[Cite as *State v. Thomas*, 2010-Ohio-6373.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

STATE OF OHIO	C.A. No. 10CA0003
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
SCOTT A. THOMAS	COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO
Appellant	CASE No. 08-CR-0436

DECISION AND JOURNAL ENTRY

Dated: December 27, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} After spending the night at her friend's house, eleven-year-old E.G. accused her friend's father of giving her alcohol, touching her breasts, and licking her vagina. Her friend's father, Scott Thomas, was acquitted of one count of rape, but convicted of one count of gross sexual imposition. He has appealed, arguing that the conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. He has also argued that the matter must be remanded because the trial court did not notify him that violations of the terms of post-release control could result in additional prison time being added to his sentence. Despite the fact that the conviction is supported by sufficient evidence and is not against the manifest weight of the evidence, this Court must remand the matter under Section 2929.19.1 of the Ohio Revised Code.

BACKGROUND

{¶2} On Friday, May 2, 2008, E.G. went to spend the night at her friend V.T.'s house. V.T. lived with her father, Mr. Thomas, and her older brother. E.G. had never been to V.T.'s house and had never met her father. E.G. testified that Mr. Thomas spent most of the evening looking at pictures on the internet, but later in the evening, he joined the girls in the living room for a movie. At some point in the evening, Mr. Thomas told E.G. that he would let her try some alcohol. According to E.G., Mr. Thomas sent his son to bed early for teasing the girls. Around midnight, Mr. Thomas told V.T. that it was time for bed, and V.T. went upstairs. Mr. Thomas stayed downstairs with E.G.

{¶3} E.G. testified that Mr. Thomas waited a little while after V.T. had gone to bed before he brought out a bottle of wine. He showed E.G. an organ that had been converted to a bar and allowed her to choose a glass to try the wine. E.G. testified that she used a champagne glass at first, but later picked out a Muppets shot glass with Miss Piggy on it. She said that she had never before tasted alcohol. She said that Mr. Thomas offered her several flavors of alcohol including raspberry, root beer, and banana, but that none of them tasted like she thought they might. After drinking several types of alcohol, E.G. went to lie down on the couch. She was wearing pajama pants, underwear, and an oversized t-shirt.

{¶4} According to E.G., Mr. Thomas sat on the couch beside her and told her to sit up. He then put her legs over his and began stroking her lower legs under her pajama pants. He told her she had soft hands and started kissing her face and mouth. Then he laid her down on the couch and put his hand under her shirt and touched her breasts. Finally, he pulled down her pajama pants and underwear and put his mouth on her vagina. E.G. said that Mr. Thomas licked her vagina before telling her to sit up and pull up her pants. He then asked her if she wanted to

go on or go to bed. She said she wanted to go to sleep, and Mr. Thomas went upstairs. E.G. did not see him again until the next morning, when he acted like nothing had happened.

{¶5} Mr. Thomas testified that he is a single father who has been raising his two children for ten years. He admitted to sending his son to bed early the night E.G. was at his house, but denied touching E.G. inappropriately. He testified that E.G. had asked him for alcohol all evening and he had finally said "we'll see" out of frustration. But, he testified that he never gave her any alcohol. On cross-examination, Mr. Thomas was asked about the written statement he gave police just days after E.G. had spent the night at his house. In the statement, Mr. Thomas had written that he had been sitting beside E.G. on the couch when she grabbed his hand, commented on how rough it was, and tried to hold it. Mr. Thomas said that, in response, he removed his hand from her grasp and asked her how old she was. When E.G. responded that she was eleven, he told her that he was thirty-three. Shortly thereafter, he got up and told V.T. that it was time to go to bed. According to Mr. Thomas, E.G. wanted to sleep downstairs by herself while V.T. went upstairs to sleep in her bedroom. Mr. Thomas testified that he went upstairs at the same time as V.T. and did not see E.G. again until the morning.

{¶6} E.G. testified that she told V.T. about the incident the next morning. The girls did not have school on the following Monday, but Tuesday during school, they disclosed it to a math teacher. The teacher immediately reported it to the police, who called in Children Services. After school, E.G. told her mother what had happened and her parents took her to the emergency room. Hospital staff advised them to return in a couple of days for an appointment. At that time, six days after the incident, a Children Services worker interviewed E.G. and a pediatrician examined her. A Rittman police officer named Paul Fiocca testified that he interviewed Mr. Thomas and obtained a written statement. Officer Fiocca said that Mr. Thomas allowed him to

look around inside his home. The officer testified that he was able to recognize a number of things inside the home from E.G.'s description, including the organ that had been turned into a bar, the Muppets shot glasses, and bottles of wine.

{¶7} The State indicted Mr. Thomas on one count of rape and one count of gross sexual imposition. After initially pleading not guilty to the charges, Mr. Thomas pleaded guilty to gross sexual imposition in April 2009, and the State dismissed the rape charge. Before sentencing, but after completing a pre-sentence investigation, the trial court allowed Mr. Thomas to withdraw his guilty plea. Mr. Thomas waived his right to a jury trial and proceeded with a bench trial. The trial court found Mr. Thomas guilty of gross sexual imposition, a third-degree felony, but not guilty of rape. On December 18, 2009, Mr. Thomas was sentenced to four years in prison, a mandatory five years of post-release control, and a fine of $5000 plus costs. He was classified as a Tier II sex offender.

SUFFICIENCY

{¶8} The first part of Mr. Thomas's first assignment of error is that his conviction for gross sexual imposition is not supported by sufficient evidence. Mr. Thomas, however, has not offered any argument properly aimed at sufficiency of the evidence. He has not argued that the State failed to present any evidence on any one or more elements of the crime of gross sexual imposition. All of his arguments in relation to the first assignment of error deal with whether the fact finder properly weighed the evidence. Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. We must determine whether, viewing the evidence in a light most favorable to the prosecution, it could

have convinced the average finder of fact of Mr. Thomas's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991).

{¶9} Mr. Thomas was convicted of gross sexual imposition. Under Section 2907.05(A)(4), "[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." "'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).

{¶10} At trial, E.G. testified that Mr. Thomas kissed her and touched her breasts before pulling down her pajama pants and her underwear and licking her vagina. There was no dispute that E.G. was eleven years old at the time of these events. In considering the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution. See *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991). Therefore, E.G.'s testimony alone was sufficient because, if believed, it could have convinced the average finder of fact beyond a reasonable doubt that Mr. Thomas had touched one or more erogenous zones of a child under the age of thirteen for the purpose of sexual arousal or gratification. The first part of Mr. Thomas's first assignment of error is overruled.

MANIFEST WEIGHT OF THE EVIDENCE

{¶11} The second part of Mr. Thomas's first assignment of error is that his conviction is against the manifest weight of the evidence. If a defendant argues that his conviction is against the manifest weight of the evidence, this Court "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of 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 a new trial ordered." *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶12} Mr. Thomas has argued that E.G.'s allegations were not credible because she told contradictory stories about what happened and there was no corroborating evidence to support the allegations. Section 2907.05, however, does not require corroboration of a victim's testimony to support a conviction for gross sexual imposition. *State v. Guerra*, 2d Dist. No. 2006-CA-5, 2006-Ohio-6661, at ¶7. In fact, if the State does present "[e]vidence other than the testimony of the victim . . . corroborating [a] violation," of Section 2907.05(A)(4) or (B), the statute requires the trial court to impose a prison term under Section 2929.14. R.C. 2907.05(C)(2)(a).

{¶13} Offenses involving sexual touching frequently lack corroborating evidence such as medical findings or eyewitnesses to support the alleged victim's allegations. This case is not an exception. The child testified that she told Mr. Thomas's daughter about the incident just hours after it happened, but Mr. Thomas's daughter did not testify. E.G.'s fifth grade teacher testified that E.G. told her about the incident on Tuesday at school. That was four days after the incident had occurred. The teacher immediately spoke with a police officer who testified that he contacted Children's Services the same day. Although E.G.'s parents took her to the emergency room that same evening, they were asked to return a couple of days later for a full examination.

{¶14} The pediatrician who completed the physical examination testified that, according to protocol, if a child presents at the hospital more than 72 hours after such an incident, they will generally not attempt to collect DNA samples. Due to the fact that DNA is unlikely to be viable by that time, the doctor testified that it is better to have the child return at a time when the entire

team can be available for the most child-friendly forensic investigation. For that reason, no DNA was collected from E.G. The doctor who completed the examination six days after the incident testified that the examination did not reveal any tissue damage. The doctor testified that the examination results were "very consistent" with the nature of the allegations made by E.G. Although a lack of physical findings can mean that nothing happened to a child, the doctor pointed out that in "at least ninety-five percent of our examinations that are performed on children who have been sexually abused [there are] . . . no physical findings." Thus, the results of the physical examination were consistent with E.G.'s account of the evening. The finder of fact was in the best position to decide the weight to assign to the physical examination and the doctor's testimony.

{¶15} Mr. Thomas has also argued that the trial court should not have believed E.G.'s account of the evening over that of Mr. Thomas because E.G.'s account was inconsistent. The focus of Mr. Thomas's argument seems to be on who pulled E.G.'s pants down. E.G.'s teacher testified that, four days after the incident, E.G. told her that Mr. Thomas had asked her to pull her pants down and she had complied. Eighteen months later, at trial, E.G. testified that Mr. Thomas had pulled her pants down. Mr. Thomas has argued that the trial court should have had reasonable doubt about E.G.'s testimony because "one of her stories is demonstrably false, because they can't both be true." This slight factual inconsistency is not pertinent to the elements of gross sexual imposition, and the fact finder may have determined it was trivial. The trial judge may have reasonably believed that the teacher had not recalled that detail correctly after eighteen months or that E.G.'s memory had faded on that point. In any event, E.G.'s allegations pertaining to the elements of gross sexual imposition were entirely consistent.

{¶16} Six days after the incident, Jennifer Garman interviewed E.G. as part of the forensic investigation conducted at the Children's Advocacy Center. The parties played a video-recording of the interview at trial. During the interview, E.G. said that Mr. Thomas had sent both of his children upstairs to bed before coaxing her to try multiple types of alcohol. When E.G. laid down on the couch in the living room, wearing an oversized t-shirt, underwear, and pajama pants, Mr. Thomas sat close beside her. E.G. said that he kissed her all over her face, put his mouth on her vagina and licked it, and put his hand on her breasts under her clothes. At trial, she testified that, after giving her alcohol, Mr. Thomas began kissing her, touched her breasts under her t-shirt, and pulled down her pants and underwear and licked her vagina. This Court's review of the entire record has not revealed any meaningful inconsistencies in E.G.'s allegations. The trial court, sitting as the fact finder in this case, was well-situated to consider the credibility of the witnesses, weigh the evidence, and determine whether Mr. Thomas was guilty of the crimes charged. Based on a review of the record, this Court cannot say that the trial court lost its way and created a manifest miscarriage of justice requiring a new trial. See *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986). Mr. Thomas's first assignment of error is overruled.

POST-RELEASE CONTROL NOTIFICATION

{¶17} Mr. Thomas's second assignment of error is that, at sentencing, the trial court incorrectly failed to warn him of the consequences of violating the terms of post-release control. The State agrees with Mr. Thomas on this point and has requested that this Court remand the matter for correction under Section 2929.19.1 of the Ohio Revised Code.

{¶18} Under Section 2967.28(B)(1) of the Ohio Revised Code, Mr. Thomas was subject to a mandatory five-year term of post-release control because he received a prison term for a felony sex offense. Under those circumstances, the Ohio Revised Code requires the sentencing

court to notify the defendant that, if he violates the terms of post-release control, the parole board could impose additional prison time totaling up to one-half of the original prison term. R.C. 2929.19(B)(3)(e). Although the trial court imposed the proper term of post-release control, it did not notify Mr. Thomas, either during the sentencing hearing or in the journal entry, of the consequences of violating the conditions of post-release control.

{¶19} Section 2929.19.1(B)(1) provides that a trial court who has failed to properly notify a defendant of the possibility of the parole board imposing a prison term for a violation of post-release control may, "prepare and issue a correction to the judgment of conviction" "at any time before the offender is released from imprisonment." The Ohio Supreme Court has held that, for sentences imposed after July 11, 2006, the effective date of Section 2929.19.1, trial courts who have failed to properly impose post-release control "shall apply the procedures set forth in R.C. 2929.191." *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434, paragraph two of the syllabus.

{¶20} In this case, the trial court properly notified Mr. Thomas that he would be subject to a mandatory five-year term of post-release control, but did not mention the consequences for violating the conditions of his supervision. The trial court imposed a prison sentence on Mr. Thomas on December 18, 2009, after the effective date of Section 2929.19.1. Therefore, the trial court should apply the remedial procedure codified in Section 2929.19.1 to correct the judgment entry. See *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434, paragraph two of the syllabus. Mr. Thomas's second assignment of error is sustained.

CONCLUSION

{¶21} Mr. Thomas's first assignment of error is overruled because the conviction is based on sufficient evidence and is not against the manifest weight of the evidence. His second

assignment of error is sustained because the trial court failed to warn him that he could be given additional prison time as a consequence of violating the terms of post-release control. Under *Singleton*, this Court remands this case for the trial court to follow the remedial procedure described in Section 2929.19.1 of the Ohio Revised Code.

Cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
MOORE, J.
CONCUR

APPEARANCES:

CLARKE W. OWENS, attorney at law, for appellant.

MARTIN FRANTZ, prosecuting attorney and LATECIA E. WILES, assistant prosecuting attorney, for appellee.