



R.C. 2903.02, which is considered a “sexually oriented offense” if it is “committed with a purpose to gratify the sexual needs or desires of the offender.”<sup>3</sup> The State has the burden of proving by clear and convincing evidence that the murder committed by Defendant was committed with a purpose to gratify his sexual needs or desires.<sup>4</sup> Whether or not the offense of murder is classified as one which was ‘committed with a purpose to gratify the sexual needs or desires of the offender’ is a question of fact which lies with the unique facts and circumstances of each individual case.”<sup>5</sup> As noted by the Eighth District Court of Appeals in *State v. Nagy*, Cuyahoga App. No. 90400, 2008-Ohio-4703, ¶41, [t]he Second District Court of Appeals, also applying the former “gratification prong,” set a standard of review for a claim challenging the evidence in support of it: ‘[w]here there is not testimony or direct evidence that the offender was gratifying himself sexually, a finding of purpose of sexual arousal or gratification may be inferred from the type, nature, and circumstances surrounding the contact.’ *State v. Florer*, 5<sup>th</sup> Dist. No. 2005-CA-47, 2006 Ohio 4441, P13, citing *State v. Anderson* (Mar. 3, 2000), 2d Dist. No. 99-CA-19, 2000 Ohio App. LEXIS 742.”<sup>6</sup>

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<sup>3</sup> Former R.C. 2950.01(D)(3). *State v. McClellan*, *supra*, ¶15.

<sup>4</sup> “Clear and convincing evidence is that measure or degree of proof that will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.” *State v. Eppinger*, 91 Ohio St.3d 158, 164, 743 N.E.2d 881, 887, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, 477, 53 Ohio Op. 361, 364, 120 N.E.2d 118, 123.

<sup>5</sup> *State v. McClellan*, *supra*, ¶15, citing *State v. Slade* (Dec. 28, 1999), Franklin App. No. 98AP-1618, 1999 Ohio App. LEXIS 6476. See *State v. Nagy*, Cuyahoga App. No. 90400, 2008-Ohio-4703, ¶41.

<sup>6</sup> In its Memorandum, and at the Hearing, the State cited to the Ohio Supreme Court’s decision in this matter, *State v. Heinish*, 50 Ohio St.3d 231, 553 N.E.2d 1026 (1989), for its proposition that the Court’s decision to vacate Defendant’s attempted rape conviction “was impacted by the rule at the time that convictions based solely on circumstantial evidence could be sustained only where the evidence excluded all reasonable hypotheses of innocence.” State’s Memorandum, at page 7. Indeed, in *Heinish*, and when explaining its decision to vacate the attempted rape conviction, the Court stated: “The attempted rape conviction was, of course, based wholly upon circumstantial evidence. We held in *State v. Woods* (1976), 48 Ohio St.2d 127, 2 O.O. 3d 289, 357 N.E.2d 1059, paragraph one of the syllabus, vacated on other grounds (1978), 438 U.S. 910, that conduct must be ‘strongly corroborative of the actor’s criminal purpose’ in order ‘to constitute a substantial step’ toward the act. We went on to state that ‘\*\*\*this standard does properly direct attention to overt acts of the defendant which *convincingly*

This Court finds by clear and convincing evidence that based upon the evidence adduced at the trial of this matter regarding the type, nature and circumstances surrounding the contact, and decisions from the Eighth, Tenth, Second and Fifth District Courts of Appeals cited and discussed herein, Defendant committed a "sexually oriented offense".<sup>7</sup> Accordingly, a HB 180 hearing is necessary and the Court will schedule the hearing.

**IT IS SO ORDERED.**

  
JUDGE PAMELA A. BARKER                      DATED 9-20-16

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*demonstrate* a firm purpose to commit a crime \*\*\*.' (Emphasis added.) *Id.* at 132, 2 O.O.3d at 292, 357 N.E.2d at 1063." The State then cited *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492, for the proposition that the rule applied in *Heinisch* is no longer the law, but instead, "[c]ircumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof." State's Memorandum, at page 7.

<sup>7</sup> This Court also notes that in that part of its decision vacating the attempted rape conviction, the Ohio Supreme Court stated: "There is no evidence by itself sufficient to reach the threshold of a separate crime of attempted rape as opposed to gross sexual imposition." (Emphasis added.) *Heinisch, supra*, at \*24.