**[Cite as *State v. Matthews*, 2009-Ohio-3254.]**

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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| STATE OF OHIO, | ) | |
| | ) | |
| PLAINTIFF-APPELLEE, | ) | |
| | ) | |
| VS. | ) | CASE NO. 08-MA-49 |
| | ) | |
| BRIAN MATTHEWS, | ) | OPINION |
| | ) | |
| DEFENDANT-APPELLANT. | ) | |

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 2006CR812

JUDGMENT: Affirmed

APPEARANCES:

For Plaintiff-Appellee

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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: June 23, 2009

**[Cite as *State v. Matthews*, 2009-Ohio-3254.]**
DONOFRIO, J.

**{¶1}** Defendant-appellant, Brian Matthews, appeals from a Mahoning County Common Pleas Court judgment convicting him of 13 counts of unlawful sexual conduct with a minor following a jury trial.

**{¶2}** Appellant worked as a farmhand from 2002 until June 2006. The farm on which he worked is owned by Alice and Joe. Appellant met Joe's daughter, S.S., while working on the farm. S.S. frequently "hung out" with the farmhands after school and helped with the farm work.

**{¶3}** In May 2006, S.S.'s family discovered a journal she had been keeping. In this journal, S.S. wrote about numerous sexual encounters with appellant. S.S. was 15 years old at the time. Appellant was approximately 20 years older than S.S. Joe learned of the journal at the end of May 2006. A week later he fired appellant and subsequently contacted the police.

**{¶4}** A Mahoning County grand jury indicted appellant on 13 counts of unlawful sexual conduct with a minor, third-degree felonies in violation of R.C. 2907.04(A)(B)(3).

**{¶5}** The case proceeded to a jury trial. The jury found appellant guilty of all 13 counts. The court later entered judgment and sentenced appellant to five years in prison on each of counts one through nine. The court ordered the five-year sentence in count two to be served consecutively to the five-year sentence in count one. The court then ordered the five-year sentences in counts three through nine to be served concurrent to the other sentences. Next, the court sentenced appellant to five years of community control on each of counts ten through 13, to be served consecutively to his prison sentence and concurrently with each other. Thus, in total the court sentenced appellant to ten years in prison followed by five years of community control. Additionally, the court classified appellant as a tier II sexual offender.

**{¶6}** Appellant filed a timely notice of appeal on March 24, 2008.

**{¶7}** Appellant raises three assignments of error, the first of which states:

**{¶8}** "APPELLANT MATTHEWS' CONVICTIONS FOR UNLAWFUL SEXUAL CONDUCT WITH A MINOR WERE AGAINST THE MANIFEST WEIGHT

OF THE EVIDENCE IN VIOLATION OF SECTION 3(B)(3) ARTICLE IV OHIO CONSTITUTION, THUS CREATING A MANIFEST MISCARRIAGE OF JUSTICE BECAUSE THE GREATER WEIGHT OF THE EVIDENCE SHOWED THAT APPELLANT MATTHEWS AND THE COMPLAINANT DID NOT ENGAGE IN SEXUAL CONDUCT."

**{¶9}** Appellant argues that his convictions are against the weight of the evidence. He gives several reasons in support.

**{¶10}** First, appellant contends that S.S.'s testimony was uncertain and unreliable. He asserts that she was uncertain as to the dates or times when appellant tried to kiss her or initiate a relationship with her. He points out that S.S. was 14 when their relationship allegedly began and she was 17 at the time of the trial. Additionally, he points out that S.S. did not tell anyone about what was allegedly going on between them. Furthermore, appellant points out that S.S. admitted that she started her journal to remember events and to entertain herself. He claims that S.S. admitted that she lied to her family, that her journal entries did not accurately recite what she meant, that there were long periods of time that she did not write in her journal, and that there were 19 pages missing from her journal. Moreover, appellant points out that at the end of the journal S.S. wrote a lengthy entry about a specific sexual encounter with him. S.S. admitted she made up this entry because it was what she had wanted to happen.

**{¶11}** Second, appellant points out that although Joe learned of his daughter's journal and its contents on May 28, 2006, Joe continued to allow appellant to work on the farm until June 9, 2006. He further points out that after Joe confronted him, Joe waited another week before contacting the police. And appellant notes that S.S. stated that her last sexual encounter with him was on June 4, 2006, during the time in which Joe stated he was closely watching his daughter.

**{¶12}** Third, appellant relies on the testimony of two other farmhands who stated that appellant was a hard worker, always finished his work on time, and that they never saw him in any type of compromising position with S.S.

**{¶13}** Finally, appellant points to his own testimony that he never had sexual relations with S.S.

**{¶14}** In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. "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.'" Id. (Emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. Id. at 390.

**{¶15}** Still, determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the facts. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

**{¶16}** The jury convicted appellant of 13 counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A)(B)(3), which provides:

**{¶17}** "(A) No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard.

**{¶18}** "(B) Whoever violates this section is guilty of unlawful sexual conduct with a minor.

**{¶19}** "* * *

**{¶20}** "(3) Except as otherwise provided in division (B)(4) of this section, if the offender is ten or more years older than the other person, unlawful sexual conduct with a minor is a felony of the third degree."

**{¶21}** There is no question that appellant is over age 18, that S.S. is not his spouse, that appellant knew that S.S. was 14 and 15 during the time in question, and that appellant is more than ten years older than S.S. The only question is whether the state proved that appellant engaged in sexual conduct with S.S. We must examine the evidence presented at trial to make that determination.

**{¶22}** S.S. testified first. She stated that her relationship with appellant began in the summer of 2004 when appellant kissed her. (Tr. 500-502). She stated that the two first had sexual intercourse around Thanksgiving of 2004. (Tr. 502). S.S. testified that it occurred in the barn. (Tr. 502). She stated that this sexual relationship continued from there with the two having sex two or three times a week until May 2006. (Tr. 503-504). S.S. testified that she and appellant engaged in vaginal, anal, and oral sex. (Tr. 504). S.S. then went on to describe several places where these sexual encounters occurred including in the woods when the two went on horseback rides, in the barn, in the farm truck, and on a hay farm. (Tr. 504-508). She stated that she went with appellant everywhere. (Tr. 509).

**{¶23}** S.S. testified that she began keeping a journal in December 2005. (Tr. 510). Inside the journal, she kept a picture of her and appellant. (Tr. 511; State Ex. 2). She stated that when she made the entries in her journal, the events were fresh in her mind and she truthfully and accurately recorded events that took place. (Tr. 513-14). S.S. dated and signed each of her entries. (Tr. 514; State Ex. 1). She stated that she started keeping the journal because she did not have anyone to talk to about the things she wrote in it. (Tr. 581).

**{¶24}** S.S. read each of the entries in her journal to the jury. The first was dated December 26, 2005, and the last was dated May 22, 2006. (State Ex. 1). Of the 44 dated entries, 13 described sexual encounters with appellant. (State Ex. 1). In many of the remaining entries, S.S. talked about appellant, their relationship, how she wanted to be with him, and her love for him. (State Ex. 1). She also wrote about how appellant told her that their relationship would never be more than sex. (Tr. 518-19, 543-44; State Ex. 1). In her entries, S.S. was very explicit in describing the

sexual acts that she and appellant engaged in. (State Ex. 1). Additionally, throughout the journal S.S. wrote, "I love Brian." (State Ex. 1). S.S. also detailed appellant's physical condition and how that affected their sexual relationship such as when appellant hurt his back and when he broke his arm. (Tr. 520-21, 548-50; State Ex. 1). She also wrote several times that she was happy she was not pregnant. (Tr. 529, 579; State Ex. 1).

**{¶25}** S.S. also recorded other events in her journal such as school events, the birth of her nieces, one of the cows on the farm giving birth, going to the dentist, her sister's birthday, spending time at her mother's house, and getting her hair cut. (Tr. 528-29, 531, 534-36, 543, 546-47, 556, 570-71; State Ex. 1).

**{¶26}** In her journal, S.S. also described lying about being ill so that she would not have to go to school and so that she would not have to go with her dad to a horse competition. (Tr. 536, 564; State Ex. 1).

**{¶27}** Finally, in the back of her journal S.S. wrote a sexual fantasy about appellant, which she set out in great detail. (Tr. 579-81; State Ex. 1). She stated that the fantasy never happened but that it was something she had wished would happen. (Tr. 580-81). She pointed out that she did not date and sign this entry like she did the others and that it was located in the back of her journal, separate from the other entries. (Tr. 581, 795).

**{¶28}** The prosecutor also asked S.S. to describe what appellant looked like with his clothes off. (Tr. 584). She stated that appellant had tattoos on his legs, stomach, and back. (Tr. 584). She also described a scar on his leg from being shot as a child. (Tr. 584-85).

**{¶29}** S.S. testified that her relationship with appellant ended when her family found her journal. (Tr. 582).

**{¶30}** On cross-examination, S.S. stated that she started keeping the journal because she did not have a lot of people to talk to about appellant and she wanted to write things down so that she could look at them. (Tr. 628). Defense counsel then asked her, "You wanted to entertain yourself with the writing?" (Tr. 628-29). S.S.

responded, “I wanted to be able to remember.” (Tr. 629). Counsel asked her once again, “You wanted to be able to remember and entertain yourself; right?” (Tr. 629). S.S. responded, “Yes.” (Tr. 629).

**{¶31}** Additionally, S.S. admitted that she lied about being sick so that she would not have to go to school and she admitted planning a lie to tell to her father so that she could meet appellant. (Tr. 671, 743).

**{¶32}** Defense counsel also questioned S.S. about 19 pages that were missing from the journal. S.S. stated that she tore them out when she needed pieces of scrap paper to jot something down. (Tr. 759-60).

**{¶33}** Finally, counsel questioned S.S. about the fantasy she wrote in the back of her journal. She stated that this particular story was not true. (Tr. 769-70).

**{¶34}** Joe, S.S.’s father, testified next. Joe testified that he first learned of appellant’s relationship with S.S. on May 28, 2006, when one of his other daughters, Mary, informed him of such. (Tr. 817-19). Joe stated that shortly thereafter, a family friend found S.S.’s journal and brought it to his attention. (Tr. 819). After that time, Joe stated that he never left S.S. alone with appellant. (Tr. 819). Joe testified that he waited to confront appellant and fire him until S.S. finished her finals because he did not want her grades to suffer. (Tr. 820). He stated that he fired appellant on S.S.’s last day of school, June 9, 2006. (Tr. 820-21).

**{¶35}** Joe also corroborated several of the events that did not involve appellant that S.S. documented in her journal such as the birth of his granddaughters, the birth of a calf on the farm, and one of his other daughter’s birthday. (Tr. 822-25).

**{¶36}** On cross-examination, Joe testified that appellant was a good, diligent worker who completed his tasks. (Tr. 832-33). He also stated that appellant was such a good worker that appellant became an intermediary between him and the other farmhands. (Tr. 831-32).

**{¶37}** Joe also admitted that he waited several days after firing appellant before contacting the police. (Tr. 863).

**{¶38}** Mary, S.S.'s sister, testified next. She stated that S.S. usually spent her time with appellant on the farm. (Tr. 870). Mary testified that in May 2006, S.S. told her about her relationship with appellant. (Tr. 873-74). Mary stated that she then told their father and step-mother. (Tr. 874).

**{¶39}** Alice, S.S.'s step-mother, was the next to testify. She, like Joe, testified that the reason Joe waited to fire appellant was so that S.S. could finish her finals. (Tr. 897-98). Alice also testified that after they discovered what was going on between appellant and S.S., they made sure that S.S. was never alone with appellant. (Tr. 898).

**{¶40}** On cross-examination, Alice too testified that appellant was a very good worker. (Tr. 908). She also stated that he always completed his tasks and kept busy. (Tr. 909).

**{¶41}** Renee Mayberry, a Mahoning County Children's Services caseworker, testified about her interview with S.S. She stated that S.S. reported that her last sexual encounter with appellant was about three weeks prior to the interview, which took place on June 21, 2006, but that S.S. did not give a specific date. (Tr. 950-51, 955).

**{¶42}** Dr. Stephanie Dewar examined appellant on June 21, 2006. She testified that S.S. reported to her that she had sexual contact with appellant on a weekly basis beginning in the fall/winter of 2004. (Tr. 965-66). Dr. Dewar also stated that S.S. reported that she worried all the time that she would get pregnant. (Tr. 966). Dr. Dewar testified that S.S. told her that her last sexual contact with appellant was on June 4, 2006. (Tr. 973).

**{¶43}** In his defense, appellant called two witnesses and took the stand himself.

**{¶44}** Michael Rossell was the first defense witness to testify. Rossell was a farmhand during part of the same time appellant worked at the farm. Rossell testified that appellant was an unofficial supervisor on the farm. (Tr. 1015). He stated that S.S. frequently "hung out" with the farmhands but that she did not seem to hang out

with anyone in particular more than anyone else. (Tr. 1018). Rossell further testified that he never sensed anything between appellant and S.S., that he never heard any suggestive conversation between the two, that he never saw them touch each other, and that he never perceived that there was a sexual relationship between the two. (Tr. 1018-22).

**{¶45}** William Butler was another farmhand during part of the time appellant worked at the farm. Butler also testified that S.S. came out on the farm to "chitchat" with him and appellant and to work with the horses. (Tr. 1038). He stated that he never saw appellant and S.S. in any compromising situations, he never heard any sexually suggestive talk between the two of them, and he never saw them touch each other in a way that would amount to anything. (Tr. 1040-41).

**{¶46}** Finally, appellant testified in his own defense. He stated unequivocally that S.S.'s allegations were false, that he never spoke suggestively to her, that he never touched her inappropriately, that he never engaged in any type of sexual contact with her, and that the contents of her journal were untrue. (Tr. 1078-79).

**{¶47}** Given this evidence, we cannot conclude that the jury's verdict was against the weight of the evidence.

**{¶48}** The state's case depended on S.S. and her journal. Between S.S.'s testimony and her journal entries, 16 specific sexual encounters were described. (Tr. 502-578; State Ex. 1). In addition to these explicitly detailed sexual encounters, S.S. also documented her feelings for appellant, her desires to be with appellant, and appellant's statements to her that their relationship would never amount to more than sex. Additionally, while S.S. did write a fantasy about a sexual encounter with appellant in her journal, this entry was separate from the rest of the entries, it was not dated, and it was not signed, as were the rest of the entries. And while a good portion of S.S.'s journal dealt with appellant, she also documented everyday events like the birth of her nieces, her sister's birthday, school assignments, and visiting at her mother's house. The addition of these events, many of which Joe corroborated,

gave further support to the truthfulness of the journal's contents. It demonstrated that S.S. was not keeping a fantasy journal as appellant alleges.

**{¶49}** While S.S. admitted to lying to her father in order to "play hooky" from school and avoid going to a horse competition, these lies were typical teenage lies. They do not prove that S.S. was a habitual liar or that her journal entries were fabricated. Furthermore, the jury had this evidence before them, which they were able to use when weighing the truthfulness of S.S.'s testimony.

**{¶50}** Additionally, the state was not required to prove the specific dates and times that each sexual encounter between appellant and S.S. took place. This is because generally specific dates and times are not essential elements of the offense. *State v. Sellards* (1985), 17 Ohio St.3d 169, 171, 478 N.E.2d 781. It was sufficient that the state proved the dates of each of the 13 offenses by reference to S.S.'s dated journal entries.

**{¶51}** Likewise, the state was not required to prove its case by the use of physical evidence as appellant contends.

**{¶52}** Appellant is correct that Dr. Dewar stated that S.S. reported her last sexual encounter with him was on June 4, during the period that Joe supposedly never left S.S. alone with appellant. However, S.S. reported that her last sexual encounter with appellant was at the end of May and Mayberry stated that S.S. reported her last sexual encounter was approximately three weeks prior to June 21. Thus, the dates here could have easily been confused since we are dealing with such a short time period.

**{¶53}** Furthermore, although Joe waited over a week after learning of appellant's relationship with his daughter before confronting and firing him, he did so for S.S.'s benefit. Joe knew that S.S. would be upset that he had found out about her relationship and that he was going to fire appellant. And Joe knew that S.S.'s finals were approaching. He did not want her grades to suffer. Consequently, Joe waited until S.S.'s last day of school before firing appellant.

**{¶54}** Finally, while appellant testified that he did not have any type of sexual relationship with S.S., his credibility was a matter for the jury, as the trier of facts, to determine. *DeHass*, 10 Ohio St.3d at paragraph one of the syllabus. This is because the trier of the facts is in the best position to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of their testimony. *State v. Wright,* 10th Dist. No. 03AP-470, 2004-Ohio-677, at ¶11. While two other farmhands testified that they never witnessed anything inappropriate between appellant and S.S., the farm is over 100 acres. Thus, S.S. and appellant could have easily hid their relationship.

**{¶55}** This case came down to the matter of whose testimony the jury believed, S.S.'s testimony or appellant's testimony. Although an appellate court is permitted to independently weigh witnesses' credibility, when determining if a verdict is against the manifest weight of the evidence, we must give great deference to the fact finder's credibility determinations. *State v. Deltoro*, 7th Dist. No. 07-MA-90, 2008-Ohio-4815, at ¶62. An appellate court will generally not second-guess the jury's determination as to credibility of the witnesses. *State v. Rodriguez-Barron*, 7th Dist. No. 07-MA-86, 2008-Ohio-4816, at ¶34; *State v. Hoover*, 4th Dist. No. 07CA3164, 2008-Ohio-6136, at ¶11; *State v. Murphy*, 12th Dist. No. CA2007-03-073, 2008-Ohio-3382, at ¶13. The jury's job as the trier of facts was to judge the credibility of these witnesses and determine who was telling the truth. The jury was free to believe all, part, or none of each witnesses' testimony. *State v. Nichols* (1993), 85 Ohio App.3d 65, 76, 619 N.E.2d 80. Here the jury chose to believe S.S.'s testimony over appellant's testimony. We will not second-guess their assessment.

**{¶56}** For all of these reasons, the jury's verdict was supported by the manifest weight of the evidence. Accordingly, appellant's first assignment of error is without merit.

**{¶57}** Appellant's second assignment of error states:

**{¶58}** "THE TRIAL COURT ERRED WHEN IT APPLIED R.C. §2907.02(D), OHIO'S RAPE SHIELD LAW, AT MR. MATTHEWS' TRIAL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

**{¶59}** During trial, the state filed a motion in limine requesting that the court bar the defense from eliciting any testimony that would indicate that S.S. was of bad moral character. The motion requested that the defense not be permitted to introduce evidence that S.S. wore fishnet stockings, mini skirts, and dyed her hair pink. It also requested that the defense not be permitted to introduce any evidence of S.S.'s sexual activity. The court granted the motion. (Tr. 1008). It relied in part on the rape shield statute and in part on not allowing appellant to introduce bad character evidence. (Tr. 1008).

**{¶60}** Appellant argues that the trial court should not have used the rape shield statute in his trial to limit evidence regarding S.S.'s sexual history, which he wished to use to impeach her. He points out that the rape shield statute is contained in R.C. 2907.02(D), the rape statute, and in R.C. 2907.05(E), the gross sexual imposition statute. Appellant notes that both of these statutes provide that they are limited to evidence "admitted under this section." And he notes that the rape shield protection does not appear anywhere in R.C. 2907.04, the unlawful sexual conduct with a minor statute under which he was charged.

**{¶61}** The rape shield provision provides:

**{¶62}** "Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value." R.C. 2907.02(D).

**{¶63}** For support, appellant points to *State v. Smiddy*, 2d Dist. No. 06CA0028, 2007-Ohio-1342. In *Smiddy*, the defendant was convicted of six counts

of unlawful sexual conduct with a minor. He appealed arguing, among other things, that the trial court erred by restricting his cross-examination of the victim and preventing him from presenting evidence as to the victim's previous sexual relationship. The defendant claimed that he had counseled the victim regarding her previous sexual relationship with an inappropriate partner and that was why the victim had fabricated the story about having sex with him because she was angry with him. The defendant wanted to present this evidence for three reasons: (1) to impeach the victim's credibility and rebut her claim that she was a virgin when she had sex with the defendant; (2) to bolster the defendant's theory of the case that the victim had unsuccessfully tried to seduce him saying that she was experienced with other men; and (3) to provide a motive for why the victim made up her story about having sex with the defendant after he rejected her advances. Id. at ¶16. The trial court excluded the evidence holding that it was barred by the rape shield statute, that it had only marginal relevance, and that any relevance was outweighed by its inflammatory character and the danger of unfair prejudice.

**{¶64}** The appellate court upheld the trial court's determination. However, it concluded the trial court improperly applied the rape shield statute. Id. at ¶34. It noted that the rape shield statute is included in the rape statute, R.C. 2907.02, and in the gross sexual imposition statute, R.C. 2907.05, but is not included in the unlawful sexual conduct with a minor statute, R.C. 2907.04. Id. The court then applied the canon of statutory construction expressio unius est exclusion alterius, the expression of one thing suggests the exclusion of others, and pointed out that criminal statutes are to be construed against the state in concluding that if the General Assembly would have intended for the rape shield statute to apply to unlawful sexual conduct with a minor, it would have included that provision in R.C. 2907.04. Id.

**{¶65}** The court further determined, however, that the trial court did not abuse its discretion in barring evidence of the victim's sexual past. Id. at ¶35. The court reasoned in part:

**{¶66}** "Defendant sought to introduce evidence of the victim's previous sexual activity with persons other than Defendant in an attempt to impeach her credibility, specifically with respect to her claim that she was a virgin when she had sex with Defendant. While the evidence does have some slight relevance and probative value for that limited purpose, we note that in a prosecution under R.C. 2907.04(A), the key issue is whether Defendant engaged in sexual conduct with the minor-victim. It is irrelevant whether the victim was a virgin, whether she seduced Defendant, or whether she previously engaged in sexual conduct with other men. Those matters have marginal relevance and probative value at best, and only to the extent Defendant claims that if the victim is being untruthful about those matters, then her testimony about having sex with Defendant is also suspect." Id. at ¶32.

**{¶67}** Appellant asserts that the facts in this case are distinguishable from *Smiddy*. He points out that in *Smiddy*, there was physical evidence to support the victim's contention that she had sex with the defendant whereas in this case there was no physical evidence to support S.S.'s claims.

**{¶68}** Appellant argues that the court erred in not allowing him to use S.S.'s prior sexual activity to impeach her testimony. He claims that S.S. admitted that she had previously engaged in anal sexual intercourse. Appellant wished to question her regarding this issue. He claims that her full explanation of all of the entries in her journal was relevant to the issue of whether the entries were truthful.

**{¶69}** Plaintiff-appellee, the state of Ohio, concedes that the trial court should not have applied the rape shield statute in this trial for unlawful sexual conduct with a minor. Nonetheless, appellee argues that the trial court's error in applying the rape shield statute was harmless because of the overwhelming evidence of appellant's guilt. It further contends that the trial court did not abuse its discretion in barring the subject evidence.

**{¶70}** Whether to admit or exclude evidence is a matter within the trial court's sound discretion. *State v. Mays* (1996), 108 Ohio App.3d 598, 617, 671 N.E.2d 553. Thus, we will not reverse such a decision absent an abuse of discretion. Abuse of

discretion connotes more than an error of law; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

**{¶71}** As conceded by the state and further supported by *Smiddy*, the trial court erred in applying the rape shield law in this case to limit appellant's cross-examination of S.S. This was not a case of rape or gross sexual imposition and, as discussed above, those are the only two statutes that contain the rape shield language. However, as was also the case in *Smiddy*, our analysis does not end here.

**{¶72}** Evidence of a person's character is generally not admissible. Evid.R. 404(A). Here appellant sought to introduce evidence of S.S.'s hair color and presumptively suggestive clothing choices. His counsel argued at trial that this evidence was relevant as to S.S.'s mental and emotional stability and could show the jury that there was another side to S.S. that they should take into consideration when weighing her credibility. (Tr. 1002, 1007).

**{¶73}** This particular evidence, if admitted, would have had no bearing on the main issue in the case. It would have done nothing to prove or disprove that appellant engaged in sexual conduct with S.S. In fact, as the trial court noted, S.S. could have "walked around naked, and it still wouldn't be relevant to the charges." (Tr. 1002). This type of evidence would have had very little, if any probative value, and would have had the potential to prejudice the jury against S.S. Even relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. Evid.R. 403(A). Thus, the trial court did not abuse its discretion in barring appellant from introducing evidence of S.S.'s clothing choice and hair color.

**{¶74}** Appellant also sought to introduce evidence that S.S. had engaged in anal intercourse with someone other than him. (Tr. 1000). Again, this evidence would not have helped to prove or disprove whether appellant engaged in sexual conduct with S.S. It would have served only to inflame the jury and portray S.S. in a

bad light. Once again, the trial court did not act unreasonably, arbitrarily, or unconscionably in barring this evidence of S.S.'s alleged bad character.

**{¶75}** In conclusion, although the trial court erred in applying the rape shield law in this case, the court nonetheless acted within its discretion in barring appellant from introducing evidence as to S.S.'s character and sexual history. Accordingly, appellant's second assignment of error is without merit.

**{¶76}** Appellant's third assignment of error states:

**{¶77}** "APPELLANT MATTHEWS' INDICTMENT WAS DEFECTIVE BECAUSE THE STATE FAILED TO SPECIFY A PARTICULAR DEGREE OF CULPABILITY FOR THE COUNTS OF UNLAWFUL SEXUAL CONDUCT WITH A MINOR IN VIOLATION OF THE OHIO CONSTITUTION."

**{¶78}** Here appellant argues that his indictment was defective because it did not list the mental state required for the act of engaging in sexual conduct. He points out that R.C. 2907.04 does not include a culpable mental state. Appellant argues that the statute likewise does not indicate that strict liability is the required mens rea. He contends, therefore, that recklessness is the required mens rea for unlawful sexual conduct with a minor and that his indictment should have included this element. Appellant further claims he was unaware that the state had to prove that he acted recklessly, the prosecutor did not mention the recklessness requirement during opening or closing statements, and the jury was not instructed on the state's burden to prove he acted recklessly. Consequently, appellant contends that we must apply a structural error analysis and reverse his convictions.

**{¶79}** On the other hand, appellee asserts that the General Assembly intended unlawful sexual conduct with a minor to be a strict liability offense as the Third District found in *State v. McGinnis*, 3d Dist. No. 15-08-07, 2008-Ohio-5825. Appellee urges us to follow the Third District's reasoning and find that unlawful sexual conduct with a minor is a strict liability offense.

**{¶80}** Appellant failed to raise this alleged error with his indictment in the trial court. However, the Ohio State Supreme Court has recently held, "When an

indictment fails to charge a mens rea element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in the indictment." *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, at the syllabus. The Court further held that in that particular case, a structural-error analysis applied because of the constitutional errors that permeated the defendant's trial.

**{¶81}** But first we must determine if appellant's indictment was indeed defective. Appellant was charged with unlawful sexual conduct with a minor in violation of R.C. 2907.04(A)(B)(3), which as stated above, provides:

**{¶82}** "(A) No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard.

**{¶83}** "(B) Whoever violates this section is guilty of unlawful sexual conduct with a minor.

**{¶84}** "* * *

**{¶85}** "(3) Except as otherwise provided in division (B)(4) of this section, if the offender is ten or more years older than the other person, unlawful sexual conduct with a minor is a felony of the third degree."

**{¶86}** This statute does not set out a required mental state for the element of engaging in sexual conduct. However, "the mental state of the offender is a part of every criminal offense in Ohio, except those that plainly impose strict liability." *Colon*, 118 Ohio St.3d at ¶11, citing *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, 803 N.E.2d 770, at ¶18. Pursuant to R.C. 2901.21(B), "[w]hen the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."

**{¶87}** Accordingly, recklessness is the "catchall" mens rea for offenses that do not mention a required mental state in the statute. *Colon*, at ¶13, citing *Lozier*, at ¶21. But there is an exception for strict liability statutes where the offender's mental state is irrelevant. Id. For these strict liability offenses, however, the statute must plainly indicate a purpose to impose strict liability. Id.

**{¶88}** Appellant is correct in stating that his indictment does not include a culpable mental state for engaging in sexual conduct. Consequently, if the culpable mental state is recklessness, then appellant's indictment is defective for failing to include it. If, however, unlawful sexual conduct with a minor is a strict liability offense, the indictment is not defective because it was not required to list a culpable mental state. Thus, we must determine whether unlawful sexual conduct with a minor is a strict liability offense or whether it requires the mens rea of recklessness.

**{¶89}** In *McGinnis*, 2008-Ohio-5825, the defendant pleaded guilty to two counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A)(B)(1). He appealed, arguing in part that his indictment was defective for failing to include the mens rea of recklessness. The Third District found, however, that the defendant waived this issue on appeal by pleading guilty to the charges. Id. at ¶26.

**{¶90}** Nonetheless, the court went on to analyze the defendant's argument. It determined that unlawful sexual conduct with a minor is a strict liability offense and, therefore, the state was not required to include a mens rea in the defendant's indictment. Id. at ¶27. The court recognized that R.C. 2907.04 prescribes that the offender either knows that the victim was under 16 and over 13, or was reckless in that regard. Id. But it reasoned that this is a separate and distinct clause whereby the state must prove that the offender knew or was reckless in knowing the victim's age, but not that the offender was reckless in engaging in sexual conduct. Id.

**{¶91}** The court then relied on *State v. Maxwell,* 95 Ohio St.3d 254, 2002-Ohio-2121, in support of its determination. In *Maxwell*, the Ohio State Supreme Court examined a child pornography statute when the defendant argued that because the statute provided that he had to know the character of the material or

performance involved, he also had to knowingly engage in the act, which was "bring[ing] or cause to be brought into this state any obscene material that has a minor as one of its participants or portrayed observers." Id. at ¶28, citing *Maxwell* at ¶23. The Third District observed that the *Maxwell* Court rejected this argument finding that the offender's intent was irrelevant because it was a strict liability offense. Id., citing *Maxwell*, at ¶¶29-30. It then quoted the *Maxwell* Court:

**{¶92}** "'The General Assembly has assumed a strong stance against sex-related acts involving minors, as evidenced by the numerous statutes in the Ohio Revised Code providing for criminal liability for those acts. Therefore, it is reasonable to presume that the inclusion of a knowledge requirement regarding the character of the material and the absence of a mental element elsewhere in R.C. 2907.321 reflect legislative intent to impose strict liability for the act of bringing child pornography into the state of Ohio. Id. at ¶ 30.'"

**{¶93}** The Third District went on to reason:

**{¶94}** "Just like in *Maxwell,* it is reasonable to presume that because the legislature included the knowledge and reckless requirements regarding the victim's age in R.C. 2907.04, but did not include any degree of culpability as to the sexual conduct, the legislative intent was to impose strict liability for the act of engaging in sexual conduct with a minor.

**{¶95}** "Therefore, we find that because McGinnis pled guilty to the charges of unlawful sexual conduct with a minor, he waived any defect in the indictment. Furthermore, because R.C. 2907.04 imposes strict liability for the act of engaging in the sexual conduct with the minor, we find that McGinnis' indictment was not defective, and *Colon* is inapplicable." Id. at ¶¶29-30.

**{¶96}** In the present case, appellant asserts that *McGinnis* is simply dicta and we are not obligated to follow it. While this may be so, *McGinnis's* reasoning is on point and is very persuasive. Most convincing is the fact that the General Assembly specifically included the recklessness/knowledge mens rea in the element of knowing the victim's age. The fact that the legislature made a point of including the

reckless/knowledge mens rea in this element yet left it out of the element of engaging in sexual conduct is a strong indicator that the legislature intended engaging in sexual conduct with a minor to be a strict liability offense.

**{¶97}** Additionally, the First District has held that all crimes under R.C. Chapter 2907, which would include unlawful sexual conduct with a minor, are strict liability offenses. *State v. Williams* (1989), 52 Ohio App.3d 19, 21, 556 N.E.2d 221 ("R.C. Chapter 2907 (under which the defendant was charged) is designed to protect victims of sexual crimes. The offenses for which the defendant was charged require no precise culpable state of mind. Rather, all that is required is a showing of the proscribed sexual contact.")

**{¶98}** We too conclude that unlawful sexual conduct with a minor is a strict liability offense. Consequently, appellant's indictment was not defective since no mens rea was required.

**{¶99}** Accordingly, appellant's third assignment of error is without merit.

**{¶100}** For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.