[Cite as *State v. Czech*, 2015-Ohio-1536.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100900

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM L. CZECH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-572842-A

BEFORE: Keough, P.J., E.A. Gallagher, J., and Boyle, J.

RELEASED AND JOURNALIZED: April 23, 2015

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} Defendant-appellant, William L. Czech, appeals his convictions. For the reasons that follow, we affirm his convictions, but remand the matter to the trial court to correct nunc pro tunc the judgment entry of conviction to accurately reflect the sentence it imposed in open court.

{¶2} On July 2, 2013, the Cuyahoga County Grand Jury issued an 18-count indictment charging Czech with various offenses stemming from nine instances of sexual misconduct involving two of his granddaughters — sisters Victim 1 and Victim 2. The misconduct allegedly occurred at different time periods between 1998 and 2004, all before the victims reached the age of 13.

{¶3} Regarding Victim 1, the indictment alleged she was the complainant in five incidents. Count 1 charged rape with a serious physical harm specification that occurred between June 5, 2003 and June 4, 2004 (vaginal intercourse), with Count 2 charging the related kidnapping offense. Count 3 charged attempted rape between January 1, 2000 and June 4, 2000 (digital penetration), with Count 4 charging the related kidnapping offense. Count 5 charged attempted rape between January 1, 2000 and June 4, 2004 (fellatio), with Count 6 charging the related kidnapping offense. Count 7 charged gross sexual imposition ("GSI") between January 1, 2000 and June 4, 2004 (touching breast and buttocks), with Count 8 charging the related kidnapping offense. Count 9 charged GSI

between January 1, 2000 and June 4, 2004 (touching breast and buttocks), with Count 10 charging the related kidnapping offense.

{¶4} Regarding Victim 2, the indictment alleged she was the complainant in four incidents. Count 11 charged rape by force or threat of force between March 30, 1998 and December 31, 2001 (cunnilingus), with Count 12 charging the related kidnapping offense. Count 13 charged rape by force or threat of force between March 30, 1998 and December 31, 2001 (fellatio), with Count 14 charging the related kidnapping offense. Count 15 charged GSI between March 30, 1998 and December 31, 2001, with Count 16 charging the related kidnapping offense. Count 17 charged GSI between March 30, 1998 and December 31, 2001, with Count 18 charging the related kidnapping offense.

{¶5} All 18 counts included a sexually violent predator specification, and all nine kidnapping counts contained a sexual motivation specification. Czech elected to bifurcate the sexually violent predator specifications, trying them to the bench. The remaining counts were tried to the jury.

{¶6} Following the presentation of the state's case, the state amended the indictment to reflect the following: The time frame in Counts 5 and 6 was narrowed to state that the incident occurred between January 1, 2000 and March 1, 2003; the time frame in Counts 7 and 8 was narrowed to state that the incident occurred between January 1, 2000 and March 1, 2003. The state also deleted language in the indictment pertaining to Counts 7 and 8 that stated these incidents were the "first time sexual contact occurred" and added the language of "sexual contact in the basement." The time frame in Counts

9 and 10 was also changed to reflect that the incident occurred between January 1, 2000 and March 1, 2003, and the state deleted language on those counts in the indictment that provided "last time an act of sexual contact occurred," replacing it with "sexual contact in living room." Counts 11, 12, 13, 14 were amended to reflect a time frame between January 1, 2000 to December 31, 2001. Counts 15 and 16 were amended to read January 1, 2000 to December 31, 2001, and the state deleted language on those counts in the indictment that provided "first incident of sexual contact," replacing it with "sexual contact in basement." Counts 17 and 18 were amended to read January 1, 2000 to December 31, 2001, and the state deleted language on those counts in the indictment that provided "last incident of sexual contact," replacing it with "sexual contact in the living room."

{¶7} The court denied Czech's Crim.R. 29 motion for judgment of acquittal. That motion was renewed and again denied following the presentation of the defense case, which included Czech testifying.

{¶8} The jury found Czech not guilty of rape as charged in Counts 1 and 2, but guilty of all the remaining counts; the court found Czech to be a sexually oriented offender. At the state's request, the kidnapping counts were merged into the attendant sex offenses, with the state electing to sentence on the sex offenses. The court imposed concurrent two-year terms of imprisonment for the attempted rape convictions in Counts 3 and 5, which the court ran concurrent with the one-year concurrent terms imposed on the GSI convictions in Counts 7, 9, 15, and 17. Those terms were then run concurrent to

the concurrent life sentences the court imposed on the rape by force or threat of force convictions in Counts 11 and 13.

{¶9} Czech now appeals his convictions, raising five assignments of error.

I. Indictment Specificity

{¶10} In his first assignment of error, Czech contends that the indictment alleging nine instances of sexual misconduct involving two complainants over a six-year period that occurred more than ten years prior to the indictment, deprived him of his right to notice, due process, and a fair trial.

{¶11} Czech did not raise any objection to the form of the indictment prior to trial as required by Crim.R. 12(C); thus, waiving all but plain error. *State v. Yaacov*, 8th Dist. Cuyahoga No. 86674, 2006-Ohio-5321, ¶ 13-14. Plain error is found when defects at trial affect a substantial right. Crim.R. 52(B). To rise to the level of plain error, the alleged error must be an obvious defect that affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240.

{¶12} The sufficiency of an indictment is measured by two criteria under the Due Process Clause. First, the indictment must contain the elements of the offense charged to sufficiently apprise the defendant of conduct for which he is called to answer, and secondly, the indictment and record must provide adequate specificity to allow the defendant to plead acquittal or conviction as a defense against future indictment and punishment for the same offense. *State v. Schwarzman*, 8th Dist. Cuyahoga No. 100337, 2014-Ohio-2393, ¶ 7, citing *Russell v. United States*, 369 U.S. 749, 763-764, 82 S.Ct.

1038, 8 L.Ed.2d 240 (1962). Under Crim.R. 7(B), an indictment is sufficient if it "contains a statement that the defendant has committed a public offense" and the statement may be in the words of the applicable section of the statute, "provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged."

{¶13} In this case, Czech does not take issue with notice as to the offenses charged, but rather, he argues that the scope of the indictment — which alleged sexual abuse charges spanning over six-years — was so large and vague that it impaired his ability to present a defense.

{¶14} An indictment charging sexual offenses against children "need not state with specificity the dates of alleged abuse, so long as the prosecution establishes that the offense was committed within the time frame alleged." *Yaacov* at ¶ 17; *see also* R.C. 2941.03, *State v. Bogan*, 8th Dist. Cuyahoga No. 84468, 2005-Ohio-3412. Many child victims are unable to remember exact dates and times, particularly where the crimes involved a repeated course of conduct over an extended period of time. *State v. Mundy*, 99 Ohio App.3d 275, 296, 650 N.E.2d 502 (2d Dist.1994), citing *State v. Barnecut*, 44 Ohio App.3d 149, 152, 542 N.E.2d 353 (5th Dist1988). "The problem is compounded where the accused and the victim are related or reside in the same household, situations which often facilitate an extended period of abuse." *State v. Robinette*, 5th Dist. Morrow No. CA-652, 1987 Ohio App. LEXIS 5996 (Feb. 27, 1987), *8. Thus, "an allowance for

reasonableness and inexactitude must be made for such cases considering the circumstances." *Id*.; *Barnecut* at 152.

{¶15} However, where a defendant requests a bill of particulars, the state must supply specific dates and times for the alleged offense if it possesses the information. *State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E.2d 781 (1985). If the state is unable to supply more specific dates because it does not possess the information, the absence of specific dates may be fatal to the state's case if it "results in material detriment to the accused's ability to fairly defend himself, as where the accused asserts an alibi or claims that he was undisputedly elsewhere during part, but not all of the interval specified." *Id.* Czech maintains that the bill of particulars lacked the specific dates of the alleged offenses, thus impairing and foreclosing on his alibi defense.

{¶16} The purpose of a bill of particulars is "to elucidate or particularize the conduct of the accused alleged to constitute the charged offense." *Sellards* at 171. A bill of particulars is appropriately requested where the indictment, although legally sufficient, is so general in nature that the accused is not given a fair and reasonable opportunity to prepare a defense. *State v. Ensman*, 77 Ohio App.3d 701, 704, 603 N.E.2d 303 (8th Dist.1991), citing *State v. Gingell*, 7 Ohio App.3d 364, 365, 465, 455 N.E.2d 1066 (1982).

{¶17} In this case, the indictment originally alleged that the time frame when the alleged abuse occurred ranged from 1998 until 2004. However, the bill of particulars clarified that all the alleged abuse occurred on Anita Drive in Parma Heights. Clearly,

while the victims may not have been able to recall the exact dates, they remembered where the alleged abuse occurred. Considering that Czech and his wife purchased the Anita Drive home in 2000, Czech was on sufficient notice when the abuse was alleged to have occurred.

{¶18} Furthermore, the time frames as originally indicted narrowed during trial when the victims testified about specific instances of conduct. The narrowed time frames were consistent with the bill of particulars — reflecting the time frames when the victims lived with Czech on Anita Drive. Therefore, we find that the lack of specificity as to the time frame of the offenses in the indictment and bill of particulars was not fatal to the state's case.

{¶19} Additionally, the record does not indicate that the failure to provide Czech with specific dates was a material detriment to the preparation of his defense. While Czech claims on appeal that the broad and vague scope of the indictment denied him the ability present an alibi defense, Czech did not file a notice of his intention to rely on alibi. *See Sellards* at ¶ 172. Further, Czech did not claim that he was indisputably elsewhere during part of the time frames specified when some of these offenses allegedly occurred. Instead, Czech's defense strategy was twofold — first, that he never engaged in any sexual contact or conduct with the victims, and two, the victims fabricated the allegations in retaliation because he would not allow the victims, now adults, to continue living at his home. He maintained that he was rarely home alone with the victims because of his work schedule and his wife was always present.

{¶20} However, the testimony established that during the time frame specified in the indictment, Czech only worked second shift on weekdays, and an occasional Saturday. Additionally, Czech would be home while the victims were on summer break from school. Czech further acknowledged that his wife would occasionally run errands, leaving him home with the victims.

{¶21} This court has repeatedly affirmed convictions on multi-count indictments, finding there was no due process violation because the defendant denied any sexual contact whatsoever with the victims and, therefore, the lack of specificity in the indictments as to specific dates or places of the alleged abuse did not result in prejudice to the defendants' defense. *See Yaacov*, 8th Dist. Cuyahoga No. 86674, 2006-Ohio-5321; *State v. Ford*, 8th Dist. Cuyahoga No. 88236, 2007-Ohio-2645.

{¶22} Therefore, because the dates and times are not essential elements to the offense, and the failure to allege specific dates did not prejudice Czech's ability to defend himself based on his defense strategy, plain error has not been shown. His first assignment of error is overruled.

II. Other Acts Evidence — Evid.R. 404(B)

{¶23} In his second assignment of error, Czech contends that the trial court plainly erred and, thereby, violated his right to due process and a fair trial by allowing the prosecution to introduce improper other acts evidence where such evidence was irrelevant to issues before the jury and highly prejudicial.

{¶24} Czech claims that the victims were permitted to testify regarding a pattern of conduct that occurred outside the scope of the indictment. He also contends that the testimony reflecting abuse outside the period identified in the indictment reflects uncharged misconduct, and thus was improper and prejudicial other acts evidence.

{¶25} "'Evidence that an accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime or that he acted in conformity with bad character.'" *State v. Ceron*, 8th Dist. Cuyahoga No. 99388, 2013-Ohio-5241, ¶ 67, quoting *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 15, citing *State v. Curry*, 43 Ohio St.2d 66, 68, 330 N.E.2d 720 (1975).

{¶26} Evid.R. 404(B) provides that

> Evidence of other crimes, wrong, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

{¶27} Typically the admission of evidence is reviewed for an abuse of discretion. However, in this case, trial counsel did not object; therefore, we review this assignment of error under a plain error analysis.

{¶28} After reviewing the record, Czech's claim that other acts evidence was admitted that occurred outside the scope of the amended indictment lacks merit. Victim 1 testified that the abuse began shortly after they moved in with Czech in 2000 and ended

in 2004. The amended indictment alleged that the sexual contact and conduct occurred between January 2000 and June 2004.

{¶29} Victim 2 testified that the abuse began in 2000 "not long after they moved in," but when she was possibly age 9, and in the fourth grade through the fifth grade. The conduct occurred for about a year and one-half to two years. The amended indictment alleged that the sexual contact and conduct occurred between January 2000 and December 2001. Therefore, no testimony was presented regarding other alleged specific misconduct that occurred outside the scope of the amended indictment.

{¶30} We also find no merit to Czech's contention that improper pattern or course of conduct testimony was admitted. Regarding the applicability of Evid.R. 404(B) to course-of-conduct sexual abuse cases, extensive presentation of evidence of other acts for which a defendant was not indicted can become so pervasive as to deny that defendant a fair trial. *See, e.g., State v. Shaw*, 2d Dist. Montgomery No. 21880, 2008-Ohio-1317; *see also State v. Meador*, 12th Dist. Warren No. CA2008-03-042, 2009-Ohio-2195, ¶ 12. However, where the testimony is minimal and vague, no error will be found. *See, e.g., State v. Heft*, 3d Dist. Logan No. 8-09-08, 2009-Ohio-5908.

{¶31} In *Shaw*, the defendant was indicted for fifteen counts of rape and ten counts of sexual battery against three different victims. At trial, the state elicited testimony about several specific instances of abuse, in addition to "extensive" testimony from each victim that she was abused multiple times each week for several years. On appeal, the state argued that the testimony about the unindicted offenses was admissible under

Evid.R. 404(B) because it demonstrated why the victims tolerated the abuse. The Second District disagreed, finding that the state's reasoning at trial for the testimony was different than argued on appeal and failed to establish any of the exceptions under Evid.R. 404(B). The court reversed the defendant's convictions, finding that the "extensive" and "pervasive" testimony about other acts had denied the defendant a fair trial, especially because no limiting instruction regarding the evidence was given. *Shaw* at ¶ 14.

{¶32} In *Heft*, the defendant was indicted for rape, sexual battery, and gross sexual imposition. At trial, the victim testified that Heft abused her on "multiple occasions." She further testified that there were "many" instances of sexual abuse and then explained how the incidents would occur. The Third District recognized that Heft had been charged with multiple sex abuse offenses and that the victim's testimony about "multiple occasions" could have referenced the indicted offenses. *Id*. at ¶ 63. The court ultimately found that "these minimal, vague references" did not reach the extensive and pervasive nature of the testimony at issue in *Shaw* and thus found no abuse of discretion in allowing the testimony. *Id*.

{¶33} In this case, the testimony at issue is more akin to that in *Heft*. Victim 2 made a general isolated statement regarding when the acts of sexual abuse occurred — "at most once a week, every couple of weeks." (Tr. 368.) Victim 1 also made vague statements that she could not recall when the first incident was "because he was routine with it. His actions were pretty much the same every time." (Tr. 444.) She further

stated that the frequency of the sexual abuse was "at least once a week." (Tr. 450.) Much like *Heft*, these isolated references were not extensive. Furthermore, the victims' testimony about the occurrence of the abuse was not necessarily concerning other acts because Czech was indicted and tried for multiple sex abuse offenses for each victim.

{¶34} Accordingly, we do not find that the trial court committed plain error in allowing this limited testimony. Czech's second assignment of error is overruled.

III. Sufficiency of the Evidence

{¶35} In his third assignment of error, Czech contends that his right to due process and a fair trial were violated where the life sentences imposed for rape in Counts 11 and 13 are not supported by sufficient evidence of force as required under R.C. 2907.02(A)(2).[1]

{¶36} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Additionally, when

[1]Czech was charged in Counts 11 and 13 with rape in violation of R.C. 2907.02(A)(1)(b).

reviewing the sufficiency of the evidence, an appellate court is to consider all of the evidence admitted at trial, even if the evidence was improperly admitted. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 19.

{¶37} Czech was charged with rape in violation of R.C. 2907.02(A)(1)(b), which provides in relevant part that "[n]o person shall engage in sexual conduct with another who is not the spouse of the offender * * * when * * * [t]he other person is less than thirteen years of age." Under R.C. 2907.01(A), "sexual conduct" includes both oral and vaginal sex.

{¶38} The indictment alleged that Czech engaged in oral sex with Victim 2 — Count 11 alleged cunnilingus and Count 13 alleged fellatio. Both counts contained a furthermore clause that Czech purposely compelled the victim to submit by force or threat of force. Czech contends on appeal that the evidence was insufficient to prove the additional element of force.

{¶39} R.C. 2901.01(A)(1) defines "force" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." To establish the element of force in a rape case involving a minor child when the offender stands in a position of authority, neither express threat of harm nor evidence of significant physical restraint need be proven. *State v. Dye*, 82 Ohio St.3d 323, 695 N.E.2d 763 (1998), syllabus. Instead, it is the position of authority and power, in relationship with the child's vulnerability, that creates a unique situation of dominance and control in which explicit threats and displays of force are unnecessary. *State v. Eskridge*, 38 Ohio

St.3d 56, 526 N.E.2d 304 (1988), syllabus one (the force and violence necessary to commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other. With the filial obligation of obedience to a parent, the same degree of force and violence may not be required upon a person of tender years as would be required where the parties are more nearly equal in age, size, and strength).

{¶40} In this case, Victim 2 testified that while she was helping Czech do the laundry, he placed her on top of the washing machine and performed oral sex on her. Victim 2 further testified that one time when she was watching a pornographic video with Czech, the video depicted the act of fellatio. Czech asked her if she would do that to him. At Czech's request, they went into his bedroom where she performed oral sex on him, which lasted a couple of minutes.

{¶41} During her testimony, Victim 2 explained that she never told or asked Czech to stop because "[I] think I was just too afraid of the consequences to really be too aggressive about saying no or getting out of the situation." She further described Czech's demeanor as "[I]t was very just suggestive and gentle almost loving, if you want to put it that way. * * * He never really forced me, like he held me down or made me do anything, it was just like a heavy suggestion, maybe made me feel like I should do it." She stated the suggestions were mostly verbal "asking [her] if I could do this or kind of coaxing me." (Tr. 361.)

{¶42} When she was asked whether she could refuse Czech's advances, Victim 2 responded: "Can I say yes and no? * * * I could, but I shouldn't or shouldn't want to. * *

* Well, like I should want my grandpa to be happy or feel happy or that I could say no, but would feel guilty saying no. I don't know how else to really describe that feeling. * * * Because it's my grandpa and I loved him." (Tr. 370.)

{¶43} "When rape involves a child and that child's parent, or person who stands in loco parentis, subtle and psychological forms of coercion sufficiently show force. So long as the prosecution establishes that the victim's will was overcome by fear or duress, the forcible element of rape can be established." *State v. Whitt*, 5th Dist. Coshocton No. 10-CA-10, 2011-Ohio-3022, ¶ 49, citing *Eskridge* at 58-59.

{¶44} In this case, sufficient evidence was presented to establish the force element to support Czech's rape convictions. Regarding Count 11, force was established by Czech's physical act of placing the victim on top of the washing machine for the sole purpose of performing oral sex on her. Notwithstanding this physical use of force, Victim 2 repeatedly testified that she felt coerced into acquiescing to her grandfather's advances and suggestions. As her grandfather, Czech was the predominant male and father-figure in her life, the head of household, and rule-maker, thus creating a certain sense of control over the victim.

{¶45} Accordingly, viewing the evidence in the light most favorable to the state, sufficient evidence was presented establishing the forcible element of rape in both Counts 11 and 13. Czech's third assignment of error is overruled.

IV. Effective Assistance of Trial Counsel

{¶46} In his fourth assignment of error, Czech contends trial counsel's lapses compromised the effectiveness of the legal assistance he provided and contravened the Sixth and Fourteenth Amendments of the United States Constitution as well as Article I, Section 10 of the Ohio Constitution. Specifically, he contends that his counsel was ineffective for (1) failing to seek dismissal of the indictment because it lacked specificity and foreclosed Czech's alibi defense, and (2) failing to seek notice of and object to Evid.R. 404(B) evidence.

{¶47} The two-pronged test for ineffective assistance of counsel requires that the defendant show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶48} The basis for Czech's effective assistance of counsel claims were previously addressed in assignments of error one and two. Finding no deficiency in the indictment or that improper Evid.R. 404(B) evidence was admitted, we likewise find no error in counsel's failure to seek dismissal of the indictment or in objecting to the victims' testimony.

{¶49} Accordingly, Czech's fourth assignment of error is overruled.

V. Sentence

{¶50} In his fifth assignment of error, Czech contends that the judgment entry of conviction does not accurately reflect the sentence the court imposed in open court. The state did not address this issue in its appellate brief.

{¶51} At sentencing, the state affirmed that the kidnapping counts (Counts 4, 6, 8, 10, 12, 14, 16, and 18) merged into the attendant sex offenses. The court imposed concurrent two-year prison terms on the attempted rape convictions (Counts 3 and 5), which the court ran concurrent with the one-year concurrent terms imposed on the GSI convictions (Counts 7, 9, 15, and 17). These prison terms were then run concurrent with the life sentences the court imposed on the rape convictions (Counts 11 and 13).

{¶52} However, the court's judgment entry of conviction does not accurately reflect this sentence — the court's entry imposed life sentences on the attempted rape convictions and two-year concurrent terms on the kidnapping counts. This is a clerical error, which does not invalidate Czech's sentence because it can be corrected nunc pro tunc.

{¶53} Accordingly, Czech's assignment of error is sustained.

{¶54} Judgment affirmed; case remanded to the trial court to correct nunc pro tunc the judgment entry of conviction to accurately reflect the sentence imposed in open court.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
MARY J. BOYLE, J., CONCUR