

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	CASE NO. 12-1611
	:	
Appellee/Cross-Appellant	:	On Appeal from the Auglaize
	:	County Court of Appeals,
v.	:	Third Appellate District
	:	
DOUGLAS J. WINE	:	C.A. Case No. 2-12-01
	:	
Appellant/Cross-Appellee	:	

**APPELLANT/CROSS-APPELLEE'S MEMORANDUM IN OPPOSITION TO
THE APPELLEE/CROSS-APPELLANT'S MEMORANDUM IN SUPPORT
OF JURISDICTION OF CROSS-APPEAL**

LORIN J. ZANER (0008195) (COUNSEL OF RECORD)
545 Spitzer Building
Toledo, Ohio 43604
(419) 242-8214 Tele.
(419) 242-8658 Fax
lorinzaner@accesstoledo.com

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COUNSEL FOR THE APPELLANT/CROSS-APPELLEE, DOUGLAS J. WINE

EDWIN A. PIERCE (0023846) (COUNSEL OF RECORD)
Auglaize County Prosecuting Attorney
P.O. Box 1992
Wapakoneta, Ohio 45895
(419) 739-6785 Tele
(419) 739-6786 Fax

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COUNSEL FOR THE APPELLEE/CROSS-APPELLANT, THE STATE OF OHIO

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EXPLANATION OF WHY APPELLEE/CROSS-APPELLANT'S CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

“According to Section 2, Article IV of the Ohio Constitution, this court sits to settle the law, not to settle cases. Our exercise here offers no more than ‘error correction’ regarding the application of settled law to the facts of this case.” Cook, J. (and Lunberg Stratton, J.), concurring in *Baughman v. State Farm Mut. Auto Ins. Co.*, 2000-Ohio-397, concurrence, p. 18.

Contrary to the arguments raised by the State in its Memorandum in Support of Jurisdiction of Cross-Appeal, this is not a case of public or great interest, and does not involve any substantial constitutional questions. There is no “blurriness” in the Ohio courts as to the definition of force relating to adult victims. *State of Ohio, Memorandum in Support of Cross-Appeal*, p. 18. The Third District Court of Appeals conducted an extensive, historical review of controlling Ohio law regarding the issue of “force” starting with *State v. Labus*, (1921), 102 Ohio St. 26, 38-39 and including, but not limited to, *State v. Eskridge* (1988), 38 Ohio St.3d 56, *State v. Dye* (1988), 82 Ohio St.3d 323 and *State v. Schaim* (1992), 65 Ohio St.3d 51,52.

The State of Ohio, in the instant case, does not dispute the Third District’s interpretation and application of the principle of “force” from the numerous cases cited. The State of Ohio does not point out any conflict with any other decisions from any other District Court of Appeals or this Court. The State of Ohio randomly asserts to some unknown “blurriness” in the “jurisprudence established in Ohio” regarding the definition of force relating to adult victims as the reason for this Court to accept its cross-appeal.

There is no constitutional issue involved in this cross-appeal because the State of Ohio is not challenging or putting forth a legal issue. Instead, the State of Ohio is making a factual determination challenge to the Third District Court of Appeals determination that there was insufficient evidence of the element of “force”. The State of Ohio wants this court to **reweigh the**

evidence that was reviewed by the Court of Appeals. This Court traditionally does not do that in a situation such as this.

The State of Ohio, in the instant case, also asserts that this case is of public or great interest as it would give this Court the ability to correct the Third District's "clear misunderstanding and misapplication of the evidence...". *State of Ohio, Memorandum in Support of Cross-Appeal, p. 18*. The State asserts that the Court of Appeals decision was "... determined upon an incorrect misunderstanding of the testimony..." (emphasis added), *Cross-appeal, supra.*, p. 17. The State of Ohio, again, is arguing a factual dispute, not a legal dispute. At best, the State is arguing for this Court to perform an "error correction". This Court traditionally does not accept cases under this principle. This Court settles the law, not factual disputes. This Court should not accept the Cross-Appeal in this case.

STATEMENT OF CASE

The Appellant/Cross-Appellee prepared a Statement of Case and Facts in its Memorandum for Jurisdiction that the State of Ohio accepted in its Cross-Appeal.

The State of Ohio also submitted four paragraphs of additional "facts" in its Cross-Appeal. The first three paragraphs deal with the State's continued factual interpretation/dispute with the three Court of Appeals Judges.

The fourth paragraph is irrelevant to any issue in front of this Court. The State, without reference to the transcript pages or any other documents in the record, asserts "...the Appellant admitted his involvement in the accusations of his mother-in-law." *State of Ohio, Memorandum in Support of Cross-Appeal, p.3*. The Appellant denied any sexual conduct or contact versus his mother-in-law in sworn testimony. The admission/statement alluded to by the State was not a confession as the State attempts to insinuate in this misstatement of "fact".

**APPELLEE/CROSS-APPELLANT'S
PROPOSITION OF LAW I**

Sexual contact by force includes, but is not limited to, the continuation of touching the vagina of an awakened elderly victim under fear of duress, when the touching (sexual conduct/contact) was initiated upon the non-consensual elderly victim while sleeping.

To make a finding of force, “some amount of force must be proven **beyond that force inherent in the crime** itself.” *State v. Dye* (1998), 82 Ohio St.3d 323, 327. (emphasis added). “As long as it can be shown that the rape victim’s **will was overcome by fear or duress**, the forcible element of rape can be established.” *State v. Eskridge* (1988), 38 Ohio St.3d 56, 58-59. (emphasis added). In cases involving adult victims, the defendant must “...**use physical force** against that person **or create the belief** that physical force will be used if the victim does not submit.” *State v. Schaim* (1992), 65 Ohio St.3d 51, 55-56.

The Appellee/Cross-Appellant seems to be proposing that a victim to non-consensual touching simply has to have any level of “fear” or be under any type of “duress” at any point during or after the incident to establish “force”. The Appellee/Cross-Appellant does **not** assert that the alleged victim in this case submitted to sexual contact because her “will overcome”. The Appellee/Cross-Appellant does **not** assert that any force other than the “force inherent in the crime itself” was used. The Appellee/Cross-Appellant does **not** assert that Mr. Wine made any statement or performed any action that created a belief that physical force would be used.

In the instant case, Ms. Davis is an adult. The Appellant had no authoritative role over her. The *Eskridge* and *Dye* Standards of a lesser showing of force do not apply. On one hand, the Appellee/Cross-Appellant “...concedes the ‘subtle and psychological’ force standard is inapplicable herein.” *State of Ohio, Memorandum in Support of Cross-Appeal*, p.17. On the other hand, the Appellee/Cross-Appellant is essentially arguing, without expressly stating so, throughout

its brief that the lesser standard of force should be expanded to an “elderly” victim and the *Schaim, supra.*, Standard should be ignored.

The *Eskridge* Standard regarding a lesser showing of force, i.e., psychological force, does not apply to the instant case. Courts throughout Ohio have applied the *Eskridge* Standard of a lesser showing of force to cases of minor children and adults only where the Defendant has been in an authoritative role over them.

It is clear that evidence of the “force” element was insufficient. The State’s entire argument is based upon two propositions. First, “...Eskridge is nonetheless a consideration for the trial court in considering whether a Rule 29 motion should be granted...” *Pros Merit Brief filed with Third District Court of Appeals*, pg. 6. The State cannot offer any legal authority for that premise. Secondly, the State disagrees with the three Justices from the Third District Court of Appeals regarding their *factual* determination of what occurred after Ms. Davis, the alleged victim, awoke.

The Appellee/Cross-Appellant in its Memorandum in Support of Cross-Appeal lays out its interpretation of the alleged victim’s testimony. *State of Ohio, Memorandum in Support of Cross-Appeal*, pg. 17. Again, the Appellee/Cross-Appellant is arguing a “factual dispute” and “error correction”, at best. EVEN IF this Court were to apply an Abuse of Discretion Standard to the Third District’s decision, there is substantial evidence to support the District Courts decision as it relates to factual determinations and the application of those facts in its legal analysis.

Ms. Davis, did not testify to any threats made to her by the Appellant. Tr. p. 186-284. Ms. Davis did not testify that she was restrained in any way or manner. Tr. p. 186-284. Ms. Davis testified that she wore loose fitting flannel pajamas with no underwear on. Tr. p. 206, 207, 210. Ms. Davis’ testimony clearly indicated that Appellant slid his hand under her clothing. Tr. p. 211-

212, 244, 245. Ms. Davis testified that the blanket was not removed or pulled back. Tr. p. 214, 244, 245. Ms. Davis testified that when she was awakening, she yelled and the Appellant immediately removed his finger from her vagina. Tr. p. 214. Ms. Davis testified that after the Appellant asked a question as to who was in bed with her, he immediately left. Tr. p. 214, 247.

Assuming *arguendo* that Ms. Davis' testimony is true, there was no evidence that her will was overcome by any contemporaneous subtle or psychological force or coercion. Any fear that she claimed occurred after the removal of the finger from the vagina, after reflection of what had occurred and/or after the Appellant left the room. On direct examination, Ms. Davis testified that as the Appellant left the room, her state of mind was "stupefied" and "totally dumbfounded". Tr. p. 215. There were no testimony of any threats or menacing gestures made. There was no testimony that her clothes were "manipulated" or even moved. There was no testimony of any fear by Ms. Davis.

Again, assuming *arguendo* only, even if Ms. Davis' testimony was that she had "fear", the fear would have to be caused by some objectively quantifiable behavior of the Defendant and been of a level of fear that "overcame her will". The 7th District Court of Appeals put this issue in a clear context when it overturned one of several convictions' for gross sexual imposition on the basis that the "force" element was not established for sufficiency purposes in *State v. Dew*, 2009-Ohio-6537: ¶116 - ¶120.

CONCLUSION

The law regarding the element of "force" in sexual conduct/contact cases is clear. There is a lesser showing of force in cases involving children and adults only where the offender has some type of authority over them. In all other cases, the *Schaim* Standard applies.

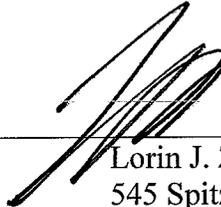
The Appellee/Cross-Appellant's Proposition of Law I would rely on the lesser showing of force and a total rejection of the *Schaim* Standard. Yet, the Appellee/Cross-Appellant is not making that a Proposition of Law nor does his arguments expressly state that.

Rather, the Appellee/Cross-Appellant wants this Court to accept this case to review the testimony and evidence because the State has a factual disagreement with the three Judges from the Third District Court of Appeals.

The Appellee/Cross-Appellant's Proposition of Law I is premised entirely on the disputed fact of whether the Appellant/Cross-Appellee continued touching Ms. Davis after she awakened (...the continuation of touching...). Again, this is a "factual dispute", not a legal issue. The Third District Court of Appeals has already determined this factual issue.

This Court traditionally does not accept "factual disputes" nor "error correction" cases. The law regarding the element of "force" is clear under Ohio law. This Court should not accept the Cross-Appeal in this case.

Respectively submitted,



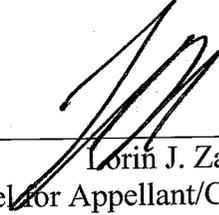
Lorin J. Zaner (0008195)
545 Spitzer Bldg.
Toledo, Ohio 43604
(419) 242-8214
(419) 242-8658
lorinzaner@accesstoledo.com

Counsel for Appellant/Cross Appellee, Douglas J. Wine



CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum was sent by regular U.S. Mail to counsel for the Appellee/Cross-Appellant, Edwin A. Pierce, Auglaize County Prosecuting Attorney, P.O. Box 1992, Wapakoneta, Ohio, 45895 on this 20th day of November, 2012.



Lorin J. Zaner (0008195)
Counsel for Appellant/Cross-Appellee Douglas J. Wine