[Cite as *State v. Shull*, 2010-Ohio-3172.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
RUSTY R. SHULL	:	Case No. 2009AP060032
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2008CR100271
JUDGMENT:	Affirmed in part; Reversed and remanded in part
DATE OF JUDGMENT ENTRY:	July 2, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
MICHAEL J. ERNEST 125 East High Avenue New Philadelphia, OH 44663	GARY L. GREIG 153 North Broadway New Philadelphia, OH 44663

Hoffman, J.

{¶1} On October 22, 2008, the Tuscarawas County Grand Jury indicted appellant, Rusty Shull, on two counts of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(3) and six counts of corrupting another with drugs in violation of R.C. 2925.02(A)(4)(a) and (b). Said charges arose from incidents involving appellant's position as a staff member at Stepping Stones Group Home, a home for neglected children.

{¶2} A bench trial commenced on March 3, 2009. By judgment entry filed April 16, 2009, the trial court found appellant guilty as charged. By judgment entry filed June 3, 2009, the trial court sentenced appellant to an aggregate term of four years in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY OF TWO (2) COUNTS PANDERING SEXUALLY ORIENTED MATERIAL INVOLVING A MINOR PURSUANT TO OHIO REVISED CODE SECTION 2907.322(A)(3), AS THE GUILTY VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND SUFFICIENCY OF THE EVIDENCE."

II

{¶5} "THE TRIAL COURT ERRED IN CONVICTING THE DEFENDANT-APPELLANT ON SIX (6) COUNTS OF CORRUPTING ANOTHER WITH DRUGS IN VIOLATION OF OHIO REVISED CODE SECTION 2925.02(A)(4)(a) and (b). AS THE THREE (3) COUNTS OF SUBSECTION (a) AND THE THREE (3) COUNTS OF

SUBSECTION (b) ARE ALLIED OFFENSES OF SIMILAR IMPORT. PURSUANT TO OHIO REVISED CODE SECTION 2941.25(A)."

I

{¶6} Appellant claims his convictions for pandering sexually oriented material involving a minor were against the sufficiency and manifest weight of the evidence. We disagree.

{¶7} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, 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." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶8} Appellant was convicted of pandering sexually oriented material involving a minor in violation of R.C. 2907.322(A)(3) which states the following:

{¶9} "(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

{¶10} "(3) Create, direct, or produce a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality."

{¶11} " '[C]reate' is defined by Black's Law Dictionary as '[t]o bring into being; to cause to exist[.]' Black's Law Dictionary (6 Ed.1990) 366." *State v. Braxton,* Franklin App. No. 04AP-725, 2005-Ohio-2198, ¶11. Black's Law Dictionary defines "direct" as "guide; order; command; instruct" and "produce" as "[t]o bring forward; to show or exhibit; to bring into view or notice." Black's Law Dictionary (6 Ed.1990) 459, 1209. A performance is "any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience." R.C. 2907.02(K).

{¶12} Appellant argues the evidence does not support the finding that he created, directed or produced a performance showing a minor engaging in sexual activity.

{¶13} S.A. was age sixteen at the time of the incidents and was a resident of Stepping Stones Group Home. T. at 39. Appellant was a staff member, hired to monitor the children staying in the home. S.A. testified appellant became friendly with him and as a result, appellant permitted S.A. and his girlfriend, T.D., age seventeen, to have an unsupervised date at the movies. T. at 19, 25, 27, 39. Appellant drove them to the mall and dropped them off. T. at 27. After the movie, appellant picked them up and dropped T.D. off at her mother's house. T. at 27-28, 33. Later that evening, S.A. asked appellant if T.D. could come over to the group home. T. at 29. Appellant conditioned his approval upon S.A. letting him watch S.A. and T.D. engage in sexual relations in the

group home van so he could watch from the window in the group home. T. at 30. S.A. agreed, and T.D. came to the group home after hours and she and S.A. engaged in sexual relations in the van. T. at 32. After T.D. left, appellant gave S.A. pills, purportedly, Vicodin. T. at 34-35. Appellant commented to S.A. that T.D. had nice boobs and a nice body. T. at 36-37.

{¶14} A week later, appellant again gave permission for T.D. to come over after hours. T. at 41-44. The plan was to clear out the recreation room and have S.A. and T.D. engage in sexual relations in that room because the room was monitored by a camera which was linked to the office. T. at 41. T.D.'s parents were concerned about her going over, but appellant vouched that he would supervise them. T. at 43-44. S.A. and T.D. engaged in sex and appellant watched them from the office via the camera. T. at 45. Afterward, appellant again gave S.A. pills. T. at 55.

{¶15} Three other residents, D.G., Z.H., and J.K. testified that on each occasion, appellant had them join him as he watched S.A. and T.D. have sex. T. at 143-145, 164-165, 174-175, 198-200, 207-209. On each occasion, S.A. and T.D. were naked. T. at 143-144, 165, 175, 200, 208-209. J.K heard appellant condition the meetings between S.A. and T.D. on letting him watch them have sex. T. at 197-198.

{¶16} There is ample evidence that appellant created the occasions for the sexual encounters, watched them, permitted juveniles to watch with him, and rewarded S.A. for letting him watch. We find these facts are sufficient to establish that he created, directed, produced, and totally orchestrated the events.

{¶17} Upon review, we find sufficient evidence to establish the pandering of sexually oriented material involving a minor.

{¶18} Assignment of Error I is denied.

II

{¶19} Appellant claims the trial court erred in convicting him of six counts of corrupting another with drugs. We agree.

{¶20} Appellant was convicted of corrupting another with drugs in violation of R.C. 2925.02(A)(4)(a) and (b) which states the following:

{¶21} "(A) No person shall knowingly do any of the following:

{¶22} "(4) By any means, do any of the following:

{¶23} "(a) Furnish or administer a controlled substance to a juvenile who is at least two years the offender's junior, when the offender knows the age of the juvenile or is reckless in that regard;

{¶24} "(b) Induce or cause a juvenile who is at least two years the offender's junior to use a controlled substance, when the offender knows the age of the juvenile or is reckless in that regard."

{¶25} Appellant argues pursuant to R.C. 2941.25(A), these incidents were allied offenses:

{¶26} "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."

{¶27} While there was testimony concerning numerous instances when Appellant supplied the three juveniles with a controlled substance, Appellant was only indicted for providing the three juveniles with drugs on one occasion, October 20, 2007. Counts 3, 5, and 7 involved furnishing a controlled substance to S.A., Z.E. and J.K. on

October 20, 2007, while Counts 4, 6, and 8 involved inducing or causing S.A., Z.E. and J.K. to use a controlled substance on October 20, 2007.

{¶28} Appellee does not argue in its brief Appellant's convictions on Counts 3 through 8 are not allied offenses of similar import because there were six separate incidents. Rather, Appellee conclusorarily states because the elements of the offenses [3 counts each charging a violation of R.C. 2925.02(A)(4)(a) and 3 counts each charging a violation of R.C. 2925.02(A)(4)(b)] relating to corrupting another with drugs are not identical and commission of one offense does not necessarily result in commission of the other offense, they are not allied offenses of similar import.

{¶29} While the offenses are not identical, an exact alignment of the elements is not necessary. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, syllabus no. 1. Because furnishing Vicodin to the three juveniles also results in inducing or causing the juveniles to use the drug, the offenses are allied offenses of similar import. Accordingly, we sustain Appellant's second assignment of error.

{¶30} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is affirmed in part, reversed in part and remanded for further proceedings in accordance with our opinion and the law.

By: Hoffman, J.

Edwards, P.J. concurs separately

Farmer, J. dissents

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

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HON. JULIE A. EDWARDS

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HON. SHEILA G. FARMER

EDWARDS, P.J., CONCURRING

{¶31} I agree with Judge Hoffman as to the analysis and disposition of the first assignment of error and as to the disposition of the second assignment of error, but disagree with the analysis used by Judge Hoffman of the second assignment of error.

{¶32} Judge Hoffman finds that R.C. 2925.02(A)(4)(a) and (b) are allied offenses of similar import because furnishing the Vicodin to the juveniles also resulted in inducing or causing the juveniles to use the drug, and exact alignment of the elements of the offenses is not necessary for finding allied offenses under *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

{¶33} I agree with Judge Hoffman that *Cabrales* makes it clear that the elements of the offense do not have to be in exact alignment before offenses can be determined to be allied. But, a *Cabrales* analysis still requires a comparison of the elements in the abstract without reference to the facts of the case: "Instead, if, in comparing the elements of the offenses in the abstract, the offense are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import." *Cabrales* at paragraph 26.

{¶34} I do not find the elements of the offenses to be so similar that the commission of one offense necessarily results in the commission of the other. R.C. 2925.02(A)(4)(a) sets forth that no person shall knowingly furnish or administer a controlled substance to a juvenile. R.C. 2925.02(A)(4)(b) sets forth that no person shall knowingly induce or cause a juvenile to use a controlled substance. In the abstract, I do not find that furnishing a controlled substance to a juvenile necessarily results in inducing or causing a juvenile to use a controlled substance, and vice versa. For

instance, one could furnish drugs to a juvenile knowing that the juvenile intends to sell it to someone else.

{¶35} In *Cabrales*, the court found that possessing a controlled substance under R.C. 2925.11(A) and trafficking in a controlled substance under R.C. 2925.03(A)(1) were not allied offenses. "To be guilty of possession under R.C. 2925.11(A), the offender must 'knowingly obtain, possess, or use a controlled substance.' To be guilty of trafficking under R.C. 2925.03(A)(1), the offender must knowingly sell or offer to sell a controlled substance. Trafficking under R.C. 2925.03(A)(1) requires an intent to sell, but the offender need not possess the controlled substance in order to offer to sell it. Conversely, possession requires no intent to sell. Therefore, possession under R.C. 2925.11(A) and trafficking under R.C. 2925.03(A)(1) are not allied offenses of similar import, because commission of one offense does not necessarily result in the commission of the other." Id. at paragraph 29.

{¶36} Therefore, I do not agree with Judge Hoffman that *Cabrales* leads us to the conclusion that these offenses are allied offenses.

{¶37} I do agree with Judge Hoffman, though, that these offenses are allied offenses of similar import. I base my conclusion on the reasoning set forth both in the majority and in the concurring opinions in *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149.

{¶38} The majority in *Brown* said that one can look to the language of the statute to determine if the legislature intended separate punishments for violations of different subsections of the same statute when offenses result from a single act undertaken with a single animus. *Brown*, paragraphs 36-40. The Ohio Supreme Court in *Brown* stated

that if the legislative intent is clear from the language of the statute that separate punishments are not intended, then one does not need to get to a *Cabrales* type analysis.

{¶39} I find that the purpose of R.C. 2925.02(A)(4)(a) and (b) is to protect juveniles from being influenced into taking controlled substances, and the intent of the legislature is clear that it did not intend violations of these two subsections to be separately punishable when the violations arise from a single act undertaken with a single animus. Therefore, under the majority's analysis in *Brown* I find that these two offenses are allied offenses of similar import.

{¶40} But, I feel compelled to state that the analysis provided by Justice Lanzinger in *Brown* seems much less confusing than the analysis by the majority and would lead to more consistent results. Justice Lanzinger looked to the clear language of R.C. 2941.25 which provides: "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import… the defendant may be convicted of only one." Justice Lanzinger stated that "the problem of allied offenses is obviated when the defendant's conduct involves a single act with a single animus, and the offenses charged are different forms of the same crime." *Brown* at paragraph 50.

{¶41} This analysis leads me to conclude also that the appellant should be sentenced for only three of the six offenses of corrupting another with drugs in the case sub judice.

{¶42} For the above reasons, I would sustain appellant's second assignment of error and return this matter to the trial court for re-sentencing after the state has decided which three convictions should remain.

s/ Julie A. Edwards

Judge Julie A. Edwards

JAE/rmn

Farmer, J., dissents

{¶43} I respectfully dissent from Judge Hoffman's analysis in Assignment of Error II that the subject offenses are allied offenses of similar import under *Cabrales*.

{¶44} I agree with the *Cabrales* analysis of Judge Edwards in her concurring opinion at ¶34, "[i]n the abstract, I do not find that furnishing a controlled substance to a juvenile necessarily results in inducing or causing a juvenile to use a controlled substance, and vice versa." However, I do not agree with the additional analysis of Judge Edwards wherein she writes at ¶39 that in examining R.C. 2925.02(A)(4)(a) and (b), "the intent of the legislature is clear that it did not intend violations of these two subsections to be separately punishable when the violations arise from a single act undertaken with a single animus."

{¶45} Appellant was twenty-four years old and the three juveniles were under eighteen. T. at 39, 155, 189, 308-309. S.A. testified on three occasions, during a recreational football game and after each sexual encounter, appellant gave him pills. T. at 34, 53-55. S.A. testified he took the pills to impress others. T. at 73. Z.H. testified appellant gave him pills after watching the sexual encounter between S.A. and T.D. in the van and on other occasions. T. at 162, 167, 178-179. J.K. testified appellant gave him pills after the van incident. T. at 201. Appellant was indicted on the acts that occurred on October 20, 2007 only, the "van incident." On said date, appellant furnished pills to each of the three juveniles.

{¶46} Because each incident was a separate offense against each juvenile, I would find six separate incidents of corrupting another with drugs, three under subsection (A)(4)(a) and three under subsection (A)(4)(b), each subject to punishment.

{¶47} I would affirm the convictions and sentence.

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RUSTY R. SHULL	:	
Defendant-Appellant	:	CASE NO. 2009AP060032

For the reasons stated in our accompanying Opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio is affirmed in part, reversed in part and remanded to that court for further proceedings in accordance with our Opinion and the law. Costs to be divided equally.

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards

HON. JULIE A. EDWARDS

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HON. SHEILA G. FARMER