**[Cite as *State v. Potter*, 2005-Ohio-6458.]**

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| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF MEDINA | ) | |

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| STATE OF OHIO<br><br>Appellee<br><br>v.<br><br>DANIEL POTTER<br><br>Appellant | C. A. No. 05CA0029-M<br><br><br><br>APPEAL FROM JUDGMENT<br>ENTERED IN THE<br>COURT OF COMMON PLEAS<br>COUNTY OF MEDINA, OHIO<br>CASE No. 04-CR-0477 |

DECISION AND JOURNAL ENTRY

Dated: December 7, 2005

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

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MOORE, Judge.

**{¶1}** Appellant, Daniel Potter, appeals from his conviction in the Medina County Court of Common Pleas. This Court affirms.

I.

**{¶2}** As a result of the events that occurred on May 15, 2004, Appellant was indicted on one count of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A), a felony of the fourth degree. Appellant pled not guilty to the charge against him and the matter proceeded to a jury trial beginning on January 19, 2005.

**{¶3}** On May 15, 2004, L.F. (the victim), Appellant, and two others drove to the residence of Appellant's cousin. While there, Appellant and L.F. drank alcohol and smoked marijuana. Later in the evening, Appellant and L.F. twice had consensual sex. Months later, L.F. disclosed the events of that evening to her father.

**{¶4}** L.F.'s father then pursued the matter with the Medina City police. L.F.'s father sought charges against Appellant because his daughter was fourteen on May 15, 2004 and Appellant was nineteen. Following the complaint by L.F.'s father, Medina City police detective Michael Wesner began an investigation. Detective Wesner contacted and interviewed Appellant at the end of August, approximately three and one-half months after the incident. During the interview, Appellant admitted to having consensual sex with L.F. and stated that he believed that L.F. was fourteen at the time of the offense.

**{¶5}** In support of its case, the State relied upon the testimony of L.F. and Detective Wesner. At the conclusion of the State's case, Appellant moved for acquittal which was denied by the trial court. Appellant then rested. Appellant renewed his motion for acquittal which was also denied. Following that denial, Appellant requested that the jury be instructed on the lesser included misdemeanor offense of sexual conduct with a minor. The trial court denied Appellant's request and the matter was sent to the jury. The jury found Appellant guilty of unlawful sexual conduct with a minor and the trial court sentenced Appellant to eight

months incarceration. Appellant timely appealed his conviction, raising three assignments of error for review.

II.

**ASSIGNMENT OF ERROR I**

> "THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT, AND APPELLANT'S FELONY CONVICTION FOR UNLAWFUL SEXUAL CONDUCT WITH A MINOR WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

**{¶6}** In his first assignment of error, Appellant asserts that his conviction is not supported by sufficient evidence and that his conviction is against the manifest weight of the evidence. We disagree.

**{¶7}** "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). Further,

> "[b]ecause sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462, at *2.

Therefore, we will address Appellant's assertion that his conviction was against the manifest weight of the evidence first as it is dispositive of Appellant's claim of insufficiency.

**{¶8}** When a defendant asserts that his 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 and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. Id.

**{¶9}** Appellant was convicted of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A) which provides as follows:

> "No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard."

In addition, R.C. 2901.22(C) defines recklessly as follows:

> "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

In support of his claims, Appellant argues that the State failed to prove that the crime occurred in Medina County and that he was reckless with regard to the age of the victim. This Court disagrees.

**{¶10}** We begin by noting that Appellant has not challenged that sexual conduct occurred. In addition, Appellant has not challenged that he was above the age of eighteen at the time of the sexual conduct and that the State proved that L.F. was fourteen at the time of the offense.

**Venue**

**{¶11}** We proceed, therefore, to examine Appellant's assertion that the State failed to prove venue during his prosecution.

> "Although it is not a material element of the offense charged, venue is a fact which must be proved in criminal prosecutions unless it is waived by the defendant. The standard of proof is beyond a reasonable doubt, although venue need not be proved in express terms so long as it is established by all the facts and circumstances in the case." (Citations omitted.) *State v. Headley* (1983), 6 Ohio St.3d 475, 477.

In the instant matter, numerous witnesses testified that the sexual conduct between Appellant and L.F. occurred in the City of Medina, in the State of Ohio. We find that such testimony established that the crime occurred in the County of Medina.

**{¶12}** Appellant, however, urges that this Court's decision in *State v. Myers*, 9th Dist. No. 21874, 2004-Ohio-4195, requires reversal. We are not persuaded by Appellant's argument.

**{¶13}** In *Myers*, the State attempted to establish venue with reference to a single street name. ("In fact, there was no evidence presented by the State as to where the assault took place in terms of city, county or state.") Id. at ¶7. We find *Myers* distinguishable from the instant matter as the State elicited evidence of both

the city and state where the alleged crimes occurred. See *State v. Simmons,* 9th Dist. No. 22221, 2005-Ohio-1469, at ¶18. Appellant's challenge to venue, therefore, lacks merit.

**Victim's Age**

**{¶14}** Appellant next challenges the evidence produced by the State which was utilized to demonstrate that Appellant was reckless with regard to L.F.'s age. A review of the record, however, does not support Appellant's assertions.

**{¶15}** L.F. testified that when she first met Appellant he stated that he thought she was sixteen or seventeen. L.F. went on to state that she informed Appellant that she was only fourteen at that time. We note, however, that the record reflects that L.F. was only thirteen at the time this discussion occurred. In addition, L.F. testified that her mother told her to go to bed because she was only fourteen and that Appellant was present during that conversation.

**{¶16}** In response to the State's case, Appellant attacked L.F.'s credibility, demonstrating that L.F. had lied to her parents about where she going on the night of the sexual conduct. L.F., however, was not the only witness who testified regarding Appellant's knowledge of her age. Detective Michael Wesner testified as follows:

> "I asked [Appellant], I said, 'Did you know how old she was?' And he said, 'I think fourteen.'"

Appellant, however, urges that Detective Wesner's response was taken out of context and that his response was given after he had learned that L.F. was only fourteen. In response, the following colloquy took place:

> "Q. Did he ever give you any other indication *** that [Appellant] at the time thought [L.F.] was some other age than fourteen. Did he ever give you that indication on that day at all?
>
> "A. No, sir.
>
> "Q. Or at anytime?
>
> "A. No, sir."

**{¶17}** Accordingly, we cannot say that the jury lost its way in finding that Appellant was reckless in regard to L.F.'s age. Substantial circumstantial evidence and Appellant's own admissions provide the basis from which the jury could conclude that Appellant was aware that L.F. was fourteen or reckless in ascertaining her age. Appellant's manifest weight challenge, therefore, lacks merit. Having disposed of Appellant's challenge to the weight of the evidence, we similarly dispose of his sufficiency challenge. See *Roberts*, supra, at *5. Appellant's first assignment of error is overruled.

## ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY ADMITTING HEARSAY TESTIMONY BY THE MINOR CONCERNING AN ALLEGED OUT-OF-COURT STATEMENT SUPPOSEDLY MADE BY HER MOTHER IN APPELLANT'S PRESENCE TO DEMONSTRATE THE TRUTH OF THE MATTER ASSERTED."

**{¶18}** In his second assignment of error, Appellant contends that the trial court erred when it admitted hearsay evidence against him. We disagree.

**{¶19}** A trial court possesses broad discretion with respect to the admission of evidence. *State v. Maurer* (1984), 15 Ohio St.3d 239, 265, certiorari denied (1985), 472 U.S. 1012. An appellate court will not disturb evidentiary rulings absent an abuse of discretion. *State v. Roberts*, 156 Ohio App.3d 352, 2004-Ohio-962, at ¶14. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

**{¶20}** In the instant matter, L.F. testified that her mother ordered her to go to bed in Appellant's presence. Specifically, L.F. testified that her mother stated that she should go to bed because she "was only fourteen." Appellant claims that the trial court improperly admitted the above statement because it is hearsay. We disagree.

**{¶21}** Evid. R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The record reflects that the State did not offer the statement made by L.F.'s mother as proof that L.F. was fourteen. Rather, the State established L.F.'s age directly through her testimony regarding her date

of birth. The statement was properly admitted by the trial court to establish the fact that Appellant had knowledge of the victim's age. Accordingly, we cannot say that the trial court abused its discretion by permitting L.F.'s testimony regarding her mother's statement. Appellant's second assignment of error is overruled.

**ASSIGNMENT OF ERROR III**

> "THE TRIAL COURT ERRED BY REFUSING TO GIVE [APPELLANT'S] REQUESTED JURY INSTRUCTION ON THE LESSER-INCLUDED OR INFERIOR-DEGREE OFFENSE OF MISDEMEANOR UNLAWFUL SEXUAL CONDUCT WITH A MINOR."

**{¶22}** In his final assignment of error, Appellant argues that the trial court erred when it refused to instruct the jury on the misdemeanor offense of unlawful sexual conduct. We disagree.

**{¶23}** While a crime may constitute a lesser included offense, it does not follow that a lesser included offense instruction is mandatory; "[a]n instruction on a lesser-included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense." *State v. Carter* (2000), 89 Ohio St.3d 593, 600. In the instant matter, Appellant urges that a jury instruction on the misdemeanor offense was appropriate based upon the language of R.C. 2907.04(B)(2) which provides:

> "Except as otherwise provided in division (B)(4) of this section, if the offender is less than four years older than the other person,

> unlawful sexual conduct with a minor is a misdemeanor of the first degree."

In support of his assertion, Appellant argues that "what really mattered for purposes of giving the requested lesser-included, or inferior-degree, jury instruction was what [Appellant] believed at the time on May 15, 2004." We disagree.

**{¶24}** In order for Appellant's assertion to have merit, this Court would be required to graft a culpable mental state onto R.C. 2907.04(B)(2). We are not inclined to take such an action. To be convicted of unlawful sexual conduct with a minor of any degree, felony or misdemeanor, the State was required to prove that Appellant was reckless. Following his conviction, the degree of Appellant's crime was ascertained through factual determinations, without reference to a mental state.

**{¶25}** Based upon the facts presented, Appellant could not have been acquitted of the felony unlawful sexual conduct with a minor and found guilty of the misdemeanor offense of the same. The facts presented clearly establish that Appellant was more than four years older than L.F. Whether Appellant knew or was reckless with regard to the age difference between L.F. and himself is irrelevant to any analysis under R.C. 2907.04(B)(2). The legislature has determined that no culpable mental state is required under R.C. 2907.04(B) and we will not alter that determination. See R.C. 2901.21(B). See also, *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, at ¶26 (holding that "where the

General Assembly indicates a mental state in one part of a statute, and does not indicate any mental state in another part of that statute, that indicates an intent to impose strict liability in that other part"). Accordingly, Appellant's third assignment of error is overruled.

III.

**{¶26}** Appellant's assignments of error are overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

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The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

CARLA MOORE
FOR THE COURT

SLABY, P. J.
BAIRD, J.
CONCUR

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to, §6(C), Article IV, Constitution.)

APPEARANCES:

JOSEPH F. SALZGEBER, Attorney at Law, P. O. Box 1589, Medina, Ohio 44258-1589, for Appellant.

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