J.H. and T.S., testified that on one or more occasions, when J.S. was not present, Ms. Covic served J.H. alcohol.

{¶33} The record does not indicate that the State had details about the dates of the alleged conduct that it refused to provide to the defense via a bill of particulars or discovery prior

to trial. The record also fails to support Ms. Covic's argument that she was materially prejudiced by the State's failure to provide more specific information regarding the dates of the alleged conduct. Therefore, her third assignment of error is overruled.

#### CONCLUSION

{¶34} Ms. Covic's first and second assignments of error are overruled because her convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. Her third assignment of error is overruled because there is no evidence that the State had specific information regarding the dates of the offenses that it failed to provide to the defense before trial and Ms. Covic has not shown that the State's failure to provide more specific information regarding the timing of the offenses materially prejudiced her ability to defend herself. The judgment of the Medina County Common Pleas Court is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, 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(C). 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

WHITMORE, P. J.  
CONCURS.

BELFANCE, J.  
CONCURRING IN JUDGMENT ONLY.

{¶35} I concur in the judgment of the majority. With respect to Ms. Covic's third assignment of error, I agree that it is properly overruled.

{¶36} In *State v. Lawrinson*, 49 Ohio St.3d 238 (1990), the Supreme Court held that:

A trial court must consider two questions when a defendant requests specific dates, times or places on a bill of particulars: whether the state possesses the specific information requested by the accused, and whether this information is material to the defendant's ability to prepare and present a defense. If these two questions are answered in the affirmative, then the state must include the information in the bill of particulars.

(Internal citations omitted.) *Id.* at 239.

{¶37} In the instant matter, Ms. Covic does not point to any portion of the record that indicates that the State possessed the information at issue. Further, Ms. Covic has not shown that her ability to prepare and present a defense was materially affected by the lack of information. However, because the main opinion *could* be read to suggest that Ms. Covic's failure to file a notice of alibi or failure to present evidence of the same is, in and of itself, fatal to her argument that the lack of information was material to her ability to prepare and present a defense, I write separately to make clear that I do not believe that to be the case. Instead, I would consider it as

part of the totality of the circumstances in determining whether Ms. Covic's defense was materially prejudiced by the lack of information. See *State v. Sellards*, 17 Ohio St.3d 169, 172 (1985). *Lawrinson* itself evidences that the failure to present an alibi defense is not fatal to demonstrating reversible error. *Lawrinson* at 239; *State v. Lawrinson*, 11th Dist. No. 12-177, 1988 WL 94380, \*1 (Sept. 9, 1988). In *Lawrinson*, the Supreme Court upheld the grant of a new trial where the State withheld information that "substantially narrowed the time from that originally contained in the indictment[.]" *Lawrinson*, 49 Ohio St.3d at 239, even where "the alibi was not part of [the defendant's] defense[.]" *Lawrinson*, 1998 WL 94380, \*1. Thus, in light of *Lawrinson*, it is my opinion that the language in *Sellards* discussing the failure to file a notice of alibi, sets out a point to consider, rather than a strict rule of law. *Sellards*, 17 Ohio St.3d at 172.

{¶38} Nonetheless, in light of the facts before us, I agree that Ms. Covic's argument is properly overruled.

APPEARANCES:

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DEAN HOLMAN, Prosecuting Attorney, and MICHAEL P. MCNAMARA, Assistant Prosecuting Attorney, for Appellee.