[Cite as *State v. Paquette*, 2009-Ohio-1961.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 08-CA-29
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2007-CR-856
v.	:	
	:	(Criminal Appeal from
SHAWN PAQUETTE	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 17th day of April, 2009.

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BROGAN, J.

{¶ 1} Shawn Paquette (Appellant) kept up a six-year, incestuous relationship with his daughter, whom we will call C.C., which began when she was twelve-years old. After she told her story, the Grand Jury responded with a fifteen-count indictment, and the jury returned fifteen guilty verdicts: rape (three); gross sexual imposition (one);

sexual battery (seven); unlawful sexual conduct with a minor (three); and pandering obscenity involving a minor, for obscene photographs he took of her (one). The trial court sentenced him to life in prison.

{¶ 2} C.C. came forward when she was eighteen-years old and shortly after she had moved out of the home she shared with her mother, father, and two brothers. The abuse began with her father's inappropriate touches. Soon, he began to perform oral sex on her, and then he forced her to do the same on him. It was not long before he began penetrating her with his penis–and sometime a lightbulb. When she first related her story, she told people she was thirteen-years old when her father touched her the first time. But after testifying before the Grand Jury, she examined a chart that compared her grade level to her age. She knew the first time occurred in the sixth grade, because she remembered it was shortly after her first menstruation (which came, unforgettably, for the first time in sixth grade). Looking at the chart, she realized that in the sixth grade she was actually only twelve not thirteen. During those six years between the ages of twelve and eighteen, her father forced himself on her hundreds of times.

{¶ 3} Soon after the police were called, Detective Keith McConnell, who worked in the Crimes Against Children Unit of the Springfield Police Department, and who was trained to investigate crimes involving child victims, visited C.C. to talk about her allegations. He suggested she call her father, and he would surreptiously record their conversation. Before she called, he wrote her a list of topics and different things she was to try and say or ask.

{¶ 4} Mr. Paquette's own words during that phone call seal his fate. The jury

heard the conversation in full, but we quote just a few telling excerpts from the transcript.

{¶ 5} From the beginning, and throughout, C.C. repeatedly tells him she is worried he will show others the pictures he took of her:

{¶ 6} "[C.C.]: Do you still have 'em or did you give them away?

{¶ 7} "[Mr. Paquette]: Yeah, I still have 'em. I ain't sent nothin'" (Tr. 1-2).

{¶ 8} "[Mr. Paquette]: Why you so scared about it?

{¶ 9} "[C.C.]: Because, I don't want anyone, anybody to know that we've, that we've had sex with each other. Like if you show them pictures.

{¶ 10} "* * *

{¶ 11} "[C.C.]: I just don't want . . . 'cause I know how you are about My Space. I don't want nobody, like for you to show pictures, and then all my friends know that we've had sex and stuff before." (Tr. 5-6).

{¶ 12} "[C.C.]: Can I just have the pictures, and forget about it?

{¶ 13} "[Mr. Paquette]: No.

{¶ 14} "* * *

{¶ 15} "[C.C.]: I'm talkin' about the pictures you took, of us.

{¶ 16} "[Mr. Paquette]: No. Uh huh.

{¶ 17} "* * *

{¶ 18} "[C.C.]: How many do you have? Like how many . . . .

{¶ 19} "* * *

{¶ 20} "[Mr. Paquette]: Six. There's six of 'em. Why?" (12-13).

{¶ 21} C.C. asks him about their relationship:

{¶ 22} "[C.C.]: Do you regret having sex with me?

{¶ 23} "[Mr. Paquette]: Nobody's there?

{¶ 24} "[C.C.]: No.

{¶ 25} "* * *

{¶ 26} "[Mr. Paquette]: No, not really. Sometimes, when . . . when you wasn't gettin' . . . (inaudible) . . . . Know what I mean?

{¶ 27} "[C.C.]: I wasn't what?

{¶ 28} "[Mr. Paquette]: Um, hold on. It was like . . . . I regret making you. Know what I mean?

{¶ 29} "[C.C.]: Yeah. But you don't regret it?

{¶ 30} "[Mr. Paquette]: A little bit. But that's why I thought we was close like that." (Tr. 15-17).

{¶ 31} "[C.C.]: We were lucky that I didn't get pregnant.

{¶ 32} "[Mr. Paquette]: Why was I?

{¶ 33} "[C.C.]: 'Cause that woulda been scary.

{¶ 34} "[Mr. Paquette]: Yeah, but . . . I was . . . made sure.

{¶ 35} "[C.C.]: Made sure what?

{¶ 36} "[Mr. Paquette]: Made sure, that you didn't. Didn't I?

{¶ 37} "* * *

{¶ 38} "[C.C.]: 'Cause you didn't . . . you didn't use anything. You didn't use protection.

{¶ 39} "[Mr. Paquette]: Oh. Yeah, well, I knew . . . (inaudible) . . . they ain't gonna get up without me in there. You know, I guess what I'm sayin', if you came back, it'd be hard not to . . . but, I don't know. It'd be like, I want you to come home. It's just . . . . I'd

do anything for you to come home. Know what I'm sayin'? I couldn't guarantee, I wouldn't think of you like that, at least once in a while." (Tr. 18).

{¶ 40} Hearing her worry repeatedly that he will show someone the pictures, and given her reluctance to continue their illicit relationship, he makes a threat:

{¶ 41} "[Mr. Paquette]: What if it . . . . okay, what if I said I was gonna show 'em . . . (inaudible) . . . if I didn't get some once in a while. Show everybody.

{¶ 42} "* * *

{¶ 43} "[C.C.]: I guess if that's gonna make you feel better. You can show 'em, 'cause I'm not doin' it. If that's gonna make you feel more like a man to show a whole bunch of people your daughter.

{¶ 44} "[Mr. Paquette]: Well . . . . [C.C.], I'll tell you this. In every . . . . (silence) . . . . it'd be hard to explain. Well, she don't look like she's fightin' back, or unhappy about it. That's all I'm tryin' to tell ya.

{¶ 45} "[C.C.]: But, I also know how to fake.

{¶ 46} "* * *

{¶ 47} "[Mr. Paquette]: Fake what? Yeah but . . . tape sure don't lie. You'd never know . . . you shoulda bit me or somethin' when you was doin' that one thing, right?

{¶ 48} "* * *

{¶ 49} "[Mr. Paquette]: If you didn't want it. I know you didn't wanna, but there was a few times when I know you did. Like bein' . . . . I love ya, and I ain't gonna ever change that. I'm your Dad, right?" (Tr. 20-21).

{¶ 50} He describes the photographs he took:

{¶ 51} "[Mr. Paquette]: * * * I got you with that tube going up yourself with the

bulb. I tell ya which ones I got. I got the one where you're in there, in the green and blue underwear.

{¶ 52} "[C.C.]: Mm hmm.

{¶ 53} "[Mr. Paquette]: Like kicked back with your hands in your hair. It'd be hard to explain why you was posin' like that. And I got ya . . . um I got one of ya with that bulb all the way in. And . . . and . . I got you suckin' it. And I got my dick goin' in your stuff . . . in the shower.

{¶ 54} "[C.C.]: Oh.

{¶ 55} "[Mr. Paquette]: You're standin' in the shower. Matter of fact I think you got your hand on . . . on your stuff when I'm stickin' it in, on the picture I got. So, I . . . I wasn't . . . . I was plannin' on showin' them. But I ain't . . . like that. If I could see ya like . . . once in a great while, like that. Could be almost guaranteed I wouldn't show 'em. I could . . . I could do that." (Tr. 21).

{¶ 56} He explains what it is he wants from her:

{¶ 57} "[Mr. Paquette]: I'd use . . . I'd use protection. 'Cause we been . . . away too long. If you just came over like . . . come over and went . . . we went for a ride or somethin' for a little bit.

{¶ 58} "* * *

{¶ 59} "[Mr. Paquette]: That's all . . . that's all I ask not to show 'em. It wouldn't be like I need it every month. Or every . . . like, every other month, come and hand out. Know what I mean?

{¶ 60} "* * *

{¶ 61} "[Mr. Paquette]: It ain't like we ain't been together, and you don't know me.

If I could guarantee that you'd never fear about those pictures again." (Tr. 21-22).

{¶ 62} She tries, unsuccessfully, to persuade him to say where he stashed the photographs:

{¶ 63} "[Mr. Paquette]: I got 'em put where nobody's gonna find 'em but me

{¶ 64} "* * *

{¶ 65} "[Mr. Paquette]: It don't matter if you tore the house down. You probably wouldn't find 'em unless I told you where they was." (Tr. 22).

{¶ 66} Near the end of the call, she asks:

{¶ 67} "[C.C.]: How many . . . how many times . . . how many times do you think it happened.

{¶ 68} "* * *

{¶ 69} "[Mr. Paquette]: I don't know. A lot.

{¶ 70} "[C.C.]: Like how many? Like guess how many times.

{¶ 71} "[Mr. Paquette]: I don't know. Why you askin' that?

{¶ 72} "[C.C.]: I was thinkin' like a hundred or somethin', I don't know.

{¶ 73} "[Mr. Paquette]: More.

{¶ 74} "[C.C.]: Like five hundred, or more?

{¶ 75} "[Mr. Paquette]: I don't know. Why you askin' all these questions like that?

{¶ 76} "[C.C.]: I just wondered, because it's really, like eatin' inside, like, I just wonder do you, like, I don't know.

{¶ 77} "[Mr. Paquette]: Do I like, what? Yeah, I feel bad about it, but we . . . we . . . we are close, and I don't know. We was close. But now . . . I just couldn't stop sometimes, like I told you I would." (Tr. 23-24).

{¶ 78} Had nothing happened between them, he likely would have responded the way he does when she asks if he did the same things to her brothers:

{¶ 79} "[Mr. Paquette]: That's sick [C.C.].

{¶ 80} "* * *

{¶ 81} "[C.C.]: It's sick with your brothers, and not your . . . my brothers and not your daughter?

{¶ 82} "[Mr. Paquette]: Yeah, that's sick too. But, I ain't gonna . . . (inaudible) . . . . Jesus, give me some credit." (26).

{¶ 83} Mr. Paquette assigns four errors for our review:

{¶ 84} "THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SUPPORT APPELLANT'S CONVICTIONS."

{¶ 85} "APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 86} "APPELLANT WAS DENIED HIS CONSTITUTIONALLY GUARANTEED RIGHT PROHIBITING UNREASONABLE SEARCHES AND SEIZURES WHEN THE TRIAL COURT DENIED HIS MOTION TO SUPPRESS EVIDENCE SEIZED FROM HIS RESIDENCE PURSUANT TO A SEARCH WARRANT OBTAINED WITHOUT PROBABLE CAUSE."

{¶ 87} "APPELLANT WAS DENIED HIS FIFTH AMENDMENT CONSTITUTIONAL RIGHTS WHEN THE COURT ERRED IN FAILING TO SUPPRESS STATEMENTS OBTAINED FROM APPELLANT."

{¶ 88} He first contends we should reverse his convictions because, as a matter of law, the evidence supports none of the jury's fifteen guilty verdicts. "Sufficiency of the evidence" is the legal standard called into service. "Sufficiency is a test of adequacy," and "[w]hether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. "[T]he inquiry is, after viewing the evidence in the light most favorable to the prosecution, whether any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492. Using this standard, a reviewing court ought to affirm a conviction if it "determines there is sufficient probative evidence to support the jury's finding." Id. at 283.

{¶ 89} Despite the broad contention, Mr. Paquette argues only that the evidence is legally insufficient to support two elements: (1) C.C was under thirteen-years of age when the abuse began, and (2) he took obscene photographs of her.

{¶ 90} As charged against him, only the rape and gross sexual imposition offenses contain the first element. Both require a prosecutor to prove the alleged victim was "less than thirteen years of age." R.C. 2907.02(A)(1)(b); R.C. 2907.05(A)(4). Mr. Paquette calls attention to C.C.'s early statements where she said he first touched her when she was thirteen. But it is irrelevant to a sufficiency inquiry that the element's supporting evidence is controverted. The question here is whether there is enough evidence that, if believed, a reasonable juror could find C.C. was under thirteen. C.C. told the jury the abuse began when she was twelve. If this testimony were believed, a reasonable juror could only find she was under thirteen. Thus, the evidence that supports the jury's age finding is legally sufficient.

{¶ 91} Only the offense of pandering obscenity involving a minor contains the second allegedly unproved element (taking obscene photographs of C.C.). The criminal statute reads, "(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following: (1) Create, reproduce, or publish any obscene material that has a minor as one of its participants or portrayed observers." R.C. 2907.321. The question is whether the evidence is sufficient to find that Mr. Paquette created, reproduced, or published obscene photographs.

{¶ 92} At least part of his argument seems to be that the evidence was insufficient because the prosecutor failed to produce the photographs. Although he cites no law in support, Mr. Paquette suggests that the law requires production of the photos before the jury could find him guilty. This is wrong. Evidence Rule 1004 says, "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if: (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or (2) Original not obtainable. No original can be obtained by any available judicial process or procedure * * *." Indeed, circumstantial evidence alone may satisfy an element of an offense, because "[c]ircumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph one of the syllabus.

{¶ 93} No Ohio court, apparently, has addressed this issue. Looking elsewhere, we find convincing the analysis of those jurisdictions that have considered it under substantially similar statutes. For example, a Wisconsin appeals court, in *State v. Lubotsky*, rejected the argument that conviction depends upon the prosecutor's ability to

produce the photographs, saying, were we to accept this argument, "we would be grafting an additional element onto the statute. Subsection (2) is directed against the *creation* of such materials, not the possession." (1988), 148 Wis.2d 435, 440, 434 N.W.2d 859 (Emphasis added.). "Certainly," concluded the court, "the person who takes numerous lewd photographs and is able to dispose of them, perhaps for profit, is no less culpable than someone with one lewd photograph hidden in a wallet." Id. See, also, *Cole v. State* (Ala.Crim.App., 1998), 721 So.2d 255, 257-258 (agreeing with *Lubotsky*'s analysis and rejecting "appellant's contention that, in order to obtain a conviction for violation of [the statute], the State had to produce the photographs he was alleged to have taken"). A District of Columbia appeals court, in *Green v. United States*, observed, "Requiring the government to produce the photographs that were taken would place the only evidence sufficient for a conviction in the exclusive possession of the suspect, who could become aware of an investigation into his activities before his arrest and destroy the evidence." (2008), 948 A.2d 554, 564 n.12.

{¶ 94} Here, the pandering statute, like the statute in *Lubotsky*, criminalizes creation not possession. Accordingly, the prosecutor was not required to produce the photographs and could prove this element with circumstantial evidence. Mr. Paquette's "testimony" provides enough of this evidence for a reasonable juror to find that he "created" obscene photographs of C.C.

{¶ 95} Mr. Paquette does not say how the evidence legally fails to support any of the ten other guilty verdicts. It is not our place to make an argument for him. We overrule the first assignment of error.

{¶ 96} Mr. Paquette next contends we should reverse because each of the fifteen

verdicts is contrary to the weight of the evidence. The "weight of evidence" standard raises a different legal question, one that "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." *Thompkins*, at 387 (Citation omitted.). It is critical to remember that "[w]eight is not a question of mathematics, but depends on its *effect in inducing belief*." Id. (Citation omitted.). But "only in the exceptional case in which the evidence weighs heavily against the conviction" should an appellate court reverse on this ground. Id. (Citation omitted.).

{¶ 97} This is not one of those exceptional cases. The evidence does not weigh heavily against Mr. Paquette's conviction. The defendant's own incriminating words must have had considerable effect in inducing belief of his guilt. We overrule the second assignment of error.

{¶ 98} The third assignment of error contends the trial court wrongly overruled his motion to suppress the evidence police found in his home. The search occurred after Detective McConnell presented a judge with an affidavit that reiterated what C.C. had told him about both the abuse and Mr. Paquette's end of the phone call (he did not listen to the recording until later). Finding the affidavit established probable cause, the judge issued a warrant. The specific question here is whether C.C., and thus the information in the affidavit, was reliable.

{¶ 99} In arguing that the judge could not have found probable cause, Mr. Paquette characterizes C.C. as an informant whose information was entirely uncorroborated. And Officer McConnell presented no evidence to the judge that attested to her reliability. It is not enough for an officer to swear that an informant is

reliable, he argues, the officer must allege facts or present evidence of this.

{¶ 100} The defect in this argument is the (mis)characterization of C.C. as a common informant. She was not only the informant but also the victim. "A tip from an identified citizen informant who is a victim or witnesses a crime is presumed reliable, particularly if the citizen relates his or her basis of knowledge." *State v. Jackson* (Mar. 5, 1999), Montgomery App. No. 17226, 1999 WL 115010, at *5; see, also, *Kirtland Hills v. Hall*, Lake App. No. 2008-L-005, 2008-Ohio-3391, at ¶32 (Citation omitted.) ("A citizen-informant who is the victim of or witness to a crime is presumed reliable."); *State v. Mansfield*, Medina App. No. 06CA0022-M, 2007-Ohio-333, at *3 ("Where the victim in a case is the source of information to the police, he is presumed to be reliable."). Thus, when the information in an affidavit comes from an informant who is the identified victim of the alleged crime, and the affidavit discloses the source of the informant's knowledge, the informant may be presumed reliable, so an officer need not present more evidence indicating the same. See *State v. Yeagley* (Aug. 28, 1996), Wayne App. No. 96CA0022, at *2.

{¶ 101} The judge who issued the search warrant here, therefore, could presume the information in the affidavit, which was from C.C., was reliable. Mr. Paquette does not argue that the information, if it is reliable, fails to provide a substantial basis to find probable cause. We overrule the third assignment of error.

{¶ 102} The fourth assignment of error also contends the trial court wrongly overruled the motion to suppress, but the target evidence here is an incriminating statement Mr. Paquette made to Detective McConnell and the evidence the statement helped police find. He argues McConnell interrogated him without first giving him the

Miranda warnings.

{¶ 103} To protect a suspect's Fifth Amendment right to be free from compulsory self-incrimination, *Miranda v. Arizona* instructs police officers to warn a suspect of his right, among others, to remain silent before beginning a "custodial interrogation." (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. The phrase means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 444. "The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel," writes the Court, "but whether he can be interrogated." Id. at 478. In other words, "[v]olunteered statements of any kind are not barred by the Fifth Amendment." Id. No one disputes Mr. Paquette was in custody, so the only issue is whether Detective McConnell "interrogated" him.

{¶ 104} In *Rhode Island v. Innis* the Supreme Court's express purpose was to "address for the first time the meaning of 'interrogation' under *Miranda v. Arizona*." (1980), 446 U.S. 291, 297, 100 S.Ct. 1682, 64 L.Ed.2d 297. "'Interrogation,' as conceptualized in the *Miranda* opinion," says *Innis*, "must reflect a measure of compulsion above and beyond that inherent in custody itself." Id. at 300. Thus interrogation can take the form of "either express questioning or its functional equivalent." Id. at 300-301. The meaning of "express questioning" is self-evident, and its "functional equivalent" refers to "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id. at 301.

{¶ 105} Here is the alleged functional-equivalent questioning by Detective McConnell:

{¶ 106} "Q: Talk us through your first interaction with the defendant. How did that work? Did you introduce yourself?

{¶ 107} "A: He got out of the back of the paddy wagon. I introduced myself. I told him we were conducting a search warrant at his residence, reference an incident with–involving his daughter [C.C.]. I told him that we were looking for child pornography and naked photos of her.

{¶ 108} "* * *

{¶ 109} "Q: When you initially made contact with him or when you told him what you were looking for, did he point out where that evidence was or where the–those photos were?

{¶ 110} "A: He told me he would take me to it." (Tr. 46-48).

{¶ 111} In a conclusory fashion, Mr. Paquette says this amounts to "interrogation." First, he asserts, McConnell knew his actions and words were reasonably likely to elicit an incriminating response from him, and second, McConnell's words invited a response. He then goes a step further and suggests this was a police practice designed to elicit an incriminating response from him. Yet Mr. Paquette explains none of these assertions. Our review of the record reveals no evidence of design in the explanation, nor did it reveal evidence that McConnell should have known his explanation–why Mr. Paquette had been arrested, why police were currently searching his home, what the object of their search was–would likely cause Mr. Paquette to tell him where one such object was. Instead, the explanation was appropriate–

indeed, desirable–and should ordinarily be offered in this sort of situation. Thus, no *Miranda* warning needed to be given, and Mr. Paquette's incriminating statement, far from unlawfully compelled, was voluntarily made.

{¶ 112} Finding no constitutional violation, we overrule the fourth assignment of error.

{¶ 113} The judgment of the trial court is affirmed.

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DONOVAN, P.J., and FAIN, J., concur.

Copies mailed to:

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