[Cite as *State v. Hannah*, 2017-Ohio-1239.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO,	:	
	:	Case No. 16CA17
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
LEONARD HANNAH JR.,	:	
	:	
Defendant-Appellant.	:	**Released: 03/27/17**

APPEARANCES:

Adam J. King, Hillsboro, Ohio, for Appellant.

Anneka P. Collins, Highland County Prosecutor, and Molly Bolek, Highland County Assistant Prosecutor, Hillsboro, Ohio, for Appellee.

McFarland, J.

{¶1} This is an appeal from a Highland County Common Pleas Court conviction and sentence imposed upon Appellant, Leonard Hannah, Jr., after a jury found him guilty of two counts of gross sexual imposition, both third degree felonies in violation of R.C. 2907.05(A)(4). On appeal, Appellant contends that 1) the trial court improperly amended the date of the offense in count two of the indictment to include a time frame outside of the time frame originally contemplated by the grand jury; and 2) his convictions are against the manifest weight of the evidence. Because we find no error or

abuse of discretion on the part of the trial court in amending count two of the indictment, we find no merit to Appellant's first assignment of error and it is overruled. Further, as we cannot conclude that Appellant's convictions are against the manifest weight of the evidence, his second assignment of error is without merit and is also overruled. Accordingly, the judgment of the trial court is affirmed.

FACTS

{¶2} Appellant was indicted on two counts of gross sexual imposition, both third degree felonies in violation of R.C. 2907.05(A)(4), on May 3, 2016. The indictment alleged Appellant committed these offenses against A.W. and M.W., both daughters of a close friend of Appellant's, at a time when both of the children were under the age of thirteen years old. A review of the record reveals that Appellant had known the children's father for ten to fifteen years, frequently worked on vehicles with him at his house and regularly stayed the night at his house, usually sleeping in the living room recliner. A.W., M.W. and their two other siblings often watched movies with Appellant in the living room on those nights and sometimes fell asleep there.

{¶3} The indictment specified that the date of the offense on count one of the indictment, which involved M.W., was "[b]eginning on or about

January 1, 2010 and continuing through January 1, 2013[.]" The indictment specified that the date of the offense on count two, which involved A.W., was "[b]eginning on or about January 1, 2007 and continuing through January 1, 2008[.]" A bill of particulars was later filed, alleging as follows with regard to count one of the indictment:

> "Date of Offense: Beginning on or about January 1, 2010 and continuing through January 1, 2013
>
> * * *
>
> M.W. reported that while living with her parents * * *, Defendant would come visit as he and M.W.'s father were good friends. M.W. reported that she fell asleep on the couch and woke up to Defendant touching her on the outside of [her] vagina. M.W. advised that Defendant then stopped touching her and went to her sister. M.W. advised that the last incident occurred when her and her sisters were watching a movie in the living room and they fell asleep. M.W. advised she was on the love seat and Defendant touched her on the outside of her vagina with his hand. M.W. advised this began when she was younger than 10 years old and the last time it occurred she was

> 11 or 12 years * * *. M.W. advised that her vagina hurt and stung when Defendant touched her. * * *."

The bill of particulars further alleged as follows with respect to count two of the indictment:

> "Date of Offense: Beginning on or about January 1, 2007 and continuing through January 1, 2008
>
> * * *
>
> A.W. reported that while living with her parents * * *, Defendant would come visit as he and A.W.'s father were good friends. A.W. advised that she was 10 or 11 years old when Defendant touched her. A.W. advised that Defendant came over with a movie to watch. A.W. and her sisters fell asleep in the living room; Defendant was also in the living room with the girls. A.W. advised she woke up because she felt pressure on her vagina. A.W. advised Defendant touched her vagina. A.W. advised she told her parents the next morning, but her father did not believe her."

{¶4} Appellant pleaded not guilty to the charges and the matter proceeded to a jury trial on August 18, 2016. At trial, the State presented several witnesses, including A.W. and M.W. and both of their parents,

Cecilia Freihofer, a forensic interviewer from Cincinnati Children's Hospital, and Detective Jennifer Swackhamer.[1] Appellant testified on his own behalf. The details of the testimony presented will be fully discussed below. At the close of the State's case, Appellant's counsel moved for acquittal on count two, arguing that the evidence presented by the State was not in accordance with the time period set forth in the indictment. The trial court discussed the testimony with counsel and then amended the date range in count two to "[b]eginning on or about January 1, 2007 and continuing to December 31, 2010," to conform to the evidence presented. Appellant did not object to the amendment, request a continuance or subsequently request a new trial.

{¶5} The jury ultimately found Appellant guilty of both counts of gross sexual imposition as charged in the indictment and Appellant was convicted and sentenced to fifty-four months on each count, to be served consecutively. It is from these convictions and sentences that Appellant now brings his appeal, setting forth two assignments of error for our review.

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT IMPROPERLY AMENDED THE DATE OF THE OFFENSE IN COUNT TWO OF THE INDICTMENT TO INCLUDE A TIME FRAME OUTSIDE OF THE TIME FRAME ORIGINALLY CONTEMPLATED BY THE GRAND JURY, AS COUNT TWO OF THE INDICTMENT INITIALLY ALLEGED THAT THE OFFENSE BEGAN ON OR ABOUT JANUARY 1,

[1] A.W. and M.W. were nineteen years old and sixteen years old, respectively, at the time of trial.

> 2007 AND CONTINUED THROUGH JANUARY 1, 2008, HOWEVER, AFTER HEARING A.W.'S TESTIMONY, WHICH ALLEGED THAT THE OFFENSE OCCURRED BETWEEN 2008 AND 2010, THE TRIAL COURT AMENDED COUNT TWO OF THE INDICTMENT TO READ THAT THE OFFENSE BEGAN ON OR ABOUT JANUARY 1, 2007 AND CONTINUED THROUGH DECEMBER 31, 2010.

II. APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AS THE GREATER AMOUNT OF EVIDENCE PRESENTED AT TRIAL TENDED TO ESTABLISH THAT APPELLANT DID NOT HAVE ANY TYPE OF SEXUAL CONTACT WHATSOEVER WITH M.W. OR A.W."

ASSIGNMENT OF ERROR I

{¶6} In his first assignment of error, Appellant contends that the trial court improperly amended count two of the indictment during trial to change the date of the offense from "[b]eginning on or about January 1, 2007 and continuing through January 1, 2008" to "[b]eginning on or about January 1, 2007 and continuing to December 31, 2010." Appellant argues that this amendment changed the time frame to a time frame outside the time frame originally contemplated by the grand jury. The State responds by arguing that Crim.R. 7(D) permitted the amendment of the indictment, that Appellant did not request a continuance nor object to the amendment of the indictment at the trial court level, and therefore contends that argument is limited to a plain error review.

{¶7} Section 10, Article I of the Ohio Constitution states: "[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury." This constitutional provision "guarantees the accused that the essential facts constituting the offense for which he is tried will be found in the indictment of the grand jury. Where one of the vital elements identifying the crime is omitted from the indictment, it is defective and cannot be cured by the court as such a procedure would permit the court to convict the accused on a charge essentially different from that found by the grand jury." *State v. Headley*, 6 Ohio St.3d 475, 478-79, 453 N.E.2d 716 (1983). This rule ensures that a criminal defendant will not be "surprised" by a charge. *See In re Reed*, 147 Ohio App.3d 182, 769 N.E.2d 412, ¶ 33 (8th Dist.2002).

{¶8} "Ordinarily, the precise time and date are not essential elements of an offense and the failure to provide specific dates and times in the indictment, in and of itself, is not a basis for dismissal of the charges." *State v. Murrell*, 72 Ohio App.3d 668, 671-72, 595 N.E.2d 982 (12th Dist.1991); citing *State v. Sellards*, 17 Ohio St.3d 169, 172, 478 N.E.2d 781 (1985). The indictment at issue here did not provide specific dates for the offenses, but rather contained time frames when the conduct was alleged to have occurred.

{¶9} By specifying when a court may permit an amendment to an indictment, Crim.R. 7(D) supplements the constitutional right to presentment and indictment by a grand jury. *State v. Evans*, 4th Dist. Scioto No. 08CA3268, 2010-Ohio-2554, ¶ 33; citing *State v. Strozier*, 2nd Dist. Montgomery No. 14021, 1994 WL 567470 (Oct. 5, 1994). The rule states:

> "The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement

> thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach to the offense charged in the amended indictment, information, or complaint. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefore is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted."

Thus, while the rule permits most amendments, it clearly prohibits amendments that change the name or identity of the crime charged. *See State v. Kittle*, 4th Dist. Athens No. 04CA41, 2005-Ohio-3198, ¶ 12. Crim.R. 7(D) permits a trial court, before, during or after a trial, to allow the State to amend an indictment, provided no change is made in the name or identity of the crime charged. Crim.R. 7(D). A trial court's decision to allow an amendment that changes the name or identity of the offense charged constitutes reversible error regardless of whether the accused can demonstrate prejudice. *Kittle* at ¶ 12. Whether an amendment changes the name or identity of the crime charged is a question of law. *Id.*

{¶10} If an amendment does not change the name or identity of the crime charged, we review the trial court's decision under an abuse of discretion standard. *Id.* at ¶ 13; *State v. Beach*, 148 Ohio App.3d 181, 2002-Ohio-2759, 772 N.E.2d 677, ¶ 23. The term abuse of discretion connotes more than an error of law or judgment; rather, it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *See State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). When the court permits an amendment that does not change the name or identity of the offense charged, the accused is entitled, upon motion, to a discharge of the jury or to a continuance, "unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made." Crim.R. 7(D). When a trial court refuses to continue or postpone the matter, the appellate court may not reverse the trial court's action unless "a failure of justice resulted."

{¶11} Here, the indictment, with regard to count two, originally charged Appellant with gross sexual imposition as to A.W. "[b]eginning on or about January 1, 2007 and continuing through January 1, 2008." At trial, there was testimony by A.W.'s mother that that was the time period in which A.W. initially reported Appellant's conduct to them and that A.W. was approximately ten years old at the time. Appellant's father testified that

A.W. reported Appellant's conduct to them some time between 2008 and 2010. A.W., who had already graduated from high school at the time she testified during the trial in 2016, testified that the conduct occurred "between 2010 … or 2008 and 2010." However, Appellant testified at trial and did not dispute that he was confronted about his conduct with regard to A.W. during the time period of 2007 to 2008.

{¶12} At the close of the State's case, Appellant's counsel moved for acquittal pursuant to Crim.R. 29, arguing that the time period testified to by A.W. was not within the time period specified in count two of the indictment. A discussion of the testimony presented at trial ensued between counsel and the trial court resulting in the trial court amending count two of the indictment as to the time period, changing it to "[b]eginning on or about January 1, 2007 and continuing to December 31, 2010," in order to conform to the evidence presented at trial. At that point, the trial court read the pertinent portions of Crim.R. 7 into the record, found that the amendment had not misled Appellant, and also stated that A.W. was probably mistaken as to the time period, but that the amendment would cure any possible mistake in the original indictment.

{¶13} Appellant's counsel did not object to the amendment during trial. Thus, he has arguably waived all but plain error. Nor did Appellant

request a continuance as a result of the amendment or file a motion for a new trial after the jury's verdict was returned. As set forth above, Crim.R. 7(D) provides, in pertinent part, as follows:

> "No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefore is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted."

Thus, Appellant failed to avail himself of the remedy available to him at the trial court level when a court permits an amendment of an indictment that does not change the name or identity of the crime charged. *State v. Evans, supra,* at ¶ 38; citing Crim.R. 7(D); *Columbus v. Bishop*, 10th Dist. Franklin No. 08AP-300, 2008-Ohio-6964.

{¶14} Further, this case is one in which gross sexual imposition occurred over a long period of time, beginning with A.W., as early as 2007, and continuing with M.W. as late as 2013, when both A.W. and M.W. were only ten years old. Although A.W. initially reported the conduct at the time, M.W. did not report it until several years later. No report was made to law

enforcement until M.W. came forward. As such, several years had passed between when the conduct occurred and when Appellant was investigated and eventually brought to trial. In fact, A.W. was nineteen years old and M.W. was sixteen years old at the time of trial.

{¶15} This Court recently stated as follows with respect to cases involving child victims of sexual offenses that occurred over long periods of time:

> "As noted previously an indictment charging a sexual offense against children need not specify the date of the alleged abuse as long as the state establishes that the offense was committed within the time frame alleged. [*State v. Czech*, 8th Dist. Cuyahoga No. 100900, 2015-Ohio-1536, ¶ 14; *State v. McIntire*, 6th Dist. Huron No. H-13-018, 2015-Ohio-1057, ¶ 42.] An allowance for reasonableness and inexactitude must be made for such cases because many child victims are unable to remember exact dates and times, particularly where the crimes involve a repeated course of conduct over an extended period of time and the accused and the victim are related or reside in the same household, which facilitates the extended period of abuse. *See State v. Adams*, 2014-Ohio-5854, 26

> N.E.3d 1283, ¶ 51 (7th Dist.), citing [*State v. Yaacov*, 8th Dist. Cuyahoga No. 86674, 2006-Ohio-5321, ¶ 17.]" *State v. Neal*, 2016-Ohio-64, 57 N.E.3d 272, ¶ 27 (1st Dist.).

Although the specific facts and arguments of *Neal* differ from the ones sub judice, we find the above reasoning applicable to the issue before us, with regard to the amendment of the time frame contained in count two of the indictment.

{¶16} "This Court has previously held that amendments that change 'only the date on which the offense occurred * * * [do] not charge a new or different offense, nor * * * change the substance of the offense.' " *State v. Evans, supra,* at ¶ 35. Based upon the foregoing, we therefore conclude that the amendment to count two of the indictment that added an additional time frame did not change the name or identity of the offense, and therefore we apply an abuse of discretion standard of review to the trial court's decision to amend the indictment. *Id.* Further, in light of the particular facts of this case, which involve child victims of sexual abuse that occurred over a period of time, we find no abuse of discretion on the part of the trial court in amending the indictment. As we reasoned in *Evans,* at all times herein Appellant stood charged with the same crimes of gross sexual imposition as to the same victims, A.W. and M.W. *Id.* Thus, the amendment to the

indictment simply added an additional time frame within which the gross sexual imposition occurred and Appellant cannot demonstrate he suffered prejudice as a result of the amendment. Also important to our decision is the fact that Appellant has never claimed an alibi with respect to the offenses, and instead has simply claimed that the offenses did not occur and that the victims were lying. *State v. Neal, supra,* at ¶ 28.

{¶17} Thus, we find no error or abuse of discretion on the part of the trial court in amending the indictment as to count two. Accordingly, Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

{¶18} In his second assignment of error, Appellant contends that his convictions are against the manifest weight of the evidence.[2] In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960

[2] Although Appellant phrases his assignment of error in the singular with respect to the word "conviction," we construe his argument to be that both of his convictions are against the manifest weight of the evidence, as his arguments relate to both convictions.

N.E.2d 955, ¶ 119. "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins* at 387. But the weight and credibility of evidence are to be determined by the trier of fact. *Kirkland* at ¶ 132. "A jury, sitting as the trier of fact, is free to believe all, part or none of the testimony of any witness who appears before it." *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23. We defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *Id.*

{¶19} The jury convicted Appellant of two counts of gross sexual imposition in violation of R.C. 2907.05(A)(4) with respect to A.W. and M.W., both children less than thirteen years old at the time of the offenses. The statute specifies that "[n]o person shall have sexual contact with another, not the spouse of the offender, cause another, not the spouse of the offender, to have sexual contact with the offender * * * when * * * [t]he other person * * * is less than thirteen years of age, whether or not the offender knows the age of that person." R.C. 2907.01(B) defines "[s]exual contact" as "any touching of an erogenous zone of another, including

without limitation the thigh, genitals, buttock, public region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

{¶20} Appellant argues that because there was no physical evidence introduced at trial, because neither A.W. or M.W. were able to provide specific dates or time frames of the alleged conduct, and because Appellant "consistently and adamantly denied ever having sexual contact with A.W. or M.W.," that the "veracity of the allegations levied against" him have been called into question and lend credence "to the contention that [his] conviction was against the manifest weight of the evidence." He further argues that "Det. Swackhamer testified that during a meeting with Appellant, Appellant explained that [the children's mother] may have encouraged A.W. and M.W. to fabricate the allegation against Appellant due to the fact that Appellant had turned down sexual advances made by [the children's mother] in the past." However, based upon the following, we reject Appellant's arguments.

{¶21} A review of the trial transcript reveals that both A.W. and M.W. testified at trial. A.W. was nineteen at the time of trial. A.W. testified that Appellant was a friend of her father's that she knew well enough to call "uncle." She testified that Appellant would sometimes spend the night at

their house and would sleep in the living room on those occasions. She testified that on one occasion between 2008 and 2010 she had fallen asleep on the couch in the living room because the children and Appellant had been watching a movie. She testified that she woke up to Appellant touching her "down there," and clarified that "down there" meant her vagina. She testified that Appellant was touching, or rubbing her vagina with his finger, underneath her clothes. She testified that she reported the incident to her mother the next morning. She testified that she did not report it to law enforcement until it came to her attention that it had happened to her sister, M.W., as well.

{¶22} M.W. testified at trial and was sixteen years old at that time. She testified that Appellant was a friend of her father's and that he would stay overnight sometimes. She testified that during times when Appellant would spend the night he would touch her with his fingers, underneath her clothing, in her "private area," which she clarified was her vagina. She testified that the conduct happened more than once, and usually happened when she was watching movies in the living room with Appellant. She testified that the conduct started before she was ten, that she didn't remember exactly when, and that the last time the conduct occurred was when she was about ten years old. She estimated that the conduct occurred

in 2010. She testified that she did not tell her mother because she was embarrassed.

{¶23} The children's mother also testified at trial. She testified that Appellant was at their house frequently and was a "regular." She testified that he would usually sleep in the living room when he would stay over. She testified that A.W. reported to her sometime between 2007 and 2008 that Appellant had sexually assaulted her, but that when confronted, Appellant denied it. She testified that when she became aware in October or November of 2015 that M.W. had been sexually assaulted by Appellant she reported it to Children's Services. The children's father testified that A.W. reported Appellant's conduct to them sometime between 2008 and 2010, because he remembered he was working third shift at Wal-Mart at the time. He further testified it was possible the report was made in 2008.

{¶24} Cecilia Freihofer, a social worker and forensic interviewer employed with the Cincinnati Children's Hospital Meyerson Center, testified on behalf of the State as well. She testified that she interviewed M.W. on January 15, 2016 due to a report that M.W. had disclosed sexual abuse by a family friend. Freihofer testified that during the interview M.W. "disclosed multiple incidents of, uh, fondling of her vagina by the alleged perpetrator's hand; as well as digital vagina penetration by the alleged perpetrator." She

testified M.W. disclosed that she remembered being less than ten years old at the time, because of a nightgown that she was wearing. She further testified that M.W. disclosed that the last time the conduct occurred she was eleven or twelve years old. Freihofer testified based upon her interview of M.W., mental health therapy was recommended for M.W.

{¶25} Detective Swackhamer also testified on behalf of the State. She testified that when she interviewed Appellant, he talked about watching movies with the children, "sometimes movies he would bring," and acknowledged being at their house. She testified that he denied the sexual assault and stated that "he thinks * * * the girls' mother, has put them up to doing this because she's made sexual advances towards him, and he's turned her down." Swackhamer further testified that she found no evidence in support of Appellant's statement during the course of her investigation.

{¶26} Appellant testified in his own defense at trial. He testified he had been friends with A.W. and M.W.'s father for ten to fifteen years and that he helped him work on vehicles regularly and stayed the night frequently. He testified that when he stayed over, he usually slept in a recliner in the living room. He said between 2007 and 2013 he watched movies in the living room with the children "multiple times." He testified that the children's father would usually carry them to their beds if they fell

asleep before their parents went to bed. He denied ever having any sexual contact with A.W. or M.W. In fact, Appellant gratuitously testified that "I'm 51 years old and I'm proud to say that I've never laid my hand on a woman and never will." Appellant maintained that A.W. and M.W. were lying, both when A.W. initially reported the incident and now at trial.

{¶27} In light of our determination that the trial court did not err or abuse its discretion in amending the time frame of count two of the indictment to conform to the evidence, as well as the foregoing trial testimony, we cannot conclude that Appellant's convictions were against the manifest weight of the evidence. Further, although Appellant essentially argues that inconsistencies in A.W. and M.W.'s testimony and his denial of the allegations should have carried more weight with the jurors, as indicated above, the weight and credibility of evidence are to be determined by the trier of fact. *Kirkland, supra,* at ¶ 132. The jury, as the trier of fact, was free to believe all, part or none of the testimony of the witnesses. *State v. West, supra,* at ¶ 23. Clearly, the jury resolved any inconsistencies in the evidence and testimony in favor of the State. Thus, after a review of the record, we cannot conclude that this is one of those instances where, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed.

State v. Thompkins, supra, at 387; *State v. Hunter, supra*, at ¶ 119. Therefore, Appellant's second assignment of error is overruled.

{¶28} Accordingly, having found no merit in the assignments of error raised by Appellant, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. & Hoover, J.: Concur in Judgment and Opinion as to Assignment of Error II; Concur in Judgment Only as to Assignment of Error I.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL: Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.