

[Cite as *State v. Scott*, 2010-Ohio-3057.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91890

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSEPH SCOTT

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-505742

BEFORE: Gallagher, A.J., Kilbane, J., and Blackmon, J.

RELEASED: July 1, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Robert Tobik
Chief Public Defender

BY: John T. Martin
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

Also listed:

Joseph Scott
Inmate No. 551-565
Mansfield Correctional Institution
P.O. Box 788
Mansfield, Ohio 44901

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Pinkey S. Carr
Diane Smilanick
Assistant Prosecuting Attorneys
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

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).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, Joseph T. Scott, appeals his convictions in the Cuyahoga County Court of Common Pleas for gross sexual imposition and attempted rape. For the reasons stated herein, we affirm.

{¶ 2} Scott was charged under a 17-count indictment with various charges of rape, kidnapping, gross sexual imposition, and attempted rape. The first seven counts involved allegations of sexual assault against Jane Doe I, a.k.a. “C.E.J.” (hereafter “victim 1”), who was under the age of 13 at the time. The remaining ten counts involved allegations of sexual assault against Jane Doe II, a.k.a. “A.R.” (hereafter “victim 2”), who was under the age of 13 at the time. Scott entered pleas of not guilty to the charges, and the case proceeded to a jury trial. At trial, the state called several witnesses and Scott testified on his own behalf. The testimony established that victim 1 is Scott’s niece, and victim 2 is Scott’s great niece.

{¶ 3} Victim 2 was 13 years old when she testified. From October 2006 to October 2007, she frequently stayed overnight at her grandmother’s house because her mother was attending nursing school. Scott was typically there during these occasions. Victim 2 usually slept in her grandmother’s room, along with her grandmother.

{¶ 4} Victim 2 recalled that one night at her grandmother’s house on East 84th Street, when the victim was 11 years old, she awoke and saw Scott at the

edge of the bed. She testified that Scott pulled his pants down, got on top of her, pulled her gown up and underwear down, licked her vagina and her chest, and then stuck his penis in her vagina.

{¶ 5} Victim 2 recalled another incident that occurred after her grandmother moved to the Martin Luther King and Kinsman area. Her grandmother moved in April 2007. Victim 2 testified that she went to sleep on a “pallet” on the floor in her grandmother’s room and that after her grandmother had fallen asleep, Scott entered the room. She said Scott was wearing overalls and he got on top of her and stuck his penis in her vagina. Victim 2 was 12 years old at the time of this incident.

{¶ 6} Victim 2 testified that the last time Scott sexually assaulted her was on her 13th birthday, September 28, 2007. She was sleeping on a couch, and a number of other child relatives were sleeping in the vicinity on makeshift beds. She stated that Scott stuck his penis in her vagina. At one point she turned away, but Scott turned her back and penetrated her again.

{¶ 7} In June 2007, victim 2 attended a sleepover with several of her cousins at the home of Felicia Williams, a.k.a. “Aunt Pooky.” Williams is Scott’s sister and victim 2’s great aunt. During the sleepover, the girls expressed a desire to go to a local store, and Williams was concerned because of the sexual predators living in her area. A conversation ensued, and Williams asked her nieces if they knew what a sexual predator was and if anyone had touched them inappropriately. Williams then spoke to each girl individually. When Williams

spoke to victim 2 and asked if any man made her feel uncomfortable, victim 2 responded by looking down and beginning to cry. Upon further questioning, victim 2 confided to Williams that Scott had been sexually assaulting her.

{¶ 8} Williams called Scott and told him that victim 2 said he had been bothering her and making her feel uncomfortable. Williams told Scott that he needed to stop. Scott became mad and hung up the phone. Williams testified that when she eventually got back on the phone with Scott, he said he “didn’t bother the girl,” he “did nothing,” and he “didn’t f*** her.” Williams responded “who said anything about f***ing her.” Williams ultimately relayed the information to victim 2’s mother.

{¶ 9} Victim 1 was 33 years old when she testified. She testified that Scott, who is her uncle, sexually abused her when she was a child. The sexual abuse began when she was eight or nine years old. She testified that Scott lived with her family and that he would wake her and perform oral sex on her. She stated this happened on more than ten occasions. She provided detailed testimony concerning the last encounter, when she was nine or ten years old, when Scott performed oral sex on her. She testified that Scott, for the first time, tried to put his penis in her vagina and that it hurt. She eventually told her mother that Scott was bothering her, but her mother told her to “find it in her heart to forgive him.” Years later, in 2007, victim 1 became aware of the allegations regarding Scott and victim 2. Thereafter, victim 1 made a statement to the police.

{¶ 10} Steven Lee Collins, a social worker with the Cuyahoga County Department of Children and Family Services (“CCDCFS”), testified that he investigated the sexual abuse allegations concerning victim 2. He described the investigative process and explained the dispositions that may be reached at the end of the process, which include the three general dispositions of unsubstantiated, substantiated, and indicated. In this particular matter, the disposition made was “indicated.” When asked to explain “indicated,” Collins responded as follows: “Indication is how it was described to me and how I describe it to other individuals. It’s kind of the preponderance of the evidence. We have a reason to believe that something happened. We can’t outright say beyond a shadow of a doubt that it did happen. So, it’s more preponderance of the evidence, so to speak.” The basis for Collins’s disposition in this matter was “the interview with [victim 2], conversation with Detective Thompson, and the charges that were brought against Mr. Scott.”

{¶ 11} Scott denied the allegations of sexual abuse. He attributed the charges brought against him to intrafamily dissension. He also testified that he was a disciplinarian toward the younger generations of the family.

{¶ 12} At the conclusion of trial, the jury returned a verdict of guilty on Count 16 for gross sexual imposition, and on Count 17 for attempted rape. Both charges related to victim 2. The jury returned a verdict of not guilty of gross sexual imposition and rape as charged in Counts 13 and 14. Scott was acquitted of the charges in Counts 10, 11, and 12. The trial court declared a

mistrial on the remaining counts (1-9 and 15) because of a hung jury. Those counts on which the jury did not render a verdict were dismissed.

{¶ 13} The trial court sentenced Scott to a five-year prison term on Count 16 and a six-year prison term on Count 17, to be served concurrent to each other. The court also classified Scott as a Tier II sex offender as to Count 16, and a Tier III sex offender as to Count 17.

{¶ 14} Scott timely appeals and raises 11 assignments of error for our review. His first assignment of error states as follows:

{¶ 15} “I. The trial court erred when it allowed the CCDCFS social worker to testify that the CCDCFS investigation indicated that Joseph Scott had engaged in sexual conduct with [victim 2].”

{¶ 16} In *State v. Boston* (1989), 46 Ohio St.3d 108, 545 N.E.2d 1220, the Ohio Supreme Court held that in child sexual abuse cases an expert may not give her opinion as to the child’s veracity. However, we have found on numerous occasions that *Boston* does not apply when the child victim actually testifies and is subject to cross-examination. *State v. Manning*, Cuyahoga App. No. 90326, 2009-Ohio-1600; *State v. Futo*, Cuyahoga App. No. 89791, 2008-Ohio-3360; *State v. Benjamin*, Cuyahoga App. No. 87364, 2006-Ohio-5330.

{¶ 17} Mr. Collins, the social worker in this case, testified that he investigated the sexual abuse allegations concerning victim 2 and made the

disposition that sexual abuse was “indicated.” He defined the term “indicated” as akin to “the preponderance of the evidence. We have a reason to believe that something happened. We can’t outright say beyond a shadow of a doubt that it did happen.”

{¶ 18} Mr. Collins was not asked to express an opinion about victim 2’s veracity. Moreover, at no time did Mr. Collins directly comment on the victim’s credibility or her truthfulness. His statements reflected his agency’s policy of classification of child abuse cases. This court has previously recognized that “a county social worker is permitted to testify as to her disposition of a case because this is merely a reflection of the agency’s classification of cases and not a judicial determination.” *Benjamin*, supra, citing *State v. Smelcer* (1993), 89 Ohio App.3d 115, 623 N.E.2d 1219.

{¶ 19} Although the testimony defining “indicated” in terms of the “preponderance of evidence” and the “believability” of what happened is borderline, we find any such error to be harmless beyond a reasonable doubt.

In this case, victim 2 testified consistent to the information she gave to the social worker, and she was subject to extensive cross-examination. Also, testimony from the state’s other witnesses further corroborated her testimony. Accordingly, Scott’s first assignment of error is overruled.

{¶ 20} Scott’s second assignment of error states as follows:

{¶ 21} “II. The conviction for count sixteen must be vacated because count sixteen failed to allege a mens rea for the offense of gross sexual imposition and the jury was never instructed on the mens rea required for that offense.”

{¶ 22} This court has repeatedly held that “the offense of gross sexual imposition, as applied to a victim who is less than thirteen years of age, constitutes a strict liability crime which requires no proof of a precise culpable state of mind.” *State v. Lawwill*, Cuyahoga App. No. 91032, 2009-Ohio-484; *State v. Dunlap*, Cuyahoga App. No. 91165, 2009-Ohio-134, discretionary appeal allowed, 122 Ohio St.3d 1409, 2009-Ohio-2751, 907 N.E.2d 1193; *State v. Crotts*, Cuyahoga App. No. 81477, 2006-Ohio-1099. Thus, the indictment’s failure to include a specific mens rea does not render it defective in this case. Scott’s second assignment of error is overruled.

{¶ 23} Scott’s third and fourth assignments of error state as follows:

{¶ 24} “III. The evidence is insufficient to sustain the convictions in count sixteen and seventeen.”

{¶ 25} “IV. The convictions are against the manifest weight of the evidence.”

{¶ 26} When an appellate court reviews a record upon a sufficiency challenge, “the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the

essential elements of the crime proven beyond a reasonable doubt.” *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 27} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether “there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” (Internal quotes and citations omitted.) *Leonard*, 104 Ohio St.3d at ¶ 81.

{¶ 28} Count 16 of the indictment charged Scott with gross sexual imposition of a victim under the age of 13 in violation of R.C. 2907.05(A)(4). Count 17 of the indictment charged Scott with attempted rape of a victim under the age of 13 in violation of R.C. 2923.02 and R.C. 2907.02(A)(1)(b). Both of the above charges set forth a time frame of July 1, 2007 through August 31, 2007.

{¶ 29} Scott asserts that there was insufficient testimony to establish that the sexual conduct or sexual contact occurred within the time frame alleged in the indictment. He further argues that the conclusion that the offenses occurred

during the time frames in the indictment is against the manifest weight of the evidence.

{¶ 30} “Ordinarily, the state is given a certain amount of latitude in child sexual abuse cases and is not strictly held to proving that a crime occurred during a period set forth in the indictment. This is so partly because the specific time and date of the offense are not elements of the offense.” (Internal citations omitted.) *State v. Gus*, Cuyahoga App. No. 85591, 2005-Ohio-6717. The court explained in *State v. Robinette* (Feb. 27, 1987), Morrow App. No. CA-652: “We note that these particular cases often make it more difficult to ascertain specific dates. The victims are young children who may reasonably be unable to remember exact times and dates of psychologically traumatic sexual abuses. This is especially true where the crimes involve several instances of abuse spread out over an extended period of time. The problem is compounded where the accused and the victim are related or reside in the same household, situations which often facilitate an extended period of abuse. An allowance for reasonableness and inexactitude must be made for such cases considering the circumstances.” (Internal citation omitted.) Additionally, the Ohio Supreme Court has found that when precise dates and times are not essential elements of the offenses and the inexactitude of the indictment as to the date is without material detriment to the preparation of a defense, the omission is without prejudice. *State v. Sellards* (1985), 17 Ohio St.3d 169, 171-172, 478 N.E.2d 781.

{¶ 31} In this case, the precise dates and times the criminal conduct occurred are not essential elements of the charged offenses. A review of the record reflects that victim 2 was a minor at the time of the abuse, she was related to Scott, she spent many nights at her grandmother's home where Scott also stayed, and there were multiple instances of alleged sexual abuse. Victim 2 provided a detailed account of each instance of alleged sexual abuse. Testimony from other witnesses supported her testimony. Under these circumstances, an allowance for inexactitude must be made, and we cannot find that Scott suffered any prejudice.

{¶ 32} Scott also asserts that there was no evidence of any attempted rape that was not consummated. He further argues that the jury, which was hung on several counts, rendered verdicts that did not "square with the evidence." We find no merit to these arguments as it was within the province of the jury to believe some of victim 2's testimony but disbelieve other portions of her testimony.

{¶ 33} We find that, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes proven beyond a reasonable doubt. Additionally, upon a thorough review of the record, we find that Scott's convictions were not against the manifest weight of the evidence and that the jury did not lose its way or create a manifest miscarriage of justice. Scott's third and fourth assignments of error are overruled.

{¶ 34} Scott's fifth assignment of error states as follows:

{¶ 35} "V. Assuming, arguendo, that the evidence is sufficient and the verdicts are not against the manifest weight of the evidence, the indictment failed to adequately advise the defendant of the pending charges and ensure that he was tried for the same offense allegations upon which the grand jury found probable cause."

{¶ 36} Section 10, Article I, of the Ohio Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury * * *." We have recognized that the right to indictment provides an inalienable protection to the defendant that he will be tried on the same essential facts on which the grand jury found probable cause. *State v. Vitale* (1994), 96 Ohio App.3d 695, 645 N.E.2d 1277.

{¶ 37} Scott's argument appears to be based upon the vague and overlapping time frames set forth in the indictment. He asserts that it is impossible to ascertain what the grand jury was contemplating in its indictment and that the defendant cannot be certain of the evidence upon which the guilty verdicts are based.

{¶ 38} Initially, we find that the *Vitale* case relied upon by Scott is distinguishable from this matter. *Vitale* involved an amendment to the indictment to include later events at a different time and place than those alleged in the initial indictment. *Id.* Under such circumstances, we found the amendment changed the identity of the crime. *Id.* at 700-701. In this case, there was no amendment

to the indictment that changed the name or identity of the crimes charged, or that charged any separate crime. Scott was convicted on the same essential facts on which he was indicted.

{¶ 39} Insofar as Scott complains of vague and overlapping time frames set forth in the indictment, we find no merit to this argument. This court has recognized that “temporal deviations in an indictment, based on information eventually elicited in discovery, need not necessarily deprive a defendant of the right to indictment by grand jury * * *.” *State v. Shafer*, Cuyahoga App. No. 79758, 2002-Ohio-6632. This is particularly so in cases involving sexual abuse of a victim under the age of 13 over a period of time. Scott’s fifth assignment of error is overruled.

{¶ 40} Scott’s sixth assignment of error states as follows:

{¶ 41} “VI. The trial court committed plain error when it failed to instruct the jury that it must be unanimous in its determination as to the conduct of Mr. Scott that constituted the gross sexual imposition and the alleged rape for which Mr. Scott was convicted.”

{¶ 42} Scott argues that the trial court erred because the jury instructions did not contain a specific unanimity instruction. The prevailing rule in Ohio is that “a general unanimity instruction will ensure that the jury is unanimous on the factual basis for a conviction, even where the indictment alleges numerous factual bases for criminal liability.” (Citations omitted.) *State v. Johnson* (1989), 46 Ohio St.3d 96, 104, 545 N.E.2d 636. The record reflects that the trial court

provided a general unanimity instruction to the jury as follows: “[I]n order to conclude the case, it is necessary that all twelve members of the jury agree upon the verdict.” We find that the trial court’s general unanimity jury instruction was proper in this case. Finding no plain error, we overrule Scott’s sixth assignment of error.

{¶ 43} Scott’s seventh assignment of error states as follows:

{¶ 44} “VII. The trial court erred when it allowed the admission of multiple hearsay evidence.”

{¶ 45} It is well established that the addition, admission, or exclusion of evidence is a matter committed to the sound discretion of the trial court. *O’Brien v. Angley* (1980), 63 Ohio St.2d 159, 163, 407 N.E.2d 490. Consequently, for the admission or exclusion of certain evidence to be overturned on appeal, there must be a showing that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. *State v. Davis* (1988), 49 Ohio App.3d 109, 550 N.E.2d 966; *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

{¶ 46} Scott argues that the trial court erred by admitting hearsay statements. He claims that the state presented four accusatory witnesses regarding Counts 16 and 17, three of whom relied upon victim 2’s input. Scott fails to cite to the record or quote any statements that constitute hearsay. Further, he fails to establish the inadmissibility of any such testimony.

{¶ 47} We are cognizant that the medical diagnosis or treatment hearsay exception can apply to psychological issues, and may be applied to counselors or

social workers. *State v. Chappell* (1994), 97 Ohio App.3d 515, 530-531, 646 N.E.2d 1191. Further, much of the testimonial evidence reflected the witnesses' personal knowledge of events and was cumulative to victim 2's testimony. Additionally, Scott has not shown that he was materially prejudiced by any erroneous admission of hearsay evidence.

{¶ 48} As Scott has failed to set forth any hearsay evidence for our review or to establish a legal basis upon which to find any such evidence inadmissible, Scott's seventh assignment of error is overruled. See App.R. 12(A)(2) and 16(A)(7).

{¶ 49} Scott's eighth assignment of error provides as follows:

{¶ 50} "VIII. The state improperly bolstered the testimony of [victim 2] by her great-aunt."

{¶ 51} During the direct examination of Felicia Williams, the prosecutor elicited testimony that she "believed" victim 2. Scott argues that this testimony bolstered the credibility of victim 2 and constitutes reversible error.

{¶ 52} In support of his argument, Scott cites *Boston*, 46 Ohio St.3d 108. However, *Boston* stands for the proposition that expert testimony cannot be used to show that a child is telling the truth or that the child accurately testified. *Id.* Here, the opinion offered was that of a lay witness.

{¶ 53} We agree that the trial court improperly admitted this opinion testimony. Nevertheless, the testimony offered by the state's witness was consistent with victim 2's testimony. Williams also testified to the victim's

demeanor upon revealing the sexual abuse, as well as Scott's reaction upon being confronted. Williams indicated that she told Scott to stop and that she ultimately told victim 2's mother about the inappropriate behavior.

{¶ 54} Upon our review, we do not find that Scott was deprived of a fair trial by the admission of the opinion testimony. We find the error was harmless because it did not affect the outcome of the trial and did not contribute unfairly to the verdicts. Scott's eighth assignment of error is overruled.

{¶ 55} Scott's ninth assignment of error states as follows:

{¶ 56} "IX. Mr. Scott was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10, of the Ohio Constitution."

{¶ 57} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that (1) the performance of defense counsel was seriously flawed and deficient and (2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689. In Ohio, there is a presumption that a properly licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905.

{¶ 58} Scott was charged in one indictment with several counts involving sexual conduct and/or contact with two different victims. Scott argues that his trial counsel was ineffective for failing to seek to have the counts involving victim 1 severed from the counts involving victim 2.

{¶ 59} A defendant may move to sever charges under Crim.R. 14, which provides in relevant part: “If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment * * *, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires.”

{¶ 60} In deciding whether severance is proper, the Ohio Supreme Court has stated as follows: “Where the evidence of each of the joined offenses would be admissible at separate trials, severance is not required because prejudice due to the cumulation of evidence or the inference of a criminal disposition is largely absent. Moreover, the jury is capable of segregating the proof of multiple charges when, as in the present case, the evidence of each crime is uncomplicated.” (Citations omitted.) *State v. Hamblin* (1988), 37 Ohio St.3d 153, 158-159, 524 N.E.2d 476.

{¶ 61} Scott has not set forth any legal basis that would have entitled him to a severance in this matter. Counsel may have reasonably believed that one trial would be the best strategy to try and persuade the jury to return a verdict of not guilty on all counts of the indictment at the same time. Further, Scott failed to

demonstrate that he was prejudiced by joinder of the offenses. Accordingly, we cannot conclude that counsel was ineffective in failing to make a motion to sever.

{¶ 62} Scott also claims that his trial counsel was ineffective for failing to object to the failure to instruct the jury on “recklessness” under Count 16, and for failing to ask for a specific unanimity instruction. As we have already rejected these claims under earlier assignments of error, we find no merit to this argument. Scott’s ninth assignment of error is overruled.

{¶ 63} Scott’s tenth assignment of error states as follows:

{¶ 64} “X. Mr. Scott cannot be classified under either the Adam Walsh Act or Ohio’s Megan’s Law.”

{¶ 65} Scott argues that the retroactive application of Senate Bill 10 to crimes that occurred before January 1, 2008 violates the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution.

{¶ 66} This court has consistently held that Ohio’s Adam Walsh Act does not violate the retroactivity clause of the Ohio Constitution and the Ex Post Facto Clause of the United States Constitution. E.g., *State v. Blanchard*, Cuyahoga App. No. 90935, 2009-Ohio-1357; *State v. Hartman*, Cuyahoga App. No. 91040, 2009-Ohio-1069. Accordingly, we overrule Scott’s tenth assignment of error.

{¶ 67} Scott’s eleventh assignment of error states as follows:

{¶ 68} “XI. The convictions are allied offenses and must be merged.”

{¶ 69} Scott asserts that the convictions must merge as allied offenses under R.C. 2941.25. A defendant may not be convicted of both gross sexual imposition and rape when the counts arise out of the same conduct. *State v. Foust*, 105 Ohio St.3d 137, 162, 2004-Ohio-7006, 823 N.E.2d 836. However, where the evidence shows the acts of gross sexual imposition were separate and distinct from the acts of rape or committed with a separate animus, the defendant may be convicted of each. See *id.*; *State v. Knight*, Cuyahoga App. No. 89532, 2008-Ohio-579.

{¶ 70} In the instant case, there was ample evidence upon which the jury could conclude that the acts of gross sexual imposition were separate and distinct, or committed with a separate animus, from the acts of rape. Victim 2 testified to multiple instances of sexual abuse, which included acts of cunnilingus, licking her chest, and vaginal intercourse. There was evidence upon which Scott could be convicted of both gross sexual imposition and attempted rape. Scott's eleventh assignment of error is overruled.

Judgment affirmed.

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 for execution of sentence.

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

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
PATRICIA ANN BLACKMON, J., CONCUR