[Cite as *State v. McCarty*, 2015-Ohio-1440.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- JOSHUA D. MCCARTY Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. John W. Wise, J. Case No. 2014CA00142 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2013CR1953
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 13, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO, Prosecuting Attorney, Stark County, Ohio By: RONALD MARK CALDWELL Assistant Prosecuting Attorney Appellate Section 110 Central Plaza, South - Suite 510 Canton, Ohio 44702-1413	BERNARD L. HUNT 2395 McGinty Rd. N.W. North Canton, Ohio 44720

Hoffman, J.

{¶1} Defendant-appellant Joshua David McCarty appeals his conviction and sentence entered by the Stark County Court of Common Pleas on one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4). Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 22, 2013, Appellant was married to D.H. On that date, D.H. left for work around 11:00 a.m. leaving Z.H., D.H.'s eleven year-old daughter (Appellant's stepdaughter), with Appellant. Z.H. planned to attend summer gymnastics camp at noon on the day in question. The State alleges Appellant instead convinced Z.H. to stay home from camp to watch movies, telling her he would take her to Wal-Mart to buy her a bike.

{¶3} Once at work, D.H. texted Appellant to see whether Z.H. had arrived at gymnastics camp. Appellant responded he kept Z.H. home because she was crying and upset. He later texted D.H. informing her Z.H. was outside and playing with neighbor kids. Instead, according to Z.H.'s testimony, Appellant turned on the television and sat next to Z.H. on the couch within five minutes of D.H. leaving for work.

{¶4} While sitting on the couch, Appellant reached over and slid Z.H.'s shorts and underwear down. He then started touching Z.H.'s vaginal area. Z.H. told Appellant to stop, but he continued fondling her vagina. Z.H. then suggested to Appellant they play video games instead of watching T.V. Appellant stopped touching Z.H. long enough for her to pull up her underwear and shorts and retreat to her bedroom.

{¶5} Once in Z.H.'s bedroom, Z.H. started playing a video game. Appellant followed her in the room, sat next to her, and again slid her shorts and underwear down. He again began touching her vaginal area. Z.H. then stated she needed to use the bathroom. She pulled her shorts and underwear back on and exited the bedroom. Z.H. ran out of the front door of the residence to her cousin S.L.'s home.

{¶6} S.L. testified she heard Z.H. run into her home shouting at her children. Z.H. was hysterical and crying. She said, "Josh" and moved her hands to her genital area. S.L. then called D.H. and the police.

{¶7} Z.H. was examined at Akron Children's Hospital and interviewed by Jessica Heilman a social worker with the emergency department. Z.H. told Heilman her stepfather touched her vaginal area with his fingers.

{¶8} Canton Police Officer Joshua Coates responded to the residence, and talked with S.L. He testified Appellant was not home and could not be located. It was later determined Appellant moved out of the residence, and moved in with his mother. He did provide a DNA sample to the police as part of the investigation. At some point, Appellant told his mother he was going out with friends, and left the state. He was eventually located and arrested in Virginia.

{¶9} Appellant was indicted on one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4). Following a jury trial, he was convicted of the charge. The trial court imposed a sentence of sixty months in prison. The trial court further classified Appellant a Tier II sexual offender.

{¶10} Appellant appeals, assigning as error:

{¶11} "I. THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, WHICH VIOLATED HIS RIGHTS UNDER THE 6TH AND 14TH AMMENDMENT [SIC] TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION.

{¶12} "II. THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT THE APPELLANT'S CRIMINAL RULE 29 MOTION FOR ACQUITTAL AND DIRECTED VERDICT.

{¶13} "III. THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT THE APPELLANT'S MOTION TO EXCLUDE THE JURY FLIGHT INSTRUCTION."

I.

{¶14} In the first assignment of error, Appellant maintains he was denied the effective assistance of trial counsel as his counsel failed to object to the clothing and shoes in which he was attired at trial.

{¶15} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. *See, Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such claims, “a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’" *Id.* at 689, citing *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

{¶16} “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in

the same way." *Strickland,* 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690.

{¶17} Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694.

{¶18} Appellant appeared at trial in prison sandals, with an orange strap, and a brown, trustee work uniform. Appellant argues his counsel's failure to object to his appearance at trial fell below the standard of reasonable court representation, and violated counsel's essential duty. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct 838. He asserts counsel's allowing him to appear in front of the jury in the attire was prejudicial and may have inferred guilt. *Holbrook v. Flynn* (1986), 475 U.S. 560, 106 S.Ct. 1340.

{¶19} During trial herein, the trial court engaged in the following discussion with Appellant concerning his attire prior to voire dire,

> The Court just has a concern that it wants to put on the record. The Defendant is clothed and he's got sandals on which has an orangish strap, which I personally don't have a problem. There could be a negative connotation. I don't know if we need to go get him a pair of shoes. I would let him, if he wants to, sit in the white socks. I know that you are the trial counsel, but I also know sometimes there is appeal counsel. So as a Judge, I always try to bring these issues out at the beginning so down the

road we don't run into that problem. If you're okay with it, I'm okay with it. I'm not trying to be difficult here, but I want to make sure everybody gets a fair trial.

(Thereupon, Ms. Bible had a discussion with the Defendant.)

MS. BIBLE: Your Honor, I've talked to Mr. McCarty and explained the reason why you don't let the jury know that he's in custody. He didn't have any clothes so he's in a trustee work uniform, brown uniform, looks like a work uniform, it's either the orange or the brown, and he's fine - - he said he's fine with that.

THE COURT: All right. What size shoe do you wear?

DEFENDANT MCCARTY: I wear ten and a half.

THE COURT: I have ten. I can drive - - a deputy will drive me - - I'll drive to my house real quick and get you a pair of shoes at ten if that's what you want, or do you want those?

DEFENDANT MCCARTY: We'll use these.

THE COURT: Okay. That's fine. As long as we've addressed the issue, that's fine. Okay. Anything else from the defense you would like me to address?

MS. BIBLE: No, Your Honor.

Tr. at 5-7.

{¶20} The trial court gratuitously and properly advised Appellant of his right to appear at trial in alternative attire. The trial court offered to provide Appellant with shoes other than standard issue jail sandals. Trial counsel discussed the issue with

Appellant, and Appellant, himself, answered he wished to proceed as he was attired. Error, if any, was clearly invited by Appellant. Accordingly, Appellant has not demonstrated he was denied the effective assistance of trial counsel.

{¶21} The first assignment of error is overruled.

II.

{¶22} In the second assignment of error, Appellant maintains his conviction is not supported by the sufficiency of the evidence and the trial court erred in denying his Criminal Rule 29 motion for acquittal and directed verdict.

{¶23} Under Criminal Rule 29(A) of the Ohio Rules of Criminal Procedure, a defendant is entitled to a judgment of acquittal on a charge against him "if the evidence is insufficient to sustain a conviction...." Whether a conviction is supported by sufficient evidence is a question of law this Court reviews de novo. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997); *State v. West,* 9th Dist. No. 04CA008554, 2005–Ohio–990, ¶ 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 Appellant's guilt beyond a reasonable doubt. *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus (1991).

{¶24} Thus, when reviewing a sufficiency-of-the-evidence claim, an appellate court must construe the evidence in a light most favorable to the prosecution. *State v. Hill,* 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. Grant,* 67 Ohio St.3d 465, 477, 620 N.E.2d 50 (1993). A reviewing court will not overturn a conviction on a sufficiency-of-the-evidence claim unless reasonable minds could not reach the

conclusion that the trier of fact did. *State v. Tibbetts,* 92 Ohio St.3d 146, 162, 749 N.E.2d 226 (2001); *State v. Treesh,* 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001).

{¶25} Here, Appellant was convicted of gross sexual imposition, in violation of R.C. 2907.05(A)(4), which reads,

> (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.

{¶26} Appellant asserts Z.H. made inconsistent statements at trial concerning the time her mother left for work and concerning the incident. Specifically, Appellant cites the following testimony of Z.H.:

> Q. Okay. During the time that you and Josh were alone, did Josh have a conversation with you regarding you behaving with your mom and listening to her?
>
> A. Yes.
>
> Q. Okay. And had there been an issue where you were maybe getting in trouble with your mom for not listening?
>
> A. Yes. And - -
>
> Q. And some temper tantrums?

A. Yeah.

Q. Yeah. Okay.

A. And my mom had told me to write her a letter, like - - like why I did that. And he just told me, don't worry about it, he'll talk to my mom. And he was - - he was like mad at me whenever my mom - - before my mom left, and then he was acting all nice to me whenever she left.

Q. Okay. Did he talk to you, though, about how you had to start behaving?

A. Yes.

Q. Okay. Was this before or after he touched you?

A. This was before?

Q. Okay. So this was after your mom left?

A. Yes. Wait, no, my mom hadn't left yet. They both had a talk with me.

Q. Okay. You just testified that Josh told you, don't worry about it, he'd talk to your mom?

A. Yeah. He said, don't worry about the letter, he'll talk to my mom whenever she gets home from work.

Q. Okay. But you - - I'm trying to be clear. When they're talking to you about your behavior and your temper tantrums, are you saying that the two of them talked to you together before she went to work, or just Josh talked to you?

A. They talked to me together.

Q. Okay.

Tr. at 96-98.

{¶27} Appellant cites the testimony of D.H. as being inconsistent with Z.H.'s testimony,

Q. Okay. When - - there's some texting about - - was there an issue with Z.H. and her having some problems behaving or some temper tantrums?

A. No, ma'am. She's a very well-mannered kid. She is ADHD, she is a little more active than the average child, but she was never out of control. She - - Q. But wasn't there an issue that you guys were talking about that she was mis- - that she wasn't listening to you or having temper tantrums?

A. It wasn't a temper tantrum. She was just bouncing off the walls as I was trying to get ready for work. She was just active, she wanted to go to camp, she wanted to flip. She's constantly in the gym.

Q. Did you and Josh sit down and talk to her about her behavior before you went to work?

A. I just told her she needed to chill out and save the flipping and the bouncing around for the gym.

Q. Did you tell her she had to write a letter?

A. I did not, no.

Q. Okay. So you didn't tell her she had to write a letter explaining why she was misbehaving?

A. No.

Q. At some point before you leave for work that day, on July 22nd, do you and Josh sit down with Z.H. and have a talk to her about her behavior?

A. Just that she needed to calm down and save the flipping and bouncing around for the gym.

Q. And Josh was there and the two of you - -

A. Yes.

Q. Okay. And in the text, there's a reference, too, that he thought he actually got through to her about her behavior correct?

A. The bouncing around in the house, yes.

Tr. at 130-131

{¶28} Appellant also cites the discrepancy in testimony as to the time of the incident. Z.H. testified the incident occurred about five minutes after her mother left for work. She testified she thought her mother left for work around 10:50 or 11:00 a.m. D.H. testified she works at noon, and usually leaves around 11:15 a.m. S.L. testified Z.H. arrived at her house around 1:00 p.m.

{¶29} Appellant argues the time line does not match the testimony; therefore, the credibility of Z.H. is brought into question.

{¶30} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison,* 49 Ohio St.3d 182, 552 N.E.2d 180 (1990). 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, 674 N.E.2d 1159, 1997–Ohio–260.

{¶31} Z.H. testified Appellant twice slid her shorts and underwear down to her knees and fondled her vagina with his fingers. She testified the touching felt weird. We find there was sufficient evidence upon which the jury could find Appellant guilty of the charge.

{¶32} The second assignment of error is overruled.

III.

{¶33} In the third assignment of error, Appellant argues the trial court improperly instructed the jury as to flight.

{¶34} The trial court instructed the jury as follows,

> Consciousness of guilt. Testimony has been admitted indicating that Defendant fled the jurisdiction. You are instructed that the Defendant's conduct alone does not raise a presumption of guilt, but it may tend to indicate the Defendant's consciousness or awareness of guilt. If you find that the facts do not support that the Defendant fled the jurisdiction, or if you find that some other motive prompted the Defendant's conduct, or if you are unable to decide what the Defendant's motivation was, then you should not consider this evidence for any purpose. However, if you find that the facts support that the Defendant engaged in such conduct, and if you decide that the Defendant was motivated by a consciousness or awareness of guilt, you may, but are not required to, consider that evidence in deciding whether the Defendant is guilty of the

crimes charged. You alone will determine what weight, if any, to give to the evidence.

Tr. at 197-198.

{¶35} Appellant's mother testified at trial Appellant purportedly made himself available to the Canton Police Department during the investigation. As such, Appellant asserts giving the flight instruction was highly prejudicial to his case, and constituted an abuse of discretion on the part of the trial court.

{¶36} The trial court specifically found Appellant's mother's testimony, noted supra, supported the instruction. She testified he was aware of the investigation, told her he was going out with friends, but never returned. He was later found in Virginia.

{¶37} A jury instruction on relevant legal issues should be given when the evidence supports the instruction. *State v. Thomas* (1989), 40 Ohio St.3d 213, 533 N.E.2d 286. Flight from justice may be indicative of consciousness of guilt. *State v. Eaton* (1972), 19 Ohio St.2d 145, 249 N.E.2d 897.

{¶38} Based upon the Ohio law above, we find the trial court did not commit error in instructing the jury on flight.

{¶39} The third assignment of error is overruled.

{¶40} Appellant's conviction and sentence entered by the Stark County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Wise, J. concur