[Cite as *State v. Nunez*, 2010-Ohio-3435.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio — Court of Appeals No. H-09-019

Appellee — Trial Court No. CRI-2009 0020

v.

Daniel Nunez — **DECISION AND JUDGMENT**

Appellant — Decided: July 23, 2010

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, and
Jennifer L. DeLand, Assistant Prosecuting Attorney, for appellee.

Michael A. Partlow, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Huron County Court of Common Pleas, following a jury trial, in which appellant, Daniel A. Nunez, was found guilty of six

counts of voyeurism, in violation of former R.C. 2907.08(D)(1) and (F)(1) and (5)[1], all fifth degree felonies, and sentenced to serve a total of three years in prison. On appeal, appellant sets forth the following assignments of error:

{¶ 2} "Assignment of Error No. I: The trial court erred by denying appellant's motion to dismiss.

{¶ 3} "Assignment of Error No. II: The Trial court abused its discretion by admitting, over objection, testimony that appellant knew his actions may have been morally wrong, to the prejudiced [sic] of appellant.

{¶ 4} "Assignment of Error No. III: The trial court abused its discretion by excluding testimony that school counselors had advised that the alleged victim be institutionalized for her self-mutilation and suicidal thoughts, to the prejudice of the appellant.

{¶ 5} "Assignment of Error No. IV: Appellant's convictions are not supported by sufficient evidence.

{¶ 6} "Assignment of Error No. V: The appellant's convictions are against the manifest weight of the evidence."

{¶ 7} On November 24, 2008, appellant's daughter, D.N., came home from school and turned on her television set to watch a movie. When the tape began playing, D.N. discovered that it contained images of her, naked, in the bathroom of the home that

[1]R.C. 2907.08 was amended, effective April 4, 2009. The version of the statute referred to in this decision was effective at all times relevant to these proceedings.

she shared with appellant. In addition, the tape also contained portions of a commercially produced pornographic video. Upon discovering the images, D.N. telephoned her grandmother, who took her to the Bellevue police station where she was asked to call appellant on his cell phone. When appellant answered the call, he immediately apologized to D.N. for making the tape. Later, appellant was interviewed by Bellevue police. During the interview, appellant admitted to secretly recording his daughter while she used the bathroom, including while she showered. However, appellant stated that he made the recordings because D.N. was a "cutter," and he was afraid she would hurt herself while she was locked in the bathroom.

{¶ 8} On December 19, 2008, the Huron County Grand Jury indicted appellant on six counts of voyeurism, a fifth degree felony, in violation of R.C. 2907.08(D)(1) and (F)(1) and (5). Appellant appeared before the trial court and entered a plea of not guilty on January 9, 2009. On May 5, 2009, a jury trial was held. At the conclusion of the state's opening statement, the defense made a motion to dismiss the indictment for failure to allege that appellant made the tape for purposes of sexual gratification or arousal. The motion was denied, and the trial continued, with the state presenting testimony by Bellevue Police Patrolman Eric Burt; Police Detective Matt Johnson; and D.N.

{¶ 9} Patrolman Burt testified at trial that he interviewed D.N. at her mother's house on November 24, 2008. Burt stated that D.N. told him she found the tape in her television set, which she found in appellant's bedroom. Burt further stated that he viewed

portions of the tape, which contained images of D.N., as well as images of appellant that were taken as he adjusted the camera in its hiding place.

{¶ 10} Detective Johnson testified at trial that he took a written statement from D.N., after which he contacted the prosecutor's office. Johnson further testified that he set up the police-monitored phone call between D.N. and appellant, during which appellant stated that he was "sorry he had done it." Johnson stated that he viewed the tape, which was over four hours long, and contained images of D.N., naked in the shower, dressing, and on the toilet, interspersed with sections of what appeared to be commercially produced pornography.

{¶ 11} Johnson further stated that he interviewed appellant at the police station on November 26, 2008, during which appellant said he "knew it was wrong." The defense objected to this testimony; however, the trial court overruled the objection on the basis that it was relevant to appellant's state of mind. On cross-examination, Johnson testified that appellant knew what was going on when he answered D.N.'s telephone call. Johnson also testified that D.N. denied to police that she was a "cutter."

{¶ 12} D.N. testified at trial that, although she reads vampire books, she does not think vampires are real, and she never drank human blood. D.N. further testified that the bathroom in appellant's house, which is always under construction, has a door behind the bathtub that goes to the basement. D.N. stated that, for several months before finding the video, she noticed red flashing lights in various locations in the bathroom that would disappear when she approached them. D.N. also stated that she once found a video of a

naked woman on appellant's phone; however, appellant told her the subject was his girlfriend, not D.N.

{¶ 13} As to the contents of the video, D.N. testified that she was naked on most of the recordings, and that the tape also contained pornography. D.N. further testified that, at one point, appellant asked her to leave the bathroom so he could use the toilet; however, viewing the tape as it was played for the jury, D.N. commented that appellant was adjusting the camera and rubbing his stomach during that time. D.N. stated that another camera was concealed in the shower to photograph her from above. She said that the video appeared to contain different shots of her in the shower that were spliced together.

{¶ 14} D.N. testified that, on several different occasions, she saw a light coming from a tube in the bathroom floor. Upon closer inspection, she discovered that there was a camera lens in the tube, which went to the basement. When she called for appellant to come and see the tube, he came from outside the back of the house, near a door that went to the basement. D.N. never found a camera in the basement. D.N. also testified that she had empty condom boxes and some box cutter blades in her bedroom. However, she stopped using the blades because her boyfriend threatened to break up with her if she did not stop injuring herself.

{¶ 15} On cross-examination, D.N. testified that she currently lives with her grandmother, mother and sisters, and that she distrusts men because of appellant's actions. D.N. also testified that she told Officer Johnson she never cut herself in the

neck; but she did not deny being a cutter. D.N. stated that she had painkillers in her room, which she takes to relieve her monthly menstrual pain.

{¶ 16} At the conclusion of D.N.'s testimony, the state rested its case. The defense then asserted that insufficient evidence was presented as to appellant's purpose in making the video, and renewed its motion to dismiss the charges on that basis. The state responded that adequate circumstantial evidence had been presented to show that appellant had a sexual motive in making the recordings. The trial court agreed that enough circumstantial evidence had been presented to establish the required sexual motive, and the motion was overruled. Thereafter, the defense presented testimony by appellant's sister, Adrianna Ortiz; his ex-girlfriends, Holly Cox and Kara Swinehart; Bellevue school principal, Dave Ritter; and appellant.

{¶ 17} Ortiz testified at trial that, on one occasion when appellant was unavailable, she was asked to pick up D.N. at school and take her to a therapist because D.N. brought razor blades to school. Ortiz also stated that D.N. told Ortiz that she did not respect appellant as a father.

{¶ 18} Cox testified at trial that she dated appellant for two years, and now lives with appellant, who helps take care of Cox's two children. Cox, who was 23 years old at the time of trial, stated that D.N. would sometimes ask Cox to "hang out" with her. Cox also stated that D.N. discussed cutting and suicide with Cox three or four times over their two-year acquaintance and that, on several occasions, D.N. asked Cox to get appellant to leave the house.

{¶ 19} Swinehart testified at trial that she is appellant's ex-girlfriend, and that D.N. lived with her and appellant for one year. Swinehart further testified that she searched D.N.'s room at appellant's request, and found razor blades, sleeping pills, empty condom boxes, and several diaries. Swinehart stated that she read portions of the diaries, in which D.N. wrote that she cut herself to eliminate pain, and drank blood to become immortal. Swinehart also stated that D.N. wrote in the diaries that she "felt dead," and would rather be dead.

{¶ 20} Swinehart testified that she and appellant discussed the idea of taping D.N.'s activities in the bathroom, and that appellant viewed the tapes at her house. Swinehart stated that, while she did not think taping D.N. was a good idea, she agreed with appellant that it was the only solution.

{¶ 21} On cross-examination, Swinehart testified that appellant never told her where he placed the camera, and she never viewed the recordings of D.N. On redirect, Swinehart stated that she was not aware D.N. was recorded in the nude until the tapes were discovered and turned over to police.

{¶ 22} Ritter testified at trial that D.N.'s school records did not contain a report of the incident involving D.N. bringing razor blades to school, because such an incident is not unusual enough to generate a report. Ritter stated that, while cutting is often a cry for help, the school does not consider it a disciplinary problem.

{¶ 23} Appellant testified at trial that his daughter has psychological and emotional problems that began when she was molested by her stepfather. Appellant also

testified that he and Swinehart searched D.N.'s room and found vials for holding blood and "vampire books" in addition to the items listed by Swinehart. Appellant stated that he placed video cameras in the bathroom to "catch [D.N.] in the act" and confront her. He used a "pinhole camera" that did not have a red light, placed in a dropped ceiling above the shower. Later, he placed another camera in a vent, and then in a speaker. Appellant testified that the speaker-camera provided a lower view of the D.N., which he described as the "best" view. Appellant further testified that the cameras had no wires, and were capable of sending a wireless signal to a recording device in another room.

{¶ 24} Appellant stated that all the recordings were made on one tape, which he reviewed at Swinehart's house. He further stated that he would tape D.N. whenever he had "suspicion she's going to do something, when she's depressed." Appellant said he heard about D.N. finding the tape almost immediately, and that he knew the purpose of her call to his cell phone before he answered the call.

{¶ 25} On cross-examination, appellant testified that he recorded D.N. "to try to catch [her] drinking her blood;" however, he never saw her drink any blood. He further testified that no illegal items were found in D.N.'s room. In response to questioning concerning his criminal record, appellant stated that he began selling drugs in high school and was convicted for trafficking and possession of cocaine when he was 23 years old. However, over the next 35 years, he "overcame all that."

{¶ 26} At the close of appellant's testimony, the defense rested its case and renewed its motion to dismiss, which the trial court denied. Closing arguments were

made, after which the trial court instructed the jury. After deliberation, the jury returned a verdict of guilty on all six counts of the indictment.

{¶ 27} On July 2, 2009, the trial court issued a judgment entry in which it stated that appellant was found guilty of six counts of voyeurism, in violation of R.C. 2907.08(D)(1) and (F)(1) and (5), all fifth degree felonies. On July 7, 2009, a sentencing hearing was held at which appellant appeared, represented by counsel, and was allowed to speak to the trial court.

{¶ 28} On August 14, 2009, the trial court issued a judgment entry of sentencing, in which it stated that it, in fashioning appellant's sentence, it considered the record, oral statements by defense counsel, the prosecutor, and appellant, the presentence investigation report and the principles and purposes of sentencing pursuant to R.C. 2929.22, and balanced the factors relating to seriousness of the offense and recidivism pursuant to R.C. 2929.12. The trial court also stated that appellant was found guilty of six counts of voyeurism as set forth above.

{¶ 29} After considering and weighing the seriousness and recidivism factors, the trial court found that a prison term is consistent with the principles and purposes of sentencing. The trial court further found that appellant is not amenable to a community control sanction. Accordingly, the trial court sentenced appellant to serve 12 months in prison for each of the six convictions. The first three convictions were ordered to be served consecutively, with Counts 4 through 6 to be served concurrently with Counts 1 through 3, for a total of three years in prison. In addition, appellant was ordered to pay a

$1,500 fine. Appellant was found to be eligible to apply for judicial release after serving 180 days in prison.

{¶ 30} After announcing appellant's sentence, the trial court advised appellant of the terms of postrelease control, and the loss of civil rights of felons. An attorney was appointed to assist appellant with his appeal and, on September 10, 2009, a timely notice of appeal was filed in this court.

{¶ 31} In his first assignment of error, appellant asserts that the trial court erred when it overruled his motion to dismiss that was made after the prosecution's opening statement. In support, appellant argues that the case should have been dismissed because, in its opening statement, the prosecution did not promise the jury that the evidence would show that he taped his daughter for personal sexual gratification, which is an element of the crime of voyeurism.

{¶ 32} The Ohio Supreme Court has long held that:

{¶ 33} "[w]here, in a criminal proceeding, the state's [opening statement] indicates that the accused was charged with the offense for which he is being tried and there is no admission of fact showing that no offense was committed or that the accused was not guilty of the offense charged, a motion by the accused for judgment on such statement should be overruled." *State v. Karcher* (1951), 155 Ohio St. 253, paragraph one of the syllabus.

{¶ 34} Appellant was charged with six counts of voyeurism pursuant to former R.C. 2907.08(D)(1) and (F)(1) and (5), which states that:

{¶ 35} "(D) No person, for the purpose of sexually arousing or gratifying the person's self, shall commit trespass or otherwise surreptitiously invade the privacy of another to photograph the other person in a state of nudity if the other person is a minor and any of the following applies:

{¶ 36} "(1) The offender is the minor's natural or adoptive parent, stepparent, guardian, or custodian, or the person in loco parentis of the minor.

{¶ 37} "* * *

{¶ 38} "(F)(1) Whoever violates this section is guilty of voyeurism.

{¶ 39} "* * *

{¶ 40} "(5) A violation of division (D) of this section is a felony of the fifth degree."

{¶ 41} In its opening statement, the prosecution made the following claim:

{¶ 42} "The defendant, as I said before, videotaped [his daughter] in the shower. He also videotaped her in the bath doing regular, routine daily activities. The evidence will show that the defendant went so far as to put the camera directly over [the] head of the shower. You will see that the defendant videotaped his minor daughter, * * *, on the same tape that [sic] he stored commercial pornography. The commercial pornography is adult pornography at the beginning, middle and end of the images of his minor daughter. * * *"

{¶ 43} At the close of the prosecution's statement, the defense made its motion for dismissal, stating that:

{¶ 44} "Your Honor, at this point I would move to dismiss the charge based upon the facts stated * * * that there was not one statement about that the videos were made for personal gratification. There is no evidence of that. * * *"

{¶ 45} At the court's request, the state responded:

{¶ 46} "Your Honor, the State does not have direct evidence of the intent of defendant here. There is circumstantial evidence in the case, that would be the pornography as well as the angle of [the] camera. Both of those were, in fact, hit in the opening statement."

{¶ 47} After hearing both parties, the trial court overruled appellant's motion, after which it stated:

{¶ 48} "The Court does believe the opening statement is sufficient to at least introduce the elements of the offense and infer what those will be. Obviously, the evidence at trial is going to have to establish those."

{¶ 49} Contrary to appellant's assertions, the prosecutor's statements clearly indicate that appellant videotaped his daughter, while she was naked in the shower, over portions of a professionally produced pornography video. Accordingly, we agree with the trial court that the state at least inferred that appellant recorded his daughter for personal sexual gratification. In addition, after reviewing the prosecutor's opening statement in its entirety, we find no admissions of fact showing that: (1) no offense was committed or (2) that appellant was not guilty as charged. Therefore, the trial court did

not err by overruling appellant's motion to dismiss, and appellant's first assignment of error is not well-taken.

{¶ 50} Appellant asserts in his second assignment of error that the trial court erred by admitting, over objection, Johnson's testimony that appellant told him that what he did was "wrong." In support, appellant argues that, by allowing such testimony, the trial court unnecessarily confused "issues of morality and law," to the prejudice of appellant.

{¶ 51} At trial, Detective Johnson testified that appellant told D.N. on the phone that he was "sorry" for his actions. The prosecutor then asked Johnson if appellant ever admitted that his actions were "wrong." At that point, defense counsel objected, stating that, if such testimony were allowed, appellant potentially could be "tried for something that's wrong. While I don't know what that means, we're here on a crime." The trial court responded that such testimony is relevant to appellant's state of mind, and overruled the objection. Johnson then testified that, in a taped interview, appellant told Johnson "he knew [that videotaping his daughter] was wrong. [Appellant] said he also spoke to a couple other people that told him that he shouldn't be doing this."

{¶ 52} At the beginning of the recorded interview, which was played for the jury, appellant waived his *Miranda* rights. The propriety of that waiver has not been challenged at any stage of these proceedings.

{¶ 53} Appellant's comments to Johnson qualify as party admissions, and are therefore not excludable as hearsay, pursuant to Evid.R. 801(D)(2). Accordingly,

appellant's statements are admissible, so long as they are relevant. See Evid.R. 402[2]. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401; *State v. DeRose,* 11th Dist. No. 2000-L-076, 2002-Ohio-4357, ¶ 15.

{¶ 54} It is well-settled that the decision to admit or exclude evidence at trial lies within the sound discretion of the trial court. *State v. Cooperider*, 3d Dist. No. 9-03-11, 2003-Ohio-5133, ¶ 1, citing *State v. Combs* (1991), 62 Ohio St.3d 278, 274. On appeal, the trial court's decision will not be disturbed absent a finding of abuse of discretion and material prejudice to the defendant. *State v. Long* (1978), 53 Ohio St.2d 91, 98. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 55} "Reversal under an abuse of discretion is not warranted merely because appellate judges disagree with the trial judge or believe the trial judge erred." *State v. Bennett,* 11th Dist. No. 2002-A-0020, 2005-Ohio-1567, ¶ 40, citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169. It is appropriate only where such abuse causes the result to be "palpably and grossly violative of fact and logic [so] that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof,

[2]Generally, all relevant evidence is admissible, "unless some other provision of law makes it inadmissible." Evid.R. 402.

not the exercise of reason but rather of passion or bias." *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222.

{¶ 56} Knowledge that appellant's acts were "wrong" is not an element of the crime of voyeurism. Appellant argued both at trial and on appeal that videotaping his daughter naked in the bathroom, while extremely distasteful to him, was necessary for her own protection. On consideration, we agree with the trial court that evidence that appellant felt it was "wrong" to record his daughter under those circumstances was not unrelated to his state of mind, nor was it overly prejudicial for the jury to hear such testimony. Accordingly, we find that the trial court did not abuse its discretion by allowing Detective Johnson to testify at trial that appellant thought his actions were "wrong." Appellant's second assignment of error is not well-taken.

{¶ 57} In his third assignment of error, appellant asserts that the trial court erred by not allowing Ortiz to testify as to statements made by D.N.'s school counselor regarding whether or not D.N. should be institutionalized or receive therapy. In support, appellant argues that such testimony would have been used to show appellant's state of mind at the time he decided to videotape his daughter in the bathroom, and to negate the charge that he made the recordings for the purpose of sexual gratification.

{¶ 58} Evid.R. 801(C) defines the term "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Generally, pursuant to Evid.R. 802, hearsay is inadmissible, unless it falls into one of the 23 recognized exceptions in Evid.R. 803. In

this case, appellant does not argue that the school counselor's statements to Ortiz fall into any particular exception; rather, he argues simply that the testimony is relevant to his own motive for surreptitiously videotaping his daughter in the bathroom. Notably, appellant did not attempt to produce the school counselor as a witness at trial.

{¶ 59} As set forth in our discussion of appellant's second assignment of error, the trial court's admission or exclusion of evidence will not be overturned on appeal absent a finding of abuse of discretion. *State v. Cooperider*, supra. On consideration of the foregoing, we find that the trial court did not abuse its discretion by finding that any testimony by Ortiz as to statements made to her by D.N.'s school counselor constitute inadmissible hearsay, and excluding them from evidence on that basis. Appellant's third assignment of error is, therefore, not well-taken.

{¶ 60} In his fourth assignment of error, appellant asserts that there was insufficient evidence presented at trial to support his convictions for voyeurism. Specifically, appellant argues that no direct evidence was presented to support that he videotaped his daughter for purposes of sexual arousal or gratification.

{¶ 61} "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 sustain the verdict as a matter law." *State v. Haldeman* (Nov. 22, 2000), 2d Dist. No. 18199, citing *State v. Thompkins* (1977), 78 Ohio St.3d 380. The applicable standard for reviewing sufficiency of the evidence is set forth in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, superceded by constitutional amendment on

other grounds in *State v. Smith* (1997), 80 Ohio St.3d 89, in which the Supreme Court of Ohio held that, when reviewing the sufficiency of the evidence, the appellate court's function "is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilty 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"

{¶ 62} R.C. 2901.05(E) defines "reasonable doubt" as "a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs."[3]

---

[3]The trial court's instruction to the jury as to reasonable doubt closely tracked the statutory definition as follows:

"Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible imaginary doubt.

"Proof beyond a reasonable doubt is proof of such a character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs."

See, also, *State v. Awkal* (1996), 76 Ohio St.3d 324. (Use of the statutory definition of "reasonable doubt" in a jury instruction is proper. Id., at 334.)

{¶ 63} Absent an admission of guilt, the proof of such a determination "invariably requires circumstantial evidence." *State v. Horrigan* (Feb. 19, 1999), 2d Dist. No. 17260, citing *State v. Mundy* (1994), 99 Ohio App.3d 275. Since intent cannot, and need not, be proved by the direct testimony of a third party, evidence of intent """must be gathered from the surrounding facts and circumstances * * *."" *State v. Lott* (1990), 51 Ohio St.3d 160, 168, quoting *State v. Johnson* (1978), 56 Ohio St.2d 35, 38. (Other citations omitted.)

{¶ 64} On appeal, we must determine whether, "an ordinary prudent person or a reasonable person sitting as a juror [would] perceive from appellant's actions, and all of the surrounding facts and circumstances, that [his] purpose or specific intention was arousal or gratification of sexual desire." *State v. Horrigan*, supra, citing *State v. Mundy*, supra, at 288-289; R.C. 2907.08(D)(1). In so doing, the trier of fact necessarily employs the process of inferential reasoning, whereby "'[it] reviews the defendant's conduct in light of the surrounding facts and circumstances and infers a purpose or motive. This conclusion * * * reflects the purpose that an ordinary prudent person would ascribe to a defendant's conduct.'" *State v. Mundy*, supra, quoting *In re Grigson* (Apr. 15, 1991), 4th Dist. No. 1881.

{¶ 65} For a conviction to be based on circumstantial evidence, the inferences supporting guilt must be strong enough to exclude reasonable inferences of innocence that are drawn from the same set of facts. *Columbus v. Kerns* (Aug. 29, 1985), 10th Dist. Nos. 84AP-921 and 84AP-922. An appellate court must reverse a conviction based only

on circumstantial evidence if the inferences supporting guilt are insufficient as a matter of law to enable the trier of fact to exclude inferences supporting a reasonable theory of innocence. Id., citing *State v. Sorgee* (1978), 54 Ohio St.2d 463; *State v. Graven* (1978), 54 Ohio St.2d 114. "However, the theory of innocence must be reasonable as opposed to merely possible. See *State v. Rose* (May 5, 1983), No. 82AP-736." Id.

{¶ 66} As set forth above, the record shows that appellant videotaped his daughter, while she was nude, by placing a hidden camera in her bathroom. In addition, appellant was seen on the tape, adjusting the camera and rubbing his stomach area. The segments of tape on which appellant recorded his daughter were interspersed with commercially produced pornography.

{¶ 67} This court has considered the entire record which was before the trial court and, upon consideration thereof, finds that sufficient circumstantial evidence was presented at trial to permit a reasonable juror to find that appellant videotaped his daughter for purposes of sexual arousal or gratification, as opposed to appellant's explanation that he was trying to find a way to keep D.N. from hurting herself. Appellant's fourth assignment of error is, therefore, not well-taken.

{¶ 68} Appellant asserts in his fifth assignment of error that his convictions were against the manifest weight of the evidence. In support, appellant argues that the jury lost its way and incorrectly failed to conclude that he taped his daughter so that he could confront her with evidence that she was hurting herself. Appellant further argues that he should have been exonerated by the tapes because he only recorded D.N. "approximately

once per week – not every time she bathed," and that, although his daughter was frequently recorded in the nude, "depicting nudity was not the purpose of such."

{¶ 69} In a challenge to a conviction based on manifest weight of the evidence, the appellate court "examines the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." *State v. Suggs*, 12th Dist. Nos. CA2008-02-052 and 053. In order to determine whether a conviction is against the manifest weight of the evidence, we must "review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, 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 new trial ordered." *State v. Wright*, 1st Dist. No. C-080437, 2009-Ohio-5474, ¶ 41, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶ 70} As the trier of fact, the jury is in the best position to clearly evaluate the evidence. *State v. Thompkins*, supra, at 387. However, in cases where a court of appeals reverses the judgment of the trial court as against the manifest weight of the evidence, the appellate court sits as a ""'thirteenth juror"' and disagrees with the factfinder's resolution of the conflicting testimony." Id., citing *Tibbs v. Florida*, 457 U.S. 31, 42; 102 S.Ct. 2211, 2228; 72 L.Ed.2d 652, 661. Accordingly, an appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances to correct a manifest miscarriage of justice, and only when the evidence

presented at trial weighs heavily in favor of acquittal." *State v. Webber*, 12th Dist. No. CA2008-11-142, ¶ 16, citing *State v. Thompkins*, supra.

{¶ 71} In this case, the record shows that the jury heard from D.N., as well as appellant and several witnesses who testified on appellant's behalf. In addition, testimony was presented by the detective who investigated the case. Finally, a recording of Johnson interviewing appellant, as well as the recording appellant made of his daughter in the bathroom of her home, were played for the jury in their entirety.

{¶ 72} On consideration of the foregoing, along with our determinations as to appellant's first four assignments of error, we do not agree with appellant's assertion that the evidence weighed heavily against his conviction, or that jury lost its way resulting in a manifest miscarriage of justice. We therefore conclude that appellant's convictions were not against the manifest weight of the evidence, and his fifth assignment of error is not well-taken.

{¶ 73} The judgment of the Huron County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

_____
JUDGE

Thomas J. Osowik, P.J.

_____
JUDGE

Keila D. Cosme, J.
CONCUR.

_____
JUDGE