[Cite as *State v. Spell*, 2009-Ohio-2562.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- CHARLES T. SPELL Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J. Case No. 08-CA-82 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Case No. 2007CR612
JUDGMENT:	Affirmed in part, Reversed in part
DATE OF JUDGMENT ENTRY:	June 1, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KENNETH W. OSWALT Licking County Prosecutor BY: TRACY F. VAN WINKLE Assistant Prosecuting Attorney 20 S. Second Street, Fourth Floor Newark, Ohio 43055	CHRISTOPHER M. SHOOK Morrow, Gordon & Byrd, Ltd. 33 W. Main Street P.O. Box 4190 Newark, Ohio 43058-4190

Hoffman, P.J.

{¶1} Defendant-appellant Charles T. Spell appeals his conviction and sentence entered by the Licking County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} This matter arises from allegations Appellant sexually abused his two nieces, P.H. and A.S., while the girls were minors living in his home.

{¶3} Licking County Children's Services ("LCCS") investigated the allegations. Heidi Ballengee, a social worker with LCCS, requested the case be presented to the Licking County Grand Jury.

{¶4} Subsequently, the Licking County Grand Jury indicted Appellant on three counts of gross sexual imposition, in violation of R.C. 2907.05; two counts of rape, in violation of R.C. 2907.02; and four counts of corruption of a minor, in violation of R.C. 2907.04.

{¶5} Appellant's niece, P.H., was born on September 24, 1984. At the time of trial, P.H. was 23 years old. P.H. grew up in the State of Louisiana, but moved to Ohio to live with Appellant and his wife when she was twelve years old. P.H. asserts Appellant made sexual advances towards her when she was twelve years old. She testified at trial Appellant came into her room while she was wearing her nightgown, laid on top of her and "humped her a little bit." She testified she could not remember the precise date this event occurred, but "it was summer time." She further testified "a couple of months after the first incident" Appellant put "his hand down her pants" and touched her vagina, but "there was no penetration." Appellant later put his hand inside

her. She stated Appellant had sexual intercourse with her when she was 13 years old. The intercourse occurred more than "five or six times" over the next "year or so, year and a half." P.H. testified Appellant attempted to force her into performing oral sex on one occasion when she was thirteen years old. She stated she did not report these incidents at the time because she was scared of her uncle, and didn't want to be kicked out of the home. She contacted LCCS when her younger sister, A.S., informed her of similar incidents involving Appellant.

{¶6} A.S. was born on October 8, 1991, and was four years old when she moved to Ohio to live with Appellant, his wife and her sister, P.H. A.S. alleges Appellant engaged in sexual misconduct with her when she was twelve years-old in June 2004. During the incident, Appellant asked her to lie next to him while he touched her vagina. A.S. testified Appellant did not put his finger inside her vagina during the incident. However, Appellant did take her hand and put it on his penis.

{¶7} Leslie Dieterich, a pediatric nurse practitioner with Licking Memorial Hospital, testified at trial she conducted a sexual assault examination of A.S. on August 7, 2007, which was completely normal. At the conclusion of her testimony, Dieterich testified her examination was consistent with the victim's details of the event.

{¶8} Following a jury trial, Appellant was convicted of all nine charges.

{¶9} The trial court sentenced Appellant to a cumulative prison term of three years, with five years of post-release control. Additionally, Appellant was classified a Tier III Sex Offender.

{¶10} Appellant now appeals, assigning as error:

{¶11} "I. THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S RULE 29 MOTION ON THE BASIS THAT THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTIONS.

{¶12} "II. APPELLANT'S CONVICTIONS WERE NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶13} "III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING AN EXPERT WITNESS TO TESTIFY AS TO HER OPINION REGARDING THE VERACITY OF THE ALLEGED VICTIM'S DETAIL OF EVENTS.

{¶14} "IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING EXPERT TESTIMONY ON THE ULTIMATE ISSUE WITHOUT PROPER FOUNDATION.

{¶15} "V. THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS IS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNTIED STATES CONSTITUTION."

I, II

{¶16} Appellant's first and second assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶18} An appellate court reviews a denial of a Crim.R. 29 motion for acquittal using the same standard used to review a sufficiency of the evidence claim. See *State v. Carter* (1995), 72 Ohio St.3d 545, 553, 651 N.E.2d 965, 1995-Ohio-104. Thus, "[t]he 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." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus."

{¶19} Our standard of review on a manifest weight challenge to a criminal conviction is stated as follows: "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. See, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175, 485 N.E.2d 717.

Rape

{¶20} Appellant was convicted of two counts of rape, in violation of R.C. 29078.02(A)(1)(b), which reads:

{¶21} "(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

{¶22} "***

{¶23} "(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

{¶24} R.C. 2907.01 defines "sexual conduct" as:

{¶25} "(A) 'Sexual conduct' means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex;

and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

{¶26} At trial, P.H. testified:

{¶27} "Q. Do you recall the first time things were not appropriate?

{¶28} "A. Yeah. I was 12 and he came into my room and he wasn't wearing any clothes and he got on top of me - - my aunt came home like 10 minutes later.

{¶29} "Q. What did he do while he was on top of you?

{¶30} "A. Nothing really. He just kind of laid on top of me and kind of humped me a little bit.

{¶31} "Q. Okay. Were you wearing clothes when that happened?

{¶32} "A. Yes, I had a nightgown on.

{¶33} "Q. Okay. Did that - - what room in the house did that happen in?

{¶34} "A. My room.

{¶35} "Q. Okay. You say your aunt was away when that started.

{¶36} "A. She went - - or she left for work. It was around 6:30 in the morning.

{¶37} "Q. Did your uncle work when you were young?

{¶38} "A. Yeah. He went to work second shift from 2 to 11, I think.

{¶39} "Q. Did your aunt work when you were young?

{¶40} "A. Yeah.

{¶41} "Q. What shift did she work?

{¶42} "A. First shift. She left at 6:00 in the morning, I think, or 5:30.

{¶43} "Q. Early?

{¶44} "A. Yeah.

{¶45} "Q. So, who took care of you between the time your aunt left for work and the time she returned home?

{¶46} "A. My uncle was home for a little while and then I went to school.

{¶47} "Q. Okay. You said you were 12 years old when that happened.

{¶48} "A. Yes.

{¶49} "Q. Do you remember a precise date that that happened?

{¶50} "A. No. It was summer time.

{¶51} "Q. Okay. Did your uncle do anything more than that you found inappropriate?

{¶52} "A. A couple months later he actually touched me inappropriately, yes.

{¶53} "Q. Okay. Couple of months after this first incident.

{¶54} "A. Yes.

{¶55} Q. Okay. How old were you during that time?

{¶56} "A. I was 12.

{¶57} "Q. Okay. And you said he touched you.

{¶58} "A. Yes.

{¶59} "Q. What part of his body made contact with what part of your body?

{¶60} "A. He put his hands down my pants.

{¶61} "Q. Okay. And I understand that sometimes we don't like to talk about these words, but to the best of your ability describe the anatomy on your body that his hand touched.

{¶62} "A. My vagina.

{¶63} "Q. Okay. On that occasion did his hand go inside of your vagina?

{¶64} "A. No, not that time.

{¶65} "Q. Okay. Did anything else happen between you and your uncle that you found to be inappropriate?

{¶66} "A. Later he did put his hand inside me and then - -

{¶67} "Q. Okay.

{¶68} "A. - - later on, a year later or so he started trying to have sex with me.

{¶69} "Q. Okay. How old were you when, in your words, would you say he started trying to have sex with you?

{¶70} "A. I was 13.

{¶71} "Q. Thirteen. And did he ever actually complete the act of intercourse with you?

{¶72} "A. Yes.

{¶73} "Q. Do you recall the first time that happened?

{¶74} "A. No, I try not to.

{¶75} "Q. Okay. Do you recall where it happened?

{¶76} "A. It was in my bedroom.

{¶77} "Q. Do you recall what time of day?

{¶78} "A. In the morning.

{¶79} "Q. Okay. Was your aunt present at home that day?

{¶80} "A. No. She left for work.

{¶81} "Q. Okay. Can you tell me with any detail how he came into your room?

{¶82} "A. He would always come in my room with either just his underwear or wasn't wearing anything at all.

{¶83} "Q. What kind of underwear specifically, do you remember?

{¶84} "A. Regular underwear, I guess. Briefs, I guess.

{¶85} "Q. Okay. And after he came into your room, what would he do?

{¶86} "A. He would lay in my bed next to me and touch me and then he would turn me over and made me take my underwear off.

{¶87} "Q. Okay. What were you normally sleeping in?

{¶88} "A. A nightgown and underwear or later I started wearing pants and a t-shirt.

{¶89} "Q. Would he ever say anything to you when he did this?

{¶90} "A. When he first started he said that the needed to teach me how to be with a man.

{¶91} "Q. And when you say he turned you over, can you describe how you were laying in the bed?

{¶92} "A. Yes, I was laying on my right side.

{¶93} "Q. When he first came in or later?

{¶94} "A. I always sleep that way.

{¶95} "Q. You always sleep on your right side.

{¶96} "A. Yes.

{¶97} "Q. All right. So, when he came into the room is that how you were sleeping?

{¶98} "A. Um-hmm.

{¶99} "Q. So, when he go in bed, where was your body in relationship to his body?

{¶100} "A. My back was to his front and then he turned me onto my back.

{¶101} "Q. Okay. Did he stay on his side, or on his front or on his back?

{¶102} "A. He got on top of me, front to front.

{¶103} "Q. Okay. And we've been talking about sex, but can you tell the jury what part of his body went into what part of your body?

{¶104} "A. Yes. He stuck his penis inside my vagina.

{¶105} "Q. Okay. Do you recall how long that act occurred?

{¶106} "A. I just tried to ignore it, but I – whatever normal. A few minutes or whatever.

{¶107} "Q. Okay. And did that happen more than once?

{¶108} "A. Yes. It happened for at least a year or so, year and a half.

{¶109} "Q. How regularly?

{¶110} "A. Whenever he could. Mostly in the morning.

{¶111} "Q. Can you pinpoint a time line at all?

{¶112} "A. Yeah. It started - -

{¶113} "Q. How many times a month maybe?

{¶114} "A. It was more than five or six times I guess.

{¶115} "Q. Okay. You've told us about touching your vagina, putting his finger inside your vagina and sex. Did anything else happen inappropriate between the two of you?

{¶116} "A. He did try to make me give him a blow job once.

{¶117} “Q. Okay. By blow job what do you mean?

{¶118} “A. He tried to put his penis in my mouth.

{¶119} “Q. Okay. Do you recall when that happened?

{¶120} “A. It was in the afternoon before my aunt got home, but I - - I was probably closer to 14 at the time.

{¶121} “Q. Okay. But still 13.

{¶122} “A. Um-hmm.

{¶123} “Q. Okay. How many times did that happen?

{¶124} “A. Just the once.”

{¶125} Tr. at 109-115.

{¶126} P.H. continued her testimony, stating:

{¶127} “Q. Okay. Phyllis, how old were you the first time that your uncle had sexual intercourse with you?

{¶128} “A. I was 13.

{¶129} “Q. Did you ever have sexual intercourse when you were less than 13?

{¶130} “A. No.

{¶131} “Q. Did you ever have oral sex with your uncle when you were less than 13?

{¶132} “A. What do you consider oral sex?

{¶133} “Q. Either his penis in your mouth or your genital region in his mouth.

{¶134} “A. No.

{¶135} “Q. Did he ever insert his fingers into your vagina when you were less than 13?

{¶136} "A. Yes.

{¶137} "Q. How old were you?

{¶138} "A. Twelve."

{¶139} Tr. at 120-121.

{¶140} While there was originally some ambiguity as to when the first instance of digital penetration occurred, P.H. did later affirmatively testify she was 12 years old at the time. The jury, as the trier of fact, was in a better position to observe the witnesses' demeanor and weigh their credibility, as the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶141} Based upon the testimony of P.H., the jury did not lose its way and there was sufficient, competent and credible testimony to support Appellant's conviction for the first count of rape. However, with regard to the second count of rape, we find there was not sufficient evidence P.H. was less than thirteen years old at the time based upon her testimony as noted above. Accordingly, we affirm Appellant's first conviction for rape but we reverse Appellant's second conviction for rape.

Gross Sexual Imposition

{¶142} Appellant was convicted of three counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4), which reads:

{¶143} "(A) No 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; or cause two or more other persons to have sexual contact when any of the following applies:

{¶144} "***

{¶145} "(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person."

{¶146} R.C. 2907.01 defines "sexual contact" as:

{¶147} "(B) 'Sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

{¶148} Upon review of the testimony set forth above, the jury had sufficient, competent, credible evidence on which to rely in finding Appellant guilty of gross sexual imposition with regard to P.H. The evidence demonstrates Appellant engaged in sexual contact with P.H. while she was under the age of 13 years-old.

{¶149} Further, A.S. testified at trial:

{¶150} "Q. Okay. Did something change when you were 12?

{¶151} "A. Yes.

{¶152} "Q. What happened?

{¶153} "A. He raped me.

{¶154} "Q. Okay. Why don't you tell me what happened precisely.

{¶155} "A. I was outside with my aunt and my sister and we were by the pool. My aunt told me to go inside to wake him up and I did, and normally when I go to wake him up, I would - - he told me to lay down with him and so I went ahead and did it when he asked me to because he said he was cold like he normally does, and I laid down and then he started to touch me.

{¶156} "Q. Okay. What part of his body touched what part of your body?

{¶157} "A. His hand touched my vagina.

{¶158} "Q. Okay. Did he do anything with his hands when he touched your vagina?

{¶159} "A. I don't remember.

{¶160} "Q. Okay. His finger didn't go inside of your vagina, did it?

{¶161} "A. No.

{¶162} "Q. Just on the outside.

{¶163} "A. Yes.

{¶164} "Q. Did anything else happen during that incident?

{¶165} "A. He tried to get me to touch his penis.

{¶166} "Q. How did he do that?

{¶167} "A. He grabbed my hand.

{¶168} "Q. Okay.

{¶169} "A. And pulled my hand towards him.

{¶170} "Q. Did your hand make contact with his penis?

{¶171} "A. Yes.

{¶172} "Q. Okay. What part of your hand did he grab?

{¶173} "A. He grabbed me kind of like by my wrist.

{¶174} "Q. Okay. What did you do?

{¶175} "A. I pulled my hand away and I got out and I was crying and I ran downstairs.

{¶176} "Q. Okay. And what time of the year did this happen.

{¶177} "A. In June of 2004.

{¶178} "Q. Okay. How old were you at that time?

{¶179} "A. I was 12."

{¶180} Atr. At 138-139.

{¶181} Based upon the above, the jury had sufficient, competent, credible testimony on which to rely in finding Appellant guilty of two counts of gross sexual imposition with regard to A.S.

Corruption of a Minor

{¶182} Appellant was convicted of four counts of corruption of a minor, in violation of R.C. 2907.07(A), which reads:

{¶183} "(A) No person shall solicit a person who is less than thirteen years of age to engage in sexual activity with the offender, whether or not the offender knows the age of such person."

{¶184} Based upon the testimony set forth above and our analysis and disposition of Appellant's arguments with regard to the charges of rape and gross sexual imposition, we find the jury had sufficient, competent and credible evidence on which to rely in finding Appellant guilty of four counts of corruption of a minor.

{¶185} Appellant's first assignment of error is sustained, in part, and overruled, in part.

III, IV

{¶186} In the third assignment of error, Appellant argues the trial court erred in permitting the expert witness, Leslie Dieterich, to testify as to her opinion regarding the veracity of the alleged victim's allegations. Specifically, Appellant cites the deposition

testimony of Leslie Dieterich, the pediatric nurse practitioner from Licking Memorial Hospital, who performed a medical examination of A.S.

{¶187} Dieterich testified as to the medical examination being normal, with no significant findings. At the conclusion of her testimony, Dieterich stated:

{¶188} "A. It's very uncommon, even in episodes of sexual abuse that has been more recent, to have physical exam findings when the touching has been finger or hand touching as was alleged by [A.S.]. So, even if she had been seen much closer to the incident, I would have been surprised to have an abnormal physical finding.

{¶189} "The vaginal area is an area that has a lot of blood vessels and blood flow similar to the mouth area, so when there's an injury to that area, it heals very quickly because of that blood flow. So, given the time frame, even if there had been injury, it would have been extremely unusual to find any evidence that there had been injury due to the healing that process usually occurs.

{¶190} "Q. Did you find Amber's exam to be consistent with her detail of events?

{¶191} "A. Yes, I did."

{¶192} Tr. at 172.

{¶193} On cross-examination, the following exchange occurred:

{¶194} "Q. And thus you are unable to determine whether Amber was sexually abused or not, isn't that the bottom line here?

{¶195} "A. No, that's not correct.

{¶196} "Q. Okay.

{¶197} "A. You're correct in that I have no way of determining the truthfulness or not of what she's told me.

{¶198} "Q. Correct. And you have no way from this - - you've got an exam in your hand that says the child was normal, correct?

{¶199} "A. Right.

{¶200} "Q. And from that exam you are unable to determine whether or not she was abused sexually or not, is that correct or incorrect?

{¶201} "A. From the physical exam alone, I cannot tell whether or not she was physically abused. That would be correct.

{¶202} "Q. That's all that you did in this case was examine her, correct?

{¶203} "A. And obtain a medical history.

{¶204} "Q. Right. None of which supports medically, scientifically or otherwise that she's been abused, correct?

{¶205} "A. That I don't agree with because 90 - - 85 to 90 percent of exams of children who have been sexually abused, the diagnosis is made based on the history because there often are not physical exam findings.

{¶206} "Q. Exactly. And in this case the allegation was that she was touched on the outside of her vagina, right? You have to check that?

{¶207} "A. I did not memorize the history. Yes, I do need to check it.

{¶208} "Q. Okay.

{¶209} "A. Yes. That she was touched on the outside of her vaginal area.

{¶210} "Q. So, there's no way medically, based on all your training, to establish whether or not that occurred, isn't that correct?

{¶211} "A. There is no way medically, yes.

{¶212} "Q. And that's what you were called for to give a medical opinion, correct?

{¶213} "A. Yes."

{¶214} Tr. at 176-177.

{¶215} Appellant stipulated to Leslie Dieterich's testifying as an expert witness, but argues Dieterich's testimony was not based upon any "scientific, technical or other specialized information" pursuant to Evidence Rule 702(C). However, Appellant does not reference where in the record he raised an objection to Dieterich's testimony in the trial court. Accordingly, we review Appellant's assigned error under a plain error analysis. Plain error does not exist unless, but for the error, the outcome of the trial would have been different. *State v. Jenks* (1991), 61 Ohio St.3d 259.

{¶216} Based upon the effective cross-examination by Appellant's counsel, no reasonable probability exists the outcome of the trial would have been different but for the trial court allowing the testimony. Accordingly, Appellant's fourth assignment of error is overruled.

V.

{¶217} Appellant's fifth assignment of error maintains his trial counsel was ineffective in failing to object to the testimony of Leslie Dieterich and for failing to specify and renew his Criminal Rule 29 motion for acquittal.

{¶218} The standard of review of an ineffective assistance of counsel claim is well-established. Pursuant to *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 673, in order to prevail on such a claim, the appellant must demonstrate both (1) deficient performance, and (2) resulting prejudice, i.e., errors on the part of counsel of a nature so serious that there exists a reasonable probability

that, in the absence of those errors, the result of the trial court would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶219} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley,* 42 Ohio St.3d at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

{¶220} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. This requires a showing there is a reasonable probability but for counsel's unprofessional errors, the result of the proceeding would have been different. *Bradley,* supra at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

{¶221} Based upon our analysis and disposition of Appellant’s first and second assignments of error, we find Appellant’s counsel was not ineffective in failing to specify and renew his Crim.R. 29 motion for acquittal.

{¶222} As to his failure to object to Dieterich’s expert opinion, we find given the effective cross-examination by Appellant’s counsel of her, no reasonable probability exists the outcome of the trial would have been different had an objection been raised and sustained.

{¶223} Appellant’s fifth assignment of error is sustained.

{¶224} Appellant's conviction in the Licking County Court of Common Pleas is affirmed, in part, and reversed, in part.

By: Hoffman, P.J.

Wise, J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
CHARLES T. SPELL	:	
Defendant-Appellant	:	Case No. 08-CA-82

For the reasons stated in our accompanying Memorandum-Opinion, Appellant's conviction in the Licking County Court of Common Pleas is affirmed, in part, and reversed, in part. Costs to be divided equally.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY