[Cite as *State v. Ruiter*, 2024-Ohio-149.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DUSTIN RUITER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 MA 0002

Motion for Reconsideration

BEFORE:
Mark A. Hanni, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Denied.

Atty. Gina DeGenova, Mahoning County Prosecutor, and *Atty. Edward A. Czopur*, Assistant Prosecuting Attorney, Mahoning County Prosecutor's Office, for Plaintiff-Appellee and

Atty. James R. Wise, for Defendant-Appellant.

Dated: January 16, 2024

PER CURIAM.

{¶1} Appellee State of Ohio (Appellee) has filed an application for reconsideration pursuant to App.R. 26(A)(1), asking this Court to reconsider part of its September 29, 2023 Opinion and Judgment Entry reversing Appellant's rape, attempted rape, and sexual battery convictions pertaining to K.F. and A.R. *State v. Ruiter*, 7th Dist. Mahoning No. 22 MA 0002, 2023-Ohio-3594 (Waite, J., dissenting in part). For the following reasons, we deny Appellee's application.

{¶2} App.R. 26 provides for the filing of an application for reconsideration, but includes no guidelines to use in determining whether a decision should be reconsidered and changed. *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (10th Dist. 1981). The test generally applied is whether the application calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not at all or was not fully considered by us when it should have been. *Id*. "Mere disagreement with this Court's logic and conclusions does not support an application for reconsideration." *State v. Carosiello*, 7th Dist. Columbiana No. 15 CO 0017, 2018-Ohio-860, ¶ 12. Rather, App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law. *Id*.

{¶3} Appellee first contends that our Opinion is inconsistent and contradictory because we reversed convictions as to A.R., but did not do so regarding Z.R., when neither relied on DNA evidence. Appellee asserts that our holding that the trial may have been tainted by denying funds to Appellant for a DNA expert applies to all victims, including Z.R.

{¶4} There is no obvious error. We affirmed Appellant's gross sexual imposition convictions as to Z.R. We also affirmed Appellant's gross sexual imposition convictions pertaining to K.F. and A.R. Gross sexual imposition under R.C. 2907.05 requires "sexual contact." The versions of rape, attempted rape, and sexual battery in effect during the relevant time required "sexual conduct" with another. *See* R.C. 2907.02 (rape); R.C. 2923.02/R.C. 2907.02 (attempted rape); R.C. 2907.03 (sexual battery).

{¶5} Accordingly, we find no obvious error in this part of our Opinion and we fully considered this issue when rendering the Opinion.

{¶6} Appellee also challenges our finding that "[t]he denial of an expert to Appellant may have impacted the accuracy of the trial and tainted other convictions in this case." Appellee asserts that we misstated the holding in *State v. Mason*, 82 Ohio St.3d 144, 1998-Ohio-370, 694 N.E.2d 932, which requires that in order for a defendant to be entitled to an expert at the State's expense, he must show more than mere possibility that an expert would assist him in his defense.

{¶7} However, Appellee omits the preceding and subsequent parts of our Opinion following the quoted statement. Prior to that statement, we explained that while Appellant's counsel sufficiently educated himself on DNA evidence and conducted a competent cross-examination, a DNA expert could have:

> distilled the DNA lab report and Ms. Troyer's complex scientific testimony relating to acid phosphatase and easy transferability of DNA. A DNA expert for Appellant was germane to his defense against the DNA lab report and expert who testified for the State at trial.

Ruiter, 2023-Ohio-3594, at ¶ 107. Subsequent to the quoted statement, we held that a DNA expert for Appellant could have more fully explained contamination of DNA evidence and its easy transferability. *Id*. at ¶ 108. We held that Appellant's counsel aptly educated himself on DNA evidence, but he was limited by Ms. Troyer's direct examination and his lack of in-depth expertise in the area. *Id*.

{¶8} In addition, we specifically examined the factors identified by the Ohio Supreme Court in *Mason,* and explained that Appellant's request for a DNA expert met the particularized showing found by that Court. *Ruiter*, 2023-Ohio-3594, at ¶ 109. We reviewed his motion requesting funds for an expert and found that it met the particularized showing under *Mason, supra.* While no assertion was made that Appellant would challenge the DNA test results about the presence of DNA, a particularized showing was made that a DNA expert would provide additional information concerning the easy transferability of DNA and other reasons why DNA would be present.

{¶9} Accordingly, we find no obvious error in this determination and we fully considered this issue.

{¶10} Finally, Appellee contends that the errors we found in the convictions as to K.F. and A.R. were harmless. Appellee cites Judge Waite's dissent where she discusses statements made by Appellant's counsel at the motion hearing that he was seeking funds for a DNA expert, but that expert would not take separate DNA tests or challenge the presence of Appellant's DNA on the swabs taken from K.F. Appellee quotes Judge Waite's conclusion that, "[a]t best, such an expert might argue that Appellant's DNA was possibly present due to reasons other than through sexual contact." *Ruiter*, *supra* at ¶ 136 (Waite, J., dissenting). Appellee also notes Judge Waite's correct holding that mere speculation is insufficient for a trial court to approve funds for an expert witness. *Id.* at ¶ 138 (citations omitted).

{¶11} At best, the DNA expert sought by Appellant could have analyzed the evidence and supported the very defense that he attempted to present: his theory that his DNA was present for reasons other than sexual conduct. Appellant testified that both K.F. and A.R. wanted to live somewhere other than his home and they testified that they collected his DNA after watching crime shows on television. While his counsel cross-examined the State's DNA expert on this issue, the lack of a DNA expert on Appellant's behalf to expound on this evidence prevented Appellant from sufficiently presenting his defense.

{¶12} As we concluded in our Opinion, we were not deciding guilt or innocence, but rather, we were focusing on "the adequacy of the process leading up to a decision." *Ruiter, supra*, at ¶ 112, quoting *State v. Bunch*, Slip Opinion No. 2022-Ohio-4723, ¶ 51.

{¶13} For these reasons, Appellee's application for reconsideration is denied as no obvious error exists in our Opinion and we have fully considered all issues raised.

JUDGE MARK A. HANNI

Dissents without Dissenting Opinion
JUDGE CHERYL L. WAITE

JUDGE CAROL ANN ROBB

NOTICE TO COUNSEL

This document constitutes a final judgment entry.