[Cite as *State v. Mole*, 2021-Ohio-4628.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,	:	JUDGES:
	:	Hon. Craig R. Baldwin, P.J.
Plaintiff - Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. Willilam B. Hoffman, J.
-vs-	:	
	:	
THOMAS MOLE,	:	Case No. 21-COA-002
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Ashland County Court of Common Pleas, Case No. 20-CRI-039
JUDGMENT:	Affirmed in Part; Reversed in Part
DATE OF JUDGMENT:	December 30, 2021

APPEARANCES:

For Plaintiff-Appellee

CHRISTOPHER R. TUNNELL
Ashland County
Prosecuting Attorney

By: NADINE HAUPTMAN
Assistant Prosecuting Attorney
110 Cottage Street
Ashland, Ohio 44805

For Defendant-Appellant

MATTHEW J. MALONE
The Law Offices of Matthew J. Malone, LLC
10 East Main Street
Ashland, Ohio 44805

Baldwin, J.

{¶1} Appellant, Thomas Mole, appeals the verdict of the jury in the Ashland County Court of Common Pleas finding him guilty of two counts of Gross Sexual Imposition in violation of R.C. 2907.05(A)(4), felonies of the third degree. Appellee is the State of Ohio.

STATEMENT OF FACTS AND THE CASE

{¶2} Thomas Mole, appellant, was charged with two counts of Gross Sexual Imposition in violation of R.C. 2907.05(A)(4), felonies of the third degree and one count of Tampering with Evidence in violation of R.C. 2921.12(A)(1) and 2921.12(B), a felony of the third degree, arising out of alleged sexual contact with two students at Mapleton Middle School. The state dismissed the tampering with evidence charge before trial.

{¶3} Mole was a substitute teacher for Mapleton Middle School as well as several other local schools. He appeared as a substitute at Mapleton Middle School frequently enough to have developed a reputation among the school administration, teachers and the students. The teachers and administration noticed a number of behaviors they described as unusual for a substitute teacher, including his interaction with the students. He consistently brought candy, cookies or donuts to the school for the students, and one teacher recalled regularly finding candy and cookie crumbs on the desk after Mole had served as a substitute. He sought out the companionship of the students, joining them for lunch in the school cafeteria. He was particularly drawn to two female students A.I. and A.W. who were in the seventh grade by the date of the trial. Without anyone's knowledge or parental consent, Mole had recorded videos and photographs of A.I. on his phone.

{¶4} A.I. discovered the photograph of herself when the students had requested to see pictures of Mole's wife and children. He made some effort to find the pictures, claimed they were not on his phone, and placed the phone on A.I.'s desk. She noticed a photograph of herself on the screen. She did not consent to Mole's taking her photograph and did not know that he had done so.

{¶5} A.I. reported the photograph to her Mother, her Mother contacted the school and the school administrator addressed the issue with Mole on February 25, 2020. He admitted to taking the photographs, but contended that he had received parental consent via email. He searched his phone for the email, but failed to locate it and has never provided a copy of such an email or any proof that he received consent to take A.I.'s photo. Mole was escorted out of the building after this confrontation and told that he would not be serving as a substitute for the school.

{¶6} On February 27, 2020, Mole appeared at an emergency room in Ashland concerned about suicidal thoughts as well inappropriate and sexual thoughts about children. He disclosed suicidal thoughts and admitted to having pictures of children on the phone, having sexual thoughts about the students, and writing fiction about the students that was of a disciplinary nature. The social worker that met with Mole struggled with the decision to report these disclosures to the police and, after a delay of a week and a conversation with her supervisor, a report was made to the Ashland Police Department.

{¶7} Upon receipt of that report on March 8, 2020, Ashland Police Officer Lee Eggeman visited Mole at his home, concerned that he might have contact with children in the morning of the next day, a Monday. The social worker reported that Mole was a substitute teacher who "expressed suicidal thoughts because he recently had his teaching

license suspended, and I learned that he had suicidal fantasies, I am sorry, sexual fantasies, and he made a statement that he was a child savior and he needs to get out of some of the youth groups he was involved in before this hit the papers." (Trial Transcript, p. 189, lines 3-8). After the interview, Officer Eggeman decided further investigation was warranted, so he delivered a report to the on-call detective.

{¶8} Lieutenant John Simmons of the Ashland Police Department responded to Officer Eggeman's report and arrived while Officer Eggeman was still present at Mole's residence. Mole initially consented to a search of two laptop computers and a cell phone but would not consent to the search of a second cellphone. Lt. Simmons obtained a search warrant for all four devices to account for the possibility that Mole would withdraw consent. He also obtained warrants to search Mole's residence and vehicle. Lt. Simmons seized all four electronic devices as well as a grey shoulder bag from the vehicle, which contained, among other things, a large bag of candy.

{¶9} Joel Icenhour, a retired police detective who was rehired and trained to extract data from electronic devices, examined the cellphones and laptops seized from Mole and discovered photographs and videos of clothed children, but nothing illegal was discovered.

{¶10} Mole unexpectedly and without invitation appeared at the Ashland Police Department on March 10, 2020 at 10:30 a.m. with his parents to ask about the laptops and cellphones that were seized. During this visited he voluntarily agreed to speak with Lt. Simmons and Detective Kim Mager. Prior to the conversation with the officers, Mole was advised that he was not under arrest, he was not obligated to talk with the officers and that he could leave.

{¶11} The officers focused on the videos and photographs and Mole, without any prompting, referenced hugging children and then commented that they are in the seventh grade. The detectives considered that a partial identification of victims, particularly significant in this case since the victims were in the seventh grade at the time of the interview.

{¶12} Mole admitted that "there are times which I have to calm down for a bit afterwards", while discussing hugging students and that he becomes aroused after hugging a student. (State's Exhibit 24, p. 32, lines 1-6; 13-19). When asked how he recovers from this, he explained that he would go into a staff restroom and masturbate after hugging the children. (State's Exhibit 24, p. 33, lines 7-13). He also identified A.I. and A.W. as the children who were the recipients of these hugs, and that they were in the sixth grade at the time of the hugs. He also comments on their ages, stating that they both turned thirteen this year, but that the subject hugs occurred in the prior year.

{¶13} Detective Mager conducted interviews of the two children, A.I. and A.W. and, on March 11, visited Mole to question him further. During this interview he denied that he masturbated after the hugs, recanting his statement of the previous day. Mole was placed in custody and then inside the patrol car when he started knocking on the window and yelling to get the detective's attention. The detective opened the door and Mole "apologized to me for lying upstairs to try to say that he had not or that he did not masturbate, and he said that the reason that he was not honest with me was because he did not want -- I believe it was to lose his teacher certificate or license, or to lose that. So he apologized to me and that was pretty much the extent of that piece." (Transcript, p. 364, lines 12-20).

{¶14} Both A.W. and A.I. had very clear recollection of Mole, his behaviors and the hugs he gave them. A.W. claimed the hug was "[j]ust on the side" when she was in the sixth grade. (Trial Transcript, p. 283, line 7-8). She also described how he followed her to a water fountain and may have taken pictures, how he would drive past her home and honk, and the few times he would sit with her and her friends at school during lunch.

{¶15} A.I. remembered Mole hugging her in the hallway. She was walking to class and he came from behind her and hugged her from the front, pressing his chest to hers in a tight hug. It was unexpected and was shocking, but she did not tell anyone. She also recalled that Mole paid more attention to her, gave her more candy and that it was her perception that he was following her. She also noticed that she and A.W. received more attention from Mole and she recalled that he "said that he was leaving and wrote his number down on a piece of paper so we could hang out sometime is what he said." (Trial Transcript, page 307, line 24 to p. 308, line 1). She recalled an incident where he placed a piece of candy on her thigh and told her she looked pretty or nice and that when she would ask for help in class "he would lean on my shoulder and be in my personal space." (Trial Transcript, page 307, lines 7-8).

{¶16} She was made uncomfortable by his frequent staring at her and recalled that he brought donuts for her class and after class, he asked for her help carrying the leftover donuts to his car. Another teacher intervened and "said no." (Trial Transcript, page 312, lines 14-15).

{¶17} Skip Fulton, principal of Mapleton Schools, was responsible for seeing that Mole was escorted from school property. He prepared a report after he had interviewed Mole and others that were involved in the discovery of the photograph of A.I. on Mole's

phone. When he spoke with A.I. he was concerned with "inappropriate sexual contact" and "asked her specifically if he touched her that was inappropriate,(SIC) and she said, no." (Trial Transcript, p. 403, lines 16-18). Fulton did not put a time frame on the question and did not know how A.I. interpreted the question. Fulton did record in his report that A.I. "reports that Mr. Mole has not touched her or made physical contact with her in any way." (Trial Transcript, p. 410, line 24 to p. 411, line 4).

{¶18} Following trial, the jury found Mole guilty on both counts. The trial court sentenced Mole to 12 months in prison on Count One and five years of community control on Count Two, concurrent to the sentence on Count One. Mole was also designated a Tier II sex offender.

{¶19} Mole filed a timely notice of appeal and submitted three assignments of error:

{¶20} "I. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL AS ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, DUE TO HIS TRIAL COUNSEL'S FAILURE TO OBJECT TO IMPROPER OPINION TESTIMONY REGARDING THE CREDIBILITY OF APPELLANT'S STATEMENTS."

{¶21} "II. APPELLANT'S CONVICTION FOR COUNT TWO, GROSS SEXUAL IMPOSITION, R.C. 2907.05(A)(4), WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶22} "III. APPELLANT'S CONVICTION FOR COUNT ONE, GROSS SEXUAL IMPOSITION, R.C. 2907.05(A)(4), WAS AGAINST THE WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUFFICIENT EVIDENCE."

ANALYSIS

I.

{¶23} Mole claims he was denied the effective assistance of counsel when his trial counsel did not object to what he characterizes as improper opinion testimony regarding the credibility of his statements.

{¶24} To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate: (1) deficient performance by counsel, i.e., that counsel's performance fell below an objective standard of reasonable representation, and (2) that counsel's errors prejudiced the defendant, i.e., a reasonable probability that but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington,* 466 U.S. 668, 687–688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. "Reasonable probability" is "probability sufficient to undermine confidence in the outcome." *Strickland* at 694.

{¶25} Mole contends that he received ineffective assistance of counsel when his trial counsel failed to object to Det. Mager's testimony regarding the truthfulness of Mole's statements made during two recorded interviews. Mole admitted to masturbating after hugging the children during his interview on March 10 and the following day, March 11, he recanted the admissions. Mole complains that "Det. Mager repeatedly appropriated this function [of the jury] and told the jurors which of Mole's statements were worthy of

belief and those which were not." (Appellant's Brief, p.9). Appellant provides a lengthy list of decisions prohibiting vouching for a witness or offering an opinion that the defendant was being untruthful, but none address the circumstances presented in this case. Mole admitted one day that he masturbated after hugging the girls and the very next day he denied that he did so. The cases cited by appellant provide no assistance when it is evident that the defendant has made one false statement and one true statement regarding the same topic. The witness need not offer an opinion that the defendant is being untruthful as was prohibited in *State v. Davis,* 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 122, because the defendant's statement has made the falsehood clear. Both statements cannot be true.

{¶26} For this assignment of error, we need not decide the underlying legal issue of whether the admission of the testimony was error but only whether Mole's trial counsel was ineffective for failing to object to the testimony. This "* * * court must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland v. Washington*, 466 U.S. 668 at 689,104 S.Ct. at 2064 as quoted in *State v. Laury,* 5th Dist. Stark No. 2017CA00138, 2018-Ohio-2944, ¶ 17. At all points, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland v. Washington*, 466 U.S. 668 at 689,104 S.Ct. at 2064.

{¶27} At the time of Mager's testimony, the jury had heard that Mole unexpectedly appeared at the police station with his parents and volunteered to make a statement that contained incriminating admissions. The record in this case does not show that Mole was under any compulsion by the state to make these admissions. The jury also heard that when the officers visited him at his home the next day he recanted. Mole's trial counsel

chose not to object to Mager's testimony perhaps to avoid a lengthy debate before the jury only emphasizing the fact that Mole made damning admissions and attempted to withdraw them after having a few hours to consider the potential consequences of his actions. We have concluded that " * * * at times it's good trial strategy to not emphasize an error with objections and cautionary instructions." *State v. Patterson*, 5th Dist. Stark No. 2009CA00142, 2010-Ohio-2988, ¶ 36. We believe this rule is particularly true considering testimony that Mole omitted from his analysis.

{¶28} After completing her second interview of Mole where he recanted his admission, Detective Mager placed him in custody and in the back of a cruiser. Mole immediately began calling out to her:

> Mr. Mole was knocking or making a noise on the window and yelling out of the patrol car, so I walked over and Officer Wolbert standing beside me and I walked over and opened the door and he communicated that he did not know how he would be able to get his devices back if he was going to be in the jail, and he apologized to me for lying upstairs to try to say that he had not or that he did not masturbate, and he said that the reason that he was not honest with me was because he did not want -- I believe it was to lose his teacher certificate or license, or to lose that. So he apologized to me and that was pretty much the extent of that piece.

(Trial Transcript, p. 364, lines 7-20).

{¶29} Detective Mager summarized Mole's statement:

Q. And he apologized for lying upstairs specifically?

A. Specifically that he lied upstairs and explained why he wanted to take back the part of masturbation, how that would effect him, that he would lose his teacher certificate or license.

Q. Would you say that was a brief interaction?

A. Yes.

Q. He said what he said and that was it?

A. Yes.

Q. So in effect then, he recanted the recantation?

Correct.

(Trial Transcript, p. 365, lines 4-14).

{¶30} We find that the trial counsel's failure to object to Mager's opinion testimony regarding the value of the recantation versus the initial admission is not ineffective assistance of counsel when Mole, without prompting, voluntarily admitted the recantation was fabricated in an effort to protect his interests. An objection in this context carried the risk of emphasizing the statement and the admitted lie, and remaining silent can be seen as a reasonable trial strategy.

{¶31} The first assignment of error is denied.

II., III.

{¶32} Moles second and third assignment of error address the sufficiency of the evidence with respect to the second count of gross sexual imposition and weight and sufficiency of the evidence for the first count of gross sexual imposition. Because the

standard of review overlaps and the charges are identical, we will address these assignments together, mindful of the different facts for each charge.

{¶33} The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Supreme Court of Ohio held, "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt 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."

{¶34} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 547 (1997). Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶35} We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass,* 10 Ohio St.2d 230, 237 N.E.2d 212 (1967). The trier of fact "has the best opportunity to view the demeanor, attitude, and

credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997–Ohio–260, 674 N.E.2d 1159. *State v. Schoeneman,* 5th Dist. Stark No. 2017CA00049, 2017-Ohio-7472, ¶¶ 21-23.

{¶36} The second and third assignments of error involve the same charge, a violation of R. C. 2907.05(A)(4) which provides that:

> (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:
>
> * *
>
> (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

{¶37} The parties agree on many of the facts but disagree on whether Mole had sexual contact with either victim. Sexual contact is "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."(Emphasis added). (R.C. 2907.10(B)). Mole's arousal is not disputed but Mole contends there was no touching of an erogenous zone. Ohio Revised Code does not define the term "erogenous zone". The state interprets the words "including without limitation" to provide what appears to be an unlimited breadth to the phrase "erogenous zone" which would include the hugs described in this case.

{¶38} The state relies heavily on a decision from the Lake County Common Pleas Court, *State v. Ackley*, 120 Ohio Misc.2d 60, 2002-Ohio-6002, 778 N.E.2d 676, ¶ 22,

where the court held that sexual contact included "any nonconsensual physical touching, even through clothing, of the body of another in an area or of a body part that a reasonable person, or the offender, or the victim, would perceive as sexually stimulating or gratifying to either the offender or the victim, for the purpose of sexually stimulating or gratifying either the offender or the victim." The Eighth District Court of Appeals holding in *State v. Jones*, 8th Dist. Cuyahoga No. 87411, 2006-Ohio-5249, ¶ 15 supports further expansion of the breadth of the statute when it found "[s]exual contact, an element of gross sexual imposition, means any nonconsensual physical touching even through clothing, of the body of another" suggesting that proof of touching an erogenous zone is unnecessary so long as the physical touching is nonconsensual. *Accord State v. Kalka, 8th Dist. Cuyahoga No. 106339, 2018-Ohio-5030, ¶ 30.* Other cases cited by appellee adopt this position and focus on the purpose of the defendant's touch, and fail to address whether the defendant has touched the erogenous zone of another. Appellee cites to *State /City of Toledo v. Jones*, 6th Dist. Lucas No. L-17-1220, 2019-Ohio-237 where the perpetrator argued that "feet do not constitute an "erogenous zone" under R.C. 2907.01(B)." *Id.* at ¶ 21. That court failed to address the issue of whether the defendant had touched the victim's erogenous zone and concluded that "[i]n the case before us, the jury could infer from the testimony of the victims and appellant's social media postings that he has a foot fetish and touching of the victims' feet was motivated by a desire for sexual arousal or gratification. Therefore, there was sufficient evidence to present the case to the jury" focusing on the defendant's purpose and ignoring the difficult question of deciding whether the victim's foot was and erogenous zone. *Supra* at ¶ 23.

{¶39} Likewise, the appellant in *State v. Stair*, 12th District, Warren No. 79501, 2002 -Ohio- 1, *4 contended that "the only testimony presented at trial indicates that he touched C.C.'s hips, not an erogenous zone defined by the Ohio Revised Code." The court did not address the definition of erogenous zone, but focused on the evidence of the appellant's purpose and motivation from which the jury was to draw a conclusion as to whether C.C.'s hips were an erogenous zone.

{¶40} The Eighth District Court of appeals relied on *State v. Cobb*, 81 Ohio App.3d 179, 185, 610 N.E.2d 1009 (9th Dist.1991) to hold that: "In determining whether sexual contact occurred, "the proper method is to permit the trier of fact to infer from the evidence presented at trial whether the purpose of the defendant was sexual arousal or gratification by his contact with those areas of the body described in R.C. 2907.01." *State v. Tate*, 8th Dist. Cuyahoga No. 98221, 2013-Ohio-370, ¶ 19. But the court in *Cobb* addressed when the "trier of facts may infer what the defendant's motivation was in making the physical contact with the victim" to determine whether the sexual arousal or gratification element of the offense was satisfied. The victim in *Cobb* testified that the appellant had touched his genitals, one of the areas expressly defined as an erogenous zone in the statute. For that reason we decline the state's invitation to adopt the rational of *Tate.*

{¶41} Appellee's argument is a request that we amend the definition of sexual contact to delete the need to prove touching an erogenous zone and, instead, allow an inference that an erogenous zone is touched if the defendant touches another "for the purpose of sexually arousing or gratifying either person" regardless of where the touch occurred. We will not rewrite the statute to eliminate the requirement but will enforce the clear requirement of the statute as written. As for the definition of erogenous zone, we

find that "its common definition includes the following: 'designating or of those areas of the body, as the genital, oral, and anal zones, that are particularly sensitive to sexual stimulation.' " Webster's New World Dictionary (3d Coll.Ed.1988), 461. *In re M.H.,* 9th Dist. Wayne No. 07CA0037, 2007-Ohio-7045, ¶ 8. While we recognize this may create difficult questions, we are confident that the solution is legislative and not judicial.

{¶42} With our position regarding the parameters established, we proceed to review assignments of error.

{¶43} Mole's second assignment of error contends that the charge of gross sexual imposition arising from his physical contact with A.W. was not supported by sufficient evidence.

{¶44} The physical contact with A.W. involved a hug, but from the side. A.W. described the hug, demonstrated with the victim advocate for the jury and the court described the position of A.W. and the victim advocate: "Just for the record, the demonstration indicated them standing side-by-side with the arm around the back." (Trial Transcript, p. 283, lines 11-14). This hug is the only touching between A.W. and Mole described in the record. A.W. denied that he hugged her often, but she was not asked how many times this occurred.

{¶45} The significance of the position of the hug lies in the statement given by Mole as well as the language of R.C. 2907.05(A)(4). First, Mole gave a lengthy statement to Detective Mager in which he revealed that he had hugged students, pressed his genitals against their bodies and became so aroused that he masturbated in the staff bathroom. Within that statement Mole also admitted that A.W. was one of the students he had hugged. These facts appear to support a finding that Mole had violated 2907.05(A)(4)

by causing A.W. to have sexual contact with him by pressing his genitals on her body for the purpose of his own sexual arousal or gratification. (R.C. 2907.01(B)). However, A.W.'s testimony refutes any possibility that this hug caused her to have contact with Mole's genitals due to their physical position and thus raises a serious question regarding whether there is sufficient evidence to support the conviction. The record contains no other evidence that Mole touched an erogenous zone of A.W. or caused her to come in contact with one of his erogenous zones. (R.C. 2907.01(B)).

{¶46} The state contends that the words "without limitation" in the definition of "erogenous zone" allows evidence of a hug to satisfy the elements of the offense citing the cases we have reviewed above. We note that each of those cases refer to a distinct body part as being the subject of the contact and the state has not designated any body part of either Mole or A.W. that was involved in a touching that would trigger the application of the statute. Without the description of a body part that would serve as an erogenous zone, we cannot find that Mole had sexual contact with A.W. even if the purpose of the hug was sexual gratification or arousal. The statute requires the body part deemed erogenous be that of another, i.e., the victim, not the offender.

{¶47} Because the record lacks evidence of contact with any of the erogenous zones listed in R.C. 2907.05 and because the state did not offer evidence that would support finding another distinct body part was an erogenous zone, we find that the record contains insufficient evidence to support the conviction.

{¶48} Mole's second assignment of error is granted.

{¶49} The third assignment of error involves a significantly different hug, and Mole tacitly admits this distinction by amending his assignment of error to contend that the

conviction was not supported by sufficient evidence and was against the manifest weight of the evidence.

{¶50} A.I. testified that Mole come from behind her and hugged her from the front, and that they touched chest to chest. She described it as a tight hug that he had never done before and that she was shocked by it, but did not tell anyone about it at the time. She contended that Mole paid more attention to her and described what might be considered stalking, but the hug was the only contact.

{¶51} This hug is consistent with Mole's confessed compulsion to hug students, force them into contact with his genitals and masturbate afterward as a result of the sexual arousal from the contact. This hug also supports a finding that Mole's hug brought him into contact with A.I.'s breasts, one of the erogenous zones listed in R.C. 2907.01(B). These facts support a conviction of gross sexual imposition as Mole caused A.I. to have contact with one of his erogenous zones while he also came in one of her erogenous zones and, per his admission, this was done for the purpose of his sexual arousal.

{¶52} Mole contends that the jury lost its way by failing to discredit A.I.'s testimony and not accepting the testimony of Principal Fulton. Mole is critical of A.I.'s testimony because she did not mention the hug to anyone after it occurred despite the fact she was in shock. She explained that she did not tell anyone because she "* * * didn't know what to tell them really." (Trial Transcript, p. 301, line 17). Mole also claims that A.I. told Principal Fulton she was not touched in any way, but the principal's testimony suggests that his question could be interpreted as referring to more egregious and obvious sexual contact and not a hug. Principal Fulton was concerned about inappropriate "sexual contact" and he asked A.I. if Mole touched her in a way that was inappropriate or if there

was "in her mind, inappropriate physical contact." A.I. responded no, but Principal Fulton did not explore the question any further nor did he have any idea how she interpreted the question. When questioned about the conversation with Principal Fulton, A.I. stated that she did tell him that Mole had hugged her and that Principal Fulton's report to the contrary was incorrect.

{¶53} We have found that the jury's verdict was "supported by some competent, credible evidence going to all the essential elements of the case" so it "will not be reversed by [this] court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578 as quoted by *Seasons Coal Co. v. City of Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). As for Mole's argument regarding the credibility of the witnesses, we are guided by the presumption that the findings of the trier of fact were correct as it is the jury that is "best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Id*. at 80.

{¶54} The jury's verdict was supported by sufficient evidence going to all element of the charge and was not against the manifest weight, as this matter does not present the "exceptional case in which the evidence weighs heavily against the conviction."

{¶55} Mole's third assignment of error is denied.

{¶56} The decision of the Ashland County Court of Common Pleas is affirmed in part and reversed in part and this matter is remanded for further proceedings consistent with this opinion.

By: Baldwin, P.J.

Gwin, J. and

Hoffman, J. concur.