[Cite as *State v. McIntire*, 2015-Ohio-1057.]

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

State of Ohio — Court of Appeals No. H-13-018

Appellee — Trial Court No. CRI-2013-0082

v.

Norvelle T. McIntire — **DECISION AND JUDGMENT**

Appellant — Decided: March 20, 2015

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, and
Patrick M. Hakos, Jr., Assistant Prosecuting Attorney, for appellee.

Eric Allen, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Following a jury trial at which he was found guilty of rape, gross sexual imposition, importuning, attempted gross sexual imposition, and public indecency, defendant-appellant, Norvelle McIntire, appeals the July 24, 2013 judgment of the Huron County Court of Common Pleas. For the reasons that follow, we affirm.

I. Background

{¶ 2} Norvelle McIntire was convicted of sexual offenses committed against 12-year-old S.C., and 14-year-old A.E, in August of 2012. According to the state, McIntire asked to touch, and ultimately did touch, the buttocks of both girls ("the first incident"), exposed himself to S.C. and tried to force her hand to his penis ("the second incident"), and pinned A.E. down and digitally penetrated her ("the third incident"). Both girls were neighbors of J.D., McIntire's girlfriend, and the offenses were committed at J.D.'s home. McIntire was 44 years old at the time of the incidents.

{¶ 3} According to the evidence presented by the state at trial, the first incident occurred while S.C. and A.E. were alone with McIntire in the upstairs of J.D.'s home. McIntire asked S.C. and A.E. if he could touch their buttocks. They refused, but McIntire smacked their bottoms. The girls left.

{¶ 4} The second incident occurred when A.E., S.C., S.C.'s younger sister, J.D.'s two children, McIntire's son, another teenaged girl ("K.R."), and K.R.'s two young nephews were at J.D.'s home with McIntire. They were watching television, playing video games, and wrestling in the living room. At some point, S.C. joined McIntire, who was sitting on the couch. She lay down with her head on his lap and shared a blanket with him because she was cold. McIntire was wearing shorts with an elastic waist. He exposed himself to S.C. and tried to pull her hand to his penis, but S.C. successfully resisted. Afterward, S.C. asked A.E. and K.R. to meet her in the bathroom, where she told them what had happened, however, neither witnessed the incident.

{¶ 5} The third incident occurred when A.E. went over to J.D.'s house to ask if J.D. needed her to babysit her daughters. Only McIntire was home. He invited her to come inside to wait for J.D. to return. A.E. entered the home, but soon decided to leave. She claims that McIntire grabbed her arm, pulled her back, and forced her onto the couch. He held A.E.'s arms down with his left hand, fondled her over her clothing, then reached into her pants and penetrated her vagina with his finger. After five to ten minutes, he let her go and she ran out of the house.

{¶ 6} Neither S.C. nor A.E. initially reported these incidents. S.C. testified that a couple of days or a couple of weeks later (her testimony was unclear), she told an acquaintance, "H",[1] about her experiences with McIntire. "H" reported the information to the police. When police officers interviewed S.C., she told them about the second incident but did not initially mention the first incident.

{¶ 7} Law enforcement officials went to school to interview A.E. about S.C.'s allegations. They asked her about the second incident involving S.C., but then asked if McIntire had ever been inappropriate with A.E. A.E. denied that he had. Sensing that A.E. was uncomfortable talking to them, officers asked if she would prefer to talk to her school guidance counselor. Although she said yes, she told the counselor nothing. A.E. remembered that her former babysitter's son, Paul Gardner, was a police officer, so she asked if she could talk to him instead. She revealed nothing to Officer Gardner. At trial she testified that she did not tell him because she was afraid of McIntire.

[1] S.C. did not know H's last name.

{¶ 8} Months later, A.E. told her cousin about the third incident. This information was ultimately relayed to A.E.'s parents who took her to the hospital to be examined on November 7, 2012. Although the passage of time made it impossible to gather any physical evidence, the hospital staff contacted the police. A.E. and her parents went to the station and A.E. reported what had happened.

{¶ 9} McIntire was charged with rape, a violation of R.C. 2907.02(A)(2), gross sexual imposition, a violation of R.C. 2907.05(A)(1), importuning, a violation of R.C. 2907.07(A), attempted gross sexual imposition, a violation of R.C. 2923.02(A) and 2907.05(A)(4), and public indecency, a violation of R.C. 2907.09(A)(1)(C)(2).

{¶ 10} The case proceeded to a jury trial. S.C., A.E., K.R., Officer Gardner, Sergeant James Fulton, and Sergeant Dave Pigman testified, as did Bellevue Hospital emergency department physician, Dr. Jack Hay, and nurse, Kimberly Cooper. The jury convicted McIntire of all charges. McIntire appealed and he assigns the following errors for our review:

> ASSIGNMENT OF ERROR I
>
> THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED DETECTIVE FULTON TO PROVIDE INADMISSABLE [sic] TESTIMONY REGARDING GENERALITIES ABOUT SEX ABUSE VICTIMS[.]

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE OF OHIO TO COMMENT ON APPELLANT'S RIGHT TO INVOKE COUNSEL IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE FEDERAL CONSTITUTION MADE APPLICABLE TO THE STATES BY THE FOURTEENTH[.]

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE APPELLANT'S MOTION FOR ACQUITTAL AS IT RELATES TO COUNT THREE IN THE INDICTMENT[.]

II. Law and Analysis

A. First Assignment of Error

{¶ 11} In his first assignment of error, McIntire claims that the trial court erred in allowing Sergeant James Fulton to testify generally about why it is not uncommon for victims of sexual abuse—in particular, child victims—to delay in reporting the crimes committed against them. McIntire argues that by allowing this testimony, the trial court permitted the state to bolster the victims' credibility and to present expert testimony without properly qualifying the witness as an expert. We note that while defense counsel objected at trial to the "generalizations" provided by Sergeant Fulton, he did not otherwise object.

{¶ 12} The following is an excerpt of the testimony at issue.

Q: And, as far as the statements that [A.E.] provided you, can you tell the Ladies and Gentlemen of the Jury what [A.E.]'s demeanor was like?

A: She was very guarded, did not answer questions very well, directly. I just got the impression that she was holding something back, but [sic] she wasn't being completely forthcoming as far as what had occurred, and I base that on totality of everything there [sic]. Her body language, the answer, the way she said the things that she said, and my experience with kids which just being a father. You kind of can tell when your kids aren't telling you everything, when somebody is holding something back. I felt she was holding something back, and I asked her, you know, I'm getting a hunch here that, been a policeman for a long time, I'm a dad, everything, I get the impression that you're not telling us everything here, and she agreed that there was some stuff she wasn't telling us, she did not feel comfortable talking to us about * * *.

Q: Okay. So, you said that your experience taught you that she was holding something back. How long have you been in law enforcement?

A: 23 years.

Q: Okay. Based on, you said, the totality of circumstances at that time?

A: Everything that was going on with talking to her and in the interview, the statements that she made, I just had the feeling that she was not being forthcoming.

Q: Okay. And you said her body language told you so as well, what was her body language?

A: She seemed afraid, guarded, hesitant. Those were some things that just I noticed, that she wouldn't look directly at us. I felt she was hiding something. She wasn't telling you everything that had happened.

Q: Okay. Now in your experience of investigating crimes of a sexual nature, is that uncommon?

A: No. Because I've had advanced training. I hold a certification of master criminal investigator, had to go to investigation of sex crimes, advanced sex crimes investigation, had multiple seminars and training in this over the years. You're asking, basically, a child to tell you something very intimate, personal and, I don't know her. I never met her before in my life, so, you – it's something that [sic] very difficult. It's not uncommon for victims of sex offenses to wait years before they –

Mr. Longo: I'm going to object to the generalization at this point.

The Court: The objection is overruled. He can testify.

By Ms. Deland:

Q: Continue.

A: It's not uncommon for victims of sex offenses to not disclose what has occurred to them for several years, if ever so that's not uncommon at all.

{¶ 13} The admission or exclusion of evidence is a matter solely within the discretion of a trial court. *Miller v. Defiance Regional Med. Ctr.*, 6th Dist. Lucas No. L-06-1111, 2007-Ohio-7101, ¶ 17. A reviewing court may reverse a court's decision only where the trial court has abused its discretion. *Id.* To find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable and was not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 14} We first address McIntire's claim that the trial court allowed Sergeant Fulton to provide improper opinion testimony. We have considered this issue a number of times in very similar scenarios. *State v. Solether*, 6th Dist. Wood No. WD-07-053, 2008-Ohio-4738, cited by the state, is one such example. In *Solether*, the state offered the testimony of an officer to explain that it is not unusual for a sexual assault victim not to report the assault immediately. *Id.* at ¶ 49-50. The officer had been on the police force for approximately nine years, had conducted 150-200 sexual assault investigations, and had "attended a couple of schools several years ago." *Id.* at ¶ 48. He explained some of the reasons for delayed reporting, including fear of the offender, fear of having to recount the incident to numerous strangers, and fear that no recourse could be obtained through the system. *Id.* at ¶ 53. The defendant objected at trial. He argued that this was expert

testimony, the officer had not been qualified as an expert, and the officer had not been disclosed as a potential expert witness before trial. *Id.* at ¶ 46-47, 57. The state urged that the officer was not offering expert testimony; rather he was relaying information learned from his personal experience. *Id.* at ¶ 46. It also maintained that even if the testimony was expert in nature, it was admissible under Evid.R. 702. *Id.*

{¶ 15} We determined that the information provided by the officer concerning the incidence of delayed reporting by sexual abuse victims was "specialized knowledge" requiring expert testimony despite the fact that it was the officer's personal experience that informed his testimony. *Id.* at ¶ 65. And while the state did not specifically ask that the officer be deemed an expert by the court, we concluded that his professional experience and training provided him with a sufficient degree of specialized knowledge to provide such testimony. *Id.* at ¶ 68-69.

{¶ 16} In *State v. McGlown*, 6th Dist. Lucas No. L-07-1163, 2009-Ohio-2160, ¶ 43, we reached a similar conclusion. There we held:

> [A]lthough the lower court did not expressly determine that [the detective] was an expert in child sexual abuse, we cannot say that the lower court abused its discretion in allowing [her] to testify as an expert witness on delayed disclosure and the reasons for it. In so holding, we note that [the detective] only defined delayed disclosure for the jury and explained why a victim might delay in disclosing the abuse. She did not express an

opinion as to whether the two victims in this case had been subjected to such abuse.

{¶ 17} Here, we reach the same conclusion. Sergeant Fulton testified that he has been with the Norwalk Police Department for 23 years and has been with the detective bureau for 14 years. He indicated that he has been involved in a number of sexual abuse cases, and he described that he holds a master criminal investigator certification and has attended a number of advanced training courses over the years where sex abuse investigation training was part of the curriculum. As in *Solether* and *McGlown,* we find no abuse of discretion in the trial court's admission of the officer's testimony that delayed reporting of sexual abuse is not uncommon.

{¶ 18} We next turn to McIntire's argument that the trial court effectively permitted Officer Fulton to bolster the victims' credibility. A witness "may not provide opinion testimony regarding the truth of a witness's statements or testimony." *State v. Robinson,* 6th Dist. Lucas No. L-09-1001, 2010-Ohio-4713, ¶ 72, quoting *State v. Stowers*, 81 Ohio St.3d 260, 262, 690 N.E.2d 881 (1998); *State v. Moreland*, 50 Ohio St.3d 58, 62, 552 N.E.2d 894 (1990). Assessing a witness's truthfulness is within the province of the trier of fact. *Id.,* citing *State v. Jones*, 114 Ohio App.3d 306, 318, 683 N.E.2d 87 (2d Dist.1996).

{¶ 19} McIntire cites *State v. Coffman,* 130 Ohio App.3d 467, 473, 720 N.E.2d 545 (3d Dist.1998), where a detective had been permitted to testify at trial that in his experience, young victims of sexual abuse tend not to lie and that most often, defendants

are more likely to be untruthful. The appellate court reversed. It found that while the detective's response to the state's questioning "contains the permissible testimony that child abuse witnesses often disclose their stories in stages, [it] also impermissibly states that those witnesses always tell the truth." *Id.* at 474.

{¶ 20} Here Sergeant Fulton provided no opinions about victims' propensity for truthfulness or whether the victims in this case had, in fact, been truthful. He merely described his observations of A.E.'s demeanor, articulated his sense that she initially was holding back information, and explained that it is not uncommon for victims of sexual abuse not to immediately report the abuse. We find that the trial court's admission of the testimony did not permit Sergeant Fulton to impermissibly bolster the victims' credibility.

{¶ 21} We find McIntire's first assignment of error not well-taken.

B. Second Assignment of Error

{¶ 22} In his second assignment of error, McIntire claims that the trial court erred in allowing the state to make reference to his invocation of his right to counsel. The dialogue at issue is as follows:

> Q: As far as statements made by the defendant, did he make any statements to you?
>
> A: We talked for a few minutes. He said he wasn't going to comment on that without his attorney, without an attorney.

Q: Okay. That's a right he has, correct?

A: That's a right he has, absolutely.

{¶ 23} Defense counsel requested a sidebar shortly after this testimony because the state announced that it intended to play an audio recording of Sergeant Fulton's interview with McIntire. The full extent of the audio recording was not discussed during the sidebar, but defense counsel objected to the use of the tape and referenced that McIntire made a remark in the interview about "God law vs. Man's law." Counsel argued, "I mean, now we're going to try to convict him on attitude or his religious beliefs when he reacts when he's served with an indictment." The state argued that whatever McIntire had said was "proof of the consciousness of the defendant's guilt or not."

{¶ 24} The trial court—which had reviewed the transcript of the audio—found that the tape had no significant probative value. It remarked that McIntire requested an attorney early on in the conversation and that the conditions of a pending bond and details about another case were also discussed during the interview. The state could articulate no probative statements made in the interview except to say, "It is what it is. Let it be what it is then he laughs [sic]." The court found that the prejudicial effect of the tape outweighed its probative value and sustained McIntire's objection to its admission.

{¶ 25} The state's examination of Sergeant Fulton continued: "Q: When you told the defendant that he was being charged with rape what, if anything, did he do?"

{¶ 26} Defense counsel objected, accusing the state of trying to elicit through testimony that which the trial court had already excluded. The court overruled the objection and Sergeant Fulton answered:

A: He laughed at the allegation. Right after that he asked for his attorney so.

Q: When he asked for his attorney, did you do any further interrogation of him?

A: No further interrogation.

{¶ 27} Although McIntire objected to this testimony at trial, the basis of that objection differs from the one now forwarded on appeal. We, therefore, conduct a plain-error analysis under Crim.R. 52(B). *State v. Leach,* 150 Ohio App.3d 567, 2002-Ohio-6654, 782 N.E.2d 631, ¶ 41 (1st Dist.), *aff'd,* 102 Ohio St. 3d 135, 2004-Ohio-2147, 807 N.E.2d 335. Under Crim.R. 52(B), McIntire must establish a plain error affecting a substantial right. Plain error exists only if the outcome of the trial would have been different but for the error. *Id.* We may consider the entire record in considering the effect of any such error. *Id.*

{¶ 28} Where an accused has been arrested and read his *Miranda* rights, the Due Process Clause is violated when the state promises that the accused's silence will not be used against him, but later offers that silence as substantive evidence in its case-in-chief. *State v. Leach,* 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335, ¶ 17, citing *Wainwright v. Greenfield,* 474 U.S. 284, 291, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986). As

we recognized in *State v. Sabbah,* 13 Ohio App.3d 124, 133, 468 N.E.2d 718 (6th Dist.1982):

> References to prior silence in the presence of the jury inevitably precipitate the impermissible inference that a failure to deny an accusation of guilt, or assert its contrary, is an admission of the accusation's truth. * * * Needless to say, the inference is an extremely tenuous one since there are frequently competing, equally plausible explanations for a defendant's silence at the time of his arrest.

{¶ 29} The Ohio Supreme Court has admonished prosecutors not to comment on post-arrest silence. *State v. Leach,* 150 Ohio App.3d 567, 2002-Ohio-6654, 782 N.E.2d 631, ¶ 29. Where, however, the invocation of the right to silence is improperly referenced by the state, we must look to "whether the comment was extensive, whether an inference of guilt from silence is stressed to the jury as a basis of conviction, and whether there is evidence that could have supported acquittal." (Citations omitted.) *State v. Saunders,* 98 Ohio App.3d 355, 360, 648 N.E.2d 587 (6th Dist.1994). If the reference is brief, isolated, and followed by a curative instruction by the trial court, the error might not be reversible. *State v. Chaney,* 7th Dist. Mahoning No. 08 MA 171, 2010-Ohio-1312, ¶ 35, citing *State v. Treesh,* 90 Ohio St.3d 460, 479-480, 739 N.E.2d 749 (2001).

{¶ 30} Here, the state argues that McIntire did not remain silent after being arrested and read his *Miranda* rights; he laughed. In any event, it urges, the statement was brief and isolated, the jury was informed through Sergeant Fulton's testimony that

McIntire possessed the right to remain silent, and the trial court provided a jury instruction to the effect that McIntire's silence could not be considered in its deliberation of McIntire's guilt or innocence.

{¶ 31} While we do not agree that McIntire's laughter provided the state with an acceptable reason for commenting on McIntire's invocation of his right to silence, we do agree that there is no reversible error here. The state never again referenced McIntire's silence and it was not mentioned during closing argument. And while the trial court did not immediately provide a curative instruction, McIntire did not request one.[2] In addition to this, both Sergeant Fulton in his testimony, and the court in its instructions, informed the jury that McIntire "absolutely" had a right to remain silent and request counsel. As far as whether there was evidence supporting acquittal, the case primarily turned on whether the jury believed S.C. and A.E. It apparently did.

{¶ 32} We find McIntire's second assignment of error not well-taken.

C. Third Assignment of Error

{¶ 33} In his third assignment of error, McIntire claims that the trial court erred by denying his motion for acquittal as to the third count of the indictment, the importuning charge. McIntire's argument is two-pronged. He first argues that the state failed to establish that the incident occurred on the date alleged in the indictment. He next argues that the state failed to prove that the purpose of McIntire's conduct was sexual

[2] It is also worth noting that defense counsel sometime specifically requested that no curative instruction be given so as not to highlight error to the jury. *See, e.g., State v. Carter,* 5th Dist. Stark No. 2002CA00125, 2003-Ohio-1313, ¶ 29-30.

gratification. Additionally, unrelated to his third assignment of error, McIntire urges that S.C.'s allegations concerning the second incident are unbelievable given that the incident allegedly occurred in a room full of children yet no one witnessed it.

{¶ 34} We review a ruling on a Crim.R. 29(A) motion for acquittal using the same standard we use to determine whether the evidence was sufficient to sustain a conviction. *State v. Kerr,* 6th Dist. Wood No. WD-13-047, 2014-Ohio-5455, ¶ 18, citing *State v. Brinkley,* 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 40. Under that standard, we view the evidence in a light most favorable to the state in determining whether the evidence admitted at trial, if believed, could have led a rational trier of fact to conclude that each essential element of the crime had been proven to establish the defendant's guilt beyond a reasonable doubt. (Citations omitted.) *Id.*

{¶ 35} Before discussing McIntire's challenge to the trial court's denial of his motion for acquittal on Count 3 of the indictment, we quickly address his argument that the testimony about the second incident was not credible. Credibility determinations fall within the province of the jury. *See, e.g., State v. Fell,* 6th Dist. Lucas No. L-10-1162, 2012-Ohio-616, ¶ 14. The jury has the benefit of seeing the witnesses testify, observing their facial expressions and body language, hearing their voice inflections, and discerning qualities such as hesitancy, equivocation, and candor. *Id.* As such, special deference must be extended to jury's credibility determinations. *Id.* The jury was fully informed of the circumstances and the identities of all who were in the room at the time of the second

incident, yet it determined that McIntire was guilty of the offense. We will not disturb the jury's conclusions.

{¶ 36} Turning to the trial court's denial of McIntire's motion for acquittal, McIntire points out that Count 3 of the indictment states that "on the 27th day of August, 2012, at Huron County, Ohio, NORVELL T. McINTIRE, unlawfully did solicit a person who is less than thirteen years of age to engage in sexual activity with the offender, whether or not the offender knows the age of such person, in violation of Section 2907.07(A)(F)(2) [sic] of the Ohio Revised Code * * *." Although McIntire acknowledges that the exact date and time of the offense in the indictment are generally immaterial, he notes that (1) the evidence adduced at trial suggests that the alleged incident occurred much earlier than August 27, 2012, and therefore, not *on* that date, and (2) the indictment did not contain the typical "wiggle room" that most indictments contain; it charged specifically that the incident occurred "on" August 27, 2012, and not "on or about" August 27, 2012.

{¶ 37} The timelines provided by the witnesses differed. S.C. believed that school started in September and her timeline was constructed around this belief. She said that the second incident happened a couple of weeks before school started, but did not recall the exact date. She estimated that it was at the end of August of 2012. She said that she told H about it either a couple of days or a couple of weeks after it happened. She recalled that the first incident occurred a week or two before the second incident.

{¶ 38} A.E. recalled that school started around August 23, 2012. She testified that the first incident occurred in the beginning or middle of August, a week or two before school started, but a couple of weeks before the second incident. The second incident was a week or so before school started. She estimated that the third incident occurred between August 25, 2012, and Labor Day. She spoke to the officers at school on September 4, 2012, about S.C.'s incident. She spoke with Officer Gardner on September 6, 2012. She went to the hospital November 7, 2012.

{¶ 39} Officer Pigman testified that he interviewed S.C. on August 31, 2012. He said that he was told the second incident occurred in June, July, or the beginning of August.

{¶ 40} At trial, it was clear that defense counsel was confused about which charges stemmed from which incidents. The state clarified that Count 3—the importuning charge—stemmed from the first incident. It occurred when McIntire asked S.C. if he could touch her buttocks. When McIntire moved for acquittal, defense counsel recognized that the state was actually alleging that two separate incidents occurred as to S.C.: (1) the first incident, which led to the importuning charge; and (2) the second incident, which led to the attempted gross sexual imposition and public indecency charges. He pointed out that the indictment indicated that these incidents both occurred on August 27, 2012, and that this could not be accurate. He emphasized that indictments usually allege that events occurred "on or about" a particular date, but this indictment

alleged that the events occurred "on" that specific date. He claimed that this was "a fatal flaw."

{¶ 41} In denying the motion, the court expressed that the issue of timing presented a credibility issue for the jury. It also reasoned that the purpose of the indictment was to put the defendant on notice of the timeframe within which the offenses took place and that the indictment provided ample notice of that timeframe.

{¶ 42} Ohio courts have repeatedly recognized that the time and date of an offense is ordinarily not required in an indictment. *State v. Dodson*, 12th Dist. Butler No. CA2010-08-191, 2011-Ohio-6222, ¶ 40; *State v. Forney*, 9th Dist. Summit No. 24361, 2009-Ohio-2999, ¶ 10. "It is not necessary for the state to provide proof that the 'offense occurred at the specific time alleged, provided the offense charged is established as having occurred within a reasonable time in relation to the dates fixed in the indictment.'" (Internal quotations omitted.) *Dodson* at ¶ 40, quoting *State v. Barnhill*, 12th Fayette App. No. CA96-01-001, 1996 WL 494827, * 8-9 (Sept. 3, 1996). *See also Forney* at ¶ 10 (explaining that the state need only prove that the offense occurred reasonably near the date specified in the indictment).

{¶ 43} Although there were discrepancies between S.C.'s and A.E.'s timelines and it appears from the testimony that the incidents did not occur on the exact date specified in the indictment, we find that these facts do not render the indictment defective. We find no error in the trial court's denial of McIntire's Crim.R. 29 motion as to this point.

{¶ 44} We now turn to McIntire's argument that with respect to the importuning charge, the state failed to prove an essential element of the offense because it did not establish that he smacked S.C.'s buttocks for the purpose of sexual gratification. We must first correct McIntire because, again, the record indicates that Count 3 refers to the solicitation by McIntire to touch S.C.'s buttocks—not the act of smacking her.

{¶ 45} R.C. 2907.07(A) provides that "No person shall solicit a person who is less than thirteen years of age to engage in sexual activity with the offender, whether or not the offender knows the age of such person." R.C. 2907.01(C) defines "sexual activity" as "sexual conduct or sexual contact, or both." Section (B) defines "sexual contact" 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."

{¶ 46} Although the definition of "sexual contact" mentions purpose, direct evidence of the defendant's mental state is not required. *State v. Curtis,* 12th Dist. Butler No. CA2008-01-008, 2009-Ohio-192, ¶ 91. A jury can infer the defendant's purpose from circumstantial evidence, including the type, nature, and circumstances of the solicitation and the personality of the defendant. *See id; State v. Cobb,* 81 Ohio App.3d 179, 185, 610 N.E.2d 1009 (9th Dist.1991).

{¶ 47} The conduct leading to the importuning charge was McIntire's request that 12-year-old S.C. allow him to touch her buttocks. S.C. testified that McIntire repeatedly

asked to touch her before ultimately smacking her. We conclude that this evidence was sufficient to overcome McIntire's Crim.R. 29 motion and to allow the issue to go forward to the jury to determine whether the "purpose" element of the offense was satisfied.

{¶ 48} We find McIntire's third assignment of error not well-taken.

III. Conclusion

{¶ 49} We find McIntire's three assignments of error not well-taken and affirm the July 24, 2013 judgment of the Huron County Court of Common Pleas. The costs of this appeal are assessed to McIntire 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.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE