[Cite as *In re Moore*, 2004-Ohio-6357.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	
		No. 04AP-581
Michael Moore,	:	(C.P.C. No. 03JU-779)
Minor Child,		
	:	(REGULAR CALENDAR)
Appellant.		
	:	

O P I N I O N

Rendered on November 30, 2004

David L. Rowland, for appellant.

Jim Petro, Attorney General, and *Katherine J. Press*, for appellee.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

BROWN, J.

{¶1} Michael Moore, a minor, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, in which the court found appellant to be a delinquent minor for having committed an act that would have constituted the offense of gross sexual imposition, in violation of R.C. 2907.05, if committed by an adult.

{¶2} On June 6, 2002, appellant, who was 11 years old at the time, and his cousin, "C.H.," who was six years old at the time, were staying overnight at the home of their grandmother, Linda Buettner. The boys were sleeping in the same room. After entering the room to check on the boys, Buettner found them together in C.H.'s bed, both lying face up, with appellant on the bottom and C.H. on top of appellant. Buettner testified that C.H.'s buttocks were against appellant's penis. When C.H. got up from the bed, she noticed that his pajama bottoms were pulled down to his ankles, and appellant's bottoms were off. It is undisputed that C.H. had been previously sexually abused by two other older cousins.

{¶3} A complaint was filed alleging appellant to be a delinquent for committing rape. On October 27, 2003, a trial was held before a magistrate. At the trial, the state called C.H., Buettner, and Detective Cynthia High, a Columbus police detective. At the conclusion of the state's case-in-chief, appellant moved the court to dismiss the complaint, pursuant to Juv.R. 29, asserting there was no evidence presented of "sexual conduct," which is a necessary element of rape. The magistrate denied the motion. Appellant presented no evidence and no witnesses, and renewed the motion to dismiss at the close of his case. The magistrate did not rule on the renewed motion and heard closing arguments. After completion of closing arguments, the magistrate stated that "there was absolutely no evidence offered as to sexual conduct," as "[t]here was never any indication of any penetration from anyone," and stated that appellant could not be charged with rape. However, the magistrate found the state demonstrated "sexual contact" had occurred, which is a necessary element of the lesser-included offense of gross sexual imposition. The magistrate then found appellant to be a delinquent minor for

having committed the lesser-included offense of gross sexual imposition. Appellant filed objections, all of which the trial court overruled. Appellant appeals the trial court's judgment, asserting the following assignments of error:

> [I.] The lower court erred as a matter of law in affirming the Magistrate's denial of the Minor Child's Rule 29 Motion for Dismissal.
>
> [II.] The lower court erred as a matter or [sic] law in affirming the Magistrate's decision as the juvenile was denied his due process rights to address the charge of Gross Sexual Imposition. The juvenile was denied the opportunity to present a defense to the lesser included offense.
>
> [III.] The lower court erred as a matter of law in affirming the Magistrate's decision which did not utilize the proper legal standard.

{¶4} We will address appellant's first and second assignments of error together, as they are related. Appellant argues in his first assignment of error that the trial court erred in affirming the magistrate's denial of his Juv.R. 29 motion to dismiss. Appellant argues in his second assignment of error that the trial court erred in affirming the magistrate's decision because he was denied his due process rights to address the charge of gross sexual imposition. With regard to his first assignment of error, appellant contends that the magistrate should have granted his motion to dismiss because he found there was no evidence offered as to "sexual conduct," which is a necessary element of the offense of rape. With regard to his second assignment of error, appellant asserts that he was not given an opportunity to address the elements of the lesser-included offense of gross sexual imposition because the magistrate did not amend the complaint to include the lesser-included offense until after the closing of all evidence.

{¶5} However, appellant's arguments are unpersuasive because an indictment on a greater offense necessarily and simultaneously charges a defendant with lesser-included offenses as well. *State v. Lytle* (1990), 49 Ohio St.3d 154, 157. It is not necessary that the indictment explicitly set forth each of these lesser offenses. Id. We rejected an argument similar to appellant's in *State v. Turner* (Dec. 30, 1997), Franklin App. No. 97APA05-709. In *Turner*, after the close of the evidence, the trial court granted the state's request for a jury instruction on lesser-included offenses and denied the defendant's motion to dismiss pursuant to Crim.R. 29. On appeal, the defendant argued that the jury would not have had the opportunity to consider the lesser-included offenses had the trial court properly granted defendant's first Crim.R. 29(A) motion. We found that, because an indictment on a greater offense necessarily and simultaneously charges a defendant with lesser-included offenses as well, a dismissal of the greater charges set forth in the indictment would not have mandated a dismissal and the defendant's discharge from further prosecution. We concluded that the issue on appeal was whether the trial court should have granted defendant's motion of acquittal with respect to the lesser-included offenses of murder based upon the evidence presented.

{¶6} In the present case, implicit in the charge of rape, was the lesser-included and inferior degree offense of gross sexual imposition. Appellant had sufficient notice that he could be found delinquent if the evidence showed that he committed gross sexual imposition and, therefore, notice was sufficient for preparation of a defense and to decide whether it should be presented. Accordingly, appellant's first and second assignments of error are overruled.

{¶7} Appellant argues in his third assignment of error that the trial court erred in affirming the magistrate's decision because the magistrate did not utilize the proper legal standard. In order to prove gross sexual imposition, the state was required to prove that appellant had "sexual contact" with C.H. The gross sexual imposition statute, R.C. 2907.05, provides, in pertinent part:

> (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:
>
> * * *
>
> (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

{¶8} R.C. 2907.01(B), defines "sexual contact," and provides:

> "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

{¶9} Appellant claims that the magistrate failed to recognize the element of "for the purpose of sexually arousing or gratifying either person" in making his determination, pointing to the magistrate's findings of fact and conclusions of law, in which the magistrate stated:

> Testimony was clear from [C.H.], Ms. Buettner, and Detective High that sexual contact had occurred between [C.H.] and Michael as defined in O.R.C. section 2907.01. Any touching of an erogenous zone of another is sufficient for a finding of sexual contact. * * *

{¶10} Appellant's argument is, in essence, that the state presented insufficient evidence to demonstrate that any contact was "for the purpose of sexually arousing or gratifying either person." An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. 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. Id. Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Indeed, in determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, at ¶79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks*, supra, at 273.

{¶11} In determining appellant's objections to the magistrate's decision, the trial court specifically addressed the element of "for the purpose of sexually arousing or gratifying either person," and we agree with the trial court's analysis. The purpose of

sexually arousing or gratifying either person is an essential element of R.C. 2907.05(A)(4). *State v. Mundy* (1994), 99 Ohio App.3d 275, 292. However, there is no requirement that there be direct testimony regarding sexual arousal or gratification. *State v. Astley* (1987), 36 Ohio App.3d 247; *State v. Cobb* (1991), 81 Ohio App.3d 179; *In re Anderson* (1996), 116 Ohio App.3d 441; *State v. Brady* (July 9, 2001), Stark App. No. 2000CA00223. Proof of an accused's purpose or specific intent invariably requires circumstantial evidence, absent an admission. *State v. Hendricks* (Sept. 18, 1998), Erie App. No. E-96-060; *State v. Jones* (July 22, 1998), Auglaize App. No. 2-98-1. In the absence of direct testimony regarding sexual arousal or gratification, the trier of fact may infer appellant was motivated by desires for sexual arousal or gratification from the "type, nature and circumstances of the contact, along with the personality of the defendant." *Cobb*, supra, at 185; *Brady*, supra (citing *Cobb*). "[T]he proper method is to permit the trier of fact to infer from the evidence presented at trial whether the purpose of the defendant was sexual arousal or gratification by his contact with those areas of the body described in R.C. 2907.01." *Cobb*, at 185. "From these facts the trier of facts may infer what the defendant's motivation was in making the physical contact with the victim. If the trier of fact determines, that the defendant was motivated by desires of sexual arousal or gratification, and that the contact occurred, then the trier of fact may conclude that the object of the defendant's motivation was achieved." Id.

{¶12} In the case sub judice, Buettner testified that, when she entered the bedroom, C.H. and appellant were lying in the bed, face up, with appellant on the bottom and C.H. on top. She noticed that C.H.'s pajama bottoms were around his ankles, and appellant had no bottoms on. She said C.H.'s buttocks were against appellant's penis.

Buettner also testified that appellant told her that C.H. wanted him to do it. Detective High testified that appellant told her that C.H. lay on top of him, and his penis touched C.H.'s behind. She also testified that appellant said C.H. asked him to do something to him because his other cousins had done it. C.H. testified that appellant did "sexual" things to him. He said appellant's "privates" touched him.

{¶13} We find this evidence sufficient for an inference that sexual contact was accomplished for the purpose of sexual arousal or gratification. There was no evidence that appellant's penis touched C.H.'s buttocks by accident. See *State v. Edwards*, Cuyahoga App. No. 81351, 2003-Ohio-998, at ¶24. Further, the buttocks are an erogenous zone as specifically defined in R.C. 2907.01(B). Although touching alone is not sufficient for a conviction, it can be strong evidence of intent. *In re Anderson*, supra, at 444. While we find this to be a difficult case due to the ages of the children involved, given these circumstances, we find there was sufficient evidence to infer that the act was committed with the specific purpose or intention of sexually arousing or gratifying appellant. Therefore, there was sufficient evidence presented at trial that a trier of fact could conclude that appellant committed gross sexual imposition. Appellant's third assignment of error is overruled.

{¶14} Accordingly, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is affirmed.

Judgment affirmed.

BRYANT and McCORMAC, JJ., concur.

McCORMAC, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.
