[Cite as *State v. Gresham*, 2009-Ohio-3305.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22766
v.	:	T.C. NO. 2007 CR 4041
JONATHAN S. GRESHAM	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 2nd day of July, 2009.

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DONOVAN, P.J.

{¶ 1} Defendant-appellant Jonathon Gresham appeals his conviction and sentence for two counts of unlawful sexual conduct with a minor, in violation of R.C. § 2907.04(A)(4), both felonies of the fourth degree.

{¶ 2} On October 5, 2007, Gresham was indicted for two counts of unlawful sexual conduct with a minor. At his arraignment on October 11, 2007, Gresham stood mute, and the trial court entered a plea of not guilty on his behalf.

{¶ 3} Gresham filed motion to suppress on October 25, 2007. On December 6, 2007, a hearing was held on said motion before the trial court. In a written decision filed on the same day, the trial court overruled Gresham's motion to suppress.

{¶ 4} The first jury trial was held on January 29 and January 30, 2008. The trial, however, ended prematurely when the judge ordered a mistrial because of improper hearsay testimony offered by Gresham, who testified on his own behalf. The objectionable testimony concerned the past practice of the minor victim, E.T., allegedly trading sex for drugs.

{¶ 5} On March 5, 2008, Gresham filed a motion to dismiss the indictment. Gresham argued that if the State were permitted to retry him on the same charges following the mistrial, he would impermissibly be subjected to double jeopardy. The trial court issued a decision overruling Gresham's motion on March 19, 2008.

{¶ 6} A second jury was empaneled, and Gresham was retried on March 25, 2008. Gresham was subsequently found guilty of both counts of unlawful sexual conduct with a minor. On May 20, 2008, the trial court sentenced Gresham to five years of community control. Gresham filed a timely notice of appeal with this Court on May 22, 2008.

I

{¶ 7} The incident which forms the basis for this appeal occurred on September 20, 2007, when Gresham was employed as a security guard for Moonlight Security Company. Although he had been employed by Moonlight Security since June of 2007, Gresham had only

recently been assigned to provide security at the River Commons Complex, located in Dayton, Ohio, a DMHA apartment complex, since early September.

{¶ 8} The minor victim, E.T., was staying at the apartment complex sporadically, visiting her aunt who was suffering from an undisclosed mental illness. A few days prior to the incident, Gresham had observed E.T. smoking a cigarette along the side of a building at the complex. It was then that Gresham became aware that E.T. was only 14 years old as he confronted her and told her that she should not be smoking.

{¶ 9} On the date of the incident, Gresham went to the apartment where E.T. was staying and asked for her phone number in order to play a joke on one of his fellow security guards. E.T. gave Gresham her phone number. At approximately 5 p.m., Gresham and E.T. began texting each other. The evidence adduced at trial establishes that Gresham and E.T. exchanged approximately 20-30 text messages.

{¶ 10} At around 10 p.m. that night, Gresham sent E.T. a message in which he told her that he would meet her outside her apartment door near the stairwell. Once he was at that location, Gresham sent E.T. a message asking her to come outside. E.T. did as she was asked, and the two met near the stairway. Gresham testified that after they spoke for a short time, he and E.T. began kissing. Gresham then asked E.T. to sit on his lap. After she did so, Gresham asked her to perform oral sex on him. After repeated requests, E.T. acquiesced and performed oral sex on Gresham as he stood on the stairs. E.T. testified that after approximately five minutes, Gresham asked her if she would have sexual intercourse with him. E.T. declined, and Gresham asked her if she would be willing to engage in further oral sex acts with him. E.T. and Gresham then walked up to the top of the stairs and the pair engaged in the previously

mentioned sexual acts for approximately 5-10 minutes. After they finished, Gresham told E.T. to wait a few minutes before she left so no one would think that they were together. Gresham left, and E.T. waited a short period of time before she returned to her aunt's apartment.

{¶ 11} Feeling pressured and unsure of herself, E.T. informed her aunt of what had occurred with Gresham the next morning. E.T.'s aunt immediately called Moonlight Security and spoke with Gresham's supervisor, Sergeant Alan Burlingame. Sgt. Burlingame directed Gresham to prepare his statement concerning his version of the alleged incident. The matter was eventually brought to the attention of Detective William Swisher of the Dayton Police Department. After he interviewed both E.T. and Gresham, Det. Swisher arrested Gresham, and he was charged with two counts of unlawful sexual conduct with a minor.

{¶ 12} After the first trial ended in a mistrial, Gresham was tried a second time. After the second jury trial, Gresham was convicted of both counts in the indictment and sentenced accordingly. It is from this judgment that Gresham now appeals.

II

{¶ 13} Gresham's first and only assignment of error is as follows:

{¶ 14} "THE TRIAL COURT ERRED IN GRANTING A MISTRIAL AND THE SUBSEQUENT TRIAL OF APPELLANT VIOLATED HIS CONSTITUTIONAL RIGHTS."

{¶ 15} In his sole assignment of error, Gresham contends that the trial court erred when it ordered a mistrial in the first trial in this case. Specifically, Gresham argues that the trial court violated his right to be free from being tried twice under the Double Jeopardy Clause.

{¶ 16} The Fifth Amendment's Double Jeopardy Clause protects a criminal defendant from repeated prosecutions for the same offense. *Oregon v. Kennedy* (1982), 456 U.S. 667, 671,

102 S.Ct. 2083, 2087, 72 L.Ed.2d 416. The reasons behind the prohibition againt double jeopardy are that "the State with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty." *Green v. United States* (1957), 355 U.S. 184, 187-188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199, 204.

{¶ 17} This right, however, is not absolute. A narrow exception applies to the Double Jeopardy Clause when the defendant's request or the judge's actions are prompted or instigated by prosecutorial misconduct designed to goad the defendant into seeking a mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 676; *State v. Glover* (1988), 35 Ohio St.3d 18. In the instant case, there is no indication from the record, and Gresham does not assert, that the prosecutor engaged in any misconduct which led to the trial court's grant of a mistrial. Our analysis in this regard, therefore, ends here.

{¶ 18} While no prosecutorial misconduct was present, double jeopardy also bars retrial when the trial court abuses its discretion in granting a mistrial. *State v. Glover*, 35 Ohio St.3d 18. An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio St. Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶ 19} In determining whether the trial court properly exercised its discretion, reviewing

courts look to whether (1) "there [was] a 'manifest necessity' or a 'high degree' of necessity for ordering a mistrial, or (2) 'the ends of public justice would otherwise be defeated.'" *State v. Widner* (1981), 68 Ohio St.2d 188, 189-190, citing *Arizona v. Washington* (1978), 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717. A "manifest necessity" for a mistrial does not mean that a mistrial was absolutely necessary or that there was no other alternative. *Arizona v. Washington*, 434 U.S. 511. In order to exercise "sound discretion" in determining that a mistrial is necessary, the trial judge should allow the defense and prosecution to state their positions on the issue, consider their competing interests, and explore some reasonable alternatives before declaring a mistrial. *Id*. at 514-516.

{¶ 20} The following exchange which occurred during the direct testimony of Gresham illustrates the basis for trial court's reasoning for granting the mistrial in the first instance:

{¶ 21} "Defense Counsel: All right. With regard to [E.T.], where [sic] there complaints which were required – were there complaints which were further investigated?

{¶ 22} "Gresham: Yes, sir.

{¶ 23} "Q: Okay. What type of complaints were there about [E.T.]?

{¶ 24} "The State: Your Honor –

{¶ 25} "Q: – which you participated in the investigation of?

{¶ 26} "The State: I withdraw, never mind.

{¶ 27} "A: A resident that I don't recall who the resident was, informed me that she was sexually active in the building and that she was a drug addict and that she was trading sex for drugs.

{¶ 28} "The State: You Honor, I'm going to object to all this as hearsay and ask that it

be stricken from the record.

{¶ 29} "The Court: Can we have a sidebar, please?

{¶ 30} ***

{¶ 31} "Defense Counsel: I think the objection could have been because he was nonresponsive to my question, because my question was what type of complaints he said he had investigated.

{¶ 32} "The State: I believe a lot of information just went before the jury that is completely inappropriate for a number of reasons. Hearsay just being one of them.

{¶ 33} "The Court: Yes. My concern is what you just put onto the record is the very sword of testimony regarding a victim in this type of case that the case law and the rules of evidence say is not supposed to be allowed.

{¶ 34} "Defense Counsel: And I understand what you're both saying. The difference is just sort of like asking the detective what he's assigned to investigate. I'm trying to ask him what he's assigned to investigate. He did not respond to my question and I would suggest that I'll re-ask it in that light (indiscernible).

{¶ 35} "The Court: That doesn't cure the concern I have right now. The concern that I have right now is that there's been testimony put on the record that she was sexually active within the building and my understanding of the case law and the rules of evidence is that it's entirely clear that the past sexual conduct of the victim in a case such as this is not admissible and should not be brought to the attention of the jury. And so my concern is how to fix that problem that's just occurred.

{¶ 36} "Defense Counsel: Judge, the case – I think the law you're talking about is

statutory case law, is that specific instances of past conduct. I [sic] not asking that, I'm asking what he is investigating. I'm not going to put on any evidence of past sexual conduct.

{¶ 37} "The State: It's out there already.

{¶ 38} "Defense Counsel: We're not going to put any evidence of specific instances of such conduct. We're just talking about what he has investigated.

{¶ 39} "The Court: I don't think in my view, that that is a distinction that addresses the problem. Saying that he is purely out of concern because he's investigating a complaint. We don't know where the complaint came from, so it's a complaint based on hearsay. And in describing that complaint he is putting onto the record the victim's sexual – comments about the victim's past sexual behavior and that is what is of concern to me. And so the issue I have right now is how do we fix this?

{¶ 40} ***

{¶ 41} "The State: Your Honor, the State would submit that perhaps counsel could have gotten out that there had been complaints against this particular person without – and prepared this witness not to testify to absolutely inadmissible statements as he did. My problem isn't just the hearsay part of it. My problem is the bell is rung and there's now accusation [sic] right now flying out there that are completely unfounded, completely uninvestigated, completely inappropriate and inadmissible in this case –

{¶ 42} "Defense Counsel: (Indiscernible).

{¶ 43} "The State: – sex assaults victim's past sexual behavior.

{¶ 44} ***

{¶ 45} "The State: State would move for a mistrial.

{¶ 46} ***

{¶ 47} (Court in recess, no jury present)

{¶ 48} "The Court: Are we on the record? Okay. The court is concerned about the testimony that was given by the defendant in the presence of the jury. The question that was posed was were there complaints about [E.T.]? And the response by the defendant was a resident had informed him that she was sexually active in the building and a drug addict. That testimony is squarely prohibited by Ohio law. In a sexual conduct with a minor case I believe that the statue is extremely clear. That there can be no evidence presented to the jury about the victim's past sexual conduct of any sort.

{¶ 49} "The only circumstance that I'm aware of where evidence of a victim's past sexual conduct could come in would be an enforceable [sic] rape case where there was an issue of consent. This of course if [sic] not that type of case. Therefore, because of that violation of the Ohio statute and a concern that the victim's sexual conduct has been placed in front of the jury and that there is no good cure for that statement being made, the court I feel has no option but to declare a mistrial.

{¶ 50} "I am very concerned that Mr. Gresham's comment was intentional. I have great regard for [defense counsel] and his experience and I would believe that [defense counsel] would have cautioned his client to not make comments about the victim's sexual past. So I am therefore very concerned about how this has occurred. However, I feel as though there is simply no good way for us to cure the problem that has been caused. I'm going to declare a mistrial and we're going to have a new date for this trial to take place.

{¶ 51} ***

{¶ 52} "The Court: *** And my point is that this case will get a new date, we'll start from scratch and at that new effort we will be more vigilant I hope in making sure that we don't run into instances where the victim's past sexual activity or reputed sexual activity or hearsay statements about the victim's past sexual activity come in front of the hearing of the jury."

{¶ 53} In *State v. Smiddy*, Clark App. No. 06CA0028, 2007-Ohio-1342, the defendant sought to introduce evidence of the victim's previous sexual activity with persons other than the defendant in a prosecution under R.C. § 2907.04(A). We specifically found in *Smiddy* that the General Assembly did not intend for the rape shield language in R.C. § 2907.02(D) to apply to prosecutions for unlawful sexual conduct with a minor, in violation of R.C. § 2907.04(A)(4). Thus, we held that the trial court erred when it applied R.C § 2907.02(D) to bar the defendant's evidence of the victim's previous sexual activity with persons other than the defendant. *Id*.

{¶ 54} We went on to conclude, however, that while the evidence of the victim's past sexual history had "some slight relevance and probative value for that limited value," we noted that in "a prosecution under R.C. 2907.04(A), the key issue is whether defendant engaged in sexual conduct with the minor victim." *Id*. We further found that it was "irrelevant whether the victim was a virgin, whether she seduced defendant, or whether she previously engaged in sexual conduct with other men." *Id*. Ultimately, we held that the trial court did not abuse its discretion when it refused to admit evidence of the minor victim's past sexual history since the "minimal relevance and probative value of that evidence to impeach the victim's credibility *** was substantially outweighed by the inflammatory character of that evidence and the danger of unfair prejudice" pursuant to Evidence Rule 403(A). *Id*.

{¶ 55} In the instant appeal, both parties agree that the rape shield law does not apply to

a charge of unlawful sexual conduct with a minor. Gresham's testimony, however, that he was told by an unnamed resident that E.T. was sexually active and trading sex for drugs was clearly hearsay prohibited by Evid. R. 802, as well as inadmissible character evidence under Evid. R. 404(A)(2).

{¶ 56} The hearsay and character evidence regarding E.T.'s alleged past sexual history and drug abuse was of such an inflammatory and prejudicial nature that the trial court correctly granted a mistrial. The record establishes that Gresham's trial counsel requested that the court give a curative instruction to the jury and strike the testimony from the record. The trial court, however, found that the taint from the objectionable testimony was so great that a curative instruction would not suffice. Under the circumstances presented in the instant case, we agree. Thus, we find that the trial court did not abuse its discretion when it granted the mistrial requested by the State, and Gresham's right to be free from double jeopardy was not violated.

{¶ 57} Lastly, Gresham points out that the judge in the second trial admitted the objectionable testimony that the judge in the first trial found to be grounds for a mistrial. Gresham argues that the decision of the judge in the second trial to admit Gresham's testimony clearly demonstrates that the judge in the first trial abused her discretion in granting the mistrial. While we acknowledge that the judges in the first and second trial rendered different rulings regarding the admission of the testimony, that fact, standing alone, is irrelevant to our review of the first judge's decision to grant a mistrial in light of the highly inflammatory and prejudicial hearsay testimony offered by Gresham.

{¶ 58} Gresham's sole assignment of error is overruled.

III

{¶ 59} Gresham's sole assignment of error having been overruled, the judgment of the trial court is affirmed.

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FAIN, J. and GRADY, J., concur.

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