[Cite as *In re A.H.*, 2015-Ohio-2174.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

IN THE MATTER OF: A.H.	:	
	:	
	:	Appellate Case No. 2014-CA-146
	:	
	:	Trial Court Case No. 2013-1515
	:	
	:	(Appeal from Domestic Relations
	:	Court – Juvenile Division)
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O P I N I O N

Rendered on the 5th day of June, 2015.

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WELBAUM, J.

{¶ 1} This matter is before the court on the appeal of a juvenile, A.H., from his adjudication of delinquency based on a charge of Rape, and the disposition that followed. In a single assignment of error, A.H. contends that the trial court erred in finding that there was sufficient evidence that he raped a minor child, G.G.

{¶ 2} We conclude that the record contains sufficient evidence of the elements of the crime. Accordingly, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 3} At the time of the events in question, the juvenile, A.H., was 13 years old and was in 7th grade at a middle school in Clark County, Ohio. The middle school occupied the same building as an elementary school that the victim, G.G., attended. G.G. was six years old, and was in kindergarten.

{¶ 4} On December 4, 2013, G.G. was riding in the family car with his mother and brothers, when he began spitting. This was unusual behavior, and when his mother asked why he was spitting, G.G. said he was thinking about something that had happened at school. Initially, G.G. was reluctant to answer his mother's questions, but ultimately, told her that another student had put his mouth on his "wee-wee" while he was in the restroom, and that he was spitting because it was disgusting.

{¶ 5} That evening, G.G.'s mother sent an email to G.G.'s teacher and principal, outlining what G.G. had told her. When the principal, Mr. S., arrived at school on December 5, 2013, he called the school's resource officer for directions on what to do. That morning, G.G. came down to S.'s office around 8:00 a.m., accompanied by his

teacher, Mrs. C. The principal then interviewed G.G. in the presence of the guidance counselor. G.G. chose not to have Mrs. C. present for the interview. During the interview, G.G. told S. that another student had licked his privates in a stall in the restroom.

{¶ 6} G.G. stated that he did not know the name of the student or his grade, but said he would be able to identify him because he saw the student every day. He described the student as being around the height of the principal (who was 5'9" or 5'10") and maybe a little "thicker" than the principal, who weighed 175 pounds. In addition, G.G. said the student had brown hair. G.G. also told the principal that the incident happened during his after-recess restroom break, which would have been from 11:15 to 11:30 a.m. At some point during the interview process, G.G. said that he thought the student might be named "Nick," because the student was wearing a shirt with the word "Nike" on it.

{¶ 7} The configuration of the building was such that G.G.'s kindergarten classroom was located in a hallway with some fifth-grade classrooms, seventh grade classrooms, and an eighth-grade classroom. The restrooms were located in that hallway, close to G.G.'s room. Because G.G. had said that he saw the student every day, and because the student was taller, S. had G.G. look at the school's 2012-2013 yearbook, beginning with fourth-grade students (who would currently be in fifth-grade), to see if G.G. could identify the student.

{¶ 8} G.G. read the pages from top to bottom, scanning the photos. On four to six occasions, he looked at a photo and said "That kind of looks like him." G.G. never gave S. an indication that any of these students were the one; their hair color was similar and

they had round face shapes. However, on p. 25 of the yearbook, G.G. had a different reaction. When he hit that page, he pointed to a photo of A.H., and said, "That's him." Trial Transcript, p. 99.

{¶ 9} After some investigation, S. learned that A.H.'s homeroom class was located in Mr. B.'s room, which was next door to G.G's classroom. In addition to having homeroom in that classroom, A.H. had intervention period there from 11:21 to 11:51 a.m., and history, from 11:51 a.m. to 12:36 p.m. Middle school students, like A.H., used the same restroom as the kindergarten students.

{¶ 10} Middle school students were encouraged to use the restroom during intervention period (which was similar to a study hall), so they would not be absent from their core classes. When students wanted to use the restroom, the teacher signed their agendas. An agenda is a book that students had been given at the beginning of the school year. Agendas were spiral-bound, were used by students to keep track of homework assignments and other information, and were taken from class to class. There was a place in the agenda to write "restroom" and the time, and the teacher would sign the agenda. Agendas were also used in lieu of hall passes.

{¶ 11} When S. came to ask Mr. B. about A.H., Mr. B. was actually on his way to speak to the middle school principal (F.) about a pattern he had noticed regarding A.H.'s bathroom use. Prior to that day, and before he was asked about A.H., Mr. B. had noticed for two or three days that A.H. was taking restroom breaks at exactly the same time. The breaks occurred every day at 11:25 a.m., and Mr. B. had actually commented to A.H. about it in a joking manner. However, what concerned him was the length of time that A.H. was gone, which was around 15 minutes. Mr. B. had intended to ask F. to roam the

halls to see if A.H. were doing something he should not have been doing, like walking around or wasting time.

{¶ 12} S. and the police (the resource officer and Deputy Buxton) decided to see if G.G. could identify the student during the restroom break, which normally occurred from 11:15 to 11:30 a.m. Mr. B. was told to conduct the intervention period as he normally did, and to let A.H. go to the restroom if he asked. Mrs. C. was also informed of the procedure, but was not told the identity of the student who was suspected. During the restroom break that day, Mrs. C. lined up her students as usual, but had them go into the restroom one at a time instead of going in five at a time. Mrs. C. told G.G. to let her know quietly if he saw the person.

{¶ 13} While Mrs. C.'s students normally had restroom break, the middle school students were changing classes, so a group of students would be coming down the hallway. When a group of boys and girls turned the corner to go towards their classroom, G.G. shouted out very loudly, "There he is, that's him," and pointed his finger. Trial Transcript, p. 164. Mrs. C. was not able to recognize the person that G.G. pointed out, because he was in a group of students who went into Mr. B's room. She thanked G.G., and told him to let her know if he saw the student again.

{¶ 14} About three to five minutes later, a student came out of Mr. B's classroom, and G.G. again pointed. With the same loud shout, G.G. said, "There, that's him." *Id*. at p. 165. The student looked at G.G. and just kept going. Mrs. C. again thanked G.G. and told him to wait for his turn to go into the restroom. At that time, Mrs. C. knew no students were in the restroom because one had just come out. She did not let any more students go in because the student G.G. identified had just gone into the restroom. She

then wrote down a physical description of the student who had been identified.

{¶ 15} After three to five minutes, the student came out. He said "hi," to Mrs. C. and then walked on. *Id.* at 167. After the break was over, Mrs. C. typed up a statement from her notes and gave it to the police. At trial, Mrs. C. identified A.H. as the person that G.G. had pointed out.

{¶ 16} At about 1:45 p.m., Deputy Buxton, the investigating officer, called Brian Driscoll, the prosecutor who was assigned to the Child Advocacy Center docket. Driscoll indicated that the appropriate charge would be rape, but told her not to file the charge yet, because he wanted her to get an interview with A.H. Driscoll told Buxton to try to get the interview first, but if she got no cooperation, to go ahead and file.

{¶ 17} Buxton then went to Children's Services around 3:00 p.m., and sat in on an interview that was conducted with G.G. At about 3:55 p.m., Buxton contacted A.H.'s mother to ask if she could interview A.H. Although A.H.'s mother first indicated she would bring A.H. in for an interview, she did not. At about 4:30 p.m., A.H.'s father appeared, without A.H., and Buxton informed him of what she had found.

{¶ 18} A.H. withdrew from school the following day and did not return. When he went home the night of December 5, 2013, he took his books and agenda with him.

{¶ 19} A.H.'s father had said that he would call Buxton back the morning of December 6, 2013, but he did not call, and Buxton was unable to reach the father. However, around 1:50 p.m. that afternoon, an attorney called and asked Buxton not to further contact A.H.'s family. The attorney also asked who the prosecutor was, so that he could go directly to the prosecutor, and Buxton gave him Driscoll's name. At that point, Buxton did not conduct any additional investigation, due to the attorney's

involvement.

{¶ 20} Around 2:00 p.m. on December 6, 2013, G.G.'s father contacted Buxton and indicated that he intended to call prosecutor, Andy Wilson, who was his neighbor, to make sure the matter was handled, or was investigated properly. After attempting to speak with Driscoll, who was out for the day, Buxton informed Wilson of her conversations with Driscoll, the status of the case, and the desire of A.H.'s attorney to talk to the prosecutor. Wilson told Buxton to file the charge as Driscoll had instructed, and to tell A.H.'s attorney that Driscoll would be working with the attorney. Buxton then filed a rape complaint against A.H. on December 9, 2013.

{¶ 21} After holding a competency hearing, the court found G.G. competent to testify on April 30, 2014. On May 12, 2014, an adjudicatory hearing was held before a magistrate, who heard testimony from G.G., G.G.'s mother and father, Mrs. C., Mr. S., Mr. B., Deputy Buxton, A.H., and A.H.'s father. Following the hearing, the magistrate concluded that A.H. had committed the offense of rape, and that A.H. should be found delinquent. Subsequently, the trial court overruled A.H.'s objections to the magistrate's decision, and found A.H. delinquent. At the dispositional hearing, the trial court placed A.H. on probation, committed him to D.Y.S. for a minimum term, but suspended the commitment, and required that A.H. participate in counseling. This appeal followed.

II. Sufficiency of the Evidence

{¶ 22} A.H.'s sole assignment of error is as follows:

> The Trial Court Erred in Finding that There was Sufficient Evidence that A.H. Raped G.G.

{¶ 23} Under this assignment of error, A.H. contends that the evidence does not support the conviction, because G.G. was uncertain at trial that A.H. was the individual who had raped him. A.H. also contends that the trial court failed to consider evidence pointing to A.H.'s innocence.

{¶ 24} "A sufficiency-of-the-evidence argument challenges whether the state has presented adequate evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law." *State v. Cherry*, 171 Ohio App.3d 375, 2007-Ohio-2133, 870 N.E.2d 808, ¶ 9 (2d Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In *Cherry*, we noted that:

> The proper test to apply to the inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492: "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. 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."

Cherry at ¶ 9.

{¶ 25} In the case before us, the complaint alleged that A.H., who was thirteen, had engaged in sexual conduct with G.G., who was six years old, by putting his mouth on the victim's genital area, in violation of R.C. 2907.02(A)(1)(b). This statute provides, in

pertinent part, that:

> (A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:
>
> * * *
>
> (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

{¶ 26} R.C. 2907.01(A) defines "sexual conduct" as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another."

{¶ 27} With respect to these elements, A.H. does not deny that G.G. was sexually assaulted; instead, he contends that the evidence was insufficient to demonstrate that he was the perpetrator. In this regard, A.H. focuses on the fact that G.G. stated a number of times during cross-examination that he was not certain that A.H. was the person who had raped him. The State responds by noting that G.G. positively identified A.H. on three occasions close in time to the incident, and also positively identified A.H. during direct and re-direct examination. In addition, the State argues that defense counsel's questions at trial were confusing. Finally, the State contends that credibility questions are not addressed in sufficiency evaluations.

{¶ 28} In *State v. Rybak*, 2d Dist. Montgomery No. 23938, 2011-Ohio-2070, we

observed that:

> In determining whether the prosecution presented legally sufficient evidence, the issue is not whether [the victim's] testimony was unbelievable or whether the trial court should have believed it. Rather, the issue is whether [the victim's] testimony, if it is accepted as true, is sufficient to support [the] conviction. *See, e .g, State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79 (recognizing that an evaluation of witness credibility "is not proper on review for evidentiary sufficiency"). [The defendant's] argument that the trial court erred in convicting him despite [the victim's] alleged lack of credibility really raises a manifest-weight issue. *See, e.g., In re C.M.*, Montgomery App. No. 21363, 2006-Ohio-3741, ¶ 64 (noting that a manifest-weight argument obligates a reviewing court to consider the "believability of the evidence"). Accepting [the victim's] testimony as true, the record contains legally sufficient evidence to support [the defendant's] conviction.

Rybak at ¶ 10.

{¶ 29} Based on this authority, we would be required to conclude that the record contains sufficient evidence of the elements of the crime, if G.G.'s testimony is accepted as true. At trial, G.G. testified during direct examination that when he was using the urinal, another boy told him to go into a stall and to stay in there. The boy then pulled G.G.'s pants down far enough that G.G's "wee-wee" came out. Subsequently, the boy put his mouth on G.G.'s "wee-wee" twice, and G.G. felt the boy's spit in his pants. G.G. also testified that he had identified the boy to Mr. S. from a picture in the yearbook and

had identified him to his teacher, Mrs. C., when he saw him in the hallway. In addition, G.G. pointed out A.H. at trial as the one who had done these acts. Trial Transcript, pp. 50-51.

{¶ 30} It is true that during cross-examination, the following exchange occurred:

Q. Did you notice anything about [A.H.] any different?

A. Now?

Q. No, then.

A. Um, yes.

Q. What about that?

A. He doesn't look the same as when I – when – when I – when he put his mouth on me.

Q. This does not – [A.H.], or I'm sorry, [G.G.], this does not look like the boy that put your – his mouth on your wee-wee, correct?

A. It does a little.

Q. Okay. But you're not certain?

A. Yeah.

Q. Do you understand what I just said, [G.G.]?

A. Yeah.

Q. All right. Because you have to tell this nice lady next to you what – what it is, okay. You don't – you can't be certain this is the boy; is that correct?

A. Yeah.

Trial Transcript, p. 74-75.

{¶ 31} During redirect examination, however, the following exchange occurred:

Q. [G.G.], we – we asked – [G.G.], just give me a couple more minutes, all right? Everything that you talked about today, I know that you've had some tough questions, all right. Do you remember the boy who did this?

A. Yes.

Q. Okay. And the boy who did this, is he in this room?

A. Yes.

Q. Okay. Does he look a little bit different?

A. Yes.

Q. Okay. But as you sit here, are you sure that the boy who did this is in this room?

A. Yes.

Q. And is that the boy you pointed out?

A. Yes.

Q. And is that the boy who put his mouth on your wee-wee?

A. Yes.

Q. Now, you did something. Mr. Lennen was asking you some questions about whether he put his tongue on your wee-wee or whether he put his mouth, and you said he was going like this and you did something. I don't think the magistrate – I don't think she saw it. Can you show her what he was doing.

A. (Nonverbal response.)

Q. Okay. And this boy in this room is the one that did that right?

A. Yes.

Q. Okay. Is it hard to remember some of those things, some of the things that happened?

A. Yes.

Q. Okay. And do you just kind of want to forget about this, kind of move on?

A. Yeah.

Id. at pp. 76-78.

{¶ 32} Finally, during recross examination, the following further exchange occurred:

Q. All right. And you – when you talked to [Mr. S.], you saw other boys that looked like the boy that did this, correct?

A. Yes.

Q. And you remember telling me here today that you're not certain this is the boy that touched your wee-wee, correct?

A. Yes.

Q. He looks like the boy, but you're not certain it's him, correct?

A. Yes.

Trial Transcript, pp. 78-79.

{¶ 33} Based on G.G.'s positive identification at trial, which was repeated twice, as well as his prior positive identifications of A.H., there was sufficient evidence that A.H. was the perpetrator. In arguing that reasonable doubt exists because of G.G.'s

statements during cross-examination, A.H. is essentially contending that G.G's testimony was not believable or credible. As we noted in *Rybak*, this is not a sufficiency argument; it is a manifest weight argument. *Rybak*, 2d Dist. Montgomery No. 23938, 2011-Ohio-2070, at ¶ 10. In fact, A.H. made such a manifest weight argument in his reply brief, even though he did not raise the manifest weight issue as an assignment of error.

{¶ 34} "When a conviction is challenged on appeal as being against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and 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.' " *State v. Hill*, 2d Dist. Montgomery No. 25172, 2013-Ohio-717, ¶ 8, quoting *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. "A judgment should be reversed as being against the manifest weight of the evidence 'only in the exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 35} In the decision following the adjudicatory hearing, the magistrate indicated that G.G. was very credible. The magistrate additionally made the following remarks:

> G.G. also testified in court. Throughout most of his testimony, he positively and firmly identified [A.H.] as his perpetrator in court. Towards the end of cross-examination, G.G. testified that [A.H.] looked different now in court, but on redirect, positively identified [A.H.] as his perpetrator.
>
> THIS COURT FURTHER FINDS that G.G.['s] demeanor in court is

> noteworthy. He answered questions and behaved in a fidgety manner as you would expect from a six year old who was required to sit and answer many questions. The only change in his demeanor was when he was asked questions about the incident itself. At that time, his voice and behavior became far more subdued and solemn, as would be expected from a victim testifying about a rape. G.G. appeared truthful and uncoached in his testimony.

July 2, 2014 Magistrate's Decision, p. 2.

{¶ 36} The magistrate also found A.H.'s demeanor noteworthy. In this regard, the magistrate observed that:

> When asked a series of questions about what he was doing during his extended bathroom breaks, his tone and answers were evasive, and [A.H.] was not as forthcoming as he had been during the rest of his testimony.

Id.

{¶ 37} In the hearing on A.H.'s objections, the trial court noted that in addition to having reviewed the transcript and other materials, the court had listened to the competency hearing testimony and the testimony of A.H., and would also listen to the testimony of the alleged victim. *See* October 16, 2014 Transcript of Proceedings, pp. 3-4 and 16. After reviewing these materials, the trial court overruled the objections to the magistrate's decision. In particular, the trial court made the following comments in the judgment entry overruling the objections:

> THE COURT FURTHER FINDS that the Court reviewed the recorded testimony of the youth and found him to be a confident, coached,

and dispassionate witness. He was forthright and did not hesitate when he answered the majority of the questions. As to the questions by the prosecutor on cross-examination, which focused on the bathroom practices of the youth and alleged activities in the bathroom, he became evasive. The youth did acknowledge that his bathroom breaks overlapped the bathroom breaks of the victim.

* * *

THE COURT FURTHER FINDS that the victim was strikingly consistent and credible in his testimony. He could spell, remember, and demonstrate the difference between truth and falsity. His vocabulary was extraordinary and his responses were direct and well-spoken. A number of times he split the compound question into two (2) answers, easily handled open-ended questions, and was consistent in his answers. Upon cross-examination, he corrected an attorney concerning the facts in the matter. His testimony was consistent on direct and cross-examination. He answered in a chronological order and had good use of times, place, and manner. He understood sequential acts and returned to earlier questions and earlier answers when defense counsel repeated his questions. The victim was able to point out faulty questions by the attorney and he clarified his answers.

The victim was somewhat ambiguous and uncertain as to the answers to a couple of questions from defense counsel. The inability of the victim to directly and consistently answer all the questions on

> cross-examination is somewhat understandable in view of the puzzling questions asked, coupled with the repeated refrain that defense counsel asked, "Isn't that correct". When that phrase was coupled with multiple facts and alleged statements made by other parties, it was understandably confusing to the victim. The Court found it confusing as well.

October 27, 2014 Judgment Entry, pp. 1-2.

{¶ 38} We have frequently stressed that "[t]he credibility of the witnesses and the weight to be given to their testimony is a matter for the trier of facts to resolve." *In re D.B.*, 2d Dist. Montgomery No. 20979, 2005-Ohio-5583, ¶ 16, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). "Because the factfinder, be it the jury or, as in this case, the trial judge, has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson*, 2d Dist. Montgomery No. 16288, 1997 WL 476684, *4 (Aug. 22, 1997).

{¶ 39} In the case before us, the magistrate and trial judge both found G.G. to be credible and A.H. to be evasive, and they were in the best position to make that assessment. In addition, after reviewing the transcript, we agree that the questions posed to G.G. were phrased in a confusing manner. As a further matter, we note that "inconsistencies in identification testimony do not render convictions against the manifest weight of the evidence." *State v. Johnson*, 2d Dist. Montgomery No. 22656,

2009-Ohio-1288, ¶ 31, citing *State v. Bliss*, 10th Dist. Franklin No. 04AP-216, 2005-Ohio-3987, ¶ 32.

{¶ 40} In this regard, we stress that the identification of A.H. as the perpetrator was not based solely on G.G.'s in-court identification. Instead, G.G. first definitively picked A.H.'s photo from a yearbook, and then positively identified A.H. to his teacher after having seen A.H. in the hallway shortly after the rape occurred.

{¶ 41} We have previously stated that "unnecessarily suggestive identification procedures and unreliability may render eyewitness identification suppressible." *State v. Hurston*, 2d Dist. Montgomery No. 16217, 1997 WL 691466, *2 (Nov. 7, 1997), citing *State v. Wogenstahl*, 75 Ohio St.3d 344, 363, 662 N.E.2d 311 (1996). However, contrary to A.H.'s contention, there is no indication in the record that the identification procedures were suggestive or unreliable in any way. The principal simply handed G.G. the yearbook and allowed him to scan the pages. Prior to the time that G.G. selected A.H., the principal did not know A.H., and there is no indication that G.G. was coached or influenced in any way.

{¶ 42} With respect to the second identification, there is also no evidence of suggestive procedures or unreliability. G.G. was only told to let Mrs. C. know if he saw the perpetrator, and Mrs. C. was not aware of the identity of the student that G.G. had previously identified.

{¶ 43} Furthermore, although G.G. stated that some other yearbook pictures "kind" of looked like the person who had been involved, this was based on their similar hair color and face shape (round). More importantly, G.G. never gave the principal any indication that any of these students had assaulted him. In contrast, when G.G. saw A.H.'s

yearbook picture, he reacted differently than when he saw the other photos, and stated "That's him." Trial Transcript, p. 99.

{¶ 44} We have previously held that the State can rely on circumstantial evidence establishing identification, rather than direct, eye-witness evidence, because "both kinds of evidence have equal probative value." *State v. Rowland*, 2d Dist. Montgomery No. 16970, 1998 WL 754605, *3 (Oct. 30, 1998), citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492, 494 (1991), paragraph one of the syllabus. *See, also, State v. Brown*, 10th Dist. Franklin No. 07AP-244, 2007-Ohio-6542, ¶ 19 (noting that " '[c]ourts have repeatedly recognized that identification can be proved by circumstantial evidence * * * .' "). (Citation omitted.) In arguing that the alleged lack of courtroom identification causes the judgment to be based on insufficient evidence, A.H. argues that there was inadequate circumstantial evidence linking him to the crime. Again, we disagree. As an initial matter, even if one disregards the courtroom identification, the evidence is undisputed that G.G. had previously identified A.H. as the perpetrator on multiple occasions. Furthermore, even though circumstantial evidence was not required due to the presence of direct evidence, there is circumstantial evidence supporting the finding of delinquency.

{¶ 45} According to A.H., no circumstantial evidence supported his identification as the perpetrator because there was no evidence about what month the incident occurred or the time of day it occurred, and there was no evidence that A.H. was seen in the bathroom at the time of the alleged rape.

{¶ 46} As was noted, G.G. reported the incident to his mother on Wednesday, December 4, 2013. At the time, based on facts that G.G. told his mother, she concluded

that the incident had occurred the Monday before Thanksgiving, which would have been November 25, 2013. When G.G. discussed the incident with the principal on December 5, 2013, G.G. stated that it had occurred during the break that occurred after recess (11:15 to 11:30 a.m.). There is no dispute about that, and G.G.'s initial description is what led the principal to investigate whether A.H. could have been present during that time period.

{¶ 47} At trial, G.G. stated for the first time that the incident had occurred during an earlier recess break, during which A.H. would have been in another part of the building. However, given that G.G.'s initial account occurred much closer to the time of the incident, as opposed to his testimony six months later, the trial court was free to credit the time frame that G.G. first mentioned.

{¶ 48} Circumstantial evidence, including the following facts, also linked A.H. to the crime: (1) A.H. was in a classroom located next door to G.G.'s classroom and near the restroom at the time the incident was alleged to have occurred; (2) A.H.'s teacher had observed him taking unusually lengthy restroom breaks on multiple occasions at exactly the same time the incident was alleged to have occurred, and on dates close in time to when the incident occurred; (3) A.H.'s teacher was actually on his way to speak to the principal about this anomaly before he learned of A.H.'s potential involvement in the sexual assault; (4) on December 5, 2013, when the restroom was being monitored, A.H. again chose to go to the restroom at the same time that the incident had occurred; (5) A.H. testified that he may have been in the restroom on occasions when G.G. was there; (6) A.H. fit the general physical description of the perpetrator; and (7) at trial, A.H. denied entering the restroom on December 5, 2013, even though both Mrs. C. and G.G saw him

leave his classroom and enter the restroom.[1]

{¶ 49} A.H. also contends that G.G. was not credible because he told the principal, Mr. S., that the perpetrator was named Nick and was a fifth-grader. However, this is an inaccurate description of the testimony. S.'s testimony indicated that the reason G.G. thought the student may have been named "Nick" is because the person had on a shirt bearing letters spelling "Nike" at the time of the incident.

{¶ 50} Furthermore, G.G. told his mother that he thought the perpetrator was in fifth grade or could be in middle school (meaning persons above fifth-grade).[2] At the time of the incident, G.G.'s classroom was in a hallway that contained kindergarten classes, fifth-graders, seventh grade classrooms, and one eighth-grade classroom. Thus, G.G. would have seen older children, including fifth-grade and middle school students during the course of his day. G.G. also told S. when he met with him that he did not know what grade the perpetrator was in, but that the person was a student he saw every day and could identify. As a result, S. had G.G. begin the yearbook search with the prior year's fourth-grade students, who would have been in fifth-grade at the time of the incident. We see nothing in this set of events that would cast doubt on G.G.'s credibility. Again, however, the trial court was in the best position to determine credibility.

{¶ 51} As a final matter, A.H. contends that the trial court ignored evidence of his innocence. In particular, A.H. focuses on a courtroom demonstration that was apparently intended to show that he could not have physically assaulted G.G. At trial,

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[1] A.H. subsequently changed his testimony and admitted that he had gone into the restroom that day. He also admitted he had heard someone say "Hey, look, there he is," or "That's the kid." Trial Transcript, p. 274.

[2] The principal testified that middle school consisted of grades six through eight.

G.G. testified that the perpetrator bent over while in the restroom stall, but did not get down on his knees. After an off-record discussion, G.G. was measured while standing against a wall in the courtroom. However, the record does not indicate exactly what was measured or the height of the measurement. *See* Trial Transcript, pp. 79-80.

{¶ 52} Subsequently, A.H. testified that he did not think he could bend over to reach 20 inches – which we presume was the height of the prior measurement. A.H. was then measured, and stated that he could "not really" bend over any further. At that time, the back of A.H.'s buttocks was measured at 32 inches. *Id.* at pp. 263-264.

{¶ 53} In responding to this argument, the State contends that A.H. locked his knees when he was being measured, implying that A.H. faked his inability to bend to the level of G.G.'s genitals. None of this is on the record, however, including even the initial measurements, and it is impossible to determine what actually occurred in the courtroom. Nonetheless, the trial court was in a position to see this evidence and give it whatever weight the court desired.

{¶ 54} "In Ohio, the admission of experimental or demonstrative evidence is within the discretion of the trial court." (Citations omitted.) *State v. Jackson*, 86 Ohio App.3d 568, 570, 621 N.E.2d 710, 711 (2d Dist.1993). "[D]emonstrative evidence is an object, picture, model, or other device intended to clarify or qualify facts for the jury, * * * such evidence is merely an aid in understanding certain facts, and * * * it is up to the jury [or trier of fact] to decide what weight to give such evidence." *State v. Agee*, 7th Dist. Mahoning No. 12 MA 100, 2013-Ohio-5382, ¶ 39. Demonstrative or experimental evidence is admissible "only if (1) the experiment is relevant, (2) the experiment is conducted under substantially similar conditions as those of the actual occurrence, and (3) the evidence of

the experiment does not consume undue time, confuse the issues, or mislead the jury." (Citation omitted.) *Jackson* at 568.

{¶ 55} Accordingly, the trial court was free to disregard A.H.'s evidence or to give it whatever weight the court deemed proper, in deciding whether A.H. committed the offense with which he was charged. In view of the deficiencies in the "experiment," we cannot say the trial court erred in failing to give this evidence more weight.

{¶ 56} Based on the preceding discussion, we conclude that the judgment was supported by sufficient evidence, and it was also not against the manifest weight of the evidence. Consequently, A.H.'s sole assignment of error is overruled.

III. Conclusion

{¶ 57} A.H.'s sole assignment of error having been overruled, the judgment of the trial court is affirmed.

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DONOVAN, J. and HALL, J., concur.

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