

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 22CA011919

Appellee

v.

JAMES I. THOMAS

APPEAL FROM JUDGMENT
ENTERED IN THE
OBERLIN MUNICIPAL COURT
COUNTY OF LORAIN, OHIO
CASE No. 22CRB 000182

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 28, 2023

STEVENSON, Judge.

{¶1} Defendant-Appellant James Thomas (“Mr. Thomas”) appeals from the judgment of the Oberlin Municipal Court. For the reasons that follow, this Court affirms.

I.

{¶2} On May 17, 2022, L.H., a student at Oberlin College, was walking along the sidewalk of College Street in Oberlin. She encountered Mr. Thomas when he blocked her path of travel. Mr. Thomas told L.H. he was in town from Cleveland to visit his sick grandmother but had run out of gas and needed money to buy more gas to leave Oberlin. L.H. opened her purse and showed Mr. Thomas that she had no money. Mr. Thomas then asked L.H. if she had a debit card and told her he needed \$20. L.H. suspected that Mr. Thomas could be tricking her just to get money, but decided to err on the side of helping someone in need and agreed to withdraw money from the Huntington Bank ATM that was approximately half a block away. L.H. and Mr. Thomas proceeded to walk to the bank together.

{¶3} While waiting at the light to cross the street, L.H. lied and told Mr. Thomas that a friend was waiting for her. L.H. wanted him to believe that if she didn't get where she was supposed to go, someone would be looking for her. L.H. did not want Mr. Thomas to know where she was going in case he had any malicious intentions.

{¶4} Although L.H. expected an outdoor ATM that would be in public view, instead the ATM was located in an enclosed room. L.H. then grew concerned when she found herself alone with Mr. Thomas in the empty ATM room. Mr. Thomas asked L.H. for a hug, stating that he wanted to express his gratitude for her kindness. L.H. agreed to the hug. However, when Mr. Thomas hugged her, he placed one hand on her buttocks and stroked it up and down.

{¶5} L.H. knew the situation felt wrong, but she could not identify what specifically was wrong. L.H. testified that she “[has] been diagnosed with Asperger’s syndrome” which she described to mean that she is “not very good at being able to judge people’s character or intentions” and is “very dependent on what they have told [her].” As a result, “[L.H.] can’t tell if people have malicious intent towards [her] or not. So red flags that would have gone up earlier for a neurotypical individual wouldn’t go off for [L.H.], unless it was much further down the line.”

{¶6} After L.H. gave Mr. Thomas the money, and while standing between L.H. and the exit to the ATM, Mr. Thomas asked her if she was dating anybody. Once again, L.H. lied in response and told him she was dating someone. Mr. Thomas then asked her if she was sure about that. L.H. responded affirmatively, at which point Mr. Thomas asked her for another hug. L.H. agreed to the second hug, but “was just hoping, crossing [her] fingers, praying that he would be normal about it” this time. During the second hug, Mr. Thomas once again placed his hands on her buttocks and stroked it up and down. Mr. Thomas then asked L.H. where she was going next, but L.H. fabricated a response and Mr. Thomas left the ATM room. The ATM and the room in

which it was located were equipped with surveillance video cameras and captured L.H.'s encounter with Mr. Thomas.

{¶7} After making sure Mr. Thomas was gone from the ATM room, L.H. went to a nearby coffee shop to process what had just happened to her. L.H. left the coffee shop after approximately 15 minutes and walked down the same side of College Street as she had earlier. She was on her way back to her dorm. As she waited to cross the street, L.H. saw Mr. Thomas standing on the other side of the street.

{¶8} At this point, L.H. realized that Mr. Thomas had not really needed to get gas to leave Oberlin and that he had tricked her to take her money and touch her inappropriately. L.H. tried to ignore Mr. Thomas by walking past him and proceeding home. However, he started shouting out at L.H. and kept walking in front of her to get her attention. Out of fear that Mr. Thomas would try to follow her home, L.H. instead followed Mr. Thomas. Mr. Thomas motioned for L.H. to step into the doorway of the Ben Franklin store. Mr. Thomas stated that he had remained in the area to help with boxes at the store, but L.H. did not believe him. Mr. Thomas then asked L.H. for a third hug. L.H. testified that at that point she was afraid of Mr. Thomas' size and that he might follow her home if she did not comply. Once again, Mr. Thomas placed his hands on her buttocks when he hugged her and stroked it up and down.

{¶9} Next, Mr. Thomas asked L.H. to remove her mask and began to move in close to her face. Both Mr. Thomas and L.H. were wearing masks due to the COVID-19 pandemic. L.H. thought he was trying to kiss her. L.H. asked Mr. Thomas why he wanted her to remove her mask, backed away from him, and attempted to get away, but he kept cutting out in front of her to stop her from leaving. When L.H. lifted her arm to motion to her watch that she was late for a meeting

in a continued effort to get away, Mr. Thomas grabbed her wrist. At this point, L.H. panicked, managed to maneuver around Mr. Thomas, and ran away.

{¶10} After L.H. got away from Mr. Thomas, she called a male friend but he did not answer so she called her roommate, A.R. L.H. told A.R. what happened with Mr. Thomas and that she thought she had been sexually harassed. Once L.H. and A.R. met back at their dorm room, they went to the Oberlin College Campus Safety Office. The Campus Safety Office summoned an Oberlin Police Patrolman (“Patrolman”). L.H. gave the Patrolman a written statement of the incident with Mr. Thomas.

{¶11} Mr. Thomas was charged with one count of sexual imposition in violation of R.C. 2907.06(A)(1), a misdemeanor of the third degree. Through counsel, Mr. Thomas filed a motion in limine pursuant to Evid. R. 403 and 404 to exclude testimony about other incidents that were alleged to have occurred over a two-week period regarding Mr. Thomas’ behavior with several retail store employees. The State responded that the witness testimony was admissible to prove Mr. Thomas’ identity, motive, plan, intent, and absence of mistake or accident under Evid.R. 404(B)(2) (Other crimes, Wrongs or Acts). The trial court reserved its ruling until the beginning of the second day of trial.

{¶12} The trial court ruled that any such testimony would be limited to incidents that took place on May 17, 2022, the same day as Mr. Thomas’ encounters with L.H., and for the sole purpose of proving the element of “sexual contact;” that is, whether the circumstances of the contact showed that it was “for the purpose of sexually arousing or gratifying either person.” R.C. 2907.01(B).

{¶13} A jury trial was held over the course of two days. Testimony was presented by L.H., A.R., and the Patrolman. The videotape of the encounter in the ATM room was entered into

evidence without objection. The jury found Mr. Thomas guilty. He was sentenced to 60 days in jail and ordered to register as a Tier I sex offender.

{¶14} Mr. Thomas timely filed a notice of appeal. He was granted a stay of execution of his sentence and a \$5,000.00 personal bond. Mr. Thomas raises three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

THE PROSECUTORIAL MISCONDUCT DURING OPENING STATEMENTS DEPRIVED MR. THOMAS OF HIS RIGHT TO A FAIR TRIAL AND DENIED HIM DUE PROCESS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

{¶15} In his first assignment of error, Mr. Thomas contends that he was denied a fair trial due to prosecutorial misconduct. Mr. Thomas alleges that comments made by the prosecutor during opening statements were improper and prejudiced him because: 1) the trial court had not ruled on Mr. Thomas' motion in limine regarding the statements and the State knew Mr. Thomas was seeking to exclude them; 2) the statements contained hearsay indicating Mr. Thomas was asking women for sex; and 3) the State never produced a witness that corroborated any of the statements at trial, specifically as to whether the contact was sexual in nature.

{¶16} Mr. Thomas takes issue with statements made by the prosecutor during her opening statement that attempted to summarize the testimony the State expected to produce of two witnesses who made police reports about contact with Mr. Thomas. These two witnesses were employees in stores near where Mr. Thomas and L.H met, and had described alleged sexual advances Mr. Thomas made towards them.

{¶17} It is well-settled that opening statements are not evidence. *State v. Frazier*, 73 Ohio St.3d 323, 338 (1995). “The purpose of opening statements is to inform the jury of the nature of the case and to outline the facts that each party will attempt to prove.” *State v. Riffle*, 9th Dist. Medina No. 09CA0056-M, 2010-Ohio-2812, ¶ 9, quoting *Maggio v. Cleveland*, 151 Ohio St.136 (1949), paragraph one of the syllabus. Prosecutors are generally given great latitude in opening statements. *State v. Jackson*, 9th Dist. Summit No. 27478, 2015-Ohio-4356, ¶ 27.

In deciding whether a prosecutor’s conduct rises to the level of prosecutorial misconduct, a reviewing court determines if the prosecutor’s actions were improper, and, if so, whether the substantial rights of the defendant were actually prejudiced. [An appellant] must show that there is a reasonable probability that but for the prosecutor’s misconduct, the result of the proceedings would have been different.

(Internal quotations and citations omitted.) *Riffle* at ¶ 6.

{¶18} “In general, a statement made by counsel of the evidence that he expects to introduce is not reversible error unless it appears that counsel made the statement in bad faith, even if it turned out that such evidence was incompetent.” *Riffle* at ¶ 10, quoting *State v. Neal*, 10th Dist. Franklin No. 95APA05-542, 1996 WL 28765, *12 (Jan. 23, 1996), quoting *State v. Lipker*, 16 Ohio App.2d 21, 25 (4th Dist.1968).

{¶19} Here, there was no bad faith by the prosecutor. In her opening statement of the evidence she expected to present at trial, she referred to several witnesses who were subpoenaed to appear and testify. The trial began two hours late due to Mr. Thomas’ failure to arrive on time. As a result of the delay, one of the witnesses the prosecutor mentioned, B.C., was unable to wait due to her work schedule. The prosecutor had no knowledge at the time of opening statements that this delay would cause B.C. to be unavailable. The other witness, D.J., began to testify but was unable to complete her testimony due to nervousness.

{¶20} Thus, circumstances beyond the prosecutor’s control, not bad faith, rendered those witnesses unable to present the testimony that the prosecutor referenced during opening statements. *See, e.g., Riffle* at ¶ 10 (prosecutor’s opening statement that victim’s psychologist would show PTSD diagnosis consistent with sexual abuse not made in bad faith and therefore could not form the basis for prosecutorial misconduct because the parties all believed the psychologist would testify since she had been subpoenaed).

{¶21} Accordingly, based on the foregoing, this Court concludes that the prosecutor’s statements did not constitute prosecutorial misconduct. Mr. Thomas’ first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE VERDICT IN THIS CASE IS AGAINST THE SUFFICIENCY OF THE EVIDENCE AND SHOULD BE REVERSED BECAUSE IT VIOLATES THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF OHIO.

{¶22} “Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo.” *State v. Williams*, 9th Dist. Summit No. 24731, 2009-Ohio-6955, ¶ 18, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). The relevant inquiry is whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction. *Thompkins* at 390. For purposes of a sufficiency analysis, this Court must view the evidence in the light most favorable to the State. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. We do not evaluate credibility, and we make all reasonable inferences in favor of the State. *Id.* at 273. The evidence is sufficient if it allows the trier of fact to reasonably conclude that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

{¶23} An individual who violates R.C. 2907.06(A)(1) is guilty of gross sexual imposition.

R.C. 2907.06(A)(1) states as follows:

(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:

(1) The offender knows that the sexual contact is offensive to the other person, or one of the other persons, or is reckless in that regard.

{¶24} “[S]exual contact” is defined 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.” R.C. 2907.01(B). Whether the defendant acted with the purpose to sexually arouse or gratify either person “is a question of fact to be inferred from the type, nature, and circumstances of the contact.” *In re A.L.*, 12th Dist. Butler No. CA2005-12-520, 2006-Ohio-4329, ¶ 20.

{¶25} The parties agree that they are not spouses of one another. Mr. Thomas argues that the State failed in its burden of production that the consensual hugs between L.H. and Mr. Thomas were sexual in nature, and that Mr. Thomas knew the contact was offensive to L.H. or was reckless in that regard. He maintains that L.H.’s claims that she felt uncomfortable with Mr. Thomas’ contact were retaliatory and only arose after she realized she had been tricked into giving him money. Mr. Thomas also argues that according to her own testimony, L.H. was unable to discern his intent due to her Asperger’s syndrome. We disagree with Mr. Thomas that the State failed to meet its burden of production.

{¶26} In his merit brief, Mr. Thomas conveniently limits his reference of the contact between him and L.H. to consensual hugs rather than the touching of L.H.’s buttocks. The hugs are not the primary subject of the State’s allegation that Mr. Thomas had “sexual contact” with

L.H., but rather Mr. Thomas' touching of L.H.'s buttocks. As previously noted, touching another's buttocks is included in the legal definition of "sexual contact." R.C. 2907.01(B). The ATM surveillance footage clearly showed that Mr. Thomas stroked L.H.'s buttocks after the first two hugs. L.H. testified that Mr. Thomas stroked her buttocks after the third hug. Thus, the videotape and L.H.'s testimony were sufficient to establish beyond a reasonable doubt that Mr. Thomas engaged in sexual contact with L.H. when he touched her buttocks.

{¶27} The State also met its burden of production regarding whether the contact was "for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B). First, L.H. and Mr. Thomas were total strangers prior to the day in question. That Mr. Thomas hugged L.H., let alone touched her buttocks three times, was outside the boundaries of behavior customary of a typical first encounter with anyone. Furthermore, Mr. Thomas' stated purpose for the hug was to show gratitude. However, not only was touching L.H.'s buttocks beyond Mr. Thomas' request for a hug, but it was also not necessary to express gratitude. The hug alone would have sufficed. Thus, based on the fact that Mr. Thomas' actions went beyond the boundaries of the expression of gratitude and turned into an unexpected display of physical affection wherein he touched L.H.'s buttocks, it was reasonable for the jury to infer that Mr. Thomas' intentions were sexual in nature.

{¶28} Moreover, the video evidence and L.H.'s testimony established that contemporaneous with the stroking of L.H.'s buttocks, Mr. Thomas asked her if she was single, and after she responded that she was dating someone, he asked her if she was sure. From those questions it could be inferred that Mr. Thomas was pressing L.H. to consider him as a potential romantic partner. He also asked her where she was going next, indicating that he wanted more than L.H.'s money and was unsatisfied with her rejection of his overtures to pursue a relationship.

Later, during the encounter on the street, Mr. Thomas asked L.H. to pull down her mask and moved in close to her face, which reasonably raises the inference that he was attempting to kiss her.

{¶29} While Mr. Thomas makes much of L.H.'s admitted inability to discern his intentions because of her Asperger's syndrome, in light of the evidence adduced from the video and L.H.'s testimony, outlined above, L.H.'s limitations in comprehending Mr. Thomas' intentions are irrelevant because Mr. Thomas' intentions were evident from his own behavior.

{¶30} Wherefore, in sum, taken together, the "type, nature and circumstances" of Mr. Thomas' actions establish that his purpose went beyond a mere display of gratitude to something intended to arouse or gratify, and therefore, was sexual in nature. *In re A.L.*, 12th Dist. Butler No. CA2005-12-520, 2006-Ohio-4329 at ¶ 20.

{¶31} The State also met its burden regarding Mr. Thomas' knowledge of the offensiveness of the contact or recklessness in that regard. R.C. 2907.06(A)(1). The video shows that while L.H. was at the ATM machine accessing the money, she glanced back and forth at Mr. Thomas and fumbled with her purse, which could raise the reasonable inference that L.H. was uncomfortable and nervous. Both the video and L.H.'s testimony reflect that after L.H. told Mr. Thomas that she was dating someone, he requested a hug and stroked her buttocks on two more occasions, once again in the ATM room, and later on the street after L.H. left the coffee shop. It is reasonable to infer that a woman who is in a dating relationship would not welcome anyone, much less a total stranger, touching her buttocks, particularly when she agreed to nothing more than giving him money for gas and a hug. That Mr. Thomas did not ascertain in advance whether touching L.H.'s buttocks was permissible is, at a minimum, reflective of his recklessness in regard to whether it would be offensive.

{¶32} While Mr. Thomas argues that L.H. consented to the hugs and thus communicated that she was not offended, that consent must be viewed through the lens of L.H.'s Asperger's syndrome and the fact that it causes delay in her ability to process someone's intentions toward her. Also, L.H. testified that she feared Mr. Thomas due to his size and simply wanted to avoid getting into more danger if she said no. The jury could have reasonably inferred that she was under duress or simply did not fully understand what was happening when she consented to the hugs.

{¶33} Viewing this evidence in a light most favorable to the State, we conclude that the State produced sufficient evidence to allow the jury to conclude that the State proved the essential elements of gross sexual imposition beyond a reasonable doubt. *Jenks*, 61 Ohio St.3d at 273. Mr. Thomas' second assignment of error is overruled.

ASSIGNMENT OF ERROR III

THE CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND OF THE OHIO CONSTITUTION.

{¶34} "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley*, 9th Dist. Summit No. 19600, 2000 WL 277908, *1 (March 15, 2000), citing *Thompkins*, 78 Ohio St.3d at 390, (Cook, J. concurring).

{¶35} When considering a challenge to the manifest weight of the evidence, this Court is required to consider 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 (9th Dist.1986). "A reversal on this basis is reserved for the exceptional case in which the evidence

weighs heavily against the conviction.” *State v. Croghan*, 9th Dist. Summit No. 29290, 2019-Ohio-3970, ¶ 26. This Court ““will not overturn a conviction as being against the manifest weight of the evidence simply because the trier of fact chose to believe the State’s version of events over another version.”” *State v. Warren*, 9th Dist. Summit No. 29455, 2020-Ohio-6990, ¶ 25, quoting *State v. Tolliver*, 9th Dist. Lorain No. 16CA010986, 2017-Ohio-4214, ¶ 15.

{¶36} “[W]e are mindful that the [trier of fact] is free to believe all, part, or none of the testimony of each witness.” (Internal quotations and citations omitted.) *State v. Gannon*, 9th Dist. Medina No. 19CA0053-M, 2020-Ohio-3075, ¶ 20. “This Court will not overturn a conviction on a manifest weight challenge only because the [trier of fact] found the testimony of certain witnesses to be credible.” *Id.*

{¶37} Mr. Thomas challenges the credibility of L.H.’s testimony. Specifically, he argues that L.H. testified Mr. Thomas grabbed her wrist after the third incident but did not initially give this information to the police or include it in her written statement. Mr. Thomas also reiterates that L.H. testified she does not have the ability to assess intent, whereas Mr. Thomas told the police that the touching of her buttocks was an accident. Based on that discrepancy, Mr. Thomas argues that his testimony was more credible than L.H.’s because he was the only one capable of expressing his own intent. Mr. Thomas also stresses that while L.H. repeatedly testified she felt tricked by Mr. Thomas into giving him money, this did not rise to a criminal act because L.H. voluntarily gave him the money as a gift. Therefore, Mr. Thomas argues that L.H. acted merely in retaliation when she later changed her position and told the police the touching was sexual and made her feel uncomfortable.

{¶38} First, this Court has previously held that slight inconsistencies in an alleged victim’s testimony is not grounds to overturn the trial court’s verdict on a manifest weight of the evidence

challenge. *State v. Roy*, 9th Dist. Lorain No. 13CA010404, 2014-Ohio-5186, ¶ 78. Accordingly, Mr. Thomas' argument that L.H. left certain details out of her statement to the police, particularly at a time when she was in an emotional state and unlikely to recall all the details, is not sufficient to meet his burden.

{¶39} The jury viewed the video of the incident which depicted Mr. Thomas' touching and rubbing L.H.'s buttocks exactly as it happened. The jury heard L.H.'s testimony as well as A.R.'s testimony as to L.H.'s statements made to her directly after the episode with Mr. Thomas. The jury also heard the Patrolman's testimony regarding his conversations with Mr. Thomas. Thus, the jury was able to assess Mr. Thomas' intent and determine if it was for the purpose of sexual arousal or gratification or if it was an accident. The jury was free to disbelieve Mr. Thomas' statement to the Patrolman that he touched L.H. accidentally as an attempt to downplay his behavior once he learned of L.H.'s allegations. The jury was also able to assess whether L.H. made known to Mr. Thomas that his contact with her was offensive or that he was reckless in that regard. The jury was also able to assess whether L.H.'s decision to report the incident with Mr. Thomas to the police was purely retaliatory because she had been tricked out of money or because she genuinely took offense at his behavior. From L.H.'s testimony, the jury was able to assess the impact of her Asperger's syndrome on her response to Mr. Thomas' behavior.

{¶40} In short, the jury chose to believe the State's version of the events. This Court gives deference to the jury's determinations of credibility at trial. *Warren*, 9th Dist. Summit No. 29455, 2020-Ohio-6990 at ¶ 25. Our review of the record reveals that this is not an exceptional case that warrants reversal. The jury did not clearly lose its way and create such a manifest miscarriage of justice that Mr. Thomas' convictions must be reversed and a new trial ordered. Accordingly, Mr. Thomas' third assignment of error is overruled.

III.

{¶41} Mr. Thomas' assignments of error are overruled. The judgment of the Oberlin Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Oberlin Municipal Court, County of Lorain, 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(C). 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 Appellant.

SCOT STEVENSON
FOR THE COURT

SUTTON, P. J.
FLAGG LANZINGER, J.
CONCUR.

APPEARANCES:

GIOVANNA V. BREMKE, Attorney at Law, for Appellant.

FARAH L. EMEKA, Attorney at Law for Appellee.