[Cite as *State v. Wade*, 2010-Ohio-4859.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 10-CA-13
BRYAN CODY WADE	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Guernsey County Court of Common Pleas, Case No. 09CR199
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 4, 2010

APPEARANCES:

For Plaintiff-Appellee

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PROSECUTING ATTORNEY
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For Defendant-Appellant

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Gwin, P.J.

{¶1} Defendant-appellant, Bryan Cody Wade, appeals from his conviction and sentence in the Guernsey County Court of Common Pleas on three counts of gross sexual imposition, felonies of the third degree, in violation of R.C. 2907.05(A)(4), and one count of disseminating matters harmful to juveniles, a felony of the fourth degree, in violation of R.C. 2907.31(A)(1). The plaintiff appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} In March 2009, appellant moved in with his father, Bryan E. Wade, and his stepmother, Laura Wade. While appellant was residing with his parents, he would occasionally babysit his three-year old nephew, C.J., alone.

{¶3} In June 2009, Laura Wade caught C.J. masturbating several times. Originally, she thought it was "no big deal," but as time progressed, she observed that C.J. had begun to take his clothes off during the act and that it was occurring with more frequency. She addressed the matter with C.J., with no apparent response from the child.

{¶4} On September 7, 2009, (Labor Day) Amanda Wade returned home from work to find her son, C.J., masturbating while laying on his bed naked. She observed her son with one finger in his rectum and one hand on his penis. The next day, she spoke with her mother regarding what she had observed, and made the decision to call C.J.'s pediatrician.

{¶5} The pediatrician, Dr. Nau, advised Amanda to take her son to the Emergency Room. On the doctor's advice, Amanda, along with her mother, Laura

Wade, picked C.J. up from school and took him to the Emergency Room at Southeastern Ohio Regional Medical Center (SEORMC).

{¶6} At the hospital, Sexual Assault Nurse Examiner (SANE) Debra McCormick reviewed body parts with C.J., discovering that the child referred to his penis as his "pee-bug" and his rectum as his "butt." She obtained a history of C.J.'s behavior from his mother and his grandmother, which included the mother's report that C.J. had identified appellant as having touched him inappropriately. During Ms. McCormick's time with C.J., he stated, "Cody put his finger up my butt and touched my pee-bug." During a physical exam, Ms. McCormick identified bruising and red areas on C.J.'s genitals.

{¶7} After the exam, Ms. McCormick advised Amanda Wade that she would need to speak with someone about filing charges in this matter. Amanda spoke with Maria Neiswonger of Guernsey County Children Services (GCCS) and Detective John Davis of the Guernsey County Sheriff's Office about what C.J. reported.

{¶8} Detective Davis arranged with appellant's father for appellant to be brought to the Sheriff's Office for an interview on September 15, 2009. Appellant slept during the afternoon of September 14, 2009. Appellant was awakened around 6:30 that night for dinner. Appellant's father drove him to work around 9:30 p.m. On the way to work, they stopped at a convenience store and appellant purchased a Mountain Dew, a pack of cigarettes, and a chocolate muffin, about the size of a softball. Appellant's father picked him up from work and took him to the Guernsey County Sheriff's Office, around 8:00 am on the morning of September 15, 2009.

{¶9} When appellant arrived at the Sheriff's Office, GCCS Case Worker Maria Neiswonger accompanied him to the office of Detective Davis. Appellant was not

handcuffed. At that point, Detective Davis advised appellant of his *Miranda* rights. Ms. Neiswonger then advised appellant of the allegations against him. Appellant stated that he had never touched C.J. and was willing to take a polygraph to prove it. Detective Davis was able to schedule a polygraph for later that same afternoon.

{¶10} In the meantime, appellant was booked and appeared in the Cambridge Municipal Court for a bench warrant due to unpaid fines. Detective Davis advised appellant that if he were released from the jail, he would need to come back to the Sheriff's Office around 12:30 pm that day to leave for the polygraph examination that had been scheduled to take place in Zanesville, Ohio.

{¶11} Appellant was released from custody between 9:00 a.m. and 10:00 a.m. Appellant was not able to find a ride home, so he waited in the lobby of the Sheriff's Office. During the time he was in the lobby, appellant was free to come and go, was unattended, and not handcuffed.

{¶12} At approximately 12:30 p.m. that day, appellant, caseworker Neiswonger, and Detective Davis drove to the Zanesville Police Department for appellant's polygraph examination in an unmarked car. The car does not have a cage, and appellant was not handcuffed while in the car. Appellant was not questioned regarding the allegations of this case during the trip to Zanesville.

{¶13} Detective Jon Hill of the Zanesville Police Department administered the polygraph examination. At the conclusion of the test, appellant took a break to use the restroom and smoke a cigarette. Appellant did not request anything to eat or drink during the test. After analyzing the results, appellant was advised that he had showed deception on the tests. As Detective Hill was explaining why he determined that

appellant was being deceptive, appellant confessed that he had inappropriate contact with C.J.

{¶14} Following his admission to Detective Hill, appellant made a taped statement in the presence of Detective Hill, Detective Davis, and caseworker Neiswonger. In that statement, appellant stated that on eight occasions since Christmas 2008, C.J. had walked in on appellant masturbating. Appellant then demonstrated for C.J. how to masturbate. Appellant stated that his hand had come into contact with C.J.'s penis on three or four occasions and that C.J.'s hand had come into contact with appellant's penis. Appellant stated that this had happened at his father's house, and that when it happened, C.J. had seen the pornography playing on appellant's computer. Appellant further stated that he and C.J. were alone in the house when this occurred.

{¶15} Appellant filed a written waiver of his right to a jury trial. On December 7, 2009 appellant filed a Motion to Suppress. The trial court conducted an evidentiary hearing on January 25, 2010.

{¶16} Appellant testified during the hearing on his motion to suppress that he last ate a meal on September 13th at approximately 6:30 p.m. He did not eat anything the entire day that he was at the police station being investigated. Appellant claimed Detective Hill questioned him and suggested things to appellant that appellant had done to his nephew. Appellant testified that he was completely confused, exhausted, threatened, and then promised to be let go with no charges filed. Appellant testified he then falsely confessed. The trial court overruled appellant’s motion to suppress and the matter proceeded to trial.

{¶17} At trial, appellant testified on his own behalf. In his testimony, appellant admitted that he babysat C.J. three times when no one else was present.

{¶18} At the conclusion of appellant's testimony, his Trial Counsel requested the Court continue and bifurcate the trial to permit appellant to subpoena Andrea Kinder as a witness. The Court granted the Motion, bifurcated the trial and ordered that counsel issue a subpoena for Ms. Kinder to appear. The Court then set the date for the final day of trial for February 19, 2010. The trial continued on February 19, 2010 with the testimony, of Andrea Kinder and the State's rebuttal witnesses.

{¶19} The court found appellant guilty on all four counts of the Indictment. On March 11, 2010, appellant was sentenced to serve a prison term of two years for Count 1, three years for Count 2, and four years for Count 3, and one year for Count 4. The sentences were ordered to be served consecutively for a total period of incarceration of ten years. No fine was imposed, and costs were ordered and deferred pending the appellant's release from prison.

{¶20} Appellant has timely appealed raising the following assignments of error:

{¶21} “I. THE DENIAL OF THE MOTION TO SUPPRESS WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AS THE TRIAL COURT DOES NOT MAKE THE APPROPRIATE FINDINGS OF FACT THAT INDICATE APPELLANT’S STATEMENT WAS VOLUNTARY.

{¶22} “II. THE JUDGMENT OF CONVICTION MADE BY THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN THAT GUERNSEY COUNTY PROSECUTING ATTORNEY FAILED TO PRODUCE SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION.”

I.

{¶23} In his first assignment of error appellant argues that the trial court erred in overruling his motion to suppress. Specifically, appellant contends that a combination of factors renders his statement involuntary and that the trial court did not make findings of fact on those factors when determining his statement was voluntarily given to police. We disagree.

{¶24} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 154-155, 797 N.E.2d 71, 74, 2003-Ohio-5372 at ¶ 8. When ruling on a motion to suppress, the trial court assumes the role of Trier of fact and is in the best position to resolve questions of fact and to evaluate witness credibility. See *State v. Dunlap* (1995), 73 Ohio St.3d 308, 314, 652 N.E.2d 988; *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583. Accordingly, a reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. See *Burnside,* supra; *Dunlap,* supra; *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1; *State v. Medcalf* (1996), 111 Ohio App.3d 142, 675 N.E.2d 1268. However, once this Court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standard. See *Burnside,* supra, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539; See, generally, *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744; *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657. That is, the application of the law to the trial court's findings of fact is subject to a *de novo* standard of review. *Ornelas*, supra. Moreover, due weight should be given “to

inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas*, supra at 698, 116 S.Ct. at 1663.

{¶25} Whenever the State bears the burden of proof in a motion to suppress a statement allegedly obtained in violation of the *Miranda* doctrine, the State need prove waiver only by a preponderance of the evidence. *Lego v. Twomey* (1972), 404 U.S. 477, 92 S.Ct. 619; *Colorado v. Connelly* (1986), 479 U.S. 157, 107 S.Ct. 515.

{¶26} In Ohio, in order to determine whether an individual has waived his or her rights to remain silent and have the assistance of counsel, we must examine the totality of the circumstances surrounding the waiver. *State v. Clark* (1988), 38 Ohio St.3d 252, 261, 527 N.E.2d 844, 854. The totality of the circumstances analysis is triggered by evidence of police coercion. C*lark,* supra at 261, 527 N.E.2d 844. "[T]his approach requires us to inquire into all the circumstances surrounding the interrogation. This includes the age, mentality and prior criminal experience of the accused; the length, intensity and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement. *State v. Edwards* (1976), 49 Ohio St.2d 31, 358 N.E.2d 1051, paragraph two of the syllabus, reversed on other grounds, (1978), 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155.

{¶27} The suspect's impaired mental condition at the time of the waiver and the confession has some bearing on the issue of the voluntariness, but only as to whether police officers deliberately exploit the suspect's mental condition to coerce the waiver and confession. *Connelly,* 479 U.S. at 164-165, 107 S.Ct. at 520-521. In *Connelly*, the court held that "police over-reaching" is a prerequisite to a finding of involuntariness. Evidence of use by the interrogators of an inherently coercive tactic (e.g*.,* physical

abuse, threats, deprivation of food, medical treatment, or sleep) will trigger the totality of the circumstances analysis. *State v. Clark* (1988), 38 Ohio St.3d 252, 261, 527 N.E.2d 844, 854.

{¶28} In the case at bar, appellant was advised of his rights and signed a written waiver form on September 15, 2009 at 1:38 pm. (T. at 41-42). Appellant was again read his rights prior to the commencement of the polygraph test. (T. at 59-60). Further appellant signed a "Recorded Statement Affidavit" at the Delaware police department at 4:38 pm on that same day. In that affidavit appellant averred that he had not been mistreated or promised anything in exchange for his cooperation.

{¶29} Evidence of a written waiver form signed by the accused is strong proof that the waiver was valid. *State v. Clark* (1988), 38 Ohio St.3d 252, 261, 527 N.E.2d 844, 854*;* see *North Carolina v. Butler* (1979), 441 U.S. 369, 374-375, 99 S.Ct. 1755, 1758-1759, 60 L.Ed.2d 286, 293; *State v. Dennis* (1997), 79 Ohio St.3d 421, 425, 1997-Ohio-372, 683 N.E.2d 1096, 1102.

{¶30} Appellant's father testified that appellant had prior experience with law enforcement and the court system for prior traffic, child support, and child endangerment offenses. (Supp. T. at 17.) During the course of his contact with the various law enforcement officers on the day in question appellant never expressed any desire to remain silent or to consult counsel.

{¶31} In the cause *sub judice,* the record does not reveal any type of physical deprivation or mistreatment. Moreover, there is no evidence that police subjected appellant to threats or physical abuse, or deprived him of food, sleep, or medical treatment. See *State v. Cooey* (1989), 46 Ohio St.3d 20, 28, 544 N.E.2d 895, 908.

{¶32} The polygraph took approximately 90 minutes. After the polygraph test appellant was given a cigarette and restroom break. Appellant was in Zanesville for approximately 3 1/2 hours. The credible evidence submitted at the suppression hearing indicates that appellant was properly advised of his constitutional rights and that he validly waived those rights.

{¶33} In a motion to suppress, the trial court assumes the role of Trier of fact, and, as such, is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594, 621 N.E.2d 726. (Citations omitted). In *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81, 461 N.E.2d 1273, the Ohio Supreme Court explained: "[a] reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." See, also *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1. Accordingly, an appellate court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Id., citing *State v. Fausnaugh* (Apr. 30, 1992), Ross App. No. 1778.

{¶34} Based upon the above evidence, we conclude the state met its burden in establishing that appellant knowingly, voluntarily and intelligently waived his *Miranda* rights. Appellant's will was not overborne by any lack of sleep or hunger at the time of the interviews. The interviews were not excessive in length or intensity. The record also indicates appellant was not physically deprived or mistreated. Accordingly, appellant's statements during the interview were the "product of a rational intellect and a free will."

{¶35} Appellant's first assignment of error is overruled.

II.

{¶36} In his second assignment of error appellant maintains that his conviction is against the manifest weight of the evidence and was not supported by sufficient evidence. We disagree.

{¶37} When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. See *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 546 (stating that "sufficiency is the test of adequacy"); *State v. Jenks* (1991), 61 Ohio St.3d 259 at 273, 574 N.E.2d 492 at 503. The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational Trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781; *Jenks,* 61 Ohio St.3d at 273, 574 N.E.2d at 503.

{¶38} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Wilson,* 713 Ohio St.3d 382, 387-88, 2007-Ohio-2202 at ¶ 25-26; 865 N.E.2d 1264, 1269-1270. "In other words, a reviewing court asks whose evidence is more persuasive--the state's or the defendant's? Even though there may be sufficient evidence to support a conviction, a reviewing court can still reweigh the evidence and reverse a lower court's holdings." *State v. Wilson,* supra. However, an appellate court may not merely substitute its view for that of the jury, but must find that "the jury 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. Thompkins*, supra, 78 Ohio St.3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins,* supra.

{¶39} Employing the above standard, we believe that the state presented sufficient evidence from which the Trier of fact could conclude, beyond a reasonable doubt, that appellant committed the offenses of gross sexual imposition and disseminating matters harmful to juveniles.

{¶40} R.C. 2907.31, "Disseminating matter harmful to juveniles," states:

(A) No person, with knowledge of its character or content, shall recklessly do any of the following:

(1) Directly sell, deliver, furnish, disseminate, exhibit, rent, or present to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles any material that is obscene or harmful to juveniles[].”

{¶41} Appellant argues first that there was not sufficient evidence to convict him of disseminating matter harmful to juveniles. Specifically, appellant argues that there was no evidence presented that C.J. actually viewed pornography.

{¶42} Upon review of the statute, R.C. 2907. 31 does not require the material be presented at trial. *State v. Toth* (9th Dist.) No. 05CA008632, 2006-Ohio-2173; *State v. Hess*, Morrow App. No. 2009 CA 0016, 2010-Ohio-3692 at ¶187. Rather, we must view the evidence in light most favorable to the prosecution.

{¶43} Appellant's statement, admitted without objection as an exhibit at trial, contains appellant's admission that C.J. saw a pornographic video on at least one occasion. (Statement 3.)

{¶44} R.C. 2907.05(A)(4), Gross Sexual Imposition, prohibits “sexual contact” when the offender knows the other person is less than thirteen years of age. “Sexual Contact” is defined as “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”. R.C. 2907.01. Accordingly, touching the “erogenous zone” is what is prohibited.

{¶45} Appellant argues that there was insufficient evidence to convict him of gross sexual imposition because there was testimony presented that C.J. knew two adult males by the name of "Cody," but appellant was the only "Cody" that C.J. called "Uncle Cody." Further, appellant maintains there was no testimony concerning how C.J. physically described "Cody," how old "Cody" was, what his relationship to "Cody" was, when "Cody" allegedly touched him, the location that C.J. and "Cody" were when "Cody" allegedly touched him. Simply put there were no other statements or details given during testimony about the man C.J. identified other than his name was "Cody" which happens to be the middle name of appellant. [Appellant’s Brief at 15].

{¶46} At trial, appellant admitted that he babysat C.J. three times when no one else was present. The other "Cody" to whom appellant refers was identified at trial as Cody Lenars, a friend of C.J.'s father. C.J.'s mother testified at trial that C.J. had never been alone with Cody Lenars, As Detective Hill was explaining why he determined that appellant was being deceptive on the polygraph examination, appellant confessed that

he had had inappropriate contact with C.J. (Supp. T. 73.) Following his admission to Detective Hill, appellant made a taped statement in the presence of Detective Hill, Detective Davis, and caseworker Neiswonger. In the statement, appellant admitted to inappropriate contact with C.J. on multiple occasions.

{¶47} From these additional facts, the trier of fact could find that all the elements of the offenses charged in the indictment had been proven beyond a reasonable doubt. We hold, therefore, that the state met its burden of production regarding each element of the crimes and, accordingly, there was sufficient evidence to support appellant's convictions.

{¶48} "A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' *United States v. Barnard*, 490 F.2d 907, 912 (C.A.9 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891)". *United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-1267.

{¶49} Although appellant cross-examined the witnesses and argued that he did not commit the crimes, that the child was referring to a different individual, other witnesses contradicted the assertions that the child had been acting out, and further that he confessed under duress, the weight to be given to the evidence and the credibility of the witnesses are issues for the Trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881.

{¶50} The trial court as Trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236 Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. S*tate v. Raver,* Franklin App. No. 02AP-604, 2003- Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; *State v. Burke*, Franklin App. No. 02AP-1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096. Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492.

{¶51} After reviewing the evidence, we cannot say that this is one of the exceptional cases where the evidence weighs heavily against the convictions. The trial court did not create a manifest injustice by concluding that appellant was guilty of the crimes charged in the indictment.

{¶52} We conclude the Trier of fact, in resolving the conflicts in the evidence, did not create a manifest injustice to require a new trial.

{¶53} Appellant's second assignment of error is overruled.

{¶54} For the reasons stated in the foregoing opinion, the decision of the Court of Common Pleas, Guernsey County, is hereby affirmed.

By Gwin, P.J.,

Farmer J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

_____
HON. SHEILA G. FARMER

_____
HON. PATRICIA A. DELANEY

WSG:clw 0921

[Cite as *State v. Wade*, 2010-Ohio-4859.]

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
BRYAN CODY WADE	:	
Defendant-Appellant	:	CASE NO. 10-CA-13

For the reasons stated in our accompanying Memorandum-Opinion, the decision of the Court of Common Pleas, Guernsey County, is hereby affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. PATRICIA A. DELANEY