[Cite as *State v. Johnson*, 2009-Ohio-6760.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	CASE NO. 08-MA-144
	)	
ANTHONY JOHNSON,	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 07CR968
JUDGMENT:	Affirmed in part Reversed and Remanded in part
APPEARANCES: For Plaintiff-Appellee	Paul Gains Prosecutor Ralph M. Rivera Jennifer McLaughlin Smith Assistant Prosecutors 21 W. Boardman Street, 6th Floor Youngstown, Ohio 44503-1426
For Defendant-Appellant	Attorney J. Dean Carro Appellate Review Office The University of Akron School of Law Akron, Ohio 44325-2901

JUDGES:

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

Dated: December 15, 2009

[Cite as *State v. Johnson*, 2009-Ohio-6760.]
DONOFRIO, J.

{¶1} Defendant-appellant, Anthony Johnson, appeals from a Mahoning County Common Pleas Court judgment convicting him of three counts of rape and three counts of sexual battery following a jury trial and the resulting sentence.

{¶2} When T.B. was four years old, her mother, April, began dating appellant. Appellant and April married a few years later. T.B. referred to appellant as her dad as he was the only father she had known. The two had a close relationship while T.B. was growing up. However, according to T.B., when she turned 14, her relationship with appellant changed. She stated that appellant became controlling, domineering, and manipulative.

{¶3} T.B. stated that when she turned 14, appellant began having sex with her. T.B. did not refuse appellant's advances because she was afraid of him and afraid that his mentality toward her would change. According to T.B. and April, appellant had gotten violent with them in the past. T.B. recalled three specific times appellant had sex with her, occurring when she was ages 14, 17, and 22. As a result of the last sexual encounter, T.B. became pregnant with appellant's baby.

{¶4} After T.B. gave birth to the baby, April called the police. She did so because she and T.B. were going to move out of the house they shared with appellant. They were going to take April and appellant's son with them and April was afraid that appellant would become violent with her. When the police arrived, April also told them that appellant had been having sex with his step-daughter, T.B.

{¶5} A Mahoning County grand jury indicted appellant on three counts of rape, first-degree felonies in violation of R.C. 2907.02(A)(2)(B), and three counts of sexual battery, third-degree felonies in violation of R.C. 2907.03(A)(5)(B), with violent sexual predator specifications.

{¶6} The court granted appellant's motion to have the court try the specifications and the jury try the charges. The case proceeded to a jury trial on the charges on June 30, 2008. The jury returned guilty verdicts on all counts.

{¶7} The trial court then tried the specifications. It found that appellant is a violent sexual predator. The court also conducted a sentencing hearing and

sentenced appellant to ten years to life on each of the three counts of rape, to be served consecutively, for a total of 30 years to life. The court found that the sexual battery counts merged with the rape counts.

{¶8} Appellant filed a timely notice of appeal on July 9, 2008.

{¶9} Appellant raises four assignments of error, the first of which states:

{¶10} "THE STATE FAILED TO MEET ITS CONSTITUTIONAL BURDEN OF PROOF BEYOND A REASONABLE DOUBT, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, WHEN IT FAILED TO INTRODUCE SUFFICIENT EVIDENCE TO SHOW THAT APPELLANT JOHNSON PURPOSELY COMPELLED THE VICTIM TO SUBMIT BY FORCE OR THREAT OF FORCE."

{¶11} Appellant argues that his convictions were not supported by sufficient evidence. Specifically, he alleges that plaintiff-appellee, the State of Ohio, failed to introduce evidence that he purposely compelled T.B. to submit by force or threat of force. He asserts that the evidence demonstrated that he did not use threats, commands, or physical force to compel T.B. to have sex with him. Appellant argues that given T.B.'s age at the times of the incidents, ages 14, 17, and 22, T.B. could have refused his advances.

{¶12} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict. *State v. Smith* (1997), 80 Ohio St.3d 89, 113. In essence, sufficiency is a test of adequacy. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Whether the evidence is legally sufficient to sustain a verdict is a question of law. Id. In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Smith,* 80 Ohio St.3d at 113.

{¶13} The jury convicted appellant of three counts of rape in violation of R.C. 2907.02(A)(2), which provides:

{¶14} "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶15} We will examine the evidence in light of these elements to determine if the state produced evidence going to each element.

{¶16} T.B. testified first. She stated that she is now 24 years old. T.B. testified that she has one child whom appellant fathered. (Tr. 228). T.B. stated that she was four years old when she met appellant. (Tr. 229). She referred to him as her dad, as he was the only father she ever knew. (Tr. 229). T.B. testified that at first she and appellant had a loving relationship. (Tr. 231). However, she stated that after she turned 14, appellant became "controlling," "domineering," and "manipulative." (Tr. 231).

{¶17} T.B. stated that appellant began sexually abusing her when she was 14 years old. (Tr. 228-29). Although she testified that there were more instances, T.B. specifically recalled three times. (Tr. 229, 239-40).

{¶18} The first instance that T.B. recalled occurred when she was 14. (Tr. 232). T.B. testified that appellant read in her diary that she had kissed an older boy. (Tr. 232). She stated that he became very upset with her and told her that he did not want her to end up pregnant. (Tr. 232). According to T.B., appellant asked her to have sex with him and she did not say no. (Tr. 232). She stated that the two then had sexual intercourse. (Tr. 233). T.B. stated that appellant told her he was doing it out of love because he did not want her to go out and have sex with other men. (Tr. 232).

{¶19} T.B. stated that she did not say no to appellant because she "was afraid that his mentality towards me would change." (Tr. 232). When asked what she meant by that, T.B. stated that appellant had a tendency to get angry and violent. (Tr. 233). She testified that appellant has been violent with her and with her mother in the past. (Tr. 233). T.B. testified that she did not tell anyone, including her mother, because she did not want to break up the family. (Tr. 234). T.B. stated that her relationship with appellant subsequently changed. (Tr. 235). She testified that

appellant became more controlling, he scared her friends away, and she did not leave the house except to go to school. (Tr. 235).

{¶20} The second instance occurred when T.B. was 17. (Tr. 235). T.B. recalled that on this particular occasion, a male friend of hers called the house. (Tr. 237). She stated that appellant answered the phone and when the boy told appellant who he was, appellant became very angry. (Tr. 237). T.B. stated that appellant shut the phone off and put it in her mouth. (Tr. 237). T.B. testified that she was scared. (Tr. 237). T.B. stated that is when appellant had sex with her again. (Tr. 237). Once again, she stated that she did not tell him no. (Tr. 238). She stated that she did not refuse him because she was afraid that his mentality toward her would change, she was afraid he would take it out on her mother, and she was afraid that he would become violent with her. (Tr. 238). T.B. testified that she did not attempt to fight appellant off because she was scared. (Tr. 239).

{¶21} The third instance that T.B. recalled occurred when she was 22. (Tr. 244-45). Once again, T.B. testified that appellant asked her to have sex with him and she did not say no. (Tr. 245). And again, she stated that she did not say no because she feared appellant's mentality and how violent he would become. (Tr. 245). T.B. testified that she would do anything to make appellant happy because she "loved him that much." (Tr. 246). T.B. stated that five months later she found out that she was pregnant. (Tr. 246-47).

{¶22} T.B. stated that after she turned 18, she still lived at home with appellant. (Tr. 250). She testified that she went to school and worked, but other than that she did not leave the house because appellant did not allow her to go out. (Tr. 250).

{¶23} As to appellant's violent nature, T.B. stated that appellant had slapped her in the face a couple of times. (Tr. 252). Additionally, she stated that she had seen him choke her mother when she was pregnant. (Tr. 252). T.B. testified that she was afraid that appellant would do that to her if she refused him. (Tr. 252). And T.B. stated that she did not tell anyone about what was going on with appellant

because she was afraid and did not want to cause any more trouble. (Tr. 282). When asked if she ever tried to fight appellant away from her. T.B. responded "no." (Tr. 251-52). T.B. stated that she was scared to try. (Tr. 252). She also stated that appellant had told her that he was a boxer or a fighter and that was intimidating to her. (Tr. 252).

{¶24} On cross-examination, T.B. admitted that she reported to police that on these three occasions, appellant did not use force and did not physically attempt to make her have sex with him. (Tr. 260-61). She further stated that appellant did not threaten her in order to make her have sex with him. (Tr. 261).

{¶25} T.B.'s mother, April, testified next. April testified that she met appellant when T.B. was four years old. (Tr. 287). She married him three years later and T.B. referred to appellant as her dad. (Tr. 287). April stated that T.B. and appellant were very close and spent a lot of time together. (Tr. 288). She stated that when T.B. reached age 14, T.B.'s relationship with appellant changed. (Tr. 288). April stated that appellant became very strict and controlling. (Tr. 288).

{¶26} April stated that when she learned that T.B. was pregnant with appellant's baby, she and T.B. stayed living in the house with appellant because she was afraid to leave him and she was afraid that he would try to take the son they shared away from her. (Tr. 292). However, she stated that once the baby was born, she, her son, T.B., and the baby all moved out. (Tr. 293).

{¶27} April stated that she contacted the police on July 29, 2007, right after T.B. gave birth to the baby and was still in the hospital. (Tr. 293). April stated that she waited that long to call the police due to fear. (Tr. 293). And when she called the police, it was not to report that appellant had been having sex with T.B. (Tr. 305-306). Instead, it was because she was moving their son out of the house and she was afraid that appellant would get violent with her for taking their son. (Tr. 318-19). April testified that appellant had been violent with her in the past. (Tr. 319).

{¶28} Vanessa McClain, April's sister, testified next. She stated that appellant's relationship with T.B. was "very dominating." (Tr. 331). According to

McClain, whenever T.B. was around appellant T.B. was very quiet and subdued. (Tr. 331). McClain further testified that on the day T.B. gave birth, appellant repeatedly called April and April was very frightened. (Tr. 338-39).

{¶29} Marsha Lewis, a family friend, testified that T.B. seemed intimidated by appellant. (Tr. 346). And Hillary Charles Smith, another friend, testified that T.B. and appellant appeared to have a father-daughter relationship. (Tr. 350-51). Finally, Russell Edelheit, a forensic scientist at the Bureau of Criminal Identification and Investigation, testified that based on the submitted DNA samples, there was a 99.999 percent probability that appellant was the father of T.B.'s baby. (Tr. 370).

{¶30} In order to determine whether this evidence demonstrated that appellant used force or the threat of force to compel T.B. to have sex with him, we must examine several cases on the subject regarding the various tests to apply.

{¶31} In *State v. Eskridge* (1988), 38 Ohio St.3d 56, the Ohio Supreme Court affirmed the defendant's conviction for raping his four-year-old daughter where he used force or the threat of force to compel her submission. The Court held:

{¶32} "The force and violence necessary to commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other. With the filial obligation of obedience to a parent, the same degree of force and violence may not be required upon a person of tender years, as would be required were the parties more nearly equal in age, size and strength." Id. at paragraph one of the syllabus.

{¶33} Quoting a North Carolina case, the Court noted, "'youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose.'" Id. at 59, quoting *State v. Etheridge* (1987), 319 N.C. 34, 47. The Court concluded that the defendant held a position of authority over the daughter that did not require any explicit threats or displays of force. Id.

{¶34} The next significant case dealing with force or threat of force in a rape was *State v. Schaim* (1992), 65 Ohio St.3d 51. In *Schaim*, the defendant was convicted of forcibly raping his 20-year-old daughter. The court of appeals reversed the defendant's conviction. The state appealed. Relying on *Eskridge*, supra, the state argued that the defendant's alleged pattern of sexual abuse of his daughter was sufficient to uphold his conviction for forcible rape even though the victim admitted that the defendant did not use physical force or the threat of physical force.

{¶35} The Court disagreed. It stated that *Eskridge* was based solely on the recognition of the amount of control that parents have over their children, particularly young children. Id. at 55. It further stated, "[e]very detail of a child's life is controlled by a parent, and a four-year-old child knows that disobedience will be punished, whether by corporal punishment or an alternative form of discipline." Id. The Court then distinguished the case before it:

{¶36} "The same rationale does not apply to an adult. No matter how reprehensible the defendant's alleged conduct, a woman over the age of majority is not compelled to submit to her father in the same manner as is a four-year-old girl. She is no longer completely dependent on her parents, and is more nearly their equal in size, strength, and mental resources. Although we are aware of the devastating effects of incest on its victims, and are sympathetic to the victim whose will to resist has been overcome by a prolonged pattern of abuse, we reluctantly conclude that a pattern of incest is not always a substitute for the element of force required by R.C. 2907.02(A)(2)."

{¶37} In finding that the state did not prove the elements of forcible rape, the Court then held:

{¶38} "A defendant purposely compels another to submit to sexual conduct by force or threat of force if the defendant uses physical force against that person, or creates the belief that physical force will be used if the victim does not submit. A threat of force can be inferred from the circumstances surrounding sexual conduct, but a pattern of incest will not substitute for the element of force where the state

introduces no evidence that an adult victim believed that the defendant might use physical force against her. (*State v. Eskridge* [1988], 38 Ohio St.3d 56, 526 N.E.2d 304, distinguished.)" Id. at paragraph one of the syllabus.

{¶39} The third significant Supreme Court case is *State v. Dye* (1998), 82 Ohio St.3d 323. In *Dye*, the defendant was convicted of forcibly raping a nine-year-old child. The Court expanded its holding in *Eskridge*, holding:

{¶40} "A person in a position of authority over a child under thirteen may be convicted of rape of that child with force pursuant to R.C. 2907.02(A)(1)(b) and (B) without evidence of express threat of harm or evidence of significant physical restraint." Id. at the syllabus.

{¶41} This court later addressed the *Eskridge* and *Dye* holdings. In *State v. Haschenburger*, 7th Dist. No. 05-MA-192, 2007-Ohio-1562, the defendant appealed his convictions for numerous counts of rape. His victim was between the ages of 14 and 16 when the rapes occurred. On appeal, the defendant argued, among other things, that the trial court erred in using the *Eskridge* definition of force in instructing the jury. He contended that because his victim was over the age of 13, *Eskridge* did not apply to his case.

{¶42} This court disagreed stating:

{¶43} "We agree with the holding of our sister district [in *State v. Milam,* 8th Dist. No. 86268, 2006-Ohio-4742 (appeal not accepted for review in 112 Ohio St.3d 1472)] and find that *Dye* does not preclude an instruction on the *Eskridge* psychological force instruction when the victim is still a minor but is 13 years or older. We agree with *Milam* that the question in this type of case where the victim is not of so tender an age as Eskridge is whether the victim's will was overcome by fear or duress. We note that other appellate districts would also find as such. See *State v. Dippel,* 10th Dist. No. 03AP-448, 2004-Ohio4649 (victim was 14 years old); *State v. Oddi,* 5th Dist. No. 02CAA01005, 2002-Ohio5926 (victim was 15 years old); *State v. Nieland,* 2d Dist. No.2005-CA-15, 2006-Ohio784 (victim was raped when 15 and 16, court questioned whether *Eskridge* instruction was appropriate but since the victim

testified that she did not resist him because she was afraid of what he might do to her was enough to support the force element)." Id. at ¶44.

{¶44} Given these holdings, we must examine appellant's rape convictions under two separate standards. Because two counts of rape occurred when T.B. was still a minor, we will examine them based on the *Eskrige*/*Dye* definition of force. However, because the third count of rape occurred when T.B. was 22, we will examine it based on the *Schaim* definition of force.

{¶45} As to the first two counts, the state presented sufficient evidence to prove that T.B.'s will was overcome by fear or duress. Appellant was T.B.'s stepfather. T.B. testified that appellant was the only father she had ever known and he had been in her life since she was four. Thus, appellant held a position of parental authority over T.B. T.B. testified that appellant was dominating, controlling, and manipulative. T.B. also testified that appellant had a violent nature. She stated that appellant slapped her in the face several times and she had seen him choke her mother. She further stated that immediately prior to the sexual encounter when she was 17 years old, appellant put a phone in her mouth when he was unhappy about the person who had called her. Furthermore, T.B. stated that appellant had told her that he was a boxer and fighter and this intimidated her. She stated that she was afraid to refuse appellant's advances because she feared for herself and her mother. April corroborated T.B.'s testimony as to appellant's violent nature and stated that she too feared appellant.

{¶46} Additionally, both of these instances of sex occurred when appellant became angry with T.B. The first instance occurred after appellant read in T.B.'s diary that she had kissed an older boy. The second instance occurred after T.B. received a phone call from an older man. These things angered appellant and he had sex with T.B. immediately after on both occasions. Thus, appellant was already angry when he initiated sex with T.B.

{¶47} This evidence, if believed, was sufficient to support the jury's finding that appellant compelled T.B. to submit to sex by threat of force.

{¶48} As this court previously held, the issue in this type of case is whether the victim's will was overcome by fear or duress. *Haschenburger*, 7th Dist. No. 05-MA-192, at ¶44. This showing of the victim's will being overcome by fear or duress satisfies the element of force or threat of force in this type of case. In *Haschenburger*, the victim was 14, 15, and 16 years old when the alleged rapes occurred. Here, T.B. was 14 and 17 years old. T.B.'s testimony was sufficient to establish that her will was overcome by fear of appellant and his violent nature and what he might do if she refused him.

{¶49} The evidence as to the third count, given the fact that more was required to prove force or threat of force since T.B. was now an adult, is not as convincing. T.B. was 22. Although she still lived at home, she was well over the age of majority. She would have been more evenly matched with appellant in terms of strength and she would no longer be as vulnerable as when she was only 14 and 17. Appellant would no longer be in parental control of her as he was when she was a minor. T.B. did testify that she feared that appellant's mentality would change toward her, as she did with the other two instances, but the difference here is that T.B. was no longer obligated to reside with appellant and submit to his parental authority as she was when she was a minor. Thus, the threat here is not as great as when she was a minor. Also relevant is the fact that appellant never threatened T.B. Given these details and the fact that the state's burden was higher since T.B. was now an adult, the evidence was insufficient to convict appellant on this third count of rape.

{¶50} While the evidence was not sufficient to support the rape conviction for this instance of sex, it nonetheless clearly support's appellant's conviction for sexual battery as to this instance. In addition to finding him guilty of rape, the jury found appellant guilty of sexual battery pursuant to R.C. 2907.03(A)(5), which provides: "No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply * * * The offender is the other person's * * * stepparent." The trial court merged this conviction with the rape conviction for sentencing purposes.

{¶51} Thus, although the evidence was insufficient to support the third count of rape, appellant was still guilty of sexual battery for the third instance of sex.

{¶52} Appellant also raises an issue as to his sentence in this assignment of error. Appellant argues that in order to sentence him to life, the trial court was required to find that he used force beyond that inherent in the offense itself. Because there was no additional force other than the force inherent in the crime, appellant contends that his sentence is contrary to law.

{¶53} Appellant is mistaken here. R.C. 2971.03 provides the required sentences for those offenders who are convicted of sexually violent predator specifications, as was appellant. R.C. 2971.03(A)(3)(d)(ii) specifically provides:

{¶54} "Except as otherwise provided * * * if the offense for which the sentence is being imposed is rape for which a term of life imprisonment is not imposed under division (A)(2) of this section or division (B) of section 2907.02 of the Revised Code, it shall impose an indefinite prison term as follows:

{¶55} "* * *

{¶56} "(ii) If the rape is committed prior to January 2, 2007, * * * it shall impose an indefinite prison term consisting of a minimum term fixed by the court that is not less than ten years, and a maximum term of life imprisonment."

{¶57} That is what the trial court did here. On each of appellant's rape counts, the court sentenced him to ten years to life. Thus, appellant's sentence is not contrary to law as he alleges.

{¶58} Accordingly, appellant's first assignment of error has merit as to the third count of rape.

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

{¶60} "THE TRIAL COURT ERRED WHEN IT MADE IMPERMISSIBLE FINDINGS OF FACT PRIOR TO IMPOSING APPELLANT JOHNSON'S SENTENCE IN VIOLATION OF THE SIXTH AMENDMENT RIGHT TO A FAIR TRIAL."

{¶61} Appellant contends here that the trial court engaged in impermissible fact-finding in sentencing him. He takes issue with four specific findings the court

made: (1) T.B.'s injury was exacerbated by her age; (2) T.B. suffered serious mental harm; (3) T.B.'s relationship with appellant facilitated the offense; and (4) T.B.'s child will be burdened. Appellant contends that these findings do not match the jury's findings, which constituted only the elements of the offenses and no more. Appellant contends that the court was not permitted to make findings as to the seriousness factors set out in R.C. 2929.12(B).

{¶62} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Ohio Supreme Court held that several of Ohio's sentencing statutory sections that required judicial fact-finding were unconstitutional. The Court severed these unconstitutional statutory sections and left the remaining sentencing statutes in tact. In addition to *Foster*, the Court decided the sentencing case of *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855. In *Mathis*, the Court held that a sentencing court need only consider "R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender." Id. at ¶38. The Court did not find the R.C. 2929.12 factors to be unconstitutional in either *Foster* or *Mathis*. In fact, it specifically instructed sentencing courts to consider these factors.

{¶63} So pursuant to *Foster* and *Mathis*, a sentencing court is to consider the R.C. 2929.12 seriousness and recidivism factors in sentencing offenders. Included in the seriousness factors are:

{¶64} "(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

{¶65} "(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

{¶66} "* * *

{¶67} "(6) The offender's relationship with the victim facilitated the offense." R.C. 2929.12(B).

{¶68} Thus, the trial court properly considered these factors in sentencing appellant.

{¶69} Additionally, R.C. 2929.12(A) instructs that the court may consider "any other factors that are relevant to achieving those purposes and principles of sentencing." The trial court did just this when it considered the factor that T.B.'s child would be burdened.

{¶70} Hence, the trial court properly considered the sentencing factors that appellant now takes issue with. Accordingly, appellant's second assignment of error is without merit.

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

{¶72} "THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S OBJECTION AND ALLOWING INTO EVIDENCE WITNESS TESTIMONY REGARDING MOTIVE THAT WAS IRRELEVANT AND MORE PREJUDICIAL THAN PROBATIVE IN VIOLATION OF EVIDENCE RULES 402 AND 403."

{¶73} During April's testimony, the court instructed the parties that April could refer to her reason for calling the police but without using the term "domestic violence." (Tr. 312). April testified that on the day she was moving out of her home with appellant, she went to pick up their son. (Tr. 318-19). April testified that appellant had been violent with her in the past and that she called the police because she was frightened. (Tr. 319). Appellant objected. (Tr. 319).

{¶74} Appellant now argues that April's statement was inadmissible because it was irrelevant, having nothing to do with what went on between appellant and T.B. He further contends that its probative value was outweighed by the danger of unfair prejudice because it may have caused the jury to believe that he was arrested for domestic violence. And appellant asserts that this statement was inadmissible character evidence in violation of Evid.R. 404(B).

{¶75} A trial court has broad discretion in determining whether to admit or exclude evidence and its decision will not be reversed absent an abuse of discretion.

State v. Mays (1996), 108 Ohio App.3d 598, 617. Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶76} "Relevant evidence" is any evidence that tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. Generally, all relevant evidence is admissible. Evid.R. 402. Relevant evidence may be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. Evid.R. 403.

{¶77} Appellant first contends that the reason April called the police was irrelevant. However, this fact was relevant. One of the main issues in this case was whether T.B. feared that appellant would become violent with her if she refused his advances. T.B. testified that she had seen appellant act violently in the past, especially toward April. April's testimony that she, too, feared appellant, enough to call the police, helped to substantiate T.B.'s fears. Thus, April's testimony that she called the police because she was afraid appellant would react violently when she left with their son was relevant.

{¶78} Appellant also expresses concern that the jury may have concluded that he was arrested for domestic violence. However, the court was careful to instruct the state that it could not use the term "domestic violence" and no one used this term.

{¶79} Appellant next contends that this evidence was not admissible to prove his character. Evid.R. 404(B) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." But the evidence of April's call to police was not an attempt to prove that appellant acted violently on that occasion or that he acted violently in committing the rapes. Instead, it was offered to lend credence to T.B.'s fears that appellant *could* become violent. And more simply, it was also offered to explain to

the jury what transpired when April and T.B. finally left appellant and moved out of the house.

{¶80} For all of these reasons, the trial court did not abuse its discretion in allowing April to testify as to why she called the police regarding appellant. Accordingly, appellant's third assignment of error is without merit.

{¶81} Appellant's fourth assignment of error states:

{¶82} "THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S OBJECTION AND ALLOWING INTO EVIDENCE TESTIMONY THAT WAS NOT WITHIN THE WITNESS' PERSONAL KNOWLEDGE IN VIOLATION OF EVIDENCE RULE 602."

{¶83} Marsha Lewis testified regarding her observations during shopping trips with April. Lewis testified that April's cellular phone rang constantly. (Tr. 346). Based on April's ringing phone, Lewis determined that appellant was "keeping tabs" on April. (Tr. 346). Appellant objected. (Tr. 346). The court overruled the objection. (Tr. 346).

{¶84} Appellant argues that Lewis's testimony may have caused the jury to believe that he is controlling or manipulative. He further argues that Lewis had no specific information on which to base her conclusion because she did not know whether appellant was the caller or what the subject of the phone calls was.

{¶85} As stated above, whether to admit or exclude evidence is within the trial court's discretion. *Mays*, 108 Ohio App.3d at 617.

{¶86} Here Lewis testified that she believed appellant was keeping tabs on April. She drew this conclusion from the fact that April's phone constantly rang when the two went shopping. Lewis did not testify that she knew for a fact it was appellant calling April or that she knew for a fact that appellant was keeping tabs on April. Instead, she stated that was the impression she got from the phone calls. Given that Lewis simply gave her opinion, and did not purport to know for sure that appellant was keeping tabs on April, it was within the trial court's discretion to allow this evidence.

{¶87} Accordingly, appellant's fourth assignment of error is without merit.

{¶88} For the reasons stated above, appellant's first two rape convictions and sentences are hereby affirmed. Appellant's third rape conviction is reversed. The matter is remanded so that the trial court can sentence appellant for his sexual battery conviction that it originally merged with the third rape conviction.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.