

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-19
 : (C.P.C. No. 03CR12-8584)
 John Kepiro, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on September 8, 2009

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, John Kepiro, appeals from a judgment of the Franklin County Court of Common Pleas sentencing him to a prison term of nine years following a jury verdict finding him guilty of 25 counts of gross sexual imposition in violation of R.C. 2907.05. Defendant assigns a single error:

THE VERDICT FORMS WERE INADEQUATE TO SUPPORT APPELLANT'S CONVICTIONS FOR GROSS SEXUAL IMPOSITION AS A THIRD DEGREE FELONY, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF

LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

Because this court determined the same issue adversely to defendant in defendant's first appeal of his conviction, we affirm.

I. Procedural History

{¶2} On December 23, 2003, defendant was indicted on 25 counts of gross sexual imposition. Each count alleged defendant engaged in sexual contact with the same victim who was under the age of 13 at the time of the violations. The counts in the indictment were tried to a jury beginning on August 21, 2006, and defendant was found guilty on all 25 counts. The jury verdict forms for each count state the jury found defendant guilty pursuant to [the applicable] count "of the indictment for Gross Sexual Imposition." (R. 519-43.) The jury verdict forms do not specify the age of the victim.

{¶3} After a presentence investigation report was prepared, the trial court held a sentencing hearing on November 27, 2006. Although the trial court sentenced defendant to three years on each count, it ordered the sentences imposed on four counts to be served consecutively to each other; the other counts were ordered to be served concurrently with each other and concurrently with the four consecutive sentences. As a result, the court imposed a total of 12 years of incarceration on defendant.

{¶4} On appeal, this court affirmed defendant's conviction but vacated his sentence and remanded for resentencing. *State v. Kepiro*, 10th Dist. No. 06AP-1302, 2007-Ohio-4593 ("*Kepiro I*"). Upon remand, the trial court sentenced defendant to three years each on Counts 14 through 25, to be served concurrently with each other, and two years each on Counts 1 through 13, also to be served concurrently with each other. The

court, however, ordered the sentences for Counts 1, 8, 13, and 20 to be served consecutively to each other, for a total of nine years.

II. Assignment of Error

{¶5} In his sole assignment of error, defendant contends a problem with the verdict forms renders his convictions for third-degree felonies invalid. Defendant argues that the Ohio Supreme Court's decision in *State v. Sessler*, 119 Ohio St.3d 9, 2008-Ohio-3180 ("*Sessler III*"), mandates remand of this case with instructions to the trial court to enter convictions for felonies of the fourth degree.

A. Defendant's First Appeal

{¶6} Defendant raised the same issue in his first appeal, contending the verdict forms were inadequate to support defendant's convictions for gross sexual imposition as a third-degree felony. Defendant argued that, because the statute under which he was convicted can be either a third or fourth degree felony, the Supreme Court's decision in *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, mandated he could not be guilty of the more severe crime unless the jury verdict forms specifically so found. This court was not persuaded and held that "*Pelfrey* does not control, because the statute at issue in *Pelfrey* was mechanically different from the statute at issue here." *Kepiro I*, at ¶29.

{¶7} Subsequent to this court's decision, the Third Appellate District issued its decision in *State v. Sessler*, 3d Dist. No. 03-06-23, 2007-Ohio-4931 ("*Sessler I*"), concluding *Pelfrey* applied to an indictment that charged two counts of intimidation under R.C. 2921.04(B). *Sessler I* thus determined that because the forms neither specified the degree of the offense charged nor set forth any aggravating factors, they did not "permit a

determination as to which degree of offense Sessler is guilty of committing." *Id.* at ¶13. The court decided "that as to each count of intimidation, the jury found Sessler guilty of the least offense, * * * a first degree misdemeanor." *Id.*

{¶8} The Supreme Court of Ohio granted a motion to certify a conflict between the decision in *Sessler I* and this court's decision in *Kepiro I* to answer the certified question: "Is the holding in *State v. Pelfrey*, 112 Ohio St.3d 422 [2007-Ohio-256], applicable to charging statutes that contain separate sub-parts with distinct offense levels?" *State v. Sessler*, 116 Ohio St.3d 1505, 2008-Ohio-381 ("*Sessler II*"). Based on *Pelfrey*, the Supreme Court answered the question affirmatively and affirmed the Third District's judgment in *Sessler I*. *Sessler III*.

{¶9} Apart from the reference to *Pelfrey*, *Sessler III* does not explain the Supreme Court's reasoning for its decision, stating only that "[t]he certified question is answered in the affirmative, and the judgment of the court of appeals is affirmed, on the authority of *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735." The Supreme Court's opinion in *Sessler III* does not mention *Kepiro I*, which found *Pelfrey* inapplicable to the statute addressing gross sexual imposition under R.C. 2907.05(A), a different statute than those at issue in *Sessler I* and *Pelfrey*. Defendant points to no legal authority supporting his contention that the Supreme Court's silence on *Kepiro I* reverses or negates our holding in that case.

B. Law of the Case Doctrine

{¶10} Generally, the law of the case doctrine " provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for

all subsequent proceedings in the case at both the trial and reviewing levels.' " *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, ¶15, quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3. Considered a rule of practice, not a binding rule of substantive law, "[t]he doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution." *Id.* citing *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 32; *Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St.3d 402, 404.

{¶11} An exception to the law of the case doctrine, first recognized in *Jones v. Harmon* (1930), 122 Ohio St. 420, occurs when an intervening Supreme Court case conflicts with the appellate decision rendered in the case. At issue in *Jones* was a jury instruction on the duty to yield the right of way. The appellate court determined the trial court erroneously instructed the jury, reversed the trial court's judgment, and remanded the case for retrial with the appropriate jury instruction. Upon remand, the trial court complied with the appellate court's mandate. Prior to the second trial, however, the Ohio Supreme Court issued an opinion that conflicted with the appellate court's initial decision, rendering the jury instruction given at the second trial again erroneous. The Supreme Court held that under those circumstances, adherence to the law of the case is reversible error. See also *Nolan*, *supra*, at syllabus (holding the law of the case doctrine inapplicable in "extraordinary circumstances, such as an intervening decision by the Supreme Court").

{¶12} Defendant, in effect, contends the exception applies here. He asserts that because the Supreme Court found *Sessler I* conflicts with *Kepiro I*, the court necessarily discredited *Kepiro I* when it affirmed *Sessler I* in *Sessler III*. Defendant maintains that, in

light of the Supreme Court's decision in *Sessler III*, this court must reverse our resolution of the issue in *Kepiro I* raised again in this appeal. Defendant's contentions, though at first blush engaging, fail for reasons somewhat unique to the facts of this case.

{¶13} Generally, when the Supreme Court hears a certified conflict pursuant to App.R. 25, it addresses only the judgment of the court in which the motion to certify a conflict is filed; it does not overrule the conflicting case because that case typically is not before it. Unlike the usual circumstances, *Kepiro I* was before the Supreme Court while it considered *Sessler I*. The Supreme Court granted defendant's motion for a delayed appeal on March 26, 2008, after it allowed the appeal and motion to certify a conflict in *Sessler I* on February 6, 2008, and before it released its decision in that case on July 2, 2008. See *State v. Kepiro*, 117 Ohio St.3d 1437, 2008-Ohio-1279 ("*Kepiro II*"), *Sessler II* and *Sessler III*, supra.

{¶14} Despite its decision in *Sessler III*, the Supreme Court on August 6, 2008, ultimately decided not to allow defendant's appeal. See *State v. Kepiro*, 119 Ohio St.3d 1408, 2008-Ohio-3880 ("*Kepiro III*"). When the Supreme Court denies jurisdiction over a discretionary appeal, application of the law of the case doctrine settles the issue of law appealed. *Sheaffer v. Westfield Ins. Co.*, 110 Ohio St.3d 265, 2006-Ohio-4476, ¶16 (stating that "[u]nder the law-of-the-case doctrine, the denial of jurisdiction over a discretionary appeal by this court settles the issue of law appealed"). Because the Supreme Court disallowed defendant's appeal of *Kepiro I* when it had the opportunity to reverse *Kepiro I* following its decision in *Sessler III*, *Sheaffer* means the Supreme Court's decision in *Sessler III* does not negate our decision in *Kepiro I*. Also significant is the

distinct difference in the statutes at issue in *Sessler I* and *Pelfrey* on the one hand, and *Kepiro I* on the other.

C. Statutory Differences in *Sessler I* and *Kepiro I*

{¶15} *Kepiro I* held *Pelfrey* does not apply to defendant's indictment, as R.C. 2907.05 is mechanically different from the statute addressed in *Pelfrey*. R.C. 2907.05, the statute governing gross sexual imposition, sets forth in each paragraph a separate type of gross sexual imposition, with no interaction between them. R.C. 2907.05(A) essentially prohibits five different kinds of conduct, with each kind constituting a separate offense bearing a separate penalty.

{¶16} More specifically, in addition to sexual contact with a person less than 13 years old, gross sexual imposition can also occur when (1) the offender purposely compels another person to submit by force or threat of force, (2) the offender administers any drug or intoxicant to the other person for the purpose of preventing resistance, (3) the offender knows the judgment or control of another person is substantially impaired as a result of the influence of any drug or intoxicant consensually administered to the other person for medical treatment, or (4) the ability of the other person to resist or consent is substantially impaired because of a mental or physical condition or advanced age, and the offender knows or has reasonable cause to believe that the other person is under such impairment. R.C. 2907.05. Gross sexual imposition with a person less than 13 years old is a third-degree felony; the four other types of gross sexual imposition are penalized as fourth-degree felonies, potentially leading to a lesser penalty.

{¶17} Thus, for each particular manner of committing the crime of gross sexual imposition, R.C. 2907.05 provides a corresponding determinate classification. The statute includes no additional elements or attendant circumstances that change, or enhance the penalty, for the basic offense: a person convicted of gross sexual imposition of a minor automatically receives the punishment for a third-degree felony.

{¶18} In contrast, the statutes at issue in *Pelfrey* and *Sessler* increased the punishment when the basic offense crime was committed in a more serious manner through the presence of additional elements or aggravating factors. The defendant in *Pelfrey* was convicted of tampering with records in violation of R.C. 2913.42, and his offense would have been a misdemeanor under R.C. 2913.42(B)(2)(a) but for the additional element: the records at issue were government records. In that circumstance, the crime was elevated to a third-degree felony pursuant to R.C. 2913.42(B)(4). The Supreme Court in *Pelfrey* held that under R.C. 2945.74(A)(2) the defendant could only be found guilty of the least degree of the offense charged, as the verdict did not make clear the degree of the offense, the governmental nature of the records involved, or the jury's verdict on the more serious offense of tampering with government records.

{¶19} Likewise, the statute at issue in *Sessler* contains an additional element that alters the penalty. The *Sessler* defendant was convicted of intimidation in violation of R.C. 2921.04(B). R.C. 2921.04 generally prohibits intimidation of a witness, and a violation of R.C. 2921.04(B) constitutes a third-degree felony, but violation of R.C. 2921.04(A) is only a first-degree misdemeanor. The difference between the two sections concerns whether the intimidation was accomplished through the use of force or unlawful threat of harm to

any person or property. In the absence of force or threat of harm, a defendant can only be found guilty of the misdemeanor.

{¶20} Sessler was found guilty of a felony violation of the statute, even though the verdict form did not specify the degree of the offense, mention the statutory section upon which the offense was based, or specifically refer to the use of force or threat of harm in the verdict form. Based upon *Pelfrey, Sessler I* held Sessler could be found guilty only of the least offense, which in that case was a first-degree misdemeanor pursuant to R.C. 2921.04(A).

{¶21} In the final analysis, under the statutes at issue in *Pelfrey* and *Sessler*, the defendants could have committed the lesser crime without committing the more severe crime. Here, by contrast, it was not possible for defendant to have committed any crime other than third-degree felony gross sexual imposition, for if the jury had not found defendant had sexual contact with a child under the age of 13, it would have acquitted him. No other version of gross sexual imposition matches the facts alleged in the indictment, and no evidence introduced at trial even remotely suggests defendant's actions constituted a different type of gross sexual imposition.

{¶22} Given that (1) the statutes involved in *Sessler I* and *Pelfrey* differ substantially from the gross sexual imposition statute at issue here, (2) the Supreme Court offered no rationale for its decision in *Sessler III*, and (3) the Supreme Court refused to accept *Kepiro I* for review when it decided *Sessler III*, we cannot conclude the Supreme Court in *Sessler III* reversed *Kepiro I*. *Kepiro I* thus controls our resolution of defendant's single assignment of error, as we addressed and overruled it in *Kepiro I*.

Because our decision in *Kepiro I* correctly determined defendant's assignment of error lacked merit, it again is overruled.

{¶23} Having overruled defendant's single assignment of error, we affirm the judgment of the trial court.

Judgment affirmed.

BROWN and TYACK, JJ., concur.
