[Cite as *State v. Fell*, 2012-Ohio-616.]

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

State of Ohio — Court of Appeals No. L-10-1162

Appellee — Trial Court No. CR0200902661

v.

Anthony Fell — **DECISION AND JUDGMENT**

Appellant — Decided: February 17, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Lindsay D. Navarre, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} Defendant-appellant, Anthony Fell, appeals his conviction for gross sexual imposition for which the Lucas County Court of Common Pleas sentenced him to a three-year prison term. On May 17, 2010, the trial court entered a judgment thereon. This appeal followed.

{¶ 2} Fell was indicted on one count of gross sexual imposition in violation of R.C. 2907.05(A)(4) and (C), a third degree felony. On April 28, 2010, after a three-day jury trial, Fell was found guilty. The core facts from the trial record are as follows. The victim, who at the time of the event was 10 years old, testified that on the evening of August 22, 2009, she and her sister, J.B., had slept over at the house of her friend, M.R. M.R.'s mother, Lacee Tharpe, is Fell's wife and has a son by Fell. Fell resided in Tharpe's home on Everett Street, which is four houses away from the victim's. Both Tharpe and the victim's mother, Shawne Chamblee, testified that the girls frequently slept at each other's homes that summer. On August 22nd, all three girls were sleeping in the same bedroom. M.R. and the victim slept on the bed while J.B. slept on the floor.

{¶ 3} Early in the morning the victim woke suddenly when she felt something touching her chest. She testified that Fell was standing over her, rubbing her breasts with his hand on the outside of her pajamas. It was sunrise outside and she stated she could see him in the light. As she raised her head, she asked Fell what he was doing, but he grabbed her ear and pushed her head down, telling her to be quiet. Fell then left the room and returned with two pillows and asked her, "why was [she] so grumpy." Then he went out again. The victim stated she began crying and "felt disgust[ed]." Her sister, J.B., corroborated most of this account. She testified that she woke up after hearing her sister say "stop, stop." J.B. sat up on the floor and saw Fell standing over the bed on the side where her sister was lying. At that point J.B. was not sure what Fell was doing. She lay down again briefly, but after Fell left, her sister got up crying and said, "we got to go

[and] I don't want to be here no more." Both sisters gathered their belongings and went back to Chamblee's house.

{¶ 4} Chamblee testified that she knew who Fell was before this incident. She would allow her daughters to sleep over at Tharpe's home only when Tharpe assured her that Fell was not going to be there. Chamblee stated that it was about 7:30 a.m. when both girls came in. The victim was hysterical. After being told what happened, Chamblee immediately went to Tharpe's home where she confronted Fell with her daughter's accusation. She testified that Fell was standing at the front door and merely lowered his head and shook it, but otherwise said nothing. Chamblee then returned home, called 9-1-1, and took her daughter to St. Anne's where a nurse interviewed and examined her. There was no bruising or indication of physical injury, but at trial the nurse testified this was not unusual in cases where only touching was alleged. The state also presented testimony about the victim's demeanor when the incident was initially reported. The nurse, a Toledo police officer who responded to the 9-1-1 call, and a detective from the special victim's unit testified that the victim was perceptibly "withdrawn," "overwhelmed" and "upset." The victim "cried throughout the interview," according to the detective.

{¶ 5} During the defense case-in-chief, Tharpe testified that when Chamblee confronted Fell, he said that nothing happened and he did not know what her daughter was talking about. M.R. testified that Fell had stuck his head in the bedroom doorway once that morning, asked where the cat was, but never came inside. She fell back to sleep

afterward but woke again and saw the victim crying beside her. She testified Fell was not in the bedroom then.

{¶ 6} Fell now assigns one error for our review:

> The jury lost its way in finding appellee's evidence proved appellant's guilt beyond a reasonable doubt.

{¶ 7} In criminal appeals challenging the jury's verdict on manifest-weight grounds, the issue is whether the state met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 78 N.E.2d 541. "Weight is not a question of mathematics, but depends on its *effect in inducing belief*." (Emphasis sic.) *Id.* at 387. Sitting as the putative "thirteenth juror," the appeals court must "examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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.'" (Internal citations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004–Ohio–6235, ¶ 81.

{¶ 8} R.C. 2907.05(A)(4) states that "[n]o person shall have sexual contact with another, not the spouse of the offender * * * when * * * [t]he other person * * * is less than thirteen years of age, whether or not the offender knows the age of that person." Further, "'sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

{¶ 9} Contact qualifies as impermissible "sexual contact" only if the touching was for the purpose of sexual arousal or gratification. *Id*. This determination is largely inferential. In resolving testimony alleging sexual contact, the jury "may consider the type, nature and circumstances of the contact, along with the personality of the defendant. From these facts, the [jury] may infer what the defendant's motivation was in making the physical contact with the victim. If the [jury] determines that the defendant was motivated by desires of sexual arousal or gratification, and that the contact occurred, then [it] may conclude that the object of the defendant's motivation was achieved." *State v. Cobb*, 81 Ohio App.3d 179, 185, 610 N.E.2d 1009 (1991).

{¶ 10} Fell's essential complaint is that the state's case "rested on the shoulders of [the victim]," since her sister did not see the actual touching of the breasts that would constitute the element of sexual contact. Though other witnesses were called by both sides, he claims only one, M.R., testified to seeing Fell in or near the bedroom before the victim began crying and left with her sister. He suggests that both accounts cannot be true. Since M.R. was sleeping next to the victim and "would have noticed the person next to her sitting up and [then] being pushed back down," the alleged sexual contact could not have occurred without M.R. seeing it, and therefore the victim's account was unworthy of belief. Fell also points to Tharpe's testimony as supporting M.R.'s account. Though he raises other testimonial issues, it is from this credibility-based premise - the jury's acceptance of the victim's account over M.R.'s - that Fell insists the jury "clearly lost its way" because the conflicting testimony favored reasonable doubt.

{¶ 11} We are not persuaded that an errant verdict resulted merely because the jury believed the victim rather than defense witnesses. Tharpe testified that she was in her bedroom eating the breakfast Fell brought her when he came in very early that morning. But he soon left the room (and her view) for about ten minutes. M.R.'s testimony placed Fell at the bedroom door that morning and is consistent with her being asleep when the sexual contact occurred. It is explicitly consistent with the statements of J.B. and the victim that the latter was crying and upset and then immediately fled the house. Thus, the jury reasonably could have recognized these elements in the testimony as credible threads supporting the victim's account. As well, the jury could reasonably find them consonant with the manner and timing of the sexual contact as the victim recounted it.

{¶ 12} Fell also complains that the jury became "bogged down" on two extraneous matters pertaining to his character. The first concerned his apparent penchant for frequenting "after-hours clubs" and not returning home until very early in the morning. The second pertained to a late-night incident at Chamblee's house about a month earlier when M.R. was sleeping there. Fell went there at 4:00 a.m. allegedly "to check on" M.R., and then looked or "peeked" in the victim's bedroom window. This act puzzled the girls, vexed the dog to barking wildly and, later that morning, induced an agitated visit from Chamblee's boyfriend. Fell claims this testimony made him look "weird" in the jury's eyes.

{¶ 13} However, not only was no objection made to either line of testimony, but the window-peeping incident was also developed in some detail by defense counsel

during Tharpe's direct examination. Then, on cross-examination, Tharpe added that she "was just shocked" that Fell had not simply knocked on the door and asked to speak to Chamblee if he had some concern about M.R. She acknowledged "it was weird he was looking in the windows" and stated she too "would be kind of mad about it." The subject of the after-hours clubs was also developed during Tharpe's testimony. Her testimony that Fell was strict with M.R., and purportedly a positive role-model for their children, prompted the prosecutor to inquire into his attraction to late-night clubs. She acknowledged that Fell regularly stayed out late at these clubs on Friday and Saturday nights. In any event, the failure to object forfeits all but plain error. *State v. Hanna*, 95 Ohio St. 3d 285, 2002-Ohio-2221, 767 N.E.2d 678, ¶ 77. Plain error means "obvious error," and we find none in allowing the testimony on either matter. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶16.

{¶ 14} Because the primary form of the admitted evidence will be testimonial, the jury's first-hand assessment of each witness's unique axiopisty sets a necessarily high standard in a manifest-weight challenge. *State v. Hudson*, 7th Dist. No. 09-MA-89, 2011-Ohio-1343, ¶ 35. The jury is free to accept or reject evidence, to note ambiguities and inconsistencies in testimony—whether between several witnesses or in the conflicting statements of a single witness—and to resolve or discount them accordingly. *State v. Gonzales*, 154 Ohio App.3d 9, 2003-Ohio-4421, 796 N.E.2d 12, ¶ 113. Jurors may accept as true all, some or none of what a witness tells them. On that score, unlike the "thirteenth juror," the original twelve had the benefit of actually seeing the witnesses testify. They

observed their facial expressions and body language. They heard their voice inflections in responding to questions. In all of this the jurors could instinctively discern qualities such as hesitancy, equivocation, or candor (or the lack of it). The intimate and evanescent nature of observed testimony simply cannot be replicated after the fact. For that reason, we are required to extend "special deference" to the jury's determinations of credibility. *Thompkins* at 390 (Cook, J. concurring).[1]

{¶ 15} Here, the testimony of the victim and her sister, if believed as it indeed was, supported a reasonable inference that Fell touched or rubbed the victim's breasts and that sexual gratification was the purpose of the contact. That the jury heard conflicting accounts is not alone a basis for reversal. It is not against the "manifest weight" of testimonial evidence for the jury to choose to believe the victim over defense witnesses where it could reasonably make that choice. *State v. Mock*, 187 Ohio App.3d 599, 2010–Ohio–2747, 933 N.E.2d 270, ¶ 40. Having reviewed the record and the trial transcript, we cannot say that the jury "clearly lost its way" in finding Fell guilty. Nor are we persuaded

[1] This deference also originates from the unanimity restriction on appellate courts contained in Section 3(B) 3 of Article IV of the Ohio Constitution. That section limits our power to reverse a jury verdict on manifest weight and "preserve[s] the jury's role with respect to issues surrounding the credibility of witnesses." *Thompkins* at 389. Thus, despite frequent and optimistic allusions to the appeals court "sitting as a thirteenth juror," *see, e.g., State v. Alexander*, 5th Dist. No. 2011CA00096, 2011-Ohio-6784, ¶ 15, in truth our ability to take a cold record and assess credibility post-hoc is limited. *State v. Reynolds*, 10th Dist., No. 03AP-701, 2004-Ohio-3692, ¶ 13.

that this is "the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins, supra*, at 386-387.

{¶ 16} Accordingly, Fell's sole assignment of error is not well-taken.

{¶ 17} On consideration whereof, the judgment of the Lucas 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

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE