[Cite as *State v. Ferrell*, 2010-Ohio-1201.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92573

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRANDON FERRELL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED
WITH INSTRUCTIONS

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-504440

BEFORE: Rocco, J., Gallagher, A.J., and Cooney, J.

RELEASED: March 25, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant Brandon Ferrell appeals from his convictions and the sentence imposed after the trial court found him guilty of two counts of forcible gross sexual imposition upon a child under the age of ten, with sexually violent predator specifications.

{¶ 2} Ferrell presents seven assignments of error. He claims: 1) the trial court lacked jurisdiction over him because the state failed to prove he was over the age of 18 when the offenses were committed; 2) the trial court erred in permitting the state to amend his indictment to reflect a range of dates during which the offenses were alleged to have been committed; 3) the trial court erred in finding the 5-year-old victim competent to testify; 4) the trial court erred in allowing other witnesses to "bolster" the victim's credibility; 5) his indictment failed to include the essential elements of the specification; 6) the offenses of which he was convicted were "allied offenses"; and, 7) the trial court failed to state the statutory "reasons" necessary to impose consecutive terms of imprisonment.

{¶ 3} Upon a thorough review of the record, this court cannot find that any of Ferrell's assignments of error have merit. Consequently, his convictions and sentence are affirmed. Due to defects in the trial court's journal entry of guilt and sentence, however, this case is remanded with instructions to correct it.

{¶ 4} According to the testimony presented at Ferrell's trial,[1] Ferrell became 18 years old on May 28, 2007. He lived until that time with either his natural father, or, more often, with his mother's family at their home on West 44th Street in Cleveland. This family consisted of Ferrell's mother, his stepfather, RM,[2] his younger male siblings, TF and RF, and his much younger half-siblings, the female victim, TM, and AM, who was a baby. TM was 4 years old.

{¶ 5} Once Ferrell turned 18, RM told him to "find himself a place" of his own. Ferrell abided by this directive. Thereafter, he "wasn't living in the home, but he was in and out."

{¶ 6} By the time Ferrell moved out of the home, his mother's family had been overseen for a number of years by the Cuyahoga County Department of Children and Family Services (hereinafter, the agency). This oversight was necessary because his mother was "lower functioning" and did not "have much control over any of the children," his brothers had "behavior issues," RM had substance abuse problems, and TM and the baby had health vulnerabilities.

{¶ 7} In June 2007 the agency's social worker assigned to the family retired. Her replacement, Leah Johnson, took over. Johnson met with the

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[1]Testimony is placed in quotes.

[2]Pursuant to this court's policy of protecting the privacy of victims of sexual abuse, the victim's family members are referred to in this opinion by their initials.

family, worked out a case plan with them, and visited nearly "three times a month" to ensure that the plan continued to help the family.

{¶ 8} Occasionally, Johnson also conducted "family team meetings" in the home. At these meetings, "all the service providers involved" with the family would assemble and discuss with the parents how the plan might require modification. One such meeting took place on a morning in late September 2007.

{¶ 9} Johnson convened the meeting in the dining room. She sat "at the head of the table," and, after the discussion got underway, found herself "sitting back letting everyone talk." When Johnson dropped out of the adult conversation, she found herself "trying to give [the victim] ideas" of ways to keep herself occupied.

{¶ 10} The victim continued to return to Johnson, who was the person present who was paying any attention to her, until, at one point, she "just kind of leaned over [Johnson's] chair and said, 'Brandon sticks his dick in my cookie.'" Johnson asked her what a "cookie" was, and TM responded, "You know." Johnson stated that she did not know; TM then "pointed to her vagina."

{¶ 11} At that, Johnson told the other adults she had to speak to TM in private. Johnson took TM to her bedroom, where Johnson interviewed her. Immediately thereafter, Johnson "called our hotline and reported the incident."

Johnson additionally referred TM for an evaluation at Metrohealth Medical Center's "Alpha Clinic."

{¶ 12} Dr. Mark Feingold, a pediatrician and director of the clinic, met with TM on September 25, 2007. In his subsequent written report, Feingold noted he received TM's "history" from both RM and Johnson, and obtained an "abstract" of the incident from Johnson. According to the "abstract," TM told Johnson that Ferrell "had put his dick in her cookie and 'gooey stuff' came out," while, at another time, he "put his fingers in her cookie." This activity "hurt her, making her cry."

{¶ 13} Feingold also interviewed TM alone. When he asked TM, "[w]hat sort of stuff does [Ferrell] do with you," she answered, "Has sex with me." Feingold repeated the question, and the victim elaborated, "He put his psa (spells out p-s-a)—his dick—in my cookie. He put his finger in my cookie." When asked "how often," TM responded, "He do that 2 times." She explained that her "cookie" was her crotch area, and "p-s-a" was "his dick."

{¶ 14} Feingold performed a physical examination of TM that did not reveal any sign of injury to her genital tissue. As a result of TM's clinical evaluation, Feingold made "initial assessments"; in relevant part, these included his assessment that TM gave him and Johnson "an explicit history of sexual abuse," and that her father stated TM complained her "cookie" was "hurting 2 weeks ago,"

which "may be associated with sexual abuse." Based upon TM's disclosures to him and to Johnson, Feingold made a "medical diagnosis of sexual abuse."

{¶ 15} Feingold's diagnosis led to TM's referral to Michael Bokmiller of the agency's sexual abuse unit. Bokmiller interviewed TM on October 17, 2007.

{¶ 16} According to Bokmiller, he began the interview with the object of "building rapport" with her, so he asked her about her family. TM told him Ferrell was "mean" because he was "asking [her] out for sex." Bokmiller proceeded to ask TM what sex was, and she eventually described it as a boy putting his "dick" in "a girl's cookie." Subsequently, after Bokmiller provided her with "anatomically-correct" pictures of a preschool-aged female and an adult male, she illustrated her understanding by circling certain parts of the body.

{¶ 17} Cleveland police detective Sherilyn Howard began her investigation of the case by interviewing the child on October 25, 2007. Howard asked TM to identify body parts on anatomically-correct drawings. While she and TM "were going over everything, [the victim] just said that Brandon touched me on my cookie." Howard asked TM to circle on the male drawing "what he touched her with." TM "circled the penis." She also circled the hand.

{¶ 18} Ferrell was indicted in this case on December 11, 2007. Counts 1, 2 and 3 charged him with rape. Each count contained two furthermore clauses that alleged he compelled the victim by force and alleged the victim was under 10

years old, and each also contained a sexually violent predator specification. The date of the offense was set forth on each count as "September 2007."

{¶ 19} On the date set for trial, the prosecutor made an oral motion to amend the date of the offense as alleged in the indictment. She explained that, while the disclosure had been made in September, "the last time that Mr. Ferrell lived in his parents' house was in May of 2007 when he then became an adult himself and was asked to leave the home," therefore, the date of the offense should read "May 2007." Since defense counsel had no objection to the change, the trial court permitted it.

{¶ 20} The trial court at that point conducted a voir dire of TM; thereafter, the court determined she was competent to testify. Before the proceedings adjourned for the day, Ferrell signed a waiver of his right to a jury trial.

{¶ 21} The following morning, the prosecutor made another oral motion to amend the dates as set forth in the indictment. She stated that after further review of the information provided by TM and the victim's age, "it should be a span" to "include May of 2007 through September of 2007."

{¶ 22} Defense counsel objected on the ground that it was his "understanding" the incident "was a one-time occurrence" involving three different acts. Counsel argued that the change did not provide adequate notice to his client.

{¶ 23} The trial court disagreed. In analyzing the issue, the trial court noted that since TM had been only 4 years old, it was inclined to "give some leeway to the State." The court further noted that the requested time frame encompassed both the originally-stated month and the month to which no objection had been made.

{¶ 24} The case then proceeded to trial. After the state presented its case, the trial court overruled Ferrell's motions for acquittal. Ferrell elected to present no evidence.

{¶ 25} The trial court ultimately found Ferrell not guilty of rape, but, on Counts 1 and 2, guilty of the lesser-included offense of gross sexual imposition, with the sexually violent predator specification.[3] The court imposed consecutive sentences of 4 years to life imprisonment on each count.

{¶ 26} Ferrell sets forth the following assignments of error in this appeal.

{¶ 27} "I. The trial court lacked jurisdiction where the government failed to prove that the appellant was over the age of eighteen at the time of the offense.

{¶ 28} "II. The trial court erred in allowing the state to amend the date of the indictment from a one month time frame to a twenty week time frame.

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[3]Although the trial court stated on the record it also found Ferrell guilty on the furthermore clauses, its journal entry does not specifically so indicate.

{¶ 29} "III. The trial court erred in finding a five-year-old witness to be competent to testify.

{¶ 30} "IV. The trial court erred in permitting testimony aimed at bolstering the victim's testimony in violation of *State v. Boston* (1989), 46 Ohio St.3d 108.

{¶ 31} "V. Appellant's state constitutional right to a grand jury indictment and state and federal constitutional rights to due process were violated when his indictment omitted all the essential elements of the sexually violent predator specification.

{¶ 32} "VI. The trial court erred in sentencing the appellant to consecutive sentences based on the same incident and the same victim in violation of Ohio's allied offense statute.

{¶ 33} "VII. The trial court erred in failing to make findings and offer its reasons for imposing a consecutive sentence in the instant matter."

{¶ 34} Ferrell's first, second and fifth assignments of error present challenges respecting his indictment.

{¶ 35} Initially, he asserts that the state failed to establish he was an adult at the time of the commission of the offenses; therefore, the trial court lacked jurisdiction over him. As authority for his position, Ferrell cites *State v.*

Spannahake, Lorain App. No. 05CA008725, 2006-Ohio-1489. This court, however, finds the facts in this case distinguishable.

{¶ 36} In *Spannahake*, the fact that the appellant was under the age of 18 at the time of the offense was "undisputed"; indeed, Spannahake did not become 18 years old until nine months after the incident alleged in the indictment. Under those circumstances, the state conceded Spannahake's argument with respect to the jurisdictional issue.

{¶ 37} A review of the record in this case, on the other hand, demonstrates that the indictment was intended to apply only to the time after Ferrell had left the family home. In context, the prosecutor's statements to the trial court concerning the amendment fully reflect this intent, and it is clear that the parties understood this intent.

{¶ 38} Furthermore, the prosecutor's statements in this regard are supported by RM's testimony during direct examination. In response to the prosecutor's questions, RM testified that Ferrell was forced to leave the home when he became 18 years old on May 28, 2007; thereafter he was "in and out" of the house only for visits. It is also clear from the testimony presented that, although TM had previous opportunities to make it, her disclosure came only during the month of September 2007. Since she was only 4 years old at the time, TM would not have had a long memory.

{¶ 39} Moreover, according to the medical history RM provided to Feingold, TM had complained of discomfort in her genital area only two weeks previous to the date on which Feingold saw her, viz., September 25, 2007. Feingold indicated such discomfort "may be associated with sexual abuse."

{¶ 40} Thus, the record contains support for the conclusion the indictment, both prior and subsequent to its amendment, alleged that Ferrell was over the age of 18 when the offenses were committed; therefore, the trial court did not lack jurisdiction in this case. Ferrell's first assignment of error, accordingly, is overruled.

{¶ 41} Ferrell next argues the amendment of the indictment to reflect a range of dates between May 28 and September 2007 constituted error. This court disagrees. Crim.R. 7(D) allows a trial court to amend an indictment "at any time," as long as "no change is made in the name or identity of the crime charged." See also, R.C. 2941.28; R.C. 2941.30. That same rule provides: "A trial court commits reversible error when it permits an amendment that changes the name or identity of the crime charged." *State v. Headley* (1983), 6 Ohio St.3d 475, 478-479, 453 N.E.2d 716; *State v. Fairbanks*, 172 Ohio App.3d 766, 2007-Ohio-4117, 876 N.E.2d 1293 at ¶21.

{¶ 42} On the other hand, in a case in which the crime remains the same, even after amendment, there is no violation of Crim.R. 7(D). *State v. Craft*, 181 Ohio App.3d 150, 2009-Ohio-675, 908 N.E.2d 476, at ¶23, citing *State v. Davis*,

121 Ohio St.3d 239, 2008-Ohio-4537, 903 N.E. 2d 609 at ¶5. To determine whether the "identity" of a crime has changed, the court must examine whether the "penalty or degree" changed. Id. at ¶24, citing *Davis*, at syllabus.

{¶ 43} In this case, the language of the original and the amended indictments remained the same, with the original indictment asserting that an adult Ferrell committed the offenses upon the 4-year-old victim. No change occurred in the potential penalty involved. *State v. Carey*, Cuyahoga App. No. 88487, 2008-Ohio-678, ¶15.

{¶ 44} Moreover, the error of the date in the original indictment was "clerical" in nature, and the subsequent changes to the date that the prosecutor requested were to the same effect. See, *State v. Stacey*, Seneca App. No. 13-08-44, 2009-Ohio-3816, ¶10. This conclusion is supported by defense counsel's acquiescence to the first amendment requested by the prosecutor.

{¶ 45} Finally, this court has previously noted that, in cases involving sexual abuse against children, indictments need not state with specificity the dates of the alleged abuse, as long as the prosecution establishes that the offenses occurred within the time frame alleged. *State v. Coles*, Cuyahoga App. No. 90330, 2008-Ohio-5129, ¶33, citing *State v. Yaacov*, Cuyahoga App. No. 86674, 2006-Ohio-5321, ¶17. Allowances must be made in cases in which the child-victim cannot be expected to remember exact dates and times, and in which the child-victim and alleged perpetrator are related and the course of conduct

may have occurred over a period of time. Id., citing *State v. Robinette* (Feb. 28, 1987), Morrow App. No. CA-652.

{¶ 46} Of course, an exception to the foregoing "general rule" exists when the state's failure to allege a specific date results in "material detriment to the accused's ability to fairly defend himself," e.g., in cases in which the defendant presents an alibi. *State v. Yaacov*, supra, ¶18. Ferrell did not, however, present such a defense; therefore, this court cannot find he suffered any material detriment. Id., at ¶24.

{¶ 47} Since the uncertainty in the dates resulted from Ferrell's inconsistent subsequent visits after his ejection from the house, and related to the young age of the victim, the amendment did not change the name or identity of the crime charged. Ferrell's second assignment of error also is overruled.

{¶ 48} Ferrell further asserts that the indictment was defective because it did not fully set forth all the essential elements of a "sexually violent predator" specification. This assertion already has been considered and rejected by this court in *State v. Bruce*, Cuyahoga App. No. 90897, 2009-Ohio-1067,[4] ¶30-33, as follows:

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[4]Affirmed by *State v. Bruce*, 123 Ohio St.3d 464, 2009-Ohio-6090, 917 N.E.2d 802.

{¶ 49} "In his third assignment of error, appellant * * * argues that the language in the indictment and the language of R.C. 2941.148 is [sic] insufficient to charge an offense and therefore the SVP conviction must be vacated.

{¶ 50} "The Ohio Supreme Court has stated that, 'a specification is, by its very nature, ancillary to, and completely dependent upon, the existence of the underlying criminal charge or charges to which the specification is attached.' *State v. Nagel*, 84 Ohio St.3d 280, 286, 1999-Ohio-507, 703 N.E.2d 773. Additionally, that court has previously referred to specifications as penalty enhancers, rather than separate violations or offenses. *State v. Evans*, 113 Ohio St.3d 100, 2007-Ohio-861, 863 N.E.2d 113, citing *State v. Foster* [109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470] at [¶]71. Therefore, a sexually violent predator specification is not a separate criminal offense, it is a sentencing enhancement that must be properly stated in the indictment as part of the underlying charge.

{¶ 51} "The requirements for an indictment containing a sexually violent predator specification are contained in R.C. 2941.148 that provides in pertinent part: 'A specification * * * that an offender is a sexually violent predator shall be stated at the end of the body of the indictment, count, or information and shall be stated in substantially the following form: SPECIFICATION (OR, SPECIFICATION TO THE FIRST COUNT). The grand jury (or insert the

person's or prosecuting attorney's name when appropriate) further find and specify that the offender is a sexually violent predator.' R.C. 2941.148(A)(2)."

{¶ 52} As in *Bruce,* a review of the indictment in this case demonstrates that each of the counts that included a sexually violent predator specification mirrored the statutory language as provided by R.C. 2941.148. Accordingly, Ferrell's fifth assignment of error also is overruled.

{¶ 53} In his third assignment of error, Ferrell argues that the trial court acted improperly in permitting the victim in this case to testify. This court finds his argument unpersuasive.

{¶ 54} Pursuant to Evid.R. 104, the decision to allow evidence at trial falls within the sound discretion of the trial court. *State v. Heinish* (1990), 50 Ohio St.3d 231, 553 N.E.2d 1026. Therefore, "an appellate court which reviews the trial court's admission or exclusion of evidence must limit its review to whether the lower court abused its discretion." *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233.

{¶ 55} A trial court abuses its discretion when it acts in an unreasonable, arbitrary, or unconscionable manner. A reviewing court should not substitute its judgment for that of the trial court. *State v. Whitfield*, Cuyahoga App. No. 89570, 2008-Ohio-1090, citing *State v. Jenkins* (1984), 15 Ohio St.3d 164, 473 N.E.2d 264.

{¶ 56} Evid.R. 601 provides in relevant part:

{¶ 57} "Every person is competent to be a witness except:

{¶ 58} "(A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly * * *."

{¶ 59} In determining whether a child under the age of ten is competent, the trial court must consider certain factors, including the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify, the child's ability to recollect those impressions or observations, the child's ability to communicate what he observed, the child's understanding of truth and falsity, and the child's appreciation of her responsibility to be truthful. *State v. Frazier* (1991), 61 Ohio St.3d 247, 251, 574 N.E.2d 483.

{¶ 60} The trial court in this case recognized its responsibility and committed no abuse of discretion when it determined TM was competent to testify. *State v. Whitfield*, supra, ¶14. The questions put to TM, along with the answers she provided, demonstrated she possessed the ability to communicate and to receive and recollect impressions of fact, and also knew the difference between truth and falsity.

{¶ 61} TM knew the name of the school she attended, knew her teacher's name, and, as any apt kindergarten student could, sang the alphabet song for the court. She knew that fairy tale characters were not "the truth" because they were

not real, telling the truth was a "good thing," and people who did not tell the truth would "get a spanking and go to their room."

{¶ 62} Since the record demonstrates the trial court did not abuse its discretion when it found the 5-year-old victim competent to testify, Ferrell's third assignment of error is overruled.

{¶ 63} Ferrell argues in his fourth assignment of error that the trial court improperly permitted Feingold to provide testimony that contravened the stricture set forth in *State v. Boston* (1989), 46 Ohio St.3d 108, 545 N.E.2d 1220. Therein, the supreme court held that, while an examining physician may provide his opinion as to whether he observed evidence of sexual abuse, he "may not testify as to [his own] opinion of the veracity of child declarant."

{¶ 64} In this case, however, Feingold did not provide his own opinion; rather, he detailed the manner in which he conducted his medical assessment of his patient. Evid.R. 803(4). Part of his assessment included obtaining information from the adults who brought TM, and part included obtaining information from his patient herself. See, e.g., *State v. Smelcer* (1993), 89 Ohio App.3d 115, 623 N.E.2d 1219; cf., *Boston*, supra.

{¶ 65} Feingold testified that his notes indicated that TM apparently provided an account of the incident to Johnson, and that TM provided to him a similar account. Feingold testified that his assessment of whether sexual abuse may have occurred was solely for purposes of further treatment. From his

testimony, it cannot fairly be stated that he expressed an opinion as to TM's veracity.

{¶ 66} Similarly, although the record reflects defense counsel invited Johnson to do so,[5] neither Johnson nor Bokmiller expressed an opinion concerning TM's veracity. They only described the process of their investigations; these necessarily included their interactions with TM. *Smelcer*, supra; *Whitfield*, supra; cf., *State v. Whitt* (1992), 68 Ohio App.3d 752, 589 N.E.2d 492.

{¶ 67} For the foregoing reasons, Ferrell's fourth assignment of error is overruled.

{¶ 68} In his sixth assignment of error, Ferrell argues that his convictions on Counts 1 and 2 are allied offenses pursuant to R.C. 2941.25(A).

{¶ 69} In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the Ohio Supreme Court recently instructed as follows:

{¶ 70} "[C]ourts 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

[5]The trial court refused to permit this line of inquiry.

allied offenses of similar import." *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph one of the syllabus.

{¶ 71} Even when the offenses are of similar import under R.C. 2941.25(A), however, subsection (B) requires a court to review a defendant's conduct and permits convictions for two or more similar offenses if the offenses were either committed separately or committed with a separate animus as to each. Id. at 57, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816; see, also, *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154.

{¶ 72} In this case, the evidence demonstrated the crimes were committed separately. TM indicated to every adult to whom she made her disclosure that Ferrell's abuse of her took place on more than one occasion. Under these circumstances, the trial court committed no error in determining Counts 1 and 2 did not constitute allied offenses pursuant to R.C. 2941.25.

{¶ 73} Ferrell challenges his sentence in the seventh assignment of error. However, this court has determined as follows:

{¶ 74} "The argument that *Oregon v. Ice* (2009), _U.S._, 129 S.Ct. 711, 172 N.E.2d 517, has 'abrogated' *Foster* [supra] has been addressed by this court in *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564. This court did not agree with Eaton's [sic] argument and stated that 'this court will continue to follow its own precedent, along with the precedent set forth by other Ohio district courts of appeals, which have determined that, until the Ohio Supreme Court states

otherwise, *Foster* remains binding.' Id. [Other citations omitted]." *State v. Marcano*, Cuyahoga App. No. 92449, 2009-Ohio-6458, ¶13.

{¶ 75} Accordingly, Ferrell's seventh assignment of error also is overruled.

{¶ 76} Ferrell's convictions and sentence are affirmed.

{¶ 77} As a final note, because the trial court failed to indicate in its final journal entry its disposition of the furthermore clauses attached to the indictment, this case is remanded for the trial court to correct the journal entry to reflect what occurred on the record at the conclusion of trial. Moreover, since the record also reflects the trial court failed to fulfill its mandatory duty to inform Ferrell about postrelease control, this court instructs the trial court to follow the procedure set forth in R.C. 2929.191. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph two of the syllabus.

It is ordered that appellee recover from appellant costs herein taxed.

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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court with instructions.

A certified copy of this entry shall constitute the mandate pursuant to

Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, A.J., CONCURS;
COLLEEN CONWAY COONEY, J., DISSENTS
(SEE ATTACHED DISSENTING OPINION)

COLLEEN CONWAY COONEY, J., DISSENTING:

{¶ 78} I respectfully dissent. I would reverse on the jurisdictional grounds raised in the first assignment of error. When the prosecutor amended the indictment to include the entire month of May, the time when Ferrell was under age eighteen, the court lost jurisdiction until the juvenile court conducted a proper bindover proceeding. *State v. Wilson*, 73 Ohio St.3d 40, 1995-Ohio-217, 652 N.E.2d 196. Furthermore, since nothing in the record established that the incidents occurred after Ferrell reached age eighteen, this jurisdictional defect has not been rendered moot.