

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	On Appeal of the Decision from the
	:	Athens County Court of Appeals
Plaintiff-Appellee,	:	Fourth Appellate District, Case No. 12CA14
	:	
v.	:	
	:	Case No. 13-1382
Charles Nguyen,	:	
	:	
Defendant-Appellant.	:	

MEMORANDUM IN RESPONSE

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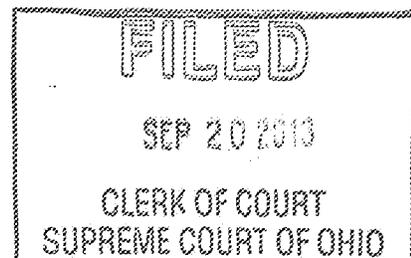


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STATEMENT OF THE FACTS

In February of 2009, Hong “Jenny” Nguyen placed a profile of herself on a dating pool website VietSingle. She did not expect that meeting someone through the website resulted in being terrorized and raped in her own home. Jenny, 28 at the time, lived in Athens, Athens County Ohio with her older sister Tracy, Tracy’s boyfriend Calvin and their three children Alex, Kayden, and Colby. Jenny met Charles Nguyen (hereinafter referred to as “Appellant”) in late February when he contacted her through the online dating website. (Appellant and Jenny have the same name but are not related). Appellant was completing his podiatrist residency at a New York hospital when the two first started communicating. Over the next month, Jenny and Appellant spoke many times over the phone, attempting to get to know one another. In March 2009, Jenny and her sisters, Mai and Tracy, scheduled a vacation - originally, they wanted to go to Las Vegas, but at the urging of Mai, the sisters travelled to New York City. Jenny agreed - and was even excited - because this would allow her to meet the Appellant face-to-face since she had enjoyed their many telephone conversations. Appellant was informed of the sisters’ visit to the City, and agreed to meet them at the airport upon arrival. (T. Day 5, pp. 23-36).

Arriving on a Saturday in late March, Jenny, her sisters and their boyfriends, Linh and Calvin, arrived by plane and were met by Appellant. The group went out to lunch in the City and Appellant showed them various locations within the city. Enjoying their time in the City, the group invited the Appellant to stay at their hotel room and made plans to out later again later that night. That evening, the group went to a Japanese restaurant for dinner followed up by dancing at a night club before returning to their hotel. All six people, including Appellant, slept in one room that had two beds: Mai and her boyfriend slept in one bed, Tracy and her boyfriend slept in the

other bed, and Appellant and Jenny slept on the floor at the foot of one of the beds. (T. Day 3, pp. 126-133).

In the early morning hours, Jenny was awoken by Appellant touching her private parts. He began kissing her on the neck even though she pushed him away several times. He then took her hand placed it on his penis. After much persistence on the part of Appellant, the two engaged in mutual masturbation. (T. Day 6, p. 189).

Later that morning, the group went to brunch at a local restaurant and visited a museum. The group also went to Chinatown, which was one of the main reasons that Mai wanted to visit New York City. After they finished their tour for the day, the group returned to their hotel room. Jenny privately stopped Appellant in the lobby of her hotel and told him that she was not interested in a romantic relationship and just wanted them to be friends. (T. Day 6, pp. 41-43). Appellant then returned to the room and gathered his belongings - after he left, Jenny's sister Tracy noticed that she was crying. After Appellant left, Jenny, her sisters and their boyfriends remained in New York City, returning home to Athens on Monday.

After Jenny arrived back in Ohio, she had subsequent conversations via phone with Appellant. Jenny continuously told Appellant that she only wanted to be friends and have a platonic, friends only relationship. After their phone conversations, Jenny felt comfortable inviting her friend out to Ohio to visit. Appellant indicated that he had a two week vacation coming up and that he would spend the first week in Philadelphia and would then come to visit Jenny in Ohio during the second week. Nervous, Jenny's sister Tracy was apprehensive about the week-long visit. Appellant arrived in Ohio on the Saturday before Mother's day. Jenny, Tracy, Tracy's boyfriend and her two children met Appellant at their airport, ate lunch together, and

drove to Dayton, Ohio to visit Jenny's mother for Mother's day. Appellant arrived in Athens on late Monday night and stayed through Saturday, May 16, 2009. Appellant stayed with Jenny at her home and accompanied her to the nail salon where she worked each day. While at the salon, Appellant - without Jenny's permission - used his cell phone to record Jenny. (T. Day 6, pp. 55-59). On May 15, Jenny and Appellant laid on her bed and watched a movie together. Appellant begged Jenny to let him stay the night in her room, but she refused. Instead, Jenny let Appellant sleep in her bed while she went to her nephew's room and slept for the night. (*Id.* at 59).

Jenny drove Appellant to Columbus, Ohio where they had dinner with her sister, Mai, before she drove him to the airport. On their drive to the airport, Jenny told Appellant that it was apparent that they could not even be friends. At the airport, Appellant simply turned and walked away from Jenny. (*Id.* at 60-62). That night, Jenny sent Appellant a text message stating that she hoped he made it back to New York safely. Jenny never heard back from Appellant. Jenny did not receive any text messages, phone calls, or e-mails from Appellant between when she dropped him off at the airport at May 19, 2009, when he showed up unexpectedly at her front door. (T. Day 6, pp. 61-68).

At 3:47 a.m. Appellant called his senior resident and reported that he could not come to work due to a family emergency. (T. Day 3, pp. 109-113). Cell phone evidence presented at trial indicated that Appellant was in Athens, Ohio at 7:50 a.m. on May 19, 2009. Around 9:00 a.m. Jenny heard a knock at her front door; she looked out the window and saw a man wearing a windbreaker and a black hat. Thinking that it was her sister's boyfriend, she opened the door alarmed and surprised to see Appellant. He told her that he had come to apologize. Uncomfortable in the nighttime attire she was wearing, Jenny excused herself to go put clothes on and Appellant followed her to her bedroom. After changing, the two sat on the bed while

Appellant told Jenny that he wanted another chance for them to be together. Jenny explained that she enjoyed their conversations over the phone, but when they met in person she did not feel that way towards him. She then told him that at this point, she just did not think that they could be friends. (T. Day 6, pp.67-73). Jenny testified that Appellant got very quiet after that and suddenly took a rope out of his pocket. Jenny instantly became fearful. Appellant pulled Jenny's shorts off and ripped her white tank top off of her body. He then had her spread her legs and told her he was going to inspect her vagina to ensure that she had not had sex with anyone else. Jenny begged Appellant to let her use the bathroom and he obliged as long as he followed her there. At that point, Kayden, Jenny's four year old nephew peeked his head into Jenny's room. Appellant shooed him away. Appellant had Jenny turn around as he tied her hands together with the rope. He threatened to kill Kayden if she did not cooperate. Pleading with him to not hurt her or her family, Appellant laid Jenny on the bed, confessing his love to her, tying her ankles together, and threatening to slit her throat if she did anything. (T. Day 6, 73-77).

During the struggle, Jenny managed to get one arm free. Appellant cut the rope that tied her ankles together and raped her. While being raped, Jenny was able to pull back, making Appellant ejaculate on her stomach. She wiped her stomach with a scarf next to her bed. Following the rape, Appellant bound Jenny's hands together with medical tape, blindfolded Jenny, and told her that he was going to take her back to New York with him. Appellant continuously asked Jenny if she was going to call the cops on him; Jenny convincingly told him that she would not. He took the scissors out of his pocket, cut her arms free, and told her to go get dressed for work. Jenny dressed, took Kayden to the car and drove away while Appellant got in his car. Eventually, Jenny was able to get Appellant's license plate number with her camera on her cell phone - GHB4898.

As soon as she got to the nail salon, Jenny told Calvin what happened and collapsed. The sheriff's department was called and Jenny was taken to O'Bleness Hospital for examination and treatment. A rape kit was completed and abrasions were noted on her wrists and ankles. Additionally, she had what appeared to be tape residue on her wrists. (T. Day 4, p. 234). The SANE nurse also took pictures of Jenny's wrists, ankles, and cervix. (T. Day 3, pp. 254-262). Deputy Alan Flickenger went out to Jenny's house and processed the crime scene for evidence. He found a piece of rope, latex gloves, a scarf with possible semen stain on it, a pair of shorts, panties, and a torn white tank top shirt. He also collected the sheet off of the bed. Jenny told Deputy Flickinger that Appellant had made the bed before they left the house. (T. Day 4, pp. 233-250). The tests of swabs taken off the latex gloves contained DNA from Appellant and Jenny. The rape kit evidence revealed DNA from the Appellant. (T. Day 5, 194-208).

On that same day, at approximately 11:30 a.m., Appellant was issued a speeding citation while traveling on Route 50 in Clarksburg, West Virginia. He was driving a vehicle bearing the license number GHB4898.

Appellant was arrested in New York on June 12, 2009 for the rape and kidnapping of Jenny Nguyen.

STATEMENT OF THE CASE

Appellant was indicted by an Athens County grand jury for one (1) count of Rape, one (1) count of kidnapping, (1) count of aggravated burglary, and one (1) count of tampering with evidence. He was convicted after a jury trial where the State called twenty-one witnesses, and was sentenced to thirty (30) years in prison. He then appealed to the Fourth District Court of Appeals. The Fourth District rejected the appeal due to a pending defense motion for new trial. He then appealed again in 12-CA-14. On July 11, 2013, the Fourth District Court of Appeals affirmed the Appellant's convictions but remanded the decision to the trial court to determine if rape and aggravated burglary, and/or the kidnapping and aggravated burglary courts should merge.

This motion for jurisdiction follows.

RESPONSE TO APPELLANT'S PROPOSITION OF LAW I

In his First Proposition of Law, Appellant argues that the denial by the trial court of the admission of “critical evidence” under the guise of Ohio’s rape shield statute violated his Sixth Amendment Right to Confrontation Clause and in violation of his Due Process Rights. There is nothing in Appellant’s Brief that would warrant this to be a case of public or great general interest.

Essentially, Appellant argues that he was “foreclosed by the court from putting on material exculpatory evidence.” *Memorandum in Support of Jurisdiction of Defendant-Appellant Charles Nguyen*, 13-1382 (Filed August 30, 2013). More specifically, Appellant contends that he was denied the right to develop his defense of consent. As the Fourth District Court of Appeals noted in his second assignment of error, “[t]his argument is vague.” *State v. Nguyen*, 4th Dist. No. 12CA14, Filed July 11, 2013). Appellant wanted to be able to bring up evidence of Jenny’s past sexual behavior, including sexual behavior involving the defendant; however, “[h]e appears to simply complain he could not go on a fishing expedition into the victim’s sexual past, which is *not permissible*.” *Id.* at p. 21. (Emphasis added).

The Fourth District already dealt with Appellant’s assertion that his Constitutional Right to Confrontation was violated in his direct appeal. The appellate court noted that courts must “balance the state interest which the statute is designed to protect against the probative value of the excluded evidence.” *Id.*, citing *State v. Gardner*, 59 Ohio St.2d 14, 17, 391 N.E.2d 337 (1979). The Fourth District found that that the Ohio’s rape shield law advances several legitimate interests, and that there was no constitution error.

Additionally, Appellant argues that the real controversy of the case, being the parties' sexual history and promises to each other was not allowed to fully be tried. The State would agree with appellant that the facts of the case would help decide whose story was more credible. In fact, the State contends that this is exactly what happened - the case was given to the jury, and the jury found Appellant guilty on all counts.

Appellant believes that Jenny lied about Appellant's semen being placed on the mattress on a previous date. This argument is lacking. As the Fourth District noted on page 19, "[a]t the end of the rape shield hearing, the court told defense counsel he could ask the victim about whether she had sex with Nguyen in Ohio apart from the rape. Thus, if Nguyen's semen was on the mattress, defense counsel could have questioned the victim about whether she and Nguyen engaged in other sexual activity that could account for it." *Id.* at p. 19.

Ohio's rape shield statute was created for cases just like this. Jenny Nguyen was the victim in this case, not Appellant. Appellant's first proposition of law does not contain an argument that raises a public of great general interest.

RESPONSE TO APPELLANT'S PROPOSITION OF LAW II

Appellant's proposition of law two claims that his trial counsel was ineffective under *Strickland v. Washington*. Appellant waived his right to argue this proposition to this Court because he failed to raise it in the court of appeals. *Hart v. Ohio Adult Parole Authority*, S.D. Ohio No. 1:12-cv-698, 2013 WL 3567483 (July 11, 2013). In the nine different assignments of error that Appellant presented to the Fourth District Court of Appeals, ineffective assistance of trial counsel was never presented, therefore, the State contends Appellant has waived such issue. Appellant's second proposition of law has no case of public or great general interest.

RESPONSE TO APPELLANT'S PROPOSITION OF LAW III

Under the plurality decision of *State v. Johnson*, Appellant's proposition of law two has no public or great general interest. It is possible to commit the offenses of rape and kidnapping with the same conduct, but it must be reviewed on a case by case basis, narrowly focusing on the appellant's conduct. *State v. Rose*, 12th Dist. No. CA2011-11-213, 2012-Ohio-5608, ¶91. Both the trial court and the appellate court found that each of these crimes were committed with a separate animus. There was only one - obvious - animus for the rape in this case, sexual gratification. However, "[a]t one point before the rape, Nguyen tied up the victim with rope but then cut the rope off. After the rape, Nguyen told the victim he was taking her to New York, made her pack and get dressed, used medical tape to bind her arms together, and took her from the bedroom to the living room. He also attempted to blindfold her and tape her mouth shut. And he asked the victim about whether she would report him to police. When she promise not to, he cut her arms free." *Nguyen*, at p. 41.

Evidence presented to both the trial court and the appellate court supports the conclusion that "the post-rape restraint and movement of the victim was not merely incidental to the rape." *Id.*, citing *State v. Logan*, 60 Ohio St.2d, 397 N.E.2d 1345 (1979).

Because a separate animus existed for the rape and kidnapping convictions, they are not allied offenses, and there is no constitutional question involved. Appellant's third proposition of law produces no general or great public interest.

RESPONSE TO APPELLANT'S PROPOSITION OF LAW IV

Appellant's proposition of law four claims that the kidnapping conviction violates his due process rights because the evidence is subject to different interpretations with respect to whether his purported removal or confinement of the victim exceeded that necessary to accomplish the accompanying felonies of aggravated burglary and/or rape, and is thus insufficient. Appellant further states that the issue should be a question for the jury after appropriate instructions, which appellate courts review under the sufficiency of the evidence standards as the due process safeguard.

Appellant cites in his argument *State v. White*, 362 S.W.3d 559 (Tenn. 2012), in which he states that the court concluded that the Tennessee legislature did not intend for the kidnapping statutes to apply to instances in which the removal or confinement of a victim is essentially incidental to an accompanying felony, such as rape or robbery, and that the inquiry is a question for the jury after appropriate instructions, which appellate courts review under sufficiency of the evidence standard as the due process safeguard.

The facts in *White* are that the defendant hid in a restaurant until closing, approached the store manager from behind while she was in the women's restroom, knocked her to her knees, and ordered her to remain in the restroom. Defendant then returned to the restroom and forced the manager at gunpoint to accompany him to another area where another employee was attempting to open the safe. After the defendant took items he directed the two women to lie down on the floor and wait eight to nine minutes. The Court stated that because removal or confinement is subject to different interpretations and the jury was not instructed on the meaning of substantial interference, the defendant's kidnapping must be reversed and the case remanded for a new trial. Appellant believes that proof in *White* is similar to the instant case.

In *State of Tennessee v. Robert Jason Burdick*, No. II-CR-053486, Appeal No. M2012-01071-CCA-R3-CD (Circuit Court for Williamson County), filed June 11, 2013, the Circuit Court jury convicted defendant Burdick of rape, aggravated kidnapping, and aggravated burglary. On appeal, the appellant challenged the court's denial of his motion to suppress, the sufficiency of the evidence sustaining his convictions, and the trial court's jury instructions regarding the kidnapping offense in light of *State v. White*, 362 S.W.3d 559 (Tenn.2012). In his final issue, the appellant contended that he should be granted a new trial on the aggravated kidnapping charge maintaining that the trial court erred in failing to charge the jury in accordance with *State v. White*, 362 S.W.3d 559 (Tenn.2012), which was released after the appellant's trial but before the hearing on his motion for a new trial. In response, the State asserted that the error, if any, was harmless.

Tennessee Code Annotated (T.C.A.) 39-13-303 defines kidnapping as false imprisonment as defined in 39-13-302, under circumstances exposing the other person to substantial risk of bodily injury. T.C.A. 39-13-302 says that a person commits the offense of false imprisonment who knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty.

In the *Burdick* case, the Court had to first determine whether *White* was applicable. In *Burdick*, the trial occurred prior to the opinion being issued in *White* and the trial court instructed the jury in accordance with the pattern jury instruction in effect at the time. The State contended that the Tennessee Supreme Court expressly states that its ruling in *White* does not articulate a new rule of constitutional law or require retroactive application. There the State essentially maintained that *White* was not applicable to the instant case. The Court agreed with Appellant in that the Court concluded that the Supreme Court intended retroactive application of the ruling to

those already tried cases and that the instruction given the jury was not sufficient. However, the Court then had to determine the effect of the error. The test was to determine whether the error was harmless or whether it appeared beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. The trial court in *Burdick* found that the charge given was the proper instruction at the time. Nevertheless, the court found that if the charge was error it was harmless. The trial court further found that there was proof beyond a reasonable doubt that the evidence supported the verdict. The Supreme Court agreed with the trial court. The proof at trial revealed that the defendant in *Burdick* had committed the acts testified to and that the proof was overwhelming that the removal and/or confinement of the victim went beyond that necessary to perpetrate the rape or the aggravated burglary. Therefore the Supreme Court concluded that the error did not contribute to the verdict obtained and was harmless beyond a reasonable doubt.

In discussing jury instructions regarding kidnapping, *State of Ohio v. Darryl Love*, 2009, First Appellate District the Appellant argued that the trial court failed to give a complete jury instruction for kidnapping. He argued that in addition to an instruction on the elements of the offense, a separate instruction was required to emphasize that, to constitute kidnapping as charged, the restraint of liberty had to have been done with the purpose of facilitating aggravated robbery. Appellant further argued that a trial court must give the jury all instructions that are relevant and necessary for the jury to discharge its function as a factfinder. But a jury instruction is not to be viewed in a vacuum, it must be evaluated in the context of the jury charge as a whole. The Court stated that given that the jury instruction tracked the statutory elements for kidnapping, and the jury was fully apprised of the elements of kidnapping including the definition of purposely, the assignment of error was overruled.

It is presumed that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, the verdict stands if the evidence is sufficient with respect to any one of the acts charged.

The evidence in the instant case was sufficient to find the Defendant guilty of kidnapping. The evidence further indicated that the victim was restrained of her liberty and therefore the evidence in the record is sufficient to ensure a guilty verdict.

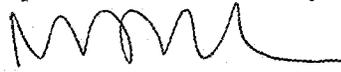
Lastly, Appellant waived his right to argue this proposition to this Court because he failed to raise it in the court of appeals. *Hart v. Ohio Adult Parole Authority*, S.D. Ohio No. 1:12-cv-698, 2013 WL 3567483 (July 11, 2013). In the nine different assignments of error that Appellant presented to the Fourth District Court of Appeals, the issue of jury instructions or the lack thereof was never presented, therefore, the State contends Appellant has waived such issue. Appellant's fourth proposition of law should be denied.

CONCLUSION

Because this case does not involve matters of public or great general interest, and because there is no substantial constitutional question, Plaintiff-Appellee requests that Defendant-Appellant's appeal be denied; the judgment entry of guilty and the subsequent sentencing be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered to the following:
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Floor, Columbus, Ohio 43215-3431; and Elizabeth Gaba, Attorney for Defendant Appellant,
1231 East Broad Street, Columbus, Ohio 43215, by regular U.S. Mail on the 20th day of
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