

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
SENECA COUNTY**

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NUMBER 13-2000-02

v.

DANNIE L. HARROLD

OPINION

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: October 31, 2000

ATTORNEYS:

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For Appellee.

SHAW, J. Following a jury trial, Dannie L. Harrold appeals the judgment of the Seneca County Court of Common Pleas convicting him of one count of Gross Sexual Imposition.

Defendant was indicted on July 28, 1999 on four felony charges: count one alleged Rape in violation of R.C. 2907.02(A)(1)(b) and included a force specification, and counts two through four alleged three charges of Gross Sexual Imposition in violation of R.C. 2907.05(A)(4). In the indictment, the State alleged that the defendant had sexual contact on multiple occasions with a nine year-old friend of his daughters. At trial, the victim testified that she had stayed overnight at defendant's house several times during the summer of 1997, and described in particular one occasion when she was watching television with the defendant after his daughters had gone to sleep. The victim testified that the defendant called her over to sit on his lap, and that when she did so he reached his hand into her underpants and fondled her genitals for at least five minutes. She also testified that on another occasion that the defendant had carried her into his bedroom, pulled up her outfit, laid on top of her and "stuck his pee-pee in my * * * ."

Following the submission of the State's case, the trial court dismissed the third count of the indictment pursuant to Crim.R. 29(A), and the jury subsequently acquitted the defendant of counts one and four. However, the jury did convict the defendant of Gross Sexual Imposition as specified in count two of the indictment.

As a continuing course of conduct between the months of January, 1997 through February, 1998, in Seneca County, Ohio, DANNIE L. HARROLD did have sexual contact with Jane Doe, to-wit: touching Jane Doe's genitals, the said Jane Doe not his spouse, and the said Jane Doe being less than 13 years of age, whether or not the said Dannie L. Harrold knew the age of Jane Doe.

This being in violation of R.C. 2907.05(A)(4) and against the peace and dignity of the State of Ohio.

On December 10, 1999, the trial court sentenced the defendant to a term of three years incarceration. Defendant now appeals, and asserts six assignments of error with the trial court's judgment.

The indictment filed against the appellant is insufficient as a matter of law as it fails to state a material element of the crime charged[,] and therefore must be declared void and the appellant discharged.

The appellant was denied his Sixth Amendment right to effective assistance of counsel[,] where defense counsel did not object to the omission of an essential element of the offense of Gross Sexual Imposition in the indictment to the prejudice of the appellant.

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¹ Defendant's third assignment of error is worded identically to his second assignment of error. However, the arguments advanced each assigned error differ. The argument supporting defendant's second assignment of error is that he received ineffective assistance of counsel by counsel's failure to object to the indictment, and the argument supporting his third assignment of error is that the allegedly defective indictment rises to the level of plain error. Compare Brief of Appellant at **5-7 with *id.* at **7-8.

We will address defendant's first three assignments of error together, as all three allege that the indictment in this case was defective.

Felony defendants are guaranteed the right to an indictment setting forth the "nature and cause of the accusation" under Section 10, Article I of the Ohio Constitution. The Ohio Supreme Court has noted that "[t]he purpose of an indictment is twofold." *State v. Sellards* (1985), 17 Ohio St.3d 169, 170. First, the indictment affords the accused with adequate notice and an opportunity to defend against the allegations contained in the indictment. *Id.* Second, by identifying and defining the offense, the indictment enables an accused to defend against any future prosecutions for the same offense. *Id.* R.C. 2941.05 provides:

In an indictment or information charging an offense, each count shall contain, and is sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the section of the Revised Code describing the offense or declaring the matter charged to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is charged.

Cf. Crim.R. 7(B). "Generally, the requirements of an indictment may be met by reciting the language of the criminal statute." *State v. Childs* (2000), 88 Ohio St.3d 194, 199, citing *State v. Murphy* (1992), 65 Ohio St.3d 554, 583 (aggravated robbery indictment that did not specify precise conduct was not invalid). In this case, defendant was convicted only under count two of the indictment. The

language of that count specifically cited the Revised Code section and subsection under which the defendant was charged, and described the factual allegations that comprised the charge using the terms contained in R.C. 2907.05, the Gross Sexual Imposition statute. We therefore believe that the indictment facially complies with R.C. 2941.05 and provides the notice and opportunity described in *Sellards*.

However, defendant correctly observes that the indictment does not specify what *mens rea* is required for commission of the specified offense. He contends that in order to convict a defendant of Gross Sexual Imposition under R.C.

2907.05(A)(4), the State must prove that the defendant touched the victim was “for the purpose of sexually arousing or gratifying either person.” R.C. 2907.01.

R.C. 2907.05(A)(4) reads:

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 * * * [t]he 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.

R.C. 2907.05(A)(4). Defendant argues that because the statute itself does not specify a culpable mental state required for the defendant’s action, the mental state must be inferred from the definition of “sexual contact” that is found in R.C. 2907.01.

"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.

R.C. 2907.01(B) (emphasis added). See also *State v. Mundy* (1994), 99 Ohio App.3d 275, 292 (stating that “purpose or specific intent is an essential element of R.C. 2907.05(A)(4)”). Defendant observes that his indictment did not specify that the offense was committed “with the purpose of sexually arousing or gratifying either person,” and argues that because this language was not present the indictment did not describe a prohibited offense.

We note that there is a conflict amongst the appellate courts as to what *mens rea* is required for the commission of the offense of gross sexual imposition on a person thirteen years or younger. Compare *State v. Astley* (1987), 36 Ohio App.3d 247, 250 (strict liability) with *State v. Mundy* (1994), 99 Ohio App.3d 275, 289 (purposefully). This Court has previously indicated that while a specific purpose to arouse or gratify is required, it may be proven by circumstantial evidence. See *State v. Jones* (July 22, 1998), Auglaize App. No. 2-98-1, unreported, 1998 WL 405906 at *3. See also *Mundy*, 99 Ohio App.3d at 289-89 (“[w]hether * * * touching was undertaken for the purpose of sexual arousal or gratification must be inferred from the type, nature and circumstances surrounding the contact”). Based upon *Jones*, the defendant correctly observes that to obtain a conviction under R.C. 2907.05(A)(4), the State is required to establish that when a

defendant engages in sexual contact with a victim, he does so with the specific purpose to arouse or gratify either party.

However, defendant's contention is not simply that specific purpose to gratify for arouse must be proven, but that an allegation of specific purpose must appear in the indictment. In support of his argument, defendant cites *State v. Ross* (1967), 12 Ohio St.2d 37. In *Ross*, the Supreme Court held that "[w]here a criminal statute does not clearly make a certain specific intent an element of the offense, but judicial interpretation has made such intent a necessary element, an indictment charging the offense solely in the language of the statute is insufficient." *Id.* at syllabus. Defendant argues that our decision in *Jones* is a "judicial interpretation" that makes specific purpose a "necessary element."

However, *Ross* is completely distinguishable from this case. In *Ross*, "the language of the statute used in the indictment [was] judicially limited, and this limitation [was] not apparent from the language itself." *Id.* at 38. The limitation in *Ross* was an additional *mens rea* requirement that did not appear in the language of the offense nor anywhere else in the Revised Code; rather, it was "inferred by [the Court] reading the language in context," and the Supreme Court noted "the motivation behind the inference was undoubtedly the preservation of language of otherwise questionable constitutionality." *Id.* (emphasis added). See generally *State v. Jacobellis* (1962), 173 Ohio St. 22, 27-28 (inferring that former R.C.

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2905.34 required ‘a guilty or wrongful purpose’ in addition to ‘knowing possession’ of obscene materials) rev’d on other grounds by *Jacobellis v. Ohio* (1964), 378 U.S. 184, 196.

In *Ross*, the statutes in the Revised Code completely failed to provide notice to criminal defendants of a *mens rea* element that had been judicially inferred and had thereby become a requirement for conviction. By contrast, the gross sexual imposition statute directly states that “sexual contact” is an element of the offense, and “sexual contact” is specifically defined in R.C. 2907.01. Therefore, unlike the situation faced by the Supreme Court in *Ross*, the elements of the crime of gross sexual imposition under R.C. 2907.05(A)(4) are clearly “apparent from the language” of the statutes. Cf. *Ross*, 12 Ohio St.2d at 38-39.

Finally, we note that defendant has not established that he was prejudiced by the State’s failure to define “sexual contact” in the indictment. The jury was instructed with the full statutory definition of the phrase, including the requirement of “purpose”, and was also given the statutory definition of “purpose.” See Trial Transcript at *390; *id.* at 388-89. As we have already noted, the indictment complied with R.C. 2941.05 and provided defendant the notice and opportunity described in *Sellards*, 17 Ohio St.3d at 170. We accordingly conclude that the requirement of an indictment was met in this case, and that any error committed

by the trial court was harmless. We therefore overrule defendant's first three assignments of error.

The evidence was insufficient as a matter of law for a conviction on Gross Sexual Imposition where there was no evidence of the appellant's specific intent to sexually arouse either himself or the victim.

Defendant next argues that the State presented insufficient evidence of the element of specific intent to arouse or gratify to sustain a conviction in this case. The transcript of the trial reveals that the victim testified about the relevant incident as follows:

Q: Okay. Now, back, back during that summer did anything happen between [you and] Dannie? Did Dannie do anything to you?

A: Yes.

Q: Okay. Could you tell the Court what, what happened; maybe starting from why you were over there in the first place?

A: What do you mean?

Q: Where did this occur?

A: In the living room.

Q: Of whose house?

A: His.

Q: Okay. Now, could you tell, tell us what exactly – well, first of all, who else was with you?

A: Uhm, his kids.

Q: Okay. Who are his kids?

A: Kira Harrold, Kady Harrold and Derron.

Q: And you were over there to see them?

A: I was staying the night with the girls.

Q: What were you doing?

A: I was sitting up watching TV.

Q: Okay. Was there anybody else there with you?

A: The kids were all in bed.

Q: Okay. Was there anybody else?

A: No.

Q: Was Dannie Harrold there?

A: Yeah.

Q: Okay. And you already said that this happened in the living room?

A: Yeah.

Q: Okay. Could you tell us what happened [o]n that particular time?

A: Well, I was watching TV and he called me over to sit on his lap, so I went over. And he, uhm, reached his hand down my underpants.

Q: Okay. How long did this, did this last?

A: Probably around, anywhere from five to 15 minutes.

Q: Okay. And was that the end of that incident then?

A: Yeah.

Q: How did that end? Did he just – what happened to end it?

A: Well, he told me to go to the bathroom and go to bed.

Q: Where did you go to bed?

A: The girls' room.

Trial Transcript, at *121-23. We have already noted that a specific purpose to arouse or gratify may be proven by circumstantial evidence. See *State v. Jones* unreported at *3. Based on the foregoing testimony viewed in a light most favorable to the prosecution, we have little difficulty concluding that a rational trier of fact could have found defendant's specific purpose to gratify or arouse proven beyond a reasonable doubt. Cf. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph 2 of the syllabus. Accordingly, defendant's fourth assignment of error is also overruled.

The trial court erred in allowing evidence of the appellant's alleged prior sexual activity over objection where the trial court did not hold a hearing in chambers to resolve the admissibility of such evidence at least three days prior to trial and no good cause was shown why such hearing should take place during trial.

The trial court erred in allowing evidence of other sexual acts of the appellant over objection.

Defendant's final assignments of error relate to the testimony of the victim's mother, September Fleury. Ms. Fleury testified that she had witnessed the defendant place his hand on the thigh of the victim's sister, who was eleven years old at the time.

I noticed that he had his hand on her thighs. I asked him to stop. He did. Probably about 10 minutes later I saw him do it again. I warned him if I seen him do it again he would [have to] leave. And it wasn't very much longer after that he did it a third time [and] I told him to leave.

Trial Transcript, at *188. Defendant contends that this testimony is inadmissible under R.C. 2907.05(D) and R.C. 2945.59, and also argues that the trial court erred by allowing the State to present this evidence without holding an evidentiary hearing three days prior to trial pursuant to R.C. 2907.05(E).

In addressing defendant's claims, we first note that evidentiary decisions are generally within the discretion of the trial court, and will only be reversed by a reviewing court where the trial court has abused its discretion. See, *e.g.*, *State v. Allen* (1995), 73 Ohio St.3d 626, 633. R.C. 2907.05(D) provides:

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Here, the trial court held that Ms. Fleury's testimony was probative and admissible "for the limited purpose of showing intent, or absence of mistake * * *." Trial Transcript, at *13. Cf. R.C. 2945.59 (permitting "other acts" evidence to show motive, intent or absence of mistake). See also Evid.R. 404(B). It also held that the State demonstrated good cause for the failure to disclose its intention to present the evidence until two days before trial. See Trial Transcript at **8-13. Cf. R.C. 2907.05(E) (allowing trial court to resolve admissibility of evidence during trial "for good cause shown").

Defendant argues that the State had no legitimate purpose in admitting this testimony. However, our review of the record reveals that defendant had made a pre-trial statement to Fostoria Police Detective Michael Clark in which he contended that his sexual contact with the victim was, in essence, an accident or mistake:

A: * * * *. And, uhm, he told me that later during the interview that an incident did occur at his house. * * * *. That, uhm, [the victim] had been to his residence and had got on his lap watching TV in the living room.

Q: Okay.

A: He told me that she had placed his hand in her vagina, or crotch area, whatever, and that he removed 'em [sic]; and that she did it again. She took his hand[s] and placed them in again in [her] crotch area.

Trial Transcript, at *155. We note that this testimony, which was presented in the State's case-in-chief, is completely consistent with defendant's own testimony in this case. See Trial Transcript, at *279. Based on the foregoing, we believe that the trial court correctly concluded that Ms. Fleury's testimony was admissible for the limited purpose of showing absence of mistake. See, *e.g.*, R.C. 2945.59.

Moreover, defendant has not asserted or established that he was prejudiced in any way by the trial court's determination that the State had shown good cause for the delay in disclosing the testimony. We therefore cannot conclude that either of the trial court's decisions was an abuse of discretion, and accordingly overrule defendant's fifth and sixth assignments of error.

For these reasons, the judgment of the Seneca County Court of Common Pleas is affirmed.

Judgment affirmed.

HADLEY, P.J., and BRYANT, J., concur.

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