[Cite as *State v. Mason*, 2011-Ohio-3301.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-337 (C.P.C. No. 09CR-09-5355)
David W. Mason,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	
State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-342 (C.P.C. No. 09CR-09-5355)
David W. Mason,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 30, 2011

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for State of Ohio.

Todd Barstow, for David W. Mason.

APPEALS from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} These are consolidated appeals. In case No. 10AP-342, defendant-appellant/appellee, David W. Mason ("defendant"), appeals from a judgment of the Franklin County Court of Common Pleas, entered upon a jury verdict convicting him of

rape, sexual battery, and gross sexual imposition. In case No. 10AP-337, plaintiff-appellee/appellant, State of Ohio ("the State"), has filed for leave to appeal the trial court's exclusion of testimony from defendant's minister, based upon clerical privilege. For the following reasons, we affirm the judgment of conviction and deny the State's request for leave to appeal.

{¶2} Defendant's convictions arise from events which occurred between November 1, 2007 and January 8, 2009 involving his stepdaughter, D.A., who was 11 or 12 years old during that time period. On September 4, 2009, defendant was indicted on two counts of rape, one count of sexual battery, two counts of gross sexual imposition as felonies of the third degree, and one count of gross sexual imposition as a felony of the fourth degree. The counts alleged vaginal intercourse as well as sexual contact involving fondling and/or kissing of the buttocks, neck, and breasts.

{¶3} This matter proceeded to jury trial on March 1, 2010, on all six offenses. The State introduced the testimony of three witnesses: (1) D.A., the victim; (2) Kerri Wilkinson, a social worker and forensic interviewer at the Child Assessment Center at Nationwide Children's Hospital; and (3) Gail Horner, a pediatric nurse practitioner at the Center for Child and Family Advocacy at Nationwide Children's Hospital. The State also attempted to proffer the testimony of Keith Bradley ("Minister Bradley"), a minister at the Columbus Christian Center Church who had counseled defendant and defendant's wife, who is D.A.'s mother. The defendant did not put on any evidence.

{¶4} D.A. testified that defendant was her stepfather. D.A.'s mother married defendant after D.A.'s father died. The three of them lived together at 2093 Cornell Street, in Franklin County, Ohio. They later moved to Burstock Court, in Franklin County,

Ohio. One weekday morning in January 2008, D.A. was home from school on a snow day. After D.A.'s mother left for work, D.A. was home alone with defendant, who indicated he was going back to sleep and asked D.A. to wake him up later.

{¶5} When D.A. went into defendant's bedroom to wake him up, defendant asked her for a hug. D.A. complied with his request for a hug. Defendant hugged her back, but then he began rubbing on her buttocks. D.A. told defendant to stop. When he did not, D.A. began to walk away. However, defendant grabbed D.A. and pulled her back towards the bed.

{¶6} Defendant was only wearing underwear. He began kissing D.A. on the neck and on her breasts, just above the edge of her tank top. Then defendant began moving lower. D.A. screamed, "stop, no, you can't do this, this isn't right," but defendant did not stop. (Tr. 41.) Defendant continued to move his penis towards D.A.'s vagina. D.A. told defendant to stop numerous times, but defendant did not stop. Instead, defendant got angry and put a pillow over D.A.'s face, which caused her to scream. Then defendant raped her, putting his penis into her vagina.

{¶7} After he stopped, D.A. ran into the bathroom, got in the shower, and scrubbed herself because she felt dirty and disgusting. When she got out of the shower, defendant was gone. D.A. cried in her bedroom but did not tell her mom about the incident when she came home from work because she was afraid she would be removed from the house and placed in foster care.

{¶8} Approximately three months later, D.A. told a friend about the incident with her stepfather. The friend urged D.A. to tell her mother and helped D.A. tell her mother about the incident. After the disclosure, defendant and D.A.'s mother remained married

and attended counseling together to deal with the issue, as well as other issues in their marriage. However, defendant did not always live with D.A. and her mother during this time period.

{¶9} In July 2009, defendant approached D.A. with money while D.A. was watching a movie and her mother was at work. Defendant began flinging money in D.A.'s face and told her she would have to work for the money. D.A. said she would do her chores, but defendant told her she would have to do other things for the money and began rubbing the money on D.A. as if she were "a prostitute or something." (Tr. 53.) D.A. presumed defendant meant she would have to have sex with him. D.A. pushed defendant away. Defendant began trying to kiss D.A. on the stomach and commented that he could "lick [her] from here to there." (Tr. 55.) When defendant tried to pull down her shorts, D.A. kicked him. She then took the bus to her mother's place of employment and reported what had occurred.

{¶10} On cross-examination, D.A. admitted to changing middle schools several times and to getting into trouble for some minor things at school. She also acknowledged that defendant was very strict about rules and often complained to her mother when she did not do her chores. After the incident, D.A. frequently disagreed with defendant. D.A. admitted that her relationship with defendant after the incident was "very rocky." (Tr. 61.)

{¶11} Kerri Wilkinson ("Ms. Wilkinson") testified she interviewed D.A. on July 10, 2009. D.A. reported three incidents involving her stepfather. The incidents took place over the course of many months, with the most recent incident occurring a month or two prior to the interview.

{¶12} Ms. Wilkinson testified the first incident occurred on a snow day when defendant hugged her and then rubbed her buttocks and kissed her neck. The incident ended when the phone rang. The second incident occurred a few weeks later when defendant began touching and kissing her. He put her on the bed, put a pillow over her face, and raped her. D.A. advised that she later reported the incident to a friend. The third incident occurred when D.A. was watching television and defendant began rubbing money on her and told her he could lick her from head to toe. Defendant tried to kiss her. D.A. kicked him and left to tell her mom what happened.

{¶13} Ms. Wilkinson also testified that a high percentage of children do not report incidents of sexual abuse right away.

{¶14} Gail Horner ("Nurse Horner") testified she conducted a medical examination of D.A. on July 10, 2009, as a result of the information D.A. revealed in her interview with Ms. Wilkinson. The examination was normal and did not reveal any signs of trauma. However, Nurse Horner testified that a normal exam does not mean that penetration has not occurred. She stated it was possible to be sexually assaulted and yet fail to show signs of trauma. In addition, if it has been weeks or months since the latest incident of sexual abuse, any evidence of penetration that may have existed could heal. She further explained that 96 percent of exams conducted on children suspected of being sexually abused have normal findings.

{¶15} Outside the presence of the jury, the State attempted to proffer the testimony of Minister Bradley after the trial court determined that the minister's testimony would be barred by clergy privilege, based on brief arguments presented by counsel.

{¶16} Minister Bradley began testifying as to his church and ministerial background and his relationship with defendant and defendant's wife. Minister Bradley proffered that defendant and his wife saw him for marriage counseling. Minister Bradley indicated the counseling addressed challenges with communication, coming together, and dealing with blended family issues, particularly where it was believed that D.A. was trying to cause a division between defendant and his wife.

{¶17} Prior to any inquiry regarding the admissions defendant made to Minister Bradley, the trial judge ended the proffer, stating he was concerned about violating the privilege and he believed that allowing further testimony would in fact violate that privilege, which in turn would be in violation of his earlier ruling. However, the trial judge did permit the prosecutor to state what he believed the minister's testimony would reveal if he were permitted to testify.

{¶18} The prosecutor stated he expected Minister Bradley would have testified that he counseled defendant and his wife in their marriage. After one of their counseling sessions ended, defendant left town and drove to Cincinnati. While driving, defendant called Minister Bradley and admitted that he had misled the minister about some of the matters discussed during the session. He conceded he had misled Minister Bradley about his sexual relationship with D.A., and he confessed he had "infidelities" with D.A. The prosecutor also explained that Minster Bradley, after consulting with others within the church, made the determination that cleric privilege did not apply and that because of this determination, he reported this information to the proper authorities.

{¶19} At the close of the State's case, the prosecution dismissed one of the rape counts (Count 2 of the indictment) and the fourth-degree felony gross sexual imposition

count (Count 6 of the indictment). On March 4, 2010, the jury returned guilty verdicts on the four remaining counts. On March 11, 2010, the trial court held a sentencing hearing. The total sentence imposed was 15 years to life. Defendant was also declared to be a Tier III sex offender and ordered to register and verify his address every 90 days for life.

{¶20} Defendant has filed a timely appeal and asserts the following three assignments of error for our review:

> I. THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF RAPE, SEXUAL BATTERY AND GROSS SEXUAL IMPOSITION AS THOSE VERDICTS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> II. THE TRIAL COURT ERRED BY SENTENCING APPELLANT TO TERMS OF IMPRISONMENT FOR BOTH RAPE AND GROSS SEXUAL IMPOSITION AS IN THE INSTANT CASE GROSS SEXUAL IMPOSITION IS A LESSER INCLUDED OFFENSE OF RAPE.
>
> III. THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING THE REQUISITE FACTUAL FINDINGS; THEREBY DEPRIVING APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION SIXTEEN OF THE OHIO CONSTITUTION.

{¶21} In addition, the State has filed a motion for leave to appeal and asks us to accept and review the following proposed assignment of error:

ASSIGNMENT OF ERROR

> THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DID NOT REQUIRE THE DEFENDANT PROVE ALL THE

ELEMENTS OF CLERGY PRIVILEGE PRIOR TO EXCLUDING EVIDENCE.

{¶22} We shall begin our analysis by first addressing defendant's assignments of error.

{¶23} In his first assignment of error, defendant argues his convictions for rape, sexual battery, and gross sexual imposition are not supported by sufficient evidence and are against the manifest weight of the evidence. Specifically, defendant argues that D.A. was not credible or believable because she was a troubled, vengeful, and an angry teen who disliked defendant and resented his intrusion into her life. Defendant also points to the lack of physical evidence to substantiate D.A.'s accusations and argues the State failed to meet its burden of proof. We disagree.

{¶24} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved, beyond a reasonable doubt, all of the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78; *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396.

{¶25} In determining whether a conviction is based on sufficient evidence, an appellate court does not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks*, paragraph two of the syllabus; *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the

evidence claim). We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶26} While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶25, citing *Thompkins* at 386. Under the manifest weight of the evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive—the state's or the defendant's? Id. at ¶25. Although there may be legally sufficient evidence to support a judgment, it may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; see also *State v. Robinson* (1955), 162 Ohio St. 486 (although there is sufficient evidence to sustain a guilty verdict, a court of appeals has the authority to determine that such a verdict is against the weight of the evidence); *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276.

{¶27} "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 factfinder's resolution of the conflicting testimony." *Wilson* at ¶25, quoting *Thompkins* at 387. In determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the jury

clearly lost its way and thereby created such a manifest miscarriage of justice that the conviction must be reversed and a new trial must be ordered. *Thompkins* at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶28} A conviction should be reversed on manifest weight grounds only in the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶29} The evidence introduced at trial, if believed, was more than sufficient to support the convictions for rape, sexual battery,[1] and gross sexual imposition.

{¶30} To prove gross sexual imposition in this case, the State was required to prove that defendant had sexual contact with D.A. and that D.A. was less than 13 years of age. "Sexual contact" is defined as "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).

{¶31} The State introduced testimony that D.A. was 11 or 12 years old at the time of the incident. Through D.A., the State also introduced testimony that defendant rubbed her buttocks and also kissed her neck and breasts, all while she was telling him to stop,

[1] The jury convicted appellant of both rape and sexual battery, but the trial court's judgment entry ordered that the two counts be merged.

and prior to defendant inserting his penis into her vagina. This is sufficient to prove gross sexual imposition.

{¶32} To prove rape in this case, the State was required to prove that defendant engaged in sexual conduct, to wit: vaginal intercourse with D.A., and that D.A. was less than 13 years old at the time of the incident. Similarly, to prove sexual battery, the State was required to prove that defendant engaged in sexual conduct, to wit: vaginal intercourse, and that defendant was D.A.'s natural or adoptive parent, or a stepparent or guardian, custodian, or person in loco parentis.

{¶33} Again, through the testimony of D.A. and the forensic interviewer, the State introduced evidence which, if believed, was sufficient to prove that defendant had vaginal intercourse with D.A., that D.A. was less than 13 years old at the time of the incident, and that defendant was married to D.A.'s mother and therefore, he was D.A.'s stepparent. This evidence is sufficient to prove the essential elements of the crimes of rape and sexual battery.

{¶34} Defendant has also argued that his convictions are against the manifest weight of the evidence, due to the lack of physical evidence and due to D.A.'s questionable motives and lack of credibility.

{¶35} In a manifest weight review, the fact finder's determination as to the credibility of the witnesses is entitled to great deference because the jury is in the best position to assess the credibility of the witnesses and their testimony. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28. An appellate court may not substitute its judgment for the judgment of the trier of fact on an issue of witness credibility, unless it is manifestly clear that the finder of fact unequivocally lost its way. *State v. Bliss*, 10th Dist.

No. 04AP-216, 2005-Ohio-3987, ¶33. Also, Ohio courts have held that the testimony of one witness, if believed by the jury, is enough to support a conviction. See *State v. Dunn*, 5th Dist. No. 2008-CA-00137, 2009-Ohio-1688, ¶133.

{¶36} It was in the province of the jury to assess the credibility of D.A. and to determine which part or parts of her testimony it found to be believable. D.A. did admit that there were times when she did not like defendant and felt he was disrespectful to her mother. However, she also testified that she wanted her mother to be happy and her mother had informed her that she was happy with defendant. In addition, D.A. testified that prior to the rape, she was happy with defendant most of the time.

{¶37} D.A.'s testimony was subject to cross-examination, at which point defendant's counsel had the opportunity to attempt to undermine her credibility. Understandably, she admitted that after the rape, she was angry and upset with defendant and began disagreeing with him more often. She also admitted that if she had a say in the matter, she would not have wanted her mother to re-marry and move defendant into their house. However, D.A. also admitted that when her mother instructed her to listen to defendant, she would do so. The jury was obviously aware of the tension and difficulties involving D.A.'s family dynamics and found her testimony about the rape, sexual battery, and gross sexual imposition offenses to be credible, thereby finding defendant guilty. Based upon the evidence presented, the jury was free to make that determination.

{¶38} Furthermore, while it is true that there was no physical evidence introduced to support D.A.'s claims against defendant, there was testimony that a lack of physical evidence did not mean that penetration had not occurred, particularly given the delay in

reporting what occurred here. Also, some of the counts involved fondling and touching, which, under most circumstances, is unlikely to produce physical evidence weeks or months later, and thus a lack of physical evidence is not necessarily significant.

{¶39} This is not the exceptional case in which the evidence weighs heavily against the convictions, and therefore, we find the convictions are not against the manifest weight of the evidence.

{¶40} Accordingly, we overrule defendant's first assignment of error.

{¶41} In his second assignment of error, defendant argues the trial court erred in sentencing defendant to consecutive sentences on the rape and gross sexual imposition counts because gross sexual imposition is a lesser included offense of rape. Defendant seems to argue that the imposition of multiple sentences where one of the offenses involved is a lesser included offense violates the double jeopardy clause. In support of his position, defendant cites to *State v. Johnson* (1988), 36 Ohio St.3d 224 ("*Johnson* I"), *State v. Kidder* (1988), 32 Ohio St.3d 279, and *Rutledge v. United States* (1996), 517 U.S. 292, 116 S.Ct. 1241.

{¶42} Presumably, what defendant is actually arguing here is that gross sexual imposition and rape are allied offenses, and where the same conduct can be construed to constitute two or more allied offenses of similar import, he can be convicted of only one offense because multiple punishments for the same offense would violate the double jeopardy clause.

{¶43} R.C. 2941.25 is a "prophylactic statute that protects a criminal defendant's rights under the Double Jeopardy Clauses of the United States and Ohio Constitutions."

State v. Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶45 ("*Johnson* II). R.C. 2941.25 provides as follows:

> (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.
>
> (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.

{¶44} Under R.C. 2941.25, "multiple offenses" of similar import must merge. *State v. Ford*, 128 Ohio St.3d 398, 2011-Ohio-765, ¶9, citing *Johnson* II at ¶48-50. "When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Johnson* II at ¶44.

{¶45} The test for allied offenses has been modified and revised on numerous occasions over the past decade. The current allied offenses analysis was established by the Supreme Court of Ohio in *Johnson* II.

> In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. [*State v.*] *Blankenship* [1988], 38 Ohio St.3d [116,] at 119 * * *. If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.
>
> If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., "a single act,

> committed with a single state of mind." [*State v.*] *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569 * * *.
>
> If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.
>
> Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.

Johnson II at ¶48-51.

{¶46} In the instant case, we find that merger of the rape and gross sexual imposition offenses was not required, as the offenses were separate acts committed with different criminal conduct and with a separate animus.

{¶47} Defendant was convicted on the gross sexual imposition counts based upon conduct which involved rubbing D.A.'s buttocks and kissing D.A. on the neck and breasts. Separate from that, but following that course of events, the rape conviction was based upon conduct whereby defendant began to move his penis towards D.A.'s vagina and began pulling down D.A.'s shorts before placing a pillow over her face and raping her by putting his penis into her vagina. Here, the conduct constituting the gross sexual imposition was not incidental to the conduct constituting the rape but constituted a separate act.

{¶48} While we acknowledge that there may be circumstances under which gross sexual imposition and rape could be allied offenses of similar import, the court in *Johnson* II has recognized that this analysis may produce varying results in different cases involving the same set of offenses. *Johnson* II at ¶52. "But different results are

permissible, given that the statute instructs courts to examine a defendant's conduct – an inherently subjective determination." Id.

{¶49} Accordingly, we overrule defendant's second assignment of error.

{¶50} In his third assignment of error, defendant argues he was deprived of due process of law because the trial court imposed consecutive sentences without making the requisite factual findings. Defendant submits that the factual findings previously required for the imposition of consecutive sentences, which were in effect prior to the severance of those statutory provisions pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, have been "reinstated" and *Foster* has essentially been overruled, based upon several recent decisions. In support of his position, defendant cites to *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711; *Evans v. Hudson* (C.A.6, 2009), 575 F.3d 560; and *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723.

{¶51} Subsequent to the filing of defendant's brief, the Supreme Court of Ohio decided a case involving an identical issue. In *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, Hodge argued that the trial court had erred in imposing consecutive sentences without making the statutory findings set forth in R.C. 2929.14(E)(4) and 2929.41(A), claiming that *Foster*'s holding that those statutory provisions were unconstitutional was no longer valid as a result of the United States Supreme Court's decision in *Ice*. Hodge further asserted that because the statutes had never been specifically repealed by the General Assembly, they were "revived" by the decision in *Ice*.

{¶52} The Supreme Court of Ohio rejected Hodge's arguments and held:

> * * * the decision of the United States Supreme Court in *Oregon v. Ice* does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v.*

> *Foster*. Because the statutory provisions are not revived, trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made.

Id. at ¶39.

{¶53} Based upon the authority of *Hodge*, we overrule appellant's third assignment of error.

{¶54} We now turn to the State' motion for leave to appeal.

{¶55} The State filed a motion for leave to appeal pursuant to App.R. 5(C) and R.C. 2945.67(A). Specifically, the State seeks leave to appeal the trial court's decision to exclude testimony from Minister Bradley regarding defendant's admission to sexual "infidelities" with his stepdaughter, based on clerical privilege.

{¶56} Appeals by the State in criminal proceedings are specifically governed by R.C. 2945.67(A). *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, ¶30. Pursuant to R.C. 2945.67(A), the State may appeal as of right an order which: (1) grants a motion to dismiss all or any part of an indictment, complaint, or information; (2) grants a motion to suppress evidence; (3) grants a motion for the return of seized property; and (4) grants postconviction relief. See R.C. 2945.67(A); and *In re A.J.S.* at ¶30. The statute also provides that, with the exception of final verdicts, the State may appeal any other decision in a criminal case by leave of the court of appeals. Id. Here, the State's appeal is not an appeal of right, but one which requires leave of the appellate court.

{¶57} Under R.C. 2945.67(A), an appellate court has discretionary authority to determine whether to hear an appeal from a decision which is adverse to the prosecution, other than a final verdict. *State v. McGhee*, 10th Dist. No. 07AP-216, 2007-Ohio-6537,

¶5, citing *State v. Bistricky* (1990), 51 Ohio St.3d 157. The decision to grant or deny the State's motion for leave to appeal lies solely within the discretion of the court of appeals. *State v. Fisher* (1988), 35 Ohio St.3d 22, paragraph two of the syllabus; *State v. Burke*, 10th Dist. No. 06AP-656, 2006-Ohio-4597, ¶8. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶58} The State submits its request for leave to appeal is proper for three reasons: (1) an appeal is required because the State is challenging an interlocutory ruling which became merged into the final judgment and the appropriateness of that ruling would be an issue if any of defendant's convictions were reversed. A ruling on the propriety of the trial court's exclusion of Minister Bradley's testimony would be necessary prior to any remand for new trial; (2) the question of whether a defendant is required to prove the elements of clerical privilege in order to warrant the exclusion of testimony under said privilege is one that is capable of repetition but avoiding review. In order to avoid such an error in future cases, the appeal should be accepted; and (3) it would be equitable to grant leave to appeal, given that defendant is pursuing an appeal of right from his conviction.

{¶59} We begin by pointing to our discussion of defendant's three assignments of error and noting that we have overruled all three assignments of error and affirmed defendant's convictions. Thus, the first ground upon which the State seeks leave to appeal is moot, given that defendant's convictions have been affirmed.

{¶60} However, the State also argues that the issue of clergy privilege and the burden of proof for establishing the foundational requirements to prove the proper application of that privilege is an issue which is capable of repetition, yet avoiding review. While the State acknowledges that a determination on this issue will not affect the outcome of the instant case (under a scenario where the convictions are affirmed), the State submits that such a determination could be applicable to future cases. The State argues that without a determination, trial courts could continue to allow the application of clergy privilege to all situations involving communication with clergy as a matter of law, without requiring that the individual asserting the privilege meet his/her burden of proof to establish that the privilege actually applies.

{¶61} R.C. 2317.02(C)(1) governs privileged communications between a cleric and a penitent confessor. Specifically, the statute provides that the cleric is accountable to the authority of the church concerning a confession or information confidentially communicated to him for a religious counseling purpose in the cleric's professional character.

{¶62} As stated above, we may entertain an appeal pursuant to R.C. 2945.67(A) if the underlying legal question is capable of repetition yet evading review. *Bistricky* at 158. Because we find the record does not support the State's contention that the trial court excluded Minister Bradley's testimony on the basis that it incorrectly believed all communication with clergy is privileged as a matter of law, and that it mistakenly believed it was the State's burden to show the communication was not privileged, we find this principle is not applicable here. As a result, we deny the State's motion for leave to appeal, as further explained below.

{¶63} The State has argued that the individual asserting the privilege, not the State, has the burden of establishing that the communication is privileged. The State further asserts the communication at issue was outside the clergy privilege for several reasons, among them the fact that the communication took place after the regular counseling session, while defendant was on the phone during a drive to Cincinnati, and outside the presence of defendant's spouse, who had also been participating in marriage counseling with defendant.

{¶64} A review of the record indicates that the trial court initially addressed the issue of clergy privilege off the record before later addressing it on the record. The State acknowledges this as well. However, the record does contain the partial proffer of testimony from Minister Bradley, as well as the State's proffer of what it expected Minister Bradley's testimony to reveal. Nevertheless, the record does not contain any specific findings from which we can definitively determine that the court's rationale for finding the communication to be privileged was based upon a belief that, as a matter of law, all communications with clergy are privileged, regardless of whether or not the penitent individual has shown that the communication meets the elements of R.C. 2317.02(C). Based upon the context of the proceedings, the trial court could have just as easily determined that defendant sufficiently bore the burden of establishing the communication was privileged, and that the post-session phone call was in fact a continuation of the counseling session and thus fell within the definition of a privileged communication because it involved a confession or information confidentially communicated to the minister for religious counseling purposes.

{¶65} While the better practice would certainly have been for the trial court to state its reasons for excluding the testimony of Minister Bradley on the record, we are not persuaded by the State's conclusion that the testimony was barred based upon an improper application of the law which presumed all communications with clergy are privileged unless the State demonstrates otherwise, or that the trial court would make such a finding in every situation involving the issue of whether communications with clergy are privileged, given that the factual circumstances here are somewhat unique. Therefore, we cannot find that this is an issue which is capable of repetition but evading review. Accordingly, we deny the State's motion for leave to appeal.

{¶66} In conclusion, we overrule defendant's first, second, and third assignments of error. The State's motion for leave to appeal is denied. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed;
motion for leave to appeal denied.

BROWN and KLATT, JJ., concur.

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