

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 113531
	:	
v.	:	
	:	
NELSON REILLO,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 20, 2026

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-23-680671-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Karen Greene, Assistant Prosecuting Attorney, *for appellee*.

Russell S. Bensing, *for appellant*.

SEAN C. GALLAGHER, J.:

{¶ 1} This case is before this court on remand in *State v. Reillo*, 2026-Ohio-2701, ¶ 38 (“*Reillo*”), for further of review of Nelson Reillo’s second assignment of error from *State v. Reillo*, 2024-Ohio-3307 (8th Dist.) (“*Panel Decision*”). In that assignment of error, Reillo claimed that the second of his two convictions, for gross

sexual imposition (“GSI”), was based on insufficient evidence — an issue we resolved before addressing Reillo’s manifest-weight challenge as to both the rape and GSI convictions. *Panel Decision* at ¶ 14 (finding sufficient evidence was presented to sustain the “convictions”); *see also State v. Thompkins*, 78 Ohio St.3d 380, 388 (1997) (“A reversal based on the weight of the evidence . . . can occur only after the State both has presented sufficient evidence to support conviction and has persuaded the jury to convict.”); *see also Reillo* at ¶ 19 (“[D]espite concluding . . . that the State’s evidence was sufficient . . . the Eighth District reversed Reillo’s convictions and remanded the matter for a new trial.”). The Ohio Supreme Court nonetheless issued a mandate for this panel to review the second assigned error on remand. *See Nolan v. Nolan*, 11 Ohio St.3d 1 (1984), syllabus (“[A]n inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.”).

{¶ 2} For the following reasons, we overrule that assignment of error and affirm the GSI conviction.

I. Background and Procedural History

{¶ 3} The State charged Reillo with two counts of rape and one count of GSI for assaulting the victim E.C., who was eight years old at the time of the events. At trial, the by then adult E.C. testified that the sexual assaults occurred. According to the Ohio Supreme Court, “there was no evidence that conflicted with her account of the crimes.” *Reillo* at ¶ 2. The jury found Reillo guilty of rape and GSI, acquitting

him on a second rape count for which the State failed to present any evidence of its having occurred. *Panel Decision* at ¶ 13.

{¶ 4} This panel originally reversed the rape and GSI convictions as being against the weight of the evidence based on “the overall credibility of the State’s case,” which depended on the testimony of the victim with key details being elicited through leading questions. *Panel Decision* at ¶ 9. When reviewing to determine whether the State met its burden of persuasion against the defendant’s fundamental right to the presumption of innocence and the State’s constitutional burden to prove guilt beyond a reasonable doubt, this panel concluded the jury lost its way, in part aggravated by misstatements of the facts by the State during its closing arguments. *Panel Decision* at ¶ 26, 12; see *State v. Veney*, 2008-Ohio-5200, ¶ 21, citing *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he right to have the [S]tate prove guilt beyond a reasonable doubt is a constitutionally protected right of an accused.”).

{¶ 5} The Ohio Supreme Court disagreed and held that the panel erred by “substituting its judgment for the jury’s on the credibility of the victim’s testimony” and by considering “itself the ‘thirteenth juror.’” *Reillo* at ¶ 2, citing *Panel Decision* at ¶ 26; but see *State v. Jordan*, 2023-Ohio-3800, ¶ 17 (When “[s]itting as the ‘thirteenth juror,’ the court of appeals considers whether the evidence should be believed and may overturn a verdict if it disagrees with the trier of fact’s conclusion.”). It was concluded that “appellate courts reviewing a manifest-weight challenge must still give some deference to a fact-finder’s credibility determinations.” *Reillo* at ¶ 3, citing *In re Z.C.*, 2023-Ohio-4703, ¶ 14, and *Seasons*

Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80 (1984). Thus, courts do not consider “whether the evidence should be believed.” *But see Jordan* at ¶ 17. Instead, as instructed in *Reillo*, “when conducting a manifest-weight review, appellate courts must defer to the fact-finder’s witness-credibility determinations” because “the trier of fact ‘is in the sole position to believe or disbelieve all or any of the testimony presented at trial.’” (Emphasis added.) *Id.* at ¶ 32, 38.

{¶ 6} “As judges, we should strive to be open about our mistakes, and look for opportunities to correct them.” *Lopez v. Ramirez*, 2026 U.S. App. LEXIS 20137, *13 (5th Cir. July 9, 2026), citing *Planned Parenthood of Greater Texas, Inc. v. Kauffman*, 981 F.3d 347, 384 (5th Cir. 2020) (Ho, J., concurring) (“[A]s human beings, judges sometimes make mistakes,’ but ‘it is more important to get the law right than to guard our self-esteem.”). Our mistake in limiting our deference to the standard established in *Thompkins*, 78 Ohio St.3d 380, at 387 — that reversals on the weight of the evidence can be exercised “only in the exceptional case in which the evidence weighs heavily against the conviction” — was twofold.

{¶ 7} First, we erroneously discounted application of the deference given to a trier-of-fact’s credibility determinations as announced in *Eastley v. Volkman*, 2012-Ohio-2179, ¶ 21. As *Reillo* noted, the Ohio Supreme Court “has since utilized the deferential standard set out in *Eastley*, see [*In re Z.C.* at ¶ 14], making it law even if [the Ohio Supreme Court did] not cite it in every manifest-weight case.”¹ *Reillo* at

¹ *In re Z.C.* held that the manifest-weight standard applied to parental-rights appeals instead of the abuse-of-discretion standard applied by the Eleventh District, and

¶ 29, citing Rep.Op.R. 2.2 (“The law stated in an opinion of the Supreme Court shall be contained in its text, including its syllabus, if one is provided, and footnotes.”) and Ohio Const., art. IV, § 1 (“The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law.”).

{¶ 8} We read too much into the fact that outside of *Eastley* and *In re Z.C.*, the Ohio Supreme Court had not announced a deferential standard in regard to the credibility determinations of the trier of fact when conducting manifest-weight review in criminal appeals. *See, e.g., Jordan*, 2023-Ohio-3800 at ¶ 17 (“Sitting as the ‘thirteenth juror,’ the court of appeals considers whether the evidence should be believed and may overturn a verdict if it disagrees with the trier of fact’s conclusion.”); *State v. Nicholson*, 2024-Ohio-604, ¶ 71 (“The central question [for the manifest-weight standard] is whether ‘there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt.’”); *State v. Hunter*, 2011-Ohio-6524, ¶ 118-119, 128 (citing the deferential standard for the sufficiency review, but omitting that deferential standard from the recitation of the manifest-weight standard); *see also State v. Yarbrough*, 2002-Ohio-2126, ¶ 79 (concluding that an evaluation of a witness’s

the matter was remanded to the appellate court for consideration of the correct standard of review. *Id.* at ¶ 18.

credibility is not proper for sufficiency review, but the court was precluded from conducting a manifest-weight review in the capital case predating January 1, 1995).

{¶ 9} Second, we “ignored precedent” and “conflated legal standards” between the scope of a credibility determination and the standard for competency to testify under Evid.R. 601(A). *Reillo* at ¶ 34.

{¶ 10} In the *Panel Decision*, we observed that the credibility determination under the manifest-weight review encompassed not only the apparent truthfulness of the witness’s statement, but also their “ability to accurately perceive and communicate that about which” they are testifying. *Panel Decision* at ¶ 15, quoting *Kravitz v. Long Island Jewish-Hillside Med. Ctr., Community Health Program of Queens-Nassau, Inc.*, 113 A.D.2d 577, 582 (N.Y.App. 1985). This observation, albeit inartful, was meant to describe the concept that credibility can depend on more than a belief that a witness is not intentionally lying or stating mistruths. *See, e.g., 2 Ohio Jury Instructions*, CR § 409.05 (Rev. Aug. 15, 2012) (testing credibility includes considering “the reasonableness of the testimony; the opportunity the witness had to see, hear, and know the things about which the witness testified; and the witness’ accuracy of memory, frankness or lack of it, intelligence, interest, and bias” against “all the facts and circumstances surrounding the testimony”).

{¶ 11} According to the Ohio Supreme Court, “whether a witness can perceive events and testify truthfully to them is solely a question of competency”; in other words, it does not impact credibility considerations. *Reillo* at ¶ 34 citing R.C.

2317.01; *State v. Wallace*, 37 Ohio St.3d 87, 93-95 (1988); *State v. Muttart*, 2007-Ohio-5267, ¶ 31, citing Evid.R. 601(A).

{¶ 12} Our mistake was applying the rules underlying competency determinations pursuant to R.C. 2317.01 to the credibility review announced under *Thompkins*, 78 Ohio St.3d at 387, and *Jordan*, 2023-Ohio-3800, at ¶ 17. There appears, however, to be a disconnect between R.C. 2317.01 and the modern competency standard under Evid.R. 601(A), (B)(1)-(2) left unresolved by *Reillo*.

{¶ 13} In *Muttart* at ¶ 31, and *Wallace* at 93-95, the Ohio Supreme Court applied Evid.R. 601(A), eff. July 1, 1991, which tracked R.C. 2317.01 nearly verbatim on the competency standard: “All persons are competent witnesses except those of unsound mind and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.” *See also* Evid.R. 601(A), eff. July 1, 1991.

{¶ 14} That case authority was not within our analysis because Evid.R. 601(A) no longer follows R.C. 2317.01. Effective July 1, 2020, Evid.R. 601(A) was amended, in pertinent part, to provide the presumption of competency to all witnesses, even those under the age of ten. In the current version, “[e]very person is competent to be a witness except” if they are “[i]ncapable of expressing [themselves] concerning the matter as to be understood, either directly or through interpretation by one who can understand” them, or are “[i]ncapable of understanding the duty of a witness to tell the truth.” Evid.R. 601(A)-(B)(1), (2); *State v. Rose*, 2025-Ohio-5659, ¶ 21 (2d Dist.) (addressing the competency of a child

under the age of ten solely through Evid.R. 601(A)-(B)(1), (2) without regard to the statutory section); *see also State v. Perkins*, 2025-Ohio-634, ¶ 52 (7th Dist.) (“Evid.R. 601 no longer requires a competency determination of children under ten years old.”); *State v. D’Andrea*, 2026-Ohio-2247, ¶ 7 (3d Dist.) (noting the amendment to the competency rule omitting removing the age cut-off rule from the presumption of competency). This rule change was meant to “bring Ohio in line with the majority of other states in regards to competence to testify,” specifying that all persons, even those under the age of ten, are presumed competent. Proposed Amendments to Rules of Practice and Procedure in Ohio Courts, Summary 3. Competency (Evid.R. 601), available at [https://supremecourt.ohio.gov/RuleAmendments/documents/2020%20P&P%20\(As%20Published%20for%20Second%20Public%20Comment\).pdf](https://supremecourt.ohio.gov/RuleAmendments/documents/2020%20P&P%20(As%20Published%20for%20Second%20Public%20Comment).pdf) (<https://perma.cc/AL6R-FFYS>).

{¶ 15} According to *Reillo*, this panel was duty bound to consider *Muttart* and *Wallace* relying on R.C. 2317.01 and the pre-2020 version of Evid.R. 601(A). This suggests that R.C. 2317.01 controls competency considerations for trial testimony despite the 2020 amendments to Evid.R. 601(A)-(B). *But see Ackison v. Anchor Packing Co.*, 2008-Ohio-5243, ¶ 29 (A “witness’s competence to testify and is, in essence, more akin to a rule of evidence [and as] such, it is procedural in nature.”); *In re Coy*, 67 Ohio St.3d 215, 218-219 (1993) (“Section 5(B), Article IV of the Ohio Constitution provides that ‘the supreme court shall prescribe rules governing practice and procedure in all courts of the state All laws in conflict with such rules shall be of no further force or effect after such rules have taken

effect.’”) The impact of the 2020 amendment to Evid.R. 601(A), (B)(1)-(2) on R.C. 2317.01 is unclear moving forward. *See, e.g., State v. Kish*, 2026-Ohio-2409, ¶ 27 (8th Dist.) (applying both Evid.R. 601(A)-(B), eff. July 1, 2020, and R.C. 2317.01); *but see State v. Rose*, 2025-Ohio-5659, ¶ 21 (2d Dist.) (addressing the competency of a child under the age of ten solely through Evid.R. 601(A), (B)(1)-(2) without regard to the statutory section).

{¶ 16} Assuming that R.C. 2317.01 and *Wallace* control to deny children under the age of ten a presumption of competence that Evid.R. 601(A) provides, that rule did not appear to apply to E.C. because she was over the age of majority at the time she testified. In this situation, “[w]hether or not the testimony of one over the age of ten concerning an event which occurred before the age of ten *is accurate is a credibility issue* to be resolved by the trier of fact.” (Emphasis added.) *State v. Clark*, 71 Ohio St.3d 466, 471 (1994). As the Ohio Supreme Court instructed in *Clark*, “[e]very credibility assessment hinges upon the *perceived accuracy and truthfulness* with which the testimony is given. As with any witness, opposing counsel will be given an opportunity to cross-examine the witness in order to challenge his or her ability to *accurately recall the events*.” (Emphasis added.) *Id.*; *see also State v. Cornelious*, 2026-Ohio-151, ¶ 140 (6th Dist.) (holding that because the witness was over the age of ten at the time of trial although testifying to events before the age of ten, they were presumed competent and any issues with accuracy of the testimony related to credibility concerns).

{¶ 17} Notwithstanding, our attempt to distill the essence of the credibility review, announced in *Thompkins*, 78 Ohio St.3d 380, and cases such as *Jordan*, 2023-Ohio-3800, in regard to a witness’s ability to accurately perceive and communicate that about which they were testifying, was in error. “[W]hether a witness can perceive events and testify truthfully to them is solely a question of competency” under R.C. 2317.01 irrespective of the amended version of Evid.R. 601(A). *See Reillo* at ¶ 34.

{¶ 18} To summarize the manifest-weight standard applied in *Reillo*, an appellate court “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.” (Cleaned up.) *Reillo* at ¶ 26. There are several caveats.

{¶ 19} Credibility does not depend on the witness’s ability to perceive the events accurately. *Id.* at ¶ 34. Regardless, an appellate court only sits as the “thirteenth juror” in considering the credibility of witnesses and only has the ability to disagree with the factfinder if that disagreement pertains to their resolution of conflicting evidence or if “a witness’s testimony is so inconsistent as to material facts, so impeached, or so fantastical as to make it patently unbelievable.” *Id.* at ¶ 3, *compare Jordan* at ¶ 17 (“Sitting as the ‘thirteenth juror,’ the court of appeals considers whether the evidence should be believed and may overturn a verdict if it disagrees with the trier of fact’s conclusion.”). When there is no conflicting evidence

because a defendant does not present evidence in his defense, then there is no evidence for an appellate court to weigh — meaning the State’s evidence must be accepted in favor of the verdict. *See Reillo* at ¶ 30. When weighing evidence where appropriate, however, the appellate court must interpret all reasonable inferences and other evidence susceptible to multiple constructions in favor of the verdict. *Id.* at ¶ 28. Importantly, all those considerations are subject to the overriding proposition that “appellate courts must defer” to the trier-of-fact’s witness-credibility determination, because the trier-of-fact “is in the sole position to believe or disbelieve all or any of the testimony presented at trial.” *Id.* at ¶ 32, 38.

{¶ 20} Thus, this deference to the trier of fact is similar to that which is provided under the sufficiency standard of review: “In either a criminal or civil case the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts” and if the jury believes the testimony and corroborating evidence presented by the State, the evidence is “sufficient to support the verdict of guilty.” *State v. DeHass*, 10 Ohio St.2d 230, 231 (1967); *see also State v. Pountney*, 2018-Ohio-22, ¶ 19, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus (“[A]n appellate court does not ask whether the evidence should be believed but, rather, whether the evidence, ‘if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt.’”). Despite the deference being similar, “the sufficiency-of-the-evidence standard of review applies to the state’s burden of production and a manifest-weight-of-the-evidence standard of review applies to the state’s burden of persuasion.” *State v. Messenger*, 2022-Ohio-

4562, ¶ 26, citing *State v. Messenger*, 2021-Ohio-2044, ¶ 44-45 (10th Dist.), and *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring).

{¶ 21} The *Reillo* Court applied that standard to the facts of this case. After giving deference to the trier of fact’s conclusions in support of the verdict, the court determined that E.C.’s testimony was not patently unbelievable, and as a result, the State proved Reillo’s guilt beyond a reasonable doubt on the rape and GSI convictions. *Id.* at ¶ 37. The Ohio Supreme Court remanded the case to this court for consideration of Reillo’s second assignment of error challenging the sufficiency of the evidence supporting the GSI conviction.

II. Sufficiency Review on Remand

{¶ 22} The Ohio Supreme Court held, after deferring to the jury’s credibility determination, that Reillo’s conviction for GSI was not against the weight of the evidence based on the victim’s testimony that “Reillo, with only a towel over his private area, rubbed her body over his genitals[,]” which “correspond[ed] with Count 3: rubbing E.C.’s body against his naked body when she was under 13.”² *Reillo* at ¶ 37. R.C. 2907.05(A)(4) criminalizes sexual contact with a child under the age of

² As the victim testified at trial:

So another time we were, again, in that same bedroom, but this time we were on the bed. He was laying down like back—he was laying down on his back on the bed and he had a towel over like his private area. He would pick—he picked me up and he put me on like his private area and he like moved me around on top of him.

13, with sexual contact being defined in part under R.C. 2907.01(B) as the touching of an erogenous zone without regard to the perpetrator's state of undress.³ According to the Reillo Court, the victim's statement, when believed, supported the conviction as indicted.

{¶ 23} Our sufficiency analysis is subsumed by the Ohio Supreme Court's manifest-weight conclusion.

{¶ 24} "A reversal based on the weight of the evidence . . . can occur only after the State both has presented sufficient evidence to support conviction and has persuaded the jury to convict." *Thompkins*, 78 Ohio St.3d at 388. From that proposition, courts have concluded that although a finding of sufficient evidence does not preclude manifest-weight review, the converse does not hold true. "Although sufficiency and manifest weight are different legal concepts, manifest weight subsumes sufficiency; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency." *State v. Williams*, 2023-Ohio-3246, ¶ 48 (8th Dist.), citing *State v. Jackson*, 2015-Ohio-1946, ¶ 11 (8th Dist.), and *Thompkins* at 380; *see also State v. Chasteen*, 2025-Ohio-5546, ¶ 23 (2d Dist.); *State v. Pennington*, 2016-Ohio-2792, ¶ 11 fn. 1 (4th Dist.);

³ Count 3 of the indictment alleged that Reillo "unlawfully did have sexual contact, to wit: rubbed victim's body against his naked body, with [E.C.] 07/23/2003 not his spouse, and the age of [E.C.] 07/23/2003 at the time of said sexual contact was under 13 years, to wit: DOB: 07/23/2003." It is not clear from the record whether the indictment was amended to remove the nakedness allegation, but the jury was nonetheless charged, in pertinent part, with determining whether Reillo had sexual contact with E.C. without regard to his state of undress. Tr. 517.

State v. Rodenberger, 2013-Ohio-4676, ¶ 8 (10th Dist.); *State v. Johnson*, 2025-Ohio-5289, ¶ 37 (11th Dist.).

{¶ 25} *Reillo*'s conclusion that the GSI conviction was not against the weight of the evidence necessarily requires the conclusion that the GSI conviction is supported by sufficient evidence. *Thompkins* at 388. The second assignment of error is overruled.

{¶ 26} *Reillo*'s conviction is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR