ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	SCT NO. 2013-0910
Appellant	:	
-vs-	:	
	:	
JAMES TATE II Appellant	:	

APPELLEE'S BRIEF

ROBERT L. TOBIK
Cuyahoga County Public Defender
BY: PAUL KUZMINS (COUNSEL OF RECORD)
0074475
Assistant Public Defender
310 Lakeside Avenue
Suite 200
Cleveland, OH 44113
(216) 443-7583
(216) 443-3632 FAX

COUNSEL FOR APPELLEE JAMES TATE II

TIMOTHY J. MCGINTY
Cuyahoga County Prosecutor
BY: JAMES PRICE
#0073356
The Justice Center – 9th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7800

COUNSEL FOR APPELLANT, THE STATE OF OHIO

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APPELLEE'S BRIEF

This matter comes to this court as a State's appeal. Below, the court of appeals vacated appellee's felony conviction for lack of sufficient evidence. *State v. Tate*, 2013-Ohio-570. The decision of the court of appeals is rooted in its determination that the government failed to present sufficient evidence regarding the identity of the alleged perpetrator. The court explained that the government failed to present sufficient evidence that James Tate, II, the appellee, was "the man" referenced in the testimony of the State's key witnesses. *State v. Tate* at ¶13.

On appeal, the government presents one proposition of law for this court's consideration: "In-court identification of the accused is not required to secure a conviction where sufficient circumstantial evidence was presented at trial identifying the accused as the person about whom the witnesses were testifying." Appellee agrees. This is an accurate statement of law. There is not and has never been a conflict amongst the appellate courts on this issue. Further, the State's proposition of law reflects the identical statement of law identified and applied by the court of appeals.

The true issue presented by the State is one of error correction. At issue is the appellate court's application of the underlying facts to the agreed upon law. Nothing about the instant case overrides the well-established principle that error correction is not the function of this Court. As such, the appellee urges this court to dismiss the instant appeal as improvidently granted. Alternatively, if the Court were to agree with the appellant, Mr. Tate prays that this court will summarily reverse the court of appeals and remand the matter for consideration of each of the assignments of error presented below including the remaining issues presented in the first assignment of error.

I. STATEMENT OF THE CASE

The State of Ohio arrested James Tate on February 12, 2011 at the library where the underlying events are alleged to have transpired. Initially, the State returned a two-count indictment against Mr. Tate. Cuyahoga County Court of Common Pleas Case No. 547272. On May 31, 2011, over three and one-half months later and as pretrial discussions stalled, the State re-indicted Mr. Tate adding four additional felony counts. In total, the new indictment alleged six violations of the Ohio Revised Code: two counts of kidnapping pursuant to Ohio Rev. Code § 2905.01(A)(2) & (A)(4); one count of abduction pursuant to RC § 2905.02(A)(1); one count of importuning pursuant to RC § 2907.07; one count of gross sexual imposition pursuant to RC § 2907.05(A)(1); and one count of public indecency pursuant to RC § 2907.09(A)(1). The kidnapping counts carried with them sexual motivation specifications pursuant to RC § 2941.147(A) and sexually violent predator specifications pursuant to RC § 2941.148(A).

With little pretrial motion practice beyond discovery, the parties proceeded to a bench trial on February 12, 2012. At trial, the government presented the testimony of 9 witnesses. Mr. Tate testified in his own defense. The defense also presented the testimony of Najiy Sabir, Mr. Tate's former employer.

The trial court found Mr. Tate guilty of five counts and acquitted Mr. Tate of the single count of abduction. The trial court held a separate hearing on the sexually violent predator and sexually motivation specifications. Mr. Tate was acquitted of both specifications.

At sentencing, the trial court imposed a sentence of 7 years imprisonment on each count of kidnapping; an 18 months prison sentence on both the importuning and gross

sexual imposition charges; and 6 months on the charge of public indecency. Each sentence was ordered to run concurrent with one another. The court also imposed costs.

A timely appeal was noted by the appellant. On appeal, Mr. Tate raised 6 assignments of error. The issues identified and addressed by Mr. Tate are as follows:

I. Whether sufficient evidence supported Appellant's convictions for Kidnapping and Gross Sexual Imposition.

II. Whether each of Mr. Tate's convictions were against the manifest weight of the evidence.

III. Whether Mr. Tate was prejudiced by the admission of 404(B), other acts evidence and the admission of an unlawfully presented photo array.

IV. Whether the trial court acted contrary to law by imposing appellant's sentence without applying Ohio's allied offenses statute.

V. Whether the trial court erred in failing to inform Appellant of court costs at sentencing, then imposing them in its sentencing entry.

VI. Whether the Trial Court erred when it failed to make statutorily required findings before imposing a seven year sentence of imprisonment.

On February 21, 2013, the court of appeals found that Mr. Tate's conviction was not supported by sufficient evidence and reversed and vacated the judgment of the trial court. The court concluded that "there was not sufficient evidence, circumstantial or otherwise, that the appellant was 'the man' repeatedly referenced in the testimony of the victim or her two friends." *Tate* at ¶13. The court then explained:

> There is absolutely no explanation on the record for the state's failure to even attempt to elicit an in-court identification of the appellant from the victim or the other two witnesses. The record is clear, however, that the victim stood solely in the best position to make such an identification. According to her own testimony she was approached by a man, spent a reasonable amount of time conversing with him, accompanied him on a walk to the location of the alleged crimes and later recognized him inside the library.

Id. The court then applied and followed its precedent set in *Cleveland Metroparks v. Lawrence*, 8th Dist. No. 98085, 2012–Ohio–5729, and *State v. Melton*, 8th Dist. No. 87186, 2006–Ohio–5610, ¶ 13, and the precedent set by the Ninth District Court of Appeals in *State v. Shinholster*, 9th Dist. No. 25328, 2011–Ohio–2244.

The court of appeals then declared the remaining five assignments of error moot but not before addressing the unlawful other acts evidence elicited and relied upon by the government. At trial the government had presented testimony from Heather Culver who met Mr. Tate at the same library nearly two weeks earlier than the alleged victim in this case. In addressing Culver's testimony, the court of appeals, explained:

> Culver's testimony plainly did not qualify as relevant Evid.R. 404(B) testimony as Culver's brief interaction with the appellant did not involve in any manner a request for sex, an attempt to lure her away from the library by deception, or any other criminal activity. Furthermore, Culver, unlike B.P., was eighteen years of age at the time of the encounter.

Tate at ¶ 20. The court's statements regarding this prejudicial 404(B) testimony are dicta but illustrate an additional problem with the prosecution of the instant matter. Other problems include the host of inconsistencies by the complaining witness in her testimony and her altogether implausible claims, including her testimony that she met with Mr. Tate for an outdoor study group in the middle of winter.

On March 1, 2013, eight days after the release of the opinion, the State filed a single motion captioned *An Application for Reconsideration and for an En Banc Hearing*. The application for reconsideration was denied on April 22, 2013. The request for en banc hearing was denied four days later on April 26, 2013. A notice of appeal was filed with this court on June 6, 2013. After consideration of the jurisdictional memoranda,

this court accepted the State's appeal. The State's appellant's brief was filed on January 6, 2014.

I. STATEMENT OF FACTS

James Tate cooperated with police on the day of the alleged incident. At that time he provided a statement to police denying any wrongdoing. Mr. Tate also testified at trial where he continued to maintain his innocence.

Tate testified that he met Brianna Pannell at the Euclid public library on February 12, 2011. (Tr. 251) He told her about his business selling internet plans, handed her his card, and the two walked and talked about making money in the business. (Tr. 251-54) Tate explained that Pannell had to be eighteen to work at the business. (Tr. 253) Tate's employer, Najih Sabir, confirmed that Tate did, in fact, work for his company selling internet plans. (Tr. 312-14)

Both Tate and Pannell testified that they exchanged phone numbers before the walk. (Tr. 138) It was cold enough outside that both were wearing heavy jackets. Both wore winter caps. (Tr. 134) The two walked directly past Officer Adam Beese, who was parked in a squad car on along the path to Memorial Pool. (Tr. 180)

During their conversation, Pannell asked if Tate smoked marijuana. (Tr. 255) She also told Tate that she worked at a strip club. (Tr. 256) At trial, she explained her family imposed no curfew on her, and testified that she could stay up until 3am. (Tr. 144) Pannell testified that she did keep a Facebook page with the exclamation: "Just got in. Man, I was high as fuck with these niggas, shaking my head, drugs." (Tr. 143) Pannell also listed her occupation on Facebook as working at Hooters, but testified her Facebook page was all "a joke." (Tr. 143)

Ultimately, near Memorial Pool, Tate made a pass at Pannell, and the two began talking about sex. Tate went so far as to ask for oral sex. (Tr. 257) He testified that Pannell failed to answer questions directly about her age. (Tr. 257) Tate decided to avoid the situation, walked away and returned to the library. (Tr. 258) Pannell also returned to the library.

At trial, Pannell testified that when she felt like leaving, she left: "I just got up and - - I knew it was so I said I have to go." (Tr. 115) She later testified that she told Tate that her mother was in the library (Tr. 153), and in another version, that her friends were calling and she had to go. (Tr. 114) She ultimately testified that the *only* reason she stood up was because she was receiving phone calls. (Tr. 150)

Both Pannell and Tate would pass police again on the way back to the library. (Tr. 116) Pannell's two friends were standing there, near the police, waiting for her. After meeting, the girls would all walk back to the library together. (Tr. 184) Tate walked back to the library, as well, and sat at a computer terminal.

Tate testified that, after they were inside the library, Pannell approached him in the library, and told him that, despite her age, she still drank and "partied" with friends. (Tr. 263) Tate asked her to go away. (Tr. 263)

Pannell, her friends and Tate all ended up in the library for forty minutes before Pannell left with her friends. (Tr. 119) During that time, Pannell testified that she talked to her friends, but did not tell them what she would later say at trial. (Tr. 119) At trial, Pannell testified that Tate told her there was a "study group" meeting behind nearby tennis courts. (Tr. 112) When she and Tate arrived at the pool, near the tennis courts,

there was no study group there. (Tr. 152) She testified that Tate called her phone number, but she did not answer. (Tr. 138)

Pannell spoke with police less than an hour after leaving the library. (Tr. 120) At that time, she told them that Tate showed his penis to her, and she walked away. Pannell never mentioned touching, or being touched by Tate, in contrast to her trial testimony. (Tr. 155-156) She also failed to mention in her police report that she got on her knees for Tate, also in contrast to her trial testimony. (Tr. 132) Officer's then drove to the Euclid library to find Tate sitting at a computer terminal.

Officers interviewed Tate at the library. (Tr. 176) Tate cooperated with police and maintained that nothing happened. (Tr. 176) Nevertheless, officers arrested Tate the same day. Tate's memory of the events has never changed – he testified on video and at trial that he did not have sexual contact with Pannell. (Tr. 258; Ex. 31 at 14:03:50)

III. APPLICABLE LAW AND DISCUSSION

The State presents a single proposition of law for the court's consideration. That proposition of law, as formulated by the State, is as follows:

Proposition of Law I:

In-court identification of the accused is not required to secure a conviction where sufficient circumstantial evidence was presented at trial identifying the accused as the person about whom the witnesses were testifying.

The instant proposition of law is entirely uncontroversial and is an accurate restatement of the controlling law regarding the use of circumstantial evidence to prove the identity of the accused. Indeed, the proposed proposition of law is the same statement of law announced, applied and followed by the court of appeals below. *Tate*, 2013-Ohio-570 at ¶11-12.

A long-established principle of criminal law is that the prosecution must prove "beyond a reasonable doubt the identity of the accused as the person who actually committed the crime." *Cleveland Metroparks v. Lawrence*, 8th Dist. No. 98085, 2012-Ohio-5729, ¶ 13 citing *In re K.S.*, 8th Dist. No. 97343, 2012-Ohio-2388. This Court has steadfastly held for at least 40 years that circumstantial evidence alone *is* sufficient to sustain a conviction. *State v. Kulig* (1974), 37 Ohio St.2d 157; see also, *State v. Nicely* (1988), 39 Ohio St.3d 147, 151; *State v. Kamel* (1984), 12 Ohio St.3d 306; *State v. Hankerson* (1982), 70 Ohio St.2d 87, certiorari denied (1982), 459 U.S. 870.

There is no dispute regarding the proposed proposition of law. Appellant and appellee agree the proposed proposition of law is an accurate statement of law. However, the appellant disagrees with the application of the statement of law to the facts, as it believes them to be, by the court of appeals.

According to Section 2, Article IV of the Ohio Constitution, this Court "sits to settle the law, not to settle cases. *Baughman v. State Farm Auto Ins. Co.*, 88 Ohio St. 3d 480, 2000-Ohio-397 (Cook, J., joined by Stratton, J. concurring). This case "offers no more than 'error correction' regarding the application of settled law to the facts of this case." Id. Because this case seeks mere error correction, Tate respectfully asks that this matter be dismissed as improvidently allowed. *State v. McGlothan*, --- N.E.2d ----, 2014-Ohio-85 (Lanzinger, J., dissenting).

The court of appeals cited *Cleveland Metroparks v. Lawrence*, supra, in its resolution of the issue at-hand. *Tate*, 2013-Ohio-570 at ¶ 11. In *Cleveland Metroparks* as in this case, the alleged perpetrator was not identified at trial by an eyewitness. In *Cleveland Metroparks*, two alleged victim/eyewitnesses gave a park ranger details

regarding the alleged assailant and on which vehicle to stop. *Cleveland Metroparks*, 2012-Ohio-5729 at ¶ 16. The park ranger testified that Lawrence matched the details provided and that he arrested Lawrence near the scene. The ranger also identified Lawrence in court. *Id.* The court of appeals found that such evidence was insufficient to establish identity:

> "Miss Rowland and Miss Difiore were never asked to identify the appellant in court, they never viewed a photo array in which they identified the appellant and, other than pointing out a specific vehicle, a rather common Chevy Malibu, they did not make any further identification of the appellant to the ranger at the scene."

Id. at ¶16-17.

The court of appeals also discussed *State v. Melton*, infra, a case that provides contrast to *Cleveland Metroparks*. *Tate*, 2013-Ohio-570 at ¶ 12 citing *State v. Melton*, 8th Dist. No. 87186, 2006-Ohio-5610, ¶ 13. *Melton* offered significantly different circumstances, hinging on the testimony of Officers Hensely and Weiss (Melton was charged with Assault at to Weiss):

> "Officer Hensley stated that he observed Officer Weiss conduct a pat-down search of Melton's person. Officer Weiss then attempted to return property into Melton's pocket. Melton rolled onto his side and kicked Officer Weiss in the shin of his leg. At that point, other officers rolled Melton onto his stomach to prevent further assaults.
>
> Officer Weiss testified he searched Melton for weapons after his arrest. He removed papers from one of Melton's coat pockets. When he attempted to return the papers to Melton's pocket, Melton rolled over onto his hip and kicked the officer while yelling, "leave me the [expletive] alone, bitch!" The kick resulted in bruising and swelling to the officer's leg. The officer received medical treatment from the Cleveland Clinic and was prescribed a full strength pain reliever."

Id. at ¶ 10-11. The court of appeals held: "The testimonial evidence offered at trial was sufficient to prove beyond a reasonable doubt that Melton was the person who assaulted Officer Weiss." *Id.* at ¶ 16.

In the case at hand, the court of appeals held that the facts more closely resembled *Cleveland Metroparks*, rather than *Melton.* Unlike *Melton*, the State presented only one direct eyewitness in its case in chief. Only Pannell testified as a direct eyewitness to what is alleged to have happened that day. As in *Cleveland Metroparks*, at no time did the State's sole eyewitness, Pannell, identify Tate in court. And as in *Cleveland Metroparks*, the "identifying" officer in the case did not witness what occurred that day – *he simply made an identification of a person after the fact.*

The court of appeals discussed facts that the State now asserts need new consideration, including the fact that Pannell's two friends were present, and that Pannell recognized the man in the library:

> "In the case sub judice, there was not sufficient evidence, circumstantial or otherwise, that the appellant was "the man" repeatedly referenced in the testimony of the victim and her two friends. There is absolutely no explanation on the record for the state's failure to even attempt to elicit an in-court identification of the appellant from the victim or the other two witnesses. The record is clear, however, that the victim stood solely in the best position to make such an identification. According to her own testimony she was approached by a man, spent a reasonable amount of time conversing with him, accompanied him on a walk to the location of the alleged crimes and later recognized him inside the library.
>
> As in *Cleveland Metroparks* however, the witnesses who had direct contact with the perpetrator, [the complaining witness and her friends] were never asked to identify the appellant in court and never viewed a photo array in which they identified the appellant as the perpetrator. As such, the

> trial court erred in denying appellant's Crim.R. 29 motion as to all counts."

Tate, at ¶13-14. A review of the above passage and the *Tate* opinion in its totality demonstrates that the court of appeals addressed the facts raised here, and below, by the State. Nevertheless, the State is dissatisfied with the court's final resolution.

The *Tate* Court correctly identified and applied the prevailing case law. The rationale of the court of appeals is clear and coherent. The court did not create new law and did not create a conflict of law between the districts. The Appellant simply is not happy about the court's application of the facts to the law. Historically, this Court has routinely refused to participate in this type of error correction. Based on this, Mr. Tate prays that this Honorable Court overrules to the government's appeal or prays that this Court dismisses the appeal as improvidently granted.

Should this Court sustain the instant appeal, this Court should summarily reverse the court of appeals and remand the matter to the court of appeals for further review. Indeed, the court of appeals should be directed to address all six of assignments of error raised below including further consideration of the first assignment of error. The court of appeals sustained the first assignment of error in part only. Still outstanding are the issues of whether the government presented sufficient evidence of "force" and whether the defendant's convictions for kidnapping and gross sexual imposition were supported by sufficient evidence. In addition, the court of appeals should more fully discuss the prejudice sustained by Mr. Tate by the introduction of prejudicial other acts evidence.

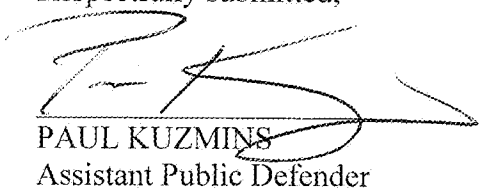
III. CONCLUSION

The appellant's proposed proposition of law accurately reflects the law in Ohio. See, *State v. Smith*, Cuyahoga App. No. 79637, 2002-Ohio-1662; *State v. Monnin* (Oct.

12, 1994), 2nd Dist. No. 1250; *State v. Baxla* (June 13, 1988), 4th Dist. No. 656. Indeed, this Court's jurisprudence in this area goes back unbroken for at least 40 years. *State v. Kulig* (1974), 37 Ohio St.2d 157, 160 (It is well-settled under Ohio law that a defendant may be convicted solely on the basis of circumstantial evidence.), see also, *State v. Nicely*, supra at 151; *State v. Kamel*, supra; *State v. Hankerson*, supra.

As discussed above, there is no dispute that the proposed proposition of law is simply a restatement of the controlling law. It controls in the instant case and in similar cases. There is no dispute that the court of appeals correctly identified and applied the controlling law. *Tate* at ¶¶11-12. The only dispute is whether the court of appeals erred in its application of the underlying facts to the controlling law. Based on this, appellee asks that this court dismiss the instant appeal as improvidently granted. In the alternative, Tate asks that this court summarily reverse the trial court and remand the matter for reconsideration of the first assignment of error and, if necessary, resolution of the remaining 5 assignments of error.

Respectfully submitted,



PAUL KUZMINS
Assistant Public Defender

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum was hand-delivered upon Timothy J. McGinty, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 25th day of February, 2014.

PAUL KUZMINS
Assistant Public Defender