

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO)
)
 Appellee,)
)
 vs.)
)
 KELLY L. COVIC,)
)
 Appellant.)

SUPREME COURT CASE
NO. 2012-1582

ON APPEAL FROM THE
COURT OF APPEALS,
NINTH APPELLATE
DISTRICT 11CA0055-M

MEDINA COUNTY
COURT OF COMMON PLEAS
CASE NO. 10-CR-0161

MEMORANDUM IN OPPOSITION TO JURISDICTION OF THE STATE OF OHIO

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

This Honorable Court should not accept jurisdiction for the following reasons:

1. This case does not present a substantial constitutional question because Covic merely wants the Court to apply existing law to the specific facts of this case and for the Court to hold, contrary to the Ninth District, that the facts in this case do not support a conviction. Notably, this case does not ask the Court to find an additional element of an offense or change the law which controls the review for sufficiency, manifest weight or the sufficiency of an indictment or bill of particulars. This case merely presents factual issues which are inappropriate for resolution by this Court.

2. This case is not of public or great general interest because resolution of any of the factually-specific issues advanced by the Appellant in this case would not assist the legal community generally and would not help to further develop an area of the law. Resolution of the issues Covic presents regarding the sufficiency and weight of the evidence as well as the specifics of the bill of particulars would only potentially aid Covic and would not help to advance understanding of the law or clarify a troublesome issue or resolve any conflict between courts.

STATEMENT OF THE CASE AND FACTS

The Ninth District Court of Appeals found the facts of this case as follows:

[*P2] 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.

[*P3] 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.

[*P4] 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.

[*P5] 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 "fd up" the previous night.

[*P6] 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.

[*P7] 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."

[*P8] 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.

[*P9] 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.

[*P10] 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]."

[*P11] 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.

[*P12] 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.

[*P13] 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.

State v. Covic, 9th Dist. No. 11CA0055-M, 2012 Ohio 3633, at ¶ 2-13

The Medina County Grand Jury indicted Kelly Covic on April 21, 2010, charging her with one (1) count of sexual battery in violation of R.C. 2907.03(A)(7), a felony of the third degree and one (1) count of contributing to the delinquency of a minor in violation of R.C. 2919.24(A)(1), a misdemeanor of the first degree. The Grand Jury returned a supplemental indictment on May 20, 2010, charging Covic with two (2) additional counts of sexual battery in violation of R.C. 2907.03(A)(7), felonies of the third degree, and two (2) counts of Endangering

Children in violation of R.C. 2919.22(A), misdemeanors of the first degree. Covic pleaded not guilty at arraignment on June 14, 2010.

The case eventually proceeded to trial, at the conclusion of which the jury convicted Covic of count III, sexual battery related to K.C., a juvenile former student, and count VI, contributing to the delinquency of a minor, J.H, a juvenile former student. The jury acquitted Covic of both counts of child endangering and the counts of sexual battery relating to J.H., counts I and II.

The trial court sentenced Covic to an aggregate prison sentence of three (3) years on April 7, 2011. Covic filed notice of appeal on April 27, 2011. The Ninth District Court of Appeals affirmed Covic's conviction on August 14, 2012.

Covic filed notice of appeal and a memorandum in support of jurisdiction on September 18, 2012. The State of Ohio hereby responds in opposition, urging the Court to decline jurisdiction and dismiss the appeal as not involving a substantial constitutional question.

LAW AND ARGUMENT

Appellee's First Proposition of Law

- I. THE TESTIMONY OF A SINGLE WITNESS IS SUFFICIENT, IF BELIEVED, TO CONVICT, *State v. Cunningham*, 105 Ohio St. 3d 197, 2004 Ohio 7007, at ¶ 53, FOLLOWED, AND CREDIBILITY CHALLENGES ARE NOT COGNIZABLE IN A SUFFICIENCY OF THE EVIDENCE ASSESSMENT, *State v. Fry*, 125 Ohio St. 3d 163, 2010 Ohio 1017, at ¶ 146, FOLLOWED.

In reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court must “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.” *State v. Jenks*, 61 Ohio St. 3d 259 (1991), paragraph two of the syllabus. “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.” *Id.*; see also *Jackson v. Virginia*, 443 U.S. 307 (1979). In essence, sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St. 3d 380, 386, 1997 Ohio 52.

The United States Supreme Court stressed in *Cavazos v. Smith*, 565 U.S. ___, 132 S. Ct. 2, 2 (2011) (*per curiam*) that *Jackson* “makes clear that it is the responsibility of the jury – not the court – to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury’s verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury.” Furthermore, the Court observed that “[b]ecause rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold.” *Id.*

Covic challenges whether the state presented “credible evidence” that Covic engaged in sexual conduct with K.C. and/or gave any child an alcoholic beverage. Brief in Support of

Jurisdiction at 10 (“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.”) (emphasis added). *See also* Brief in Support at 11 (“Here, the State’s case consisted of testimony from several *juvenile delinquents* who were forced to admit previous lies and misstatements to law enforcement 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.”) (emphasis added); *id.* (“based upon the State of Ohio’s failure to present *credible* evidence of the offenses charged”) (emphasis added).

As this Court has made clear, the testimony of a single witness is sufficient, **if believed**, to support a conviction. *State v. Cunningham*, 105 Ohio St. 3d 197, 2004 Ohio 7007, at ¶ 53 (emphasis added). Credibility determinations are left to the trier of fact in a sufficiency challenge. *State v. Fry*, 125 Ohio St. 3d 163, 2010 Ohio 1017, at ¶ 146 (“The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.”); *State v. Cleland*, 9th Dist. No. 09CA0070-M, 2011 Ohio 6786, at ¶ 17 (“In reviewing the evidence [in a sufficiency challenge], we do not evaluate credibility, and we make all reasonable inferences in favor of the State.”). A sufficiency challenge asks whether the evidence, *if believed*, supports the conviction. Covic’s argument about the credibility of witnesses exceeds the scope of the Court’s review. *Fry*, 125 Ohio St. 3d 163, at ¶ 146.

The Ninth District specifically found in this case that J.H. testified that, when he was fourteen (14) years old and a student of Ms. Covic’s, she took him to her house and gave him beer and had sex with him. This apparently happened several times near the end of his eighth grade year in May and June of 2009. K.C. testified that Ms. Covic was also his teacher in eighth

grade and she invited him over to her house near the end of the school year in May 2009. K.C. testified that he and a friend went to Ms. Covic's house several times over the course of four months to drink alcohol and play poker. During K.C.'s second visit to Covic's house, Covic and K.C. had sex. "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." *Covic*, 2012 Ohio 3633, at ¶ 17. The Court of Appeals did not err.

The only question which could properly be before this Court is whether the State presented testimony that Covic engaged in sexual conduct with K.C. and whether the State presented testimony that Covic contributed to the delinquency of a minor, J.H. As the appellate court found, the State did present that evidence. As a factual issue which does not present any legal question, this Court should refuse to accept Covic's proposition of law.

Appellee's Second Proposition of Law

II. ONLY COURTS OF APPEALS MAY OVERTURN TRIAL COURT JUDGMENTS ON THE GROUND THAT THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, *State v. Shoemaker*, 74 Ohio St. 3d 664, 660 N.E.2d 1197 (1996), FOLLOWED.

Covic contends that her convictions are against the manifest weight of the evidence. Although a proper challenge before the court of appeals, this Court may not consider weight of the evidence claims except in capital cases. R.C. 2953.02 ("The supreme court in criminal cases shall not be required to determine as to the weight of the evidence . . ."). "Only courts of appeals may overturn trial court judgments on the grounds urged here, *i.e.*, that the verdict was against the manifest weight of the evidence." *State v. Shoemaker*, 74 Ohio St. 3d 664, 664, 660

N.E.2d 1197 (1996), citing *State v. Cooney*, 46 Ohio St. 3d 20, 25-26, 544 N.E.2d 895, 905-906 (1989). Review in this Court is limited to whether the evidence is sufficient to support a conviction. *Id.*, citing *State v. Eley*, 56 Ohio St. 2d 169, 172, 383 N.E.2d 132 (1978). Covic's proposition of law therefore asks for this Court to engage in review proscribed by its precedent.

Even on its merits, however, Covic's argument asks for error correction. Having determined the facts, the jury, the trial court, and the court of appeals each separately found that Covic was criminally culpable for sexual battery and contributing to the delinquency of a minor. Were the Court to accept jurisdiction and reverse, this Court would have to delve deeply into the particular facts of this case and determine, contrary to the jury's finding, that the jury lost its way in convicting Covic such that a manifest miscarriage of justice occurred. *State v. Otten*, 33 Ohio App. 3d 339, 339-340, 515 N.E.2d 1009 (9th Dist. 1986). This Court has regularly held, however, that it does not engage in mere error correction. *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St. 3d 480, 492, 2000 Ohio 397 (Cook and Lundberg Stratton, JJ., concurring), citing Art. IV, § 2 of the Ohio Constitution.

And a trier of fact does not lose its way and create a manifest injustice simply because it chooses to believe one person's testimony over another. It is within the province of a trier of fact, in a criminal case, to give the evidence and testimony whatever weight the jury determines is appropriate. *State v. Green*, 90 Ohio St. 3d 352, 366, 738 N.E.2d 1208 (2000), citing *State v. DeHass*, 10 Ohio St. 2d 230, 227 N.E.2d 212 (1967), at paragraph one of the syllabus ("On the trial of a case, either civil or criminal, the weight to be given the evidence and the credibility of witnesses are primarily for the trier of facts.") and *State v. Fanning*, 1 Ohio St. 3d 19, 20, 437 N.E.2d 583 (1982). As evidenced by its verdict, the jury believed K.C. and some of the

testimony of J.H. and disbelieved Covic's self-interested testimony. The jury's verdict is not against the manifest weight of the evidence. This Court should therefore decline jurisdiction.

Appellee's Third Proposition of Law

- III. OMISSION OF THE SPECIFIC DATES AND TIMES OF AN ACT OF SEXUAL ABUSE IS WITHOUT PREJUDICE TO THE DEFENSE WHEN THE STATE LACKS MORE SPECIFIC INFORMATION AND IT DOES NOT MATERIALLY PREJUDICE THE DEFENDANT'S ABILITY TO DEFEND THEMSELVES, *State v. Sellards*, 17 Ohio St. 3d 169, 478 N.E.2d 781 (1985), FOLLOWED.

In her final proposition of law, Covic claims that the State failed to provide essential dates and times of the alleged sexual conduct or the acts constituting the contribution to the delinquency of a minor. Brief in Support at 13.

Under R.C. 2907.03, the precise date of the alleged crime is not an element of the offense. Typically in cases of child sexual abuse, young victims are unable to remember the exact dates when offenses occurred. *Covic*, 2012 Ohio 3633, at ¶ 28, quoting *State v. Carey*, 2d Dist. No. 2002-CA-70, 2003 Ohio 2684, at ¶ 8. A degree of inexactness in charging is not necessarily fatal. *Id.*, citing *State v. Sellards*, 17 Ohio St. 3d 169, 171, 478 N.E.2d 781 (1985). Although a specific date and time is not required to be in a bill of particulars, the State must supply that information if it has it. *Id.*, citing *Sellards*, 17 Ohio St. 3d at 171. Moreover the lack of specific dates and times may be fatal where the absence of specifics truly prejudices the accused's ability to fairly defend themselves. *Id.* However, "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.” *Id.*, quoting *State v. Gingell*, 7 Ohio App. 3d 364, 368, 455 N.E.2d 1066 (1st Dist. 1982).

Covic contends that the inexactness in the indictment and bill of particulars denied her of the ability to prepare an adequate defense. The Ninth District specifically addressed this argument, holding that “[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[.]” *Id.* at ¶ 31 (alterations in original), quoting *Carey*, 2003 Ohio 2684, at ¶ 10, and *State v. Lawrinson*, 49 Ohio St. 3d 238, 239, 551 N.E.2d 1261 (1990). “Ms. Covic also failed to show that the specific dates were in any other way critical to her defense.” *Id.*, citing *Gingell*, 7 Ohio App. 3d at 368.

The court of appeals below found that the State did not possess any additional information regarding dates or times of the offenses and that Covic was not materially prejudiced by the inability of the State to supply more specific information regarding the dates of the alleged conduct. *Id.* at ¶ 33.

That finding is a reasonable resolution of the record and arguments presented. There is nothing in the record on appeal which supports Covic’s claim that the State had the information and “deliberately” withheld it. Had the State been aware of the particular dates or times when the sexual battery or acts constituting contribution to the delinquency of a minor occurred, it would have pleaded that information in the indictment or specified it in the bill of particulars. And the appellate court found that Covic was not materially prejudiced by the absence of that information. Covic was told in the indictment and bill of particulars that the offenses occurred some time between May 1 and June 30, 2009 and did not attempt to show that she was elsewhere

during that period – she merely claimed that the incident never happened. *Lawrinson*, 49 Ohio St. 3d at 239.

Covic’s proposition of law therefore presents a factual question already addressed by the court of appeals in some detail. *See Covic*, 2012 Ohio 3633, at ¶¶ 24-33. Were this Court to accept jurisdiction, the Court would only be applying existing law to the particular facts of this case. Specifically, Covic does not assert that the Court should adopt a new standard for these challenges or otherwise urge the Court to overrule *Sellards* or *Lawrinson* in any way. Therefore this case would not present any legal controversy – merely a question whether the facts support one conclusion or another. Because this Court does not engage in mere error correction, *Baughman*, 88 Ohio St. 3d at 492 (Cook and Lundberg Stratton, JJ., concurring), the Court should refuse to accept jurisdiction and dismiss this appeal as not involving a substantial constitutional question and not presenting a case of great general or public interest.

CONCLUSION

For all of the foregoing reasons, the State of Ohio respectfully requests that this Honorable Court decline jurisdiction over the instant discretionary appeal.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition to Jurisdiction of the State of Ohio was sent via regular U.S. mail to Richard G. Lillie and Gretchen A. Holderman, Counsel for Covic, Lillie & Holderman, 75 Public Square, Suite 1313, Cleveland, Ohio 44113, this 2nd day of October, 2012.


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