

[Cite as *In re J.M.*, 2009-Ohio-3950.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

IN RE: J.M., A MINOR CHILD

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C.A. CASE NO. 22836

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T.C. NO. A

2008-0244(01)(02)

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(Civil appeal from Common

Pleas Court, Juvenile

Division)

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**OPINION**

Rendered on the 7<sup>th</sup> day of August, 2009.

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FRENCH, J. (by assignment)

{¶ 1} Appellant, J.M. ("appellant"), appeals the judgment of the Montgomery County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, that adjudicated him delinquent for rape and gross sexual imposition. In this opinion, we conclude that the trial court did not err by finding the child victim

competent to testify or by excluding the victim's mental health records. We also conclude that sufficient evidence supported the delinquency finding, and it was not against the manifest weight of the evidence. Therefore, we affirm.

{¶ 2} Appellee, the state of Ohio ("appellee"), filed a complaint alleging that appellant committed (1) gross sexual imposition against his stepsister, M.F., between August 17 and October 8, 2007, and (2) rape and gross sexual imposition against M.F. on December 31, 2007. Appellant was 15 years old and M.F. was eight years old during these incidents.

{¶ 3} In March 2008, the court held a hearing to determine whether M.F.—who would be nine years old by the time of the adjudicatory hearing—was competent to testify. In response to questions from the court, M.F. stated her age, birthday, address, and school. She was in third grade. She could read and write and knew basic multiplication. She knew the name of the president and that a presidential election was occurring. M.F. knew who lived with her. She remembered who attended her birthday party the previous year, and she remembered that she had a pink cake. The court asked M.F. about the previous Christmas. M.F. said that her favorite Christmas present was a big transportable radio that plugs into a wall. Three years prior, M.F. was asked to leave day-care because she "was being bad, hitting people, throwing blocks." (3/4/08 Tr. 8.) M.F. knew that it was wrong to throw blocks, and she went to another day-care and did not throw blocks. In first grade, M.F. was punished for fighting with another student. She said that she takes medicine called Abilify for anger management. She said that she sees a counselor for anger management, too. She identified a

bank and a clock in the judge's chambers and a blue hat and a white hat on the judge's desk. She knew that the court would be lying if it said that either the blue or white hat was green. M.F. told the truth when teachers questioned her. She knew that it was wrong to tell lies and that she would get in trouble for lying. She knew that she was supposed to tell the truth in court. She knew that, during the adjudicatory hearing, she would be asked if she promised to tell the truth, and she indicated that she was going to tell the truth.

{¶ 4} The court discussed the issue of M.F.'s competence with the parties. Defense counsel said that, in the summer of 2007, M.F. was hospitalized for psychological treatment. Defense counsel noted that the prosecution was aware of this, but did not obtain the mental health records. Defense counsel indicated that he had not yet obtained the records either. The court concluded that M.F.'s mental health records were not germane to whether M.F. was competent to testify. The court stated that it interviewed M.F. knowing "that there [were] questions from the defense regarding her mental health status." (3/4/08 Tr. 42.) The court specified that it asked M.F. "about her medications, about her issues of anger, about her problems with other youth during her school years." (3/4/08 Tr. 42-43.) The court found M.F. competent to testify. Defense counsel objected and stated that the court did not have enough information about M.F.'s mental health to make that determination.

{¶ 5} At defense counsel's request, the court ordered Kettering Hospital Youth Services and South Community Behavioral Health to provide copies of M.F.'s records. As we detail below, the defense obtained the records, but the court

retrieved them and ultimately precluded their release and admission into evidence. The defense objected and asked that the documents be made part of the record for appellate review.

{¶ 6} On April 29, 2008, the court held an adjudicatory hearing on the charges against appellant. M.F. testified as follows for appellee. On the evening of December 31, 2007, M.F. was watching television with appellant. M.F. was sitting on the couch, and appellant was lying on the couch. Appellant said that M.F. "could scoot over." (4/29/08 Tr. 20.) M.F. moved closer to appellant, and appellant placed his hands underneath M.F.'s clothes and rubbed the outside of her "private." (4/29/08 Tr. 22.) M.F. indicated this area was between her legs where she would urinate. M.F. estimated that appellant rubbed her private for half an hour. Next, appellant went inside her private with his finger. M.F. felt appellant's finger moving inside her. M.F. tried to leave, but appellant said "don't you want to watch T.V.?" (4/29/08 Tr. 26.) M.F. put a blanket on top of her so that appellant would stop because the touching did not "feel right." (4/29/08 Tr. 37.) Appellant did not stop after M.F. retrieved the blanket. M.F. testified that appellant previously did the "same thing" in the summer when they lived in a different home. (4/29/08 Tr. 34.) M.F. did not tell her mother about the first incident because she was scared. She told her mother about the second incident after her mother asked if something had happened.

{¶ 7} On cross-examination, M.F. clarified that she did not tell her mother about the first incident with appellant because she was scared that she would get in trouble. M.F. had "been in trouble before with things that had happened with"

appellant. (4/29/08 Tr. 42.) M.F. admitted telling a police detective that appellant did not say anything during the December 2007 incident. She conceded that she might be wrong about testifying that appellant spoke to her during the December 2007 incident. She said that during both incidents, appellant was on the couch "sleeping or getting ready to sleep before anything happened." (4/29/08 Tr. 56.)

{¶ 8} On redirect, M.F. testified that she did not know if appellant was getting ready to sleep before both incidents. She said that she was on the couch before appellant. She said that she had been in trouble once for bothering appellant, but M.F. did not touch appellant's "private part." (4/29/08 Tr. 59.)

{¶ 9} On recross-examination, defense counsel asked M.F. if she had "gotten in trouble a lot in school or from your mom or other people, for bothering other people." She said, "Yes." (4/29/08 Tr. 63.) Defense counsel then asked why she went to Kettering Hospital. The prosecution objected. The court sustained the objection and said "everything regarding that issue is not relevant to today's trial." (4/29/08 Tr. 63.)

{¶ 10} Kettering Police Detective Gary Voehringer testified that he interviewed appellant about the December 2007 incident. Appellant initially denied that any "skin to skin" contact occurred between M.F. and him, but then indicated that M.F. grabbed his hand and forced it to her body. (4/29/08 Tr. 72.) Appellant withdrew his hand when he realized that he was touching M.F.'s "private parts." (4/29/08 Tr. 72.) Appellant said that he was not "a hundred percent positive" that he touched M.F.'s vagina because "he might have been touching folds of her flesh

as well." (4/29/08 Tr. 73.) Appellant said that another time he was sleeping on the couch "and woke to find his hand inside [M.F.'s] pajama bottoms." (4/29/08 Tr. 73.) Appellant gave a written statement about the December 2007 incident that indicated the following. Appellant was watching television when M.F. sat next to him. M.F. asked appellant to "give her a high five" and then she "would make a move to place my hand on any of her private parts to try and make me touch her after I pushed her away and she kept trying to force my hands down her pants or even [in] her shirt to touch her anywhere that is sexual to her." (State's Exhibit 2.)

{¶ 11} The defense moved for an acquittal. The court denied the motion as to the rape and gross sexual imposition counts pertaining to the December 2007 incident, but the court granted the motion as to the remaining gross sexual imposition count.

{¶ 12} Appellant testified as follows on his own behalf. On the evening of December 31, 2007, appellant was watching television on the couch. M.F. approached and asked appellant to give her a "high-five." (4/29/08 Tr. 94.) M.F. grabbed appellant's hand and pulled it toward her body. Appellant moved his hand away so that he did not touch M.F. M.F. had tried this before, and she was punished after appellant complained. Appellant admitted that, on a different day, he "found [his] hands down [M.F.'s] pants." (4/29/08 Tr. 102.) Appellant did not touch M.F.'s vagina on December 31, 2007.

{¶ 13} On cross-examination, appellant testified that he is stronger and a lot bigger than M.F. Appellant did not tell his father or stepmother about what M.F. did on December 31, 2007. When appellant told Voehringer that he might have

touched M.F.'s vagina, he was not referring to the December 2007 incident. Appellant admitted that he did not leave the couch after M.F. approached him.

{¶ 14} On redirect examination, appellant clarified that, when he told Voehringer that M.F. tried to force his hands to her body on December 31, 2007, he did not mean to tell the detective that he actually touched her. Appellant also clarified that M.F. routinely initiated inappropriate contact with him.

{¶ 15} The defense requested admission of M.F.'s mental health records because they "are relevant to the credibility of the witness." (4/29/08 Tr. 119.) As we detail below, the court overruled the request.

{¶ 16} The defense rested, and the court adjudicated appellant delinquent for the December 2007 rape and gross sexual imposition. Appellant appeals, raising the following assignments of error:

#### ASSIGNMENT OF ERROR I

{¶ 17} "The juvenile court abused its discretion when it found M.F. competent to testify against her stepbrother when there still remained questions as to whether she was of sound mind and able to perceive and recall information accurately."

#### ASSIGNMENT OF ERROR II

{¶ 18} "The juvenile court abused its discretion when it found that M.F.'s psychiatric reports, generated by Kettering Hospital Youth Services and South Community Behavioral Health, were inadmissible at trial."

#### ASSIGNMENT OF ERROR III

{¶ 19} "The juvenile court violated [J.M.'s] right to due process when it adjudicated him delinquent of rape and gross sexual imposition, absent proof of

every element of the charges against him by sufficient, competent, and credible evidence.”

#### ASSIGNMENT OF ERROR IV

{¶ 20} “The juvenile court violated [J.M.'s] right to due process when [it] adjudicated him delinquent of rape and gross sexual imposition, when those findings were against the manifest weight of the evidence.”

{¶ 21} In his first assignment of error, appellant argues that the trial court abused its discretion in finding M.F. competent to testify. We disagree.

{¶ 22} Evid.R. 601(A) provides that every person is competent to testify except “[t]hose of unsound mind” or children under ten years old “who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.” The proponent of a witness under ten or of unsound mind must establish that the witness is competent to testify. *State v. Clark*, 71 Ohio St.3d 466, 469, 1994-Ohio-43. We will not reverse a court's decision on a person's competence to testify absent an abuse of discretion. *Id.* An abuse of discretion connotes more than an error of law or judgment; it implies a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 23} Appellant argues that the court needed to (1) review M.F.'s mental health records to determine the effect of her mental state on her competence to testify and (2) ask M.F. questions to discern whether her anger management issues were a symptom of psychosis. When the court evaluated M.F.'s competence to testify, it considered the defense's concerns about whether M.F.'s mental state

rendered her incompetent to testify. Thus, it was unnecessary for the court to (1) review the mental health records to determine if M.F. was of unsound mind or (2) consider whether M.F. showed symptoms of psychosis.

{¶ 24} A witness of unsound mind is not automatically incompetent to testify. *State v. Bradley* (1989), 42 Ohio St.3d 136, 140. Even persons of unsound mind are competent to testify if they are able to correctly state matters that have come within their perception with respect to the issues involved, and they are able to appreciate and understand the nature and obligation of the oath to be truthful. *Id.* at 140-41, quoting *State v. Wildman* (1945), 145 Ohio St. 379. Appellant argues that the trial court needed to inquire into whether M.F.'s mental state affected her ability to perceive just impressions of fact and correctly relate those impressions. However, the competence hearing demonstrated that M.F.'s mental state did not render her incompetent to testify. Instead, M.F. demonstrated an ability to perceive just impressions of fact and correctly relate them. She knew her age, birthday, address, school, and grade in school. She knew the name of the president and that a presidential election was occurring. She knew who lived with her. She recalled past events, including her previous birthday and past punishments for misbehaving. To be sure, the court did not question M.F. about the abuse. The competence hearing need not involve questions about the abuse, however, and it is sufficient that the witness being examined in the hearing demonstrate the ability to accurately recall "things from the time period of the abuse." *State v. Molen*, Montgomery App. No. 21941, 2008-Ohio-6237, ¶12. The court asked M.F. about the previous Christmas, which was just a week prior to the

incident. M.F. was able to recall her favorite Christmas present and could describe it.

{¶ 25} M.F. also understood her obligation to testify truthfully. She knew what a lie is and that it is wrong to lie, and that she would be punished for lying. M.F. also knew that, during the adjudicatory hearing, she would be asked if she promised to tell the truth, and she indicated that she was going to tell the truth.

{¶ 26} Appellant argues that M.F.'s mental state rendered her incompetent to testify when considered with her being less than ten years old. We disagree. The analysis we have provided also relates to whether a child under ten is competent to testify. See *State v. Frazier* (1991), 61 Ohio St.3d 247, 251. M.F. demonstrated that, regardless of her mental state or her young age, she is able to correctly state matters that have come within her perception with respect to the issues involved, and she is able to appreciate and understand the nature and obligation of the oath to be truthful.

{¶ 27} Accordingly, we conclude that the court did not abuse its discretion in finding M.F. competent to testify. Therefore, we overrule appellant's first assignment of error.

{¶ 28} In his second assignment of error, appellant argues that the trial court abused its discretion by not admitting into evidence M.F.'s mental health records from Kettering Hospital and South Community Behavioral Health. We disagree.

{¶ 29} "[T]he admission of evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice." *State v. Conway*,

109 Ohio St.3d 412, 2006-Ohio-2815, ¶62, citing *State v. Issa*, 93 Ohio St.3d 49, 64, 2001-Ohio-1290. See also Evid.R. 103(A) (stating that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected").

{¶ 30} Prior to the adjudicatory hearing, although the court had initially ordered the records released to defense counsel, the court retrieved the records and issued a decision that precluded their release and admission into evidence. In its decision, the court concluded that the records were privileged under state law, a conclusion appellant does not challenge here. Recognizing a possible due process concern, however, the trial court engaged in an analysis prescribed by *Pennsylvania v. Ritchie* (1987), 480 U.S. 39, 107 S.Ct. 989, which requires a trial court to balance the due process rights of an accused against the privacy rights at issue. When a defendant makes a discovery request for privileged information, a trial court must examine the information, in camera and outside the presence of counsel, to determine if it contains evidence material to the defense of the accused. *Id.* at 58-61, 107 S.Ct. 1002-03. The accused may have access to the information only if the trial court concludes that it "probably would have changed the outcome of his trial." *Id.* at 58, 107 S.Ct. 1002.

{¶ 31} After reviewing the records and applying the *Ritchie* test, the trial court found that the "prejudicial value" of M.F.'s mental health records "far outweighs their probative value in determining the credibility of the victim. Defense counsel's assertion that these records are relevant in determining the credibility of the witness due to their nature and proximity to the alleged crimes is without merit." (4/24/08

Entry, at 2.) And, in the context of rejecting appellant's argument that the prosecution had a duty to disclose the records, the court also found "it is clear that they contain no reports of tests or examinations made in connection with the instant case." (4/24/08 Entry, at 3.)

{¶ 32} At the end of the adjudicatory hearing, the court reiterated its decision to exclude the records, which remained privileged. Having heard M.F.'s testimony, the court again concluded that "they do not in any way impeach the testimony of the alleged victim." (4/29/08 Tr. 119.)

{¶ 33} To resolve the question before us, we have reviewed the Kettering Hospital and South Community records in their entirety. See *State v. Hall*, Montgomery App. No. 18724, 2001-Ohio-1842 (acknowledging the *Ritchie* test, reviewing medical records on appeal, and affirming the trial court's decision to exclude them). Having done so, we agree with the trial court.

{¶ 34} The Kettering Hospital records reflect treatment that occurred several months prior to the December 2007 incident and for issues unrelated to M.F.'s allegations. Based on the remoteness of the hospital records, in terms of both time and substance, we agree with the court's decision to exclude them.

{¶ 35} The South Community Behavioral Health records reflect treatment that did occur during the relevant time period, however. They include records that refer to the reporting of the abuse allegation and relate to M.F.'s overall mental health at that time. While the trial court stated that the records at issue reflected treatment that occurred prior to August 1, 2007, the South Community records actually reflect treatment after August 1, 2007, including treatment that occurred one month prior

to the competency hearing. Nevertheless, having reviewed the records, we conclude that nothing within them would have impeached M.F.'s credibility. The records do not, for example, suggest that M.F. had any difficulty with telling the truth or that she had a history of telling lies or making false accusations. Instead, they would have corroborated her own testimony that she had been kicked out of a day-care program for throwing things, hitting people, and fighting. They also would have confirmed, as M.F. testified, that she took the medication Abilify to control her anger and that she saw a counselor for anger issues. Finally, while the records contain isolated references to appellant, they would not have supported a defense theory that M.F. routinely got into trouble for bothering appellant, that she harbored any ill-will toward appellant or that the purpose of the counseling sessions related in any way to her allegation about the December 2007 incident.

{¶ 36} Appellant also argues that the court's decision precluded him from calling an expert witness to testify about whether M.F.'s mental state impaired her credibility. We are unable to review this argument based on the record before us, however. Appellant did not proffer any expert testimony during the adjudicatory hearing, and we cannot speculate about what an expert's testimony might have been. See *State v. Blair* (1990), 70 Ohio App.3d 774, 795.

{¶ 37} We conclude that the trial court did not err by not admitting into evidence M.F.'s Kettering Hospital and South Community mental health records. Thus, we overrule appellant's second assignment of error.

{¶ 38} In his third assignment of error, appellant contends that the court's decision to find him delinquent for rape and gross sexual imposition is based on

insufficient evidence. We disagree.

{¶ 39} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved beyond a reasonable doubt the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78. We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *Jenks* at 273. In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks*, paragraph two of the syllabus; *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim). The sufficiency of the evidence standard applies to delinquency adjudications. *In re P.G.*, Brown App. No. CA2006-05-009, 2007-Ohio-3716, ¶13.

{¶ 40} The court found appellant delinquent for rape under R.C. 2907.02(A)(1)(b), which prohibits sexual conduct with a person less than 13 years old, whether or not the offender knows the age of the other person. Sexual conduct includes "the insertion, however slight," of any part of the body into the vagina. R.C. 2907.01(A). M.F.'s testimony established that, on December 31, 2007, when she was less than 13 years old, appellant inserted his finger inside of

her vagina and moved his finger inside of her. Appellant argues that M.F.'s testimony was not credible, but we do not evaluate witness credibility when reviewing a sufficiency of the evidence claim. See *Jenks*, paragraph two of the syllabus; *Yarbrough* at ¶79. Accordingly, we conclude that appellant's delinquency adjudication for rape is based on sufficient evidence.

{¶ 41} The court found appellant delinquent for gross sexual imposition under R.C. 2907.05(A)(4), which prohibits sexual contact with a person less than 13 years old, whether or not the offender knows the age of the other person. Sexual contact means any touching of an erogenous zone of another, including the genitals, for the purpose of sexually arousing or gratifying either person. R.C. 2907.01(B). Purpose must be inferred from circumstantial evidence, including the type, nature, and circumstances of an offender's conduct. *State v. Finley*, Montgomery App. No. 19654, 2004-Ohio-661, ¶25. M.F.'s testimony established that appellant rubbed the outside of M.F.'s vagina. We infer sexual purpose from appellant touching M.F.'s vagina due to the duration of the touching, which M.F. estimated to be half an hour, and because appellant (1) took the initiative to put his hand underneath M.F.'s clothes to touch her and (2) ultimately penetrated M.F.'s vagina. Accordingly, we conclude that appellant's delinquency adjudication for gross sexual imposition is based on sufficient evidence. Therefore, we overrule appellant's third assignment of error.

{¶ 42} In his fourth assignment of error, appellant argues that the trial court's decision to find him delinquent for rape and gross sexual imposition is against the manifest weight of the evidence. We disagree.

{¶ 43} In determining whether a verdict is against the manifest weight of the evidence, we sit as a "thirteenth juror." *Thompkins* at 387. We review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. *Id.* Additionally, we determine " 'whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. We give substantial deference to the trier of fact's credibility determinations, and we will not substitute our judgment for that of the trier of fact on issues of witness credibility unless the trier of fact lost its way in arriving at its verdict. *State v. Bragg*, Montgomery App. No. 22416, 2008-Ohio-4919, ¶¶27-28. The manifest weight standard applies to delinquency adjudications. *In re P.G.* at ¶14.

{¶ 44} Appellant argues that we should reject M.F.'s testimony because she was not competent to testify and because her mental health records impeached her credibility. We have already rejected these arguments. Appellant also contends that his testimony was more credible than that of M.F. We cannot conclude that the court lost its way in accepting M.F.'s testimony and rejecting appellant's, however. Although M.F. equivocated about whether appellant said anything to her during the December 2007 incident and whether appellant was getting ready to sleep before the incident, she did not waver in her description of appellant touching

and penetrating her vagina. Although M.F. admitted to previously bothering appellant, she noted that this was not sexual behavior. Conversely, by Voehringer's account, appellant was not consistent in his version of the incident. Further undermining appellant's credibility is his written statement to Voehringer that the younger, smaller, weaker M.F. "kept trying to force" appellant into sexual activity. (State's Exhibit 2.) Likewise, it was within the province of the trial court, as trier of fact, to disbelieve appellant, given his admission that he stayed on the couch when M.F. approached him and did not leave to prevent inappropriate activity. Accordingly, we conclude that the court's decision to find appellant delinquent for rape and gross sexual imposition is not against the manifest weight of the evidence. Therefore, we overrule appellant's fourth assignment of error.

{¶ 45} In summary, we overrule appellant's four assignments of error. We affirm the judgment of the Montgomery County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

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BROGAN and FAIN, JJ., concur.

(Hon. Judith L. French, Tenth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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