

[Cite as *State v. Amos*, 2008-Ohio-7138.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,

PLAINTIFF-APPELLEE,

- VS -

JOHN E. AMOS,

DEFENDANT-APPELLANT.

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CASE NO. 07 BE 22

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from Common Pleas
Court, Case No. 07 CR 56.

JUDGMENT:

Conviction Affirmed. Sentence
Vacated. Case Remanded.

APPEARANCES:

For Plaintiff-Appellee:

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Prosecuting Attorney
Attorney Daniel P. Fry
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For Defendant-Appellant:

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JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: June 30, 2008

[Cite as *State v. Amos*, 2008-Ohio-7138.]
DeGenaro, P.J.

{¶1} This matter comes for consideration upon the record in the trial court and the parties' briefs. Defendant-Appellant, John Amos, appeals the decision of the Belmont County Court of Common Pleas convicting him of five counts of rape in violation of R.C. 2907.02(A)(2) and sentencing him to fifty years in prison. With this appeal, Amos raises multiple assignments of error challenging the validity of his conviction. However, all of those assignments of error are meritless. Amos also challenges his sentence because the trial court improperly relied on statutes which the Ohio Supreme Court severed as unconstitutional and this argument is meritorious. Therefore, Amos's conviction is affirmed, his sentence is vacated, and this case is remanded for resentencing.

Facts

{¶2} This matter originates from sexual acts allegedly occurring from September of 2003 through August of 2006 between John Amos and both his minor biological daughter KS and her friend JH. These acts allegedly occurred in multiple locations in and around Belmont County in both one-on-one and group situations. On March 7, 2007, Amos was indicted on seven counts of rape in violation of R.C. 2907.02(A)(2), felonies of the first degree. The indictment alleged that Amos engaged in sexual conduct with his daughter KS, a fourteen year old at the time of the events, and her friend JH via force or threat of force.

{¶3} A jury trial was conducted resulting in convictions on five of the seven counts. Thereafter, Amos was sentenced to five ten-year periods of incarceration to be served consecutively for a total of fifty years.

Mistrial

{¶4} In his first assignment of error, Amos argues:

{¶5} "The trial court erred when it failed to grant Defendant's motion for mistrial."

{¶6} Amos claims that the trial court should have granted a mistrial after the following exchange took place between the prosecutor and the victim, KS:

{¶7} "Q: All right. Let's go back to early 2003. Okay. Now, do you remember that time frame, something happen around that time that you were having contact with your father? Between your birth and '02, did your father have much, if any contact with

you at all?

{¶8} "A: No.

{¶9} "Q: Something happened in early '03, late '02, that he started to have contact with you?

{¶10} "A: He got out of prison, and then he started coming to see me."

{¶11} At that point defense counsel requested a sidebar and moved for a mistrial based upon the prejudice that would have resulted from the jury hearing that Amos had been incarcerated, possibly from the time of KS's birth.

{¶12} The prosecutor responded that KS had to use benchmarks in her life to recall when the alleged events happened. And "unfortunately, that's what she uses as a benchmark, she remembers when her father got out of the penitentiary, and that's when he made contact with her."

{¶13} The court acknowledged on the record that he believed the testimony to be a surprise to everyone, it instructed the State not to explore the matter any further, and then denied the motion for a mistrial.

{¶14} With regards to the grant or denial of a mistrial, the Ohio Supreme Court has stated the following:

{¶15} "In evaluating whether the declaration of a mistrial was proper in a particular case, this court has declined to apply inflexible standards, due to the infinite variety of circumstances in which a mistrial may arise. * * * This court has instead adopted an approach which grants great deference to the trial court's discretion in this area, in recognition of the fact that the trial judge is in the best position to determine whether the situation in his courtroom warrants the declaration of a mistrial." *State v. Glover* (1988), 35 Ohio St.3d 18, 19. (Citations omitted).

{¶16} Thus, the decision whether or not to grant a mistrial rests in the sound discretion of the trial court. *Glover*. An appellate court may only reverse a trial court if it abused its discretion to the extent that the defendant was materially prejudiced. *State v. Stanley* (1997), 121 Ohio App.3d 673, 699. An abuse of discretion is more than a mere

error of law or judgment but amounts to an attitude that is unreasonable, unconscionable, or arbitrary. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶17} Here the trial court explained its decision stating that KS made just the singular reference to her father being in the penitentiary. Given the amount of evidence against him, including multiple eyewitnesses to the events, it does not appear that Amos was prejudiced by this statement. Moreover, the trial court ultimately gave a curative instruction which was later requested by defense counsel. It is a well-established premise that the jury is presumed to follow cautionary or curative instructions. *State v. Treesh* (2001), 90 Ohio St.3d 460, 480; *State v. Loza* (1994), 71 Ohio St.3d 61, 75. Accordingly, this assignment of error is meritless.

Venue

{¶18} In his second assignment of error, Amos argues:

{¶19} "The state of Ohio failed to prove venue beyond a reasonable doubt relative to Counts I and II."

{¶20} Amos claims that the State failed to prove beyond a reasonable doubt that Counts I and II occurred within Belmont County. More specifically, Amos claims that none of the State's witnesses could pinpoint exactly where the alleged crimes occurred as they were driving around at night while drinking at the direction of Amos, who did not testify.

{¶21} Section 10, Article I of the Ohio Constitution fixes venue, or the proper place to try a criminal matter, in the county in which the offense is alleged to have been committed. Thus, venue is proper in the county where an offense, or any element thereof, was committed. *State v. Headley* (1983), 6 Ohio St.3d 475, 477; R.C. 2901.12(A). While venue is not a material element of any crime, it is a fact that must be proven beyond a reasonable doubt. *State v. Jalowiec* (2001), 91 Ohio St.3d 220, 228, citing *Headley*, 6 Ohio St.3d at 477. Express evidence to establish venue is not necessary if, from all of the facts and circumstances in the case, it is established beyond a reasonable doubt that the crime was committed in the county and state alleged in the

indictment. *Id.*; *State v. Gribble* (1970), 24 Ohio St.2d 85, 89-90. The trial court has broad discretion to determine the facts that establish venue. *State v. Shuttlesworth* (1995), 104 Ohio App.3d 281, 286.

{¶22} The relevant portions of the statute dealing with venue, R.C. 2901.12, provide:

{¶23} "(A) The trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter, and in the territory of which the offense or any element of the offense was committed.

{¶24} "(B) When the offense or any element of the offense was committed in an aircraft, motor vehicle, train, watercraft, or other vehicle, in transit, and it cannot reasonably be determined in which jurisdiction the offense was committed, the offender may be tried in any jurisdiction through which the aircraft, motor vehicle, train, watercraft, or other vehicle passed. * * *

{¶25} "(G) When it appears beyond a reasonable doubt that an offense or any element of an offense was committed in any of two or more jurisdictions, but it cannot reasonably be determined in which jurisdiction the offense or element was committed, the offender may be tried in any of those jurisdictions."

{¶26} In the present case, none of the witnesses could state with any certainty where the alleged acts occurred but they all suspected that they remained in Belmont County. For example, KS testified that they ended up at a lake that as far as she knew was in Belmont County. JH likewise testified that they left Martin's Ferry but she wasn't sure if they left Belmont County as it was too dark to tell where they were driving. On cross-examination JH further testified that she was pretty sure they remained in Ohio. She also stated that they stayed on Route 7 and drove towards Yorkville for about 15 to 20 minutes, and then made a left hand turn, which the defense would argue took them out of the court's jurisdiction. Cochran similarly testified that he thought they remained in Belmont County but couldn't be sure.

{¶27} In a case similar to the one at hand, *State v. Miller* (1989) 63 Ohio App.3d

479, the defendant took the victim on a canoeing trip which originated on the Little Miami River in Warren County. After traveling down river, the defendant and the victim went ashore, where a sexual incident occurred. However, it was unclear whether the point at which the two went ashore was in Warren County or some other county. The Twelfth District found that "[s]uch a situation is clearly covered by R.C. 2901.12(G)," explaining that,

{¶28} "This section of R.C. 2901.12 applies to those situations where the entire offense was committed in a single county but it cannot reasonably be determined in which county the offense was committed. * * * In such cases, where it cannot be determined in which of the counties a felony was committed, although there is proof beyond a reasonable doubt that the offense occurred in one of the counties, the statute permits the crime to be prosecuted in any of the counties." *Id.* at 485. (Citations omitted)

{¶29} Likewise, in the present case, it cannot be determined where the offense occurred. However, Belmont County is one of the counties where the alleged offenses may have occurred. Thus it was proper for the case to be tried in Belmont County. To conclude otherwise would lead to situations where a defendant could escape conviction by only victimizing small children or any other class of people who may have difficulty describing where they might have been taken. Accordingly, this assignment is meritless.

Sentencing

{¶30} As his third assignment of error, Amos maintains:

{¶31} "The trial court erred by imposing sentences based on facts that were neither admitted by Defendant-Appellant nor found by a jury."

{¶32} Amos claims that this case must be remanded for resentencing because of the trial court's reliance on unconstitutional statutory sections. Amos is correct that in this case, the trial court made certain findings when sentencing Amos to maximum and consecutive prison terms and stated that it was making these findings in accordance with R.C. 2929.14(B) and (E)(3). These statutes were found unconstitutional by the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-0856, and severed from

Ohio's felony sentencing scheme.

{¶33} In *State v. Moore*, 7th Dist. No. 06MA60, 2007-Ohio-1574, this court concluded that a sentence imposed on a felony offender two weeks after *Foster* was decided had to be remanded because the trial court relied on these unconstitutional statutes when sentencing the offender. This court recently clarified that decision in *State v. Kimble*, 7th Dist. No. 06 MA 190, 2008-Ohio-1539, at ¶13, by holding that we must remand a case for resentencing any time a trial court specifically cites to these unconstitutional statutes when sentencing a felony offender. A trial court may rely on the factors enumerated in those statutes, but may not cite them as controlling authority. *Id.*

{¶34} In this case, the trial court specifically cited the unconstitutional statutes as controlling authority when sentencing Amos. Accordingly, this court must vacate his sentence as Amos' third assignment of error is meritorious.

Answers to Jury Questions

{¶35} In his fourth and final assignment of error, Amos argues:

{¶36} "The trial court erred in usurping the jury's fact finding role in answering the jury's question while deliberating."

{¶37} In this case the jury inquired, "What incidents correlate with each count? We need a roster of charges one through seven." In response to the jury's question, the trial court responded, over the objection made by Amos:

{¶38} "Count 1 refers to JH only.

{¶39} Count 2 refers to KS at the same time as Count 1.

{¶40} Count 3 refers to threesome, March 2005.

{¶41} Count 4 refers to threesome.

{¶42} Count 5 bedroom in grandma's house.

{¶43} Count 6 Jamboree in the Hills, which we already identified.

{¶44} Count 7 is Scott Lumber."

{¶45} Amos argues that these answers improperly usurped the jury's function as fact-finder by describing which facts correlated to each count as opposed to either

requiring them to use their collective memories or by refreshing their memories with transcripts of the trial. But while Amos is correct that a trial court could improperly comment on the evidence when answering the jury's question, we do not need to answer that question in this case since Amos was not prejudiced by the trial court's comments.

{¶46} A defendant's conviction will not be reversed merely because a trial court makes improper comments to the jury at trial; a defendant must demonstrate prejudice before we will reverse his conviction. *State v. Wade* (1978), 53 Ohio St.2d 182, 188. "Generally, in determining whether a trial judge's remarks were prejudicial, the courts will adhere to the following rules: (1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel." *Id.*

{¶47} In this case, the trial court's comments were merely designed to place labels on the different charges pending against Amos. The trial court neither explicitly nor implicitly indicated that it thought that those charges had any merit. This is best demonstrated by the fact that the jury acquitted Amos of two of the seven charges. Furthermore, the information contained in those comments merely reiterated facts which the prosecutor and defense had both relied upon in their opening and closing remarks. Thus, the jury heard nothing new or revealing and retained its independence to such an extent that it partially acquitted Amos of the charges. Given these circumstances, we cannot see how Amos was prejudiced by these comments.¹

{¶48} Amos asks this court to conclude both that the trial court's comments were improper and that he was prejudiced by those comments. We conclude that Amos was not prejudiced by those comments, so his fourth assignment of error is meritless.

¹ Amos also argues that the trial court violated Crim.R. 30(A) by not giving the jury a written copy of the court's instructions. However, the record demonstrates the contrary in two separate places: at page 698 of the transcript and in the court reporter's exhibit pack. Accordingly, this argument is meritless.

{¶49} In conclusion, Amos makes multiple challenges to his convictions, but each of those challenges is meritless. On the other hand, Amos correctly argues that the trial court erred when sentencing him. Accordingly, Amos's conviction is affirmed, his sentence is vacated, and this case is remanded to the trial court for resentencing.

Donofrio, J., concurs.

Vukovich, J., concurs.