[Cite as *State v. Jackson*, 2010-Ohio-3080.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92531

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL JACKSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-505342

BEFORE: Boyle, J., Rocco, P.J., and Sweeney, J.

RELEASED: July 1, 2010

JOURNALIZED:

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Michael Jackson, appeals his convictions for rape and unlawful sexual conduct with a minor and his sentence, raising the following eight assignments of error:

{¶ 2} "[I.] Defendant was denied due process of law when the court permitted a social worker, Shawna Cornell and Ann Dodson [sic], to testify as to the truth of the allegations.

{¶ 3} "[II.] Defendant was denied due process of law when he was convicted of rape and unlawful sexual conduct with a minor which failed to allege a required culpable mental state.

{¶ 4} "[III.] Defendant was denied due process of law when the evidence does not establish force with respect to the count of rape.

{¶ 5} "[IV.] Defendant was denied due process as his conviction is against the manifest weight of the evidence.

{¶ 6} "[V.] Defendant was denied due process of law when he was convicted of a felony version of unlawful sexual conduct with a minor.

{¶ 7} "[VI.] Defendant was denied due process of law when the court sentenced defendant, first offender, to more than a minimum sentence.

{¶ 8} "[VII.] Defendant was denied due process of law when the court failed to merge the conviction for rape with the conviction for unlawful sexual conduct with a minor.

{¶ 9} "[VIII.] Defendant was denied due process of law as the court, at sentencing, did not properly advise defendant concerning postrelease control."

{¶ 10} Finding merit to Jackson's fifth and seventh assignments of error, we affirm in part, reverse in part, and remand for a new sentencing hearing.

Procedural History and Facts

{¶ 11} The Cuyahoga County Grand Jury indicted Jackson on eight counts, including four counts of rape — three in violation of R.C. 2907.02(A)(2) and one in violation of R.C. 2907.02(A)(1)(a); and four counts of unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A), which carried a furthermore clause alleging that Jackson is ten or more years older than the victim. The clause elevated the offense to a third degree felony. The amended indictment alleged that Jackson (d.o.b. February 15, 1980) committed these offenses against the victim, S.C. (d.o.b. May 25, 1991), during the time period of May 2007 through August 2007. Jackson pled not guilty to the charges, and the matter proceeded to a jury trial.

{¶ 12} The evidence at trial revealed that in January of 2007, S.C.'s relationship with his parents was extremely strained, resulting in him "running away a lot." During that time, he was friends with Jackson's little sister, Chantell, who resided with Jackson, a teacher, and another man, Kevin Marr, in a two-bedroom apartment. S.C. first met Jackson in February 2007 when he was hanging out with Chantell. S.C. later spent the night at Chantell's house on a few occasions because of the troubles that he was having at home. During this time

period and prior to even meeting Jackson, S.C. was also struggling in school, smoking marijuana, and had attempted suicide on more than one occasion. S.C. was battling a number of "psychological issues," including depression. According to S.C.'s mother, her son attempted suicide seven times; his final suicide attempt led his parents to have him committed to the Cuyahoga County Juvenile Detention Center as "unruly." While at the detention center, S.C. reported the events that gave rise to the indictment. Specifically, there were four incidents, the first occurring in May 2007, prior to S.C.'s birthday, and the last occurring in August 2007.

{¶ 13} At trial, the state moved to nolle the last three counts of the indictment relating to unlawful sexual conduct with a minor because S.C. was 16 at the time of the alleged offenses. The jury subsequently found Jackson guilty on the first count of rape and the only remaining count of unlawful sexual conduct with a minor (the first incident that occurred prior to S.C.'s 16th birthday), but not guilty as to the remaining three rape counts. (We will discuss the specific evidence relating to Jackson's convictions in our disposition of the relevant assignments of error.)

{¶ 14} At sentencing, the trial court imposed four years for the rape count and four years for unlawful sexual conduct with a minor, both to be served concurrently. The trial court also notified Jackson that his sentence included a mandatory period of five years of postrelease control. The trial court, however,

failed to notify him of the ramifications he would face if he violated a condition of postrelease control.

Testimony as to Veracity and Credibility

{¶ 15} In his first assignment of error, Jackson argues that the trial court committed reversible error in allowing certain testimony of two witnesses: Shawna Cornell, a social worker with the Cuyahoga County Department of Children and Family Services, and Ann Dodson, a counselor at the juvenile detention center. He contends that their testimony improperly bolstered the credibility of the victim and therefore deprived him of a fair trial. We disagree.

{¶ 16} It is well settled that "[a]n expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." *State v. Boston* (1989), 46 Ohio St.3d 108, 545 N.E.2d 1220, syllabus. Such testimony is presumptively prejudicial and inadmissible because it "'infringe[s] upon the role of the fact finder, who is charged with making determinations of veracity and credibility. * * * In our system of justice it is the fact finder, not the so-called expert or lay witnesses, who bears the burden of assessing the credibility and veracity of witnesses.'" Id. at 1240, quoting *State v. Eastham* (1988), 39 Ohio St.3d 307, 312, 530 N.E.2d 409.

{¶ 17} Here, Jackson contends that Cornell's testimony regarding her assessment and disposition of the report of abuse was improperly admitted. He specifically argues that Cornell's testimony that the allegation of abuse was "indicated" was unduly prejudicial and unfairly bolstered the victim's credibility.

This court, however, has already held that a social worker's determination that allegations are "indicated" is not considered testimony regarding veracity. *State v. Smelcer* (1993), 89 Ohio App.3d 115, 623 N.E.2d 1219. Indeed, we have repeatedly recognized that a social worker's interdepartmental determination of an allegation of abuse — such as, unsubstantiated, substantiated, or indicated — is acceptable, provided that the social worker does not testify as to the truthfulness or credibility of the alleged victim. Id.; see, also, *State v. Sopko*, 8th Dist. No. 90743, 2009-Ohio-140; *State v. Whitfield,* 8th Dist. No. 89570, 2008-Ohio-1090; *State v. Simpson*, 8th Dist. No. 88301, 2007-Ohio-4301.

{¶ 18} Here, Cornell did not testify as to the victim's credibility or veracity. She merely testified as to the disposition of the report. We therefore find no error in the court's admission of the testimony.

{¶ 19} Next, Jackson argues that Dodson, a counselor at the juvenile detention center, improperly bolstered the victim's credibility during the following exchange:

{¶ 20} "Q. In essence like you were judging credibility?

{¶ 21} "A. Somewhat, yes. I mean, we are deciding does their body language go along with what they are saying.

{¶ 22} "Q. Did you observe those things in [S.C.]?

{¶ 23} "A. As far as I could tell, yes, he did seem very —

{¶ 24} "[Defense Counsel]: Objection.

{¶ 25} "A. You know, mood congruent.

{¶ 26} "THE COURT: Overruled.

{¶ 27} "Q. I am sorry?

{¶ 28} "A. Mood congruent. Everything seemed to, as far as I — I didn't have anything that there was anything different in what he says.

{¶ 29} "Q. You don't know whether or not it is true, but the manner in which he was relaying it to you is what you are talking about?

{¶ 30} "A. Right. The manner is which he was relaying it to me was appropriate. I did not see any reason to doubt or to — *to doubt* or *not to doubt*."

{¶ 31} We find this testimony, however, to be vague and unclear. Nowhere in the record does Dodson explain what she means by "mood congruent." Her testimony reveals that she had no reason "to doubt" or "not to doubt" the victim. This testimony can hardly be construed as vouching for the victim's credibility. Notably, immediately following this exchange, Dodson expressly testified that she has a mandatory duty to report allegations of abuse regardless of whether she believes them to be true. She further indicated that it is not her responsibility to assess whether the allegations are true. Considering Dodson's entire testimony, we cannot say that it equates to vouching for the victim's credibility and veracity.

{¶ 32} We also note that the Ohio Supreme Court has recognized a fine line between an expert offering an opinion as to the truth of a child's statement and "testimony which is additional support for the truth of the *facts testified to* by the child, or which assists the fact finder in assessing the child's veracity." (Emphasis sic.) *State v. Stowers*, 81 Ohio St.3d 260, 262-263, 1998-Ohio-632, 690 N.E.2d

881. Whereas the first is strictly prohibited, testimony falling under the second category is allowed. In *Stowers*, the court addressed the admissibility of expert testimony that the behavior of the victims was consistent with behavior observed in sexually abused children. The court found that it was admissible and did not violate *Boston*; instead, the court concluded the expert's testimony provided information to the jury which would allow it to make an "educated determination" regarding the ultimate issues in the case. Indeed, the court emphasized a distinction "between expert testimony that a child witness is telling the truth and evidence which bolsters a child's credibility insofar as it supports the prosecution's efforts to prove that the child *has* been abused." (Emphasis sic.) Id. at 262.

{¶ 33} The cases relied on by Jackson where this court has reversed due to improper vouching of the victim's credibility are factually distinguishable from this case. In those cases, the testimony of the expert unequivocally communicated an opinion that sexual abuse occurred and such opinion was based solely on the statements of the victim. See, e.g., *State v. Knight*, 8th Dist. No. 87737, 2006-Ohio-6437; *State v. Winterich*, 8th Dist. No. 89581, 2008-Ohio-1813; *State v. West*, 8th Dist. No. 90198, 2008-Ohio-5249. Under those facts, such testimony is impermissible because it lacks an appropriate foundation and amounts to an expert attesting to the victim's veracity. Given that cases involving sexual abuse are often "credibility contests" between the victim and the defendant, an expert's opinion as to the victim's veracity is highly prejudicial. *West* at ¶8. But we do not find Dodson's testimony to fall in this category. Indeed, because Dodson's

testimony reveals that she made no determination as to S.C.'s veracity or credibility, let alone whether the abuse even occurred, we fail to see how her testimony could be construed as conveying that message to the jury.

{¶ 34} The first assignment of error is overruled.

Defective Indictment and Jury Charge

{¶ 35} In his second assignment of error, Jackson argues that he was denied due process of law because neither the indictment nor jury charge specified the required mens rea for the crimes of rape and unlawful sexual conduct with a minor. Specifically, he argues that both counts required a stated mens rea for engaging in sexual conduct. Jackson's argument, however, lacks merit.

{¶ 36} First, contrary to Jackson's assertion, he never raised this argument below nor objected to the instructions given to the jury. We accordingly review this argument under a plain error analysis. See *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3794, 893 N.E.2d 169, ¶7.

{¶ 37} Jackson was charged under R.C. 2907.02(A)(2), which states in pertinent part that "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." Regarding the rape count, this court has recently addressed the exact argument raised by Jackson and rejected it. See *State v. Rodriquez*, 8th Dist. No. 92231, 2009-Ohio-6101. In *Rodriquez*, we recognized that the requisite mens rea for rape is "purposely" and that the use of the statutory language in the

indictment adequately apprises the defendant of the culpable mental state. Id. at ¶28. See, also, *State v. Ralston*, 9th Dist. No. 08CA009384, 2008-Ohio-6347; *State v. Solether*, 6th Dist. No. WD-07-053, 2008-Ohio-4738; *Starcher v. Eberlin*, 7th Dist. No. 08BE19, 2008-Ohio-5042 (recognizing that the indictments for rape, which mirrored the language of R.C. 2907.02(A), were not defective; the mens rea included in the statutory language, namely, "purposely," applies to the conduct and the result).

{¶ 38} Jackson also argues that the indictment was defective as to the charge of unlawful sexual conduct with a minor, which mirrored the statutory language contained in R.C. 2907.04(A), because it contained no mens rea as to engaging in sexual conduct. But Ohio courts have repeatedly recognized that no mens rea is necessary for the element of engaging in sexual conduct under R.C. 2907.04(A); it is a strict liability element. *State v. Matthews*, 7th Dist. No. 08-MA-49, 2009-Ohio-3254; *State v. Notestine*, 6th Dist. No. OT-08-038, 2009-Ohio-3220; *State v. McGinnis*, 3d Dist. No. 15-08-07, 2008-Ohio-5825. Indeed, "although R.C. 2907.04 requires the offender to be at least reckless in knowing the victim's age, it does not require the state to prove the offender's mental state for engaging in sexual conduct." *Notestine* at ¶53.

{¶ 39} Accordingly, we find no error, plain or otherwise. Jackson's second assignment of error is overruled.

Sufficiency and Manifest Weight of the Evidence

{¶ 40} In his third and fourth assignments of error, Jackson argues that his rape conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. We disagree.

{¶ 41} An appellate court's function in 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. If so, the evidence is sufficient.

{¶ 42} "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the fact finder's resolution of the conflicting testimony. Id. at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶ 43} Jackson contends that the evidence was insufficient to establish force — a required element of rape. Force is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1). "A defendant purposely compels another to submit to sexual conduct by force or threat of force if the defendant uses physical force against that

person, or creates the belief that physical force will be used if the victim does not submit." *State v. Schaim*, 65 Ohio St.3d 51, 55, 1992-Ohio-31, 600 N.E.2d 661. Force can be inferred from the circumstances surrounding the sexual contact and is established if it is shown that the victim's will was overcome by fear or duress. Id.

{¶ 44} According to Jackson, the victim's testimony, at best, only allows for an inference of force, which he contends is insufficient when the victim is not a young child. He relies on this court's decision in *State v. Rodriguez,* 8th Dist. No. 82265, 2003-Ohio-7056, in support of this proposition. We find Jackson's reliance on *Rodriguez* misplaced and this case to be factually distinguishable.

{¶ 45} In *Rodriguez*, this court recognized the distinction drawn by the Ohio Supreme Court in *Schaim* between the degree of evidence necessary to establish force in a rape case involving a child, where the evidence of force could be very subtle and psychological, and rape of an adult, where the same inference could not necessarily be made. Contrary to Jackson's assertion, *Rodriguez* does not hold that the element of force can never be inferred from the circumstances surrounding the sexual conduct. (Such a holding would directly conflict with *Schaim*.) Instead, this court held that under the specific facts of that case, which involved two adults, the element of force could not be inferred. Notably, in *Rodriguez*, the victim never testified that the defendant used force. And as we noted, "everything in the record suggests consensual behavior between two adults." Id. at ¶28.

{¶ 46} Here, unlike *Rodriguez*, the alleged rape did not occur between two adults. At the time of the rape, S.C. was age 15. And, unlike the victim in *Rodriguez*, S.C. stated that Jackson forced himself onto him. Nor do the circumstances surrounding the count of rape support a conclusion that the encounter was consensual. S.C. testified as follows to the events that transpired the evening of the incident:

{¶ 47} S.C. was watching television in the living room of Jackson's apartment while Chantell was sleeping in her room, and Jackson and Kevin were in the other room. Jackson came out of his room and started talking to S.C., telling S.C. that he was "psychic" and that he knew that S.C. was "gay," which S.C. denied. Jackson admitted to S.C. that he was gay. Jackson then started "touching [S.C.'s] legs" and initiated the sexual conduct, taking off S.C.'s shorts and placing his penis inside him. At that point, S.C. specifically told him that he "didn't think it was right." Jackson continued and ultimately ejaculated inside of S.C.

{¶ 48} S.C. further testified that he did not want Jackson to do what he did, that it made him feel "scared and weak." When asked, "Did [Jackson] force himself on you," S.C. answered "yes." S.C. further explained that he did not tell Chantell or Kevin what happened because he was "scared of people's reactions" and "didn't want people to think that [he] was gay."

{¶ 49} Construing this evidence in a light most favorable to the state, reasonable minds could conclude beyond a reasonable doubt that Jackson compelled S.C. by force.

{¶ 50} To the extent that Jackson suggests that force was not established because S.C. did not resist or overcome Jackson, his argument is misplaced. To prove the element of force, it is not incumbent upon the state to prove that the victim resisted. See R.C. 2907.02(C) ("A victim need not prove physical resistance to the offender in prosecutions under this section").

{¶ 51} Likewise, we cannot say that the jury clearly "lost its way" in convicting Jackson of rape. Contrary to Jackson's assertion, S.C.'s psychological history, which included depression and previous attempts of suicide, does not render his testimony not credible. And although Jackson points to certain inconsistencies in S.C.'s testimony, such as the number of times that he spent the night at Chantell's house and the fact that S.C. admitted to lying about his age on his Facebook page, we do not find these inconsistencies to be so irreconcilable to render the victim's testimony of the rape unbelievable. Nor did the jury. Indeed, even when a witness makes some inconsistent statements, "the jury is in the best position to weigh the credibility of the witness and resolve any inconsistencies." *State v. Cooper*, 8th Dist. No. 86437, 2006-Ohio-817, ¶23.

{¶ 52} The third and fourth assignments of error are overruled.

Furthermore Clause

{¶ 53} In his fifth assignment of error, Jackson argues that the state failed to present sufficient evidence to support the furthermore clause attached to the count for unlawful sexual conduct with a minor that elevated the offense to a third degree felony. Specifically, he contends that the state failed to present sufficient evidence that he was ten years older than S.C. at the time of the incident. We agree.

{¶ 54} Our review of the record reveals that the only evidence offered as to Jackson's age was testimony from S.C., who testified that Jackson "is like 26." S.C. further testified that Jackson was older than Kevin, who was "like 21 or 22." The state argues that this testimony, coupled with evidence that Jackson was a teacher and minister, is sufficient to establish the ten-year age differential because S.C.'s birth date was offered into evidence. We find no authority that supports this assertion.

{¶ 55} The fifth assignment of error is sustained.

Allied Offenses

{¶ 56} In his seventh assignment of error, Jackson argues that the trial court erred in failing to merge the rape count with the unlawful sexual conduct with a minor count because they arose out of the same conduct and were committed with the same animus. We agree.

{¶ 57} R.C. 2941.25 provides:

{¶ 58} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or

information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶ 59} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 60} In *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, the Ohio Supreme Court held that the first step for determining whether two offenses are allied offenses of similar import requires comparing the statutory elements in the abstract, rather than comparing the offenses as charged in a particular indictment. In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, however, the Supreme Court explained that the *Rance* test had been mistakenly applied in a narrow way by several courts: "'[N]owhere does *Rance* mandate that the elements of compared offenses must exactly align for the offenses to be allied offenses of similar import under R.C. 2941.25(A). To interpret *Rance* as requiring a strict textual comparison would mean that only where *all* the elements of the compared offenses coincide exactly will the offenses be considered allied offenses of similar import under R.C. 2941.25(A).' (Emphasis sic.)" *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, ¶11, quoting *Cabrales*, 118 Ohio St.3d at ¶22.

{¶ 61} The *Cabrales* court went on to explain that the application of R.C. 2941.25 involves, as it always has, a two-tiered analysis. Id. at ¶14. In the first step, to determine "whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import." Id. at paragraph one of the syllabus.

{¶ 62} "If the offenses are allied, then '[i]n the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.'" *Cabrales* at ¶14, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

{¶ 63} Relying on the third district's decision in *State v. Dinkins*, 3d Dist. No. 1-06-50, 2007-Ohio-1917, the state argues that the two offenses are not allied because "the commission of one offense does not automatically entail the commission of the other." As recognized in *Dinkins*, "conviction for rape requires proof that the defendant engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force. R.C. 2907.02(A)(2). In contrast, conviction for unlawful sexual conduct with a minor

does not require any force or threat of force, but requires proof that the defendant engage in sexual conduct with another when the offender knows that the other person is 13 years of age or older but less than sixteen years of age or the offender is reckless in that regard. R.C. 2907.04(A)." Id. at ¶18.

{¶ 64} We note, however, that *Dinkins* was decided before the Ohio Supreme Court's decision in *Cabrales*, wherein the court specifically emphasized that in comparing the elements of two offenses, trial courts are not required to find an exact alignment of the elements. Instead, the first inquiry is whether the commission of one will necessarily result in the commission of the other. Here, applying *Cabrales*, we find that the commission of the rape wholly subsumes the commission of the unlawful sexual conduct with a minor. We therefore find the two offenses to be allied. See, generally, *State v. Grant*, 5th Dist. No. 07CA32, 2008-Ohio-3429 (unlawful sexual conduct count was merged with the rape count; the same incident gave rise to both counts).

{¶ 65} Under the second prong, we find there was no evidence in this case to suggest that the unlawful sexual conduct with a minor was anything but incidental to the rape. Therefore, because there was no separate animus, Jackson may be found guilty of both offenses but sentenced for only one. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶42.

{¶ 66} The state, however, retains the right to elect which allied offense to pursue on a remand to the trial court after appeal. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, paragraph one of the syllabus. We

therefore sustain Jackson's seventh assignment of error and remand to the trial court for a new sentencing hearing consistent with the holding in *Whitfield*. Id.

{¶ 67} Jackson's sixth and eighth assignments of error challenge other aspects of his sentence, including postrelease control notifications, which the state concedes was done in error. But because our disposition of the seventh assignment of error requires that this case be remanded for a new sentencing hearing, these assignments of error are moot.

Judgment affirmed in part, reversed in part, and case remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellee and appellant share the costs of this proceeding.

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. Case remanded to the trial court for resentencing.

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

MARY J. BOYLE, JUDGE

KENNETH A. ROCCO, P.J., and
JAMES J. SWEENEY, J., CONCUR