[Cite as *State v. Stegner*, 2024-Ohio-4750.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 23 CAA 10 0090
	:	
BARRY M. STEGNER	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Appeals
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 26, 2024

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
Melissa A. Schiffel Delaware County Prosecutor Katheryn L. Munger, Assistant County Prosecutor 145 North Union Street, Third Floor Delaware, Ohio 43015	William T. Cramer 470 Olde Worthington Road, Suite 200 Westerville, Ohio 43082

Delaney, P.J.

{¶1} Defendant-Appellant Barry M. Stegner appeals the September 19, 2023 Judgment Entry of the Delaware County Court of Common Pleas in which he was convicted of four counts of gross sexual imposition. Plaintiff-Appellee is the State of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} Defendant-Appellant Barry M. Stegner was charged with one count of gross sexual imposition with someone less than thirteen years of age in violation of R.C. 2907.05(A)(4), a third degree felony, and four counts of gross sexual imposition involving force in violation of R.C. 2907.05(A)(1), each a fourth degree felony.

{¶3} The charges stem from acts of touching his daughter, K.S. The case went to a jury trial in July 2023 and Stegner was found not guilty of count one, but guilty of counts two through five. He appeals his conviction to this Court. He argues that there was insufficient evidence to prove the element of force, that the jury's verdict was against the manifest weight of the evidence, and that the trial court committed plain error when it failed to instruct the jury on the lesser included offense of sexual imposition.

{¶4} On December 14, 2022, K.S. went with a friend to her school's guidance counselor and told her that her father had been abusing her by hitting her, yelling at her, and touching her breasts and buttocks. K.S. was 14 years old and told the counselor that the abuse had started when she was 13 years old. The counselor reported this to Delaware County Children Services. K.S. was subsequently seen by a physician and interviewed by a medical forensic interviewer at the Child Assessment Center at Nationwide Children's Hospital. Defendant was interviewed by a detective with the Delaware Police Department.

{¶5} The case proceeded to trial and the State presented testimony from the school counselor, the physician, the detective who investigated the allegations, the medical forensic interviewer, and K.S. During the testimony, the jury was shown videos of K.S.'s interview with the Child Assessment Center as well as a video of Defendant's interview with the detective. Defendant presented testimony from his sister-in-law and his son, who is K.S.'s brother.

{¶6} K.S. was 15 years old when she testified at trial. She described living at home with Defendant, her mom, and her older brother. Her mom worked long hours at a restaurant and Defendant was often at home. Her brother was usually in his room on the second floor, where he frequently played video games.

{¶7} K.S. testified that she fought constantly with Defendant and did not feel she had a good relationship with him. She said that he had slapped her, that he yelled at her, and that she didn't feel safe in her home. She maintained that on one occasion Defendant choked her and on another he threatened to hit her with a two-by-four with nails.

{¶8} K.S. further stated that she was in the sixth grade when Defendant started inappropriately touching her. She said that around the same time period he became angrier and would yell loudly at her. The first thing she remembered happening was that he put his hand on her buttock over her clothes and, as she described, squeezed it. K.S. confided in her mother what had happened. Her mother responded that K.S. should "let her voice be heard" and "[t]ell him he shouldn't be doing whatever it was that he was doing." K.S. tried to do so more than once, but to no avail. She testified that he would respond by yelling at her, at one point telling her "police cannot step foot on our grounds

because it is our home." She stated that the touching occurred two to three times per week.

{¶9} In addition to the contact that started when she was 13, K.S. testified to four specific events that happened when she was 14. Each event occurred in the living room area of the house when her mother was not home.

{¶10} The jury was provided photos of the downstairs of the house. When viewed coming in the front door, the living area was on the left and an office was on the right. The office was accessed by French doors.

{¶11} There was a television in the living area on the wall to the left. A couch and a love seat were in front of it. The couch was against a wall, perpendicular to the television. The love seat was directly across from the television. Behind the loveseat were the French doors that led to the office. Between the loveseat and the office was a hallway that led back to the kitchen and to stairs going up to the bedrooms.

{¶12} In the first event that K.S. described, she was sitting on the loveseat. She put her arms in the air to get the defendant's attention as he came out of the office. He walked over to her and at first rubbed her forearms. He then put his hands in the sleeves of her shirt and slid them down into her shirt. He put his hands over the bare skin of her breasts and squeezed them. When she put her arms down, he pulled his hands out of her shirt.

{¶13} On another occasion, she was seated on the loveseat with Defendant. She asked if she could go spend time with a friend. He said she could if she would "let him touch my butt." She walked over to him and turned so she was facing the television and

her back was to him. He proceeded to place two hands on her buttocks, and he squeezed them. She then turned around and asked if she could go, and he said she could.

{¶14} Yet another time, they were sitting on the loveseat watching television together and he began rubbing her inner thigh over her pants. She described it as the inner part of her leg, closer to her vagina. The Defendant ran his hand up and down her thigh. She testified that she felt very uncomfortable because his hand was getting closer to her vagina. He stopped when she subsequently moved away. She did not tell him how this made her feel or stop him because she was scared.

{¶15} The final incident occurred in December 2022. K.S. testified that she went into the living area and stood behind the loveseat. She leaned on the back of it and was watching television. Defendant came up behind her and placed his hands on her stomach and pressed his lower body against her. He was wearing boxers and a T-shirt. She stated she could feel his penis poking her behind. He then backed up and put his hands on her buttocks and squeezed. He told her she "had a nice butt."

{¶16} K.S. was very uncomfortable with the encounter. Sometime during the following week, she confided in a friend what had happened. They met with the school guidance counselor, Lindsey Mee. Ms. Mee testified at trial that the girls came in to see her and that K.S. "went into detail" about her father "emotionally abusing her as well as physically abusing her." She told the counselor that Defendant had hit her and her mom. She also told her that Defendant had "felt her breasts, her private area, and her butt." The counselor reported these statements to Delaware County Children Services.

{¶17} Detective Nick Strausser with the Delaware Police Department testified. He had been with the department for almost 18 years. He recounted that he received a

referral which had been screened by Children Services. He and the case worker assigned to the case went to the high school where they met K.S. in the principal's office. He said the plan was to meet her to gather a little more information and to make sure she was safe. He acknowledged that the basis for the referral was "emotional, physical, and sexual abuse." He explained that the preferred course of action was not for a full, complete interview with a juvenile, but rather to use the Child Assessment Center at Nationwide Children's Hospital. For cases that are referred to the Center, he served as part of a multidiscipline team. The team meets at Nationwide Children's Hospital and watches, via video, a conversation between a medical forensic interviewer and the child that is held in a different room. Later that day, he met with K.S.'s mother at the police department. He went to the house a few days later and took photos of the living area in which the contact took place.

{¶18} The detective testified that he interviewed Defendant. The State played the video to the jury. In the video, Defendant was asked about some of the specific allegations. He addressed the first incident by saying that he did put his hands in K.S.'s shirt, at first to tickle her, but then to feel the area directly below her breast because he said she had injured it recently and he wanted to see if she still had pain. He stated she was not wearing a bra.

{¶19} He addressed the fourth incident by informing the detective that he often went around the house in boxer shorts because he could not find shorts or sweatpants to wear. When asked specifically if he came up behind K.S. at some point and pressed against her, he described the event in detail and said that he merely stood next to her with his hand on her back.

{¶20} Defendant denied the other allegations and said he did not know why they were made. He offered that he would sometimes roughhouse with K.S. and that once she pushed his arm away and it might have brushed past her breast. He also said that he would pinch her behind.

{¶21} Two witnesses testified for the defense. Defendant's sister-in-law, his brother's wife, testified that they saw the family primarily at holidays, social gatherings, and funerals. She described her relationship with her extended family as "not super close," but said she and K.S.'s mother and all the children had taken family trips together. She described Defendant's household "tense at times" and that "it is a known fact that he has a temper."

{¶22} Defendant's son, K.S.'s brother, testified that K.S. often complained about her father, and that his father yelled. He could even hear Defendant yell downstairs when he was up in his bedroom. He acknowledges that the home was tense at times and that Defendant had "smacked" him before.

{¶23} The jury returned a verdict in favor of Defendant on the first count involving touching K.S. when she was 13. The jury found him guilty on counts two through five for gross sexual imposition. Defendant has appealed his conviction and raises three assignments of error for our review.

ASSIGNMENTS OF ERROR

I. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY CONVICTIONS FOR GROSS SEXUAL IMPOSITION THAT ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE OF FORCE.

II. THE CONVICTION FOR GROSS SEXUAL IMPOSITION WERE NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE ON THE ISSUE OF FORCE.

III. THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO INSTRUCT THE JURY ON SEXUAL IMPOSITION AS A LESSER INCLUDED OFFENSE OF GROSS SEXUAL IMPOSITION.

ANALYSIS

I.

Sufficient Evidence of Force

{¶24} In his first Assignment of error, Defendant has argued that his due process rights were violated because his convictions for gross sexual imposition were not supported by sufficient evidence on the element of force. He has claimed there was no evidence that he used actual force or that he threatened force to compel K.S. to submit to sexual contact.

{¶25} Gross sexual imposition is defined as sexual contact with another when "the offender purposely compels the other person . . . to submit by force or threat of force." R.C. 2907.05(A)(1). The offense differs from sexual imposition because it recognizes conduct that is heightened beyond what is required to commit the sexual contact itself. Accordingly, to sustain a conviction for gross sexual imposition, there must be evidence of force or the threat of force that compels the victim to submit to the sexual contact. *In re D.G.,* 2023-Ohio-3859, ¶ 27 (5th Dist.), citing *State v. Dye,* 82 Ohio St.3d 323 (1998).

{¶26} Force is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1). This Court

has recognized various actions that amount to force. These include manipulating the victim's body or limbs or the victim's clothing, telling the victim to do something or restrain from doing something, holding the victim down, continuing the touching despite the victim's wishes, and prohibiting the victim from leaving. *State v. Biggs*, 2022-Ohio-2481 (5th Dist.), citing *State v. Moore,* 2022-Ohio-2349 (5th Dist.). This evaluation can be problematic when children are involved, however, because of the unique situation that familial bonds pose.

{¶27} The Ohio Supreme Court has addressed the use of force as it relates to children. *State v. Eskridge*, 38 Ohio St.3d 56 (1988). In *Eskridge*, the defendant was found guilty of raping his four-year-old daughter.[1] The appellate court reversed his conviction because it concluded that the transcript did not reveal "threats, commands, or physical contact which would permit an inference" of force or coercion. The Ohio Supreme Court disagreed that the force used was insufficient.

{¶28} In reviewing the facts of the case, the Supreme Court noted that the defendant removed the child's underwear and placed her on a bed. It stated that the statute required only that minimal force or threat of force be used in the commission of a rape and that the defendant's actions were those of compulsion and constraint independent of the act of rape. It concluded that he used at least minimal force in committing the rape against the victim.

{¶29} The Court also considered the events surrounding the rape, including the relationship between the defendant and his daughter. It held:

[1] Because she was less than 13 years of age, the statute did not require the element of force as an element of gross sexual imposition. R.C. 2907.02(A)(3). The discussion of force came about from R.C.2907.02(B), which provided for a sentence of life in prison if the victim was compelled by force.

> With the filial obligation of obedience to a parent, the same degree of force and violence may not be required upon a person of tender years, as would be required were the parties more equal in age, size, and strength.

Eskridge, paragraph one of the syllabus. After evaluating the age difference and disparity in size, the Court determined that there was "substantial evidence of force to support the conviction." *Id.* It found that coercion is "inherent in paternal authority when a father sexually abuses his child." *Id*. This is due to the role a parent plays in his child's life.

{¶30} Based on the unequal balance power of parent and child and the duty to obey, the Court held that the same degree of force would not be required. *Id.*, citing *State v. Labus* 102 Ohio St. 26 (1921). In a familial setting where there is a mantle of authority over the child, force need not be overt and physically brutal, but it can be subtle and psychological. *Id.* at 58-59. Accordingly, the state did not have to demonstrate any "explicit threats or displays of force." As stated in *Labus*, "Sufficient threats, fright, intimidation and the like were also enough to constitute force." 102 Ohio St. at 38-39.

{¶31} In reaching its conclusion in *Eskridge*, the Court reviewed a case involving a 14-year-old and it adopted that court's definition of force. *State v. Fowler*, 27 Ohio App.3d (8th Dist. 1985). In *Fowler,* the defendant was convicted of raping his stepdaughter. He challenged that the element of force had not been proven. The court stated that "[t]he youth and vulnerability of children, coupled with the power inherent in a person of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose." *Fowler,* 27 Ohio App.3d at 59. The court held that "we are confronted with a child being told to do something by an important figure of authority and commanded not to tell anyone about it.

In such a case, we find nothing unreasonable about a finding that the child's will was overcome." *Id.*

{¶32} Although *Eskridge* involved a very young child, its holding has been applied to minors as old as 17 years old. *See State v. George* 2024-Ohio-471 (8th Dist.). In a case involving a teenage victim, this Court stated "while an adult might have managed the situation differently, society does not generally expect a 15-year-old to have the emotional or practical experience necessary to face such a situation." *State v. Oddi*, 2002-Ohio-5926 (5th Dist.). A child may be too young to fully comprehend what was done to her or him, as in *Eskridge*, where the four-year-old had some difficulty articulating what had happened. In *Fowler,* the 14-year-old did not realize what her father was doing until she saw a movie about incest and realized "what was going on in my life." The holding also was applied when a 16-year-old child testified that she tried to avoid her stepfather's touching but was unable to given the proximity of living with him in the house and his authority over her. *State v. Clay,* 2005-Ohio-6 (9th Dist.). Similarly, it was applied when a 13-year-old child was conditioned to be in fear of a parent and feel threatened after witnessing acts of domestic violence. *State v. Jordan,* 2016-Ohio-603 (2d Dist.).

{¶33} The holding in *Eskridge* was addressed in two subsequent Ohio Supreme Court cases that focused on the coercive role inherent in parental authority over minor children. In *State v. Schaim,* 65 Ohio St.3d 51, 55 (1992), it rejected the application of *Eskridge* when the victim was a 20-year-old because the victim was "no longer completely dependent on her parents, and is more nearly their equal in size, strength, and mental resources." In *State v. Dye,* 82 Ohio St.3d 323, it extended the holding to a person who was not a parent but who held a position of authority over a child's life. In that case, the

Court allowed "subtle and psychological" evidence of force when a 9-year-old victim was abused by a family friend when in his care. *Id.*

{¶34} Because K.S. was a child of 14, she was well within the range that courts have applied the reduced force requirement found in *Eskridge.* Defendant was her father. He lived in the home and had daily care for her. Therefore, any evidence of subtle and psychological force was sufficient.

{¶35} In addition to subtle and psychological force in a parent-child relationship, actual force has been found in a myriad of ways such as when clothing has been manipulated or the body has been moved or positioned. *State v. Byrd,* 2003-Ohio-3958 (8th Dist.). As previously stated, this was found in *Eskridge* when the victim's underwear was removed and she was placed on a bed. When a defendant pushed the victim's head towards him, it was deemed to be force. *In the matter of K.S.,* 2014-Ohio-188 (5th Dist.). It was an act of force for the defendant to grab the victim's hand and placed it on his penis. *State v. Steele* 2012-Ohio-3777 (5th Dist.). In *Dye,* 82 Ohio St.3d 323, the young boy was made to kneel in front of the defendant.

{¶36} Defendant has argued that force was the sole element of gross imposition insufficiently proven at trial. The Ohio Supreme Court has held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380 (1997); State v. Markley, 2021-Ohio-3340 (5th Dist.). When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court's function "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." *State v. Jenks*, 61

Ohio St.3d 259 (1991), paragraph 2 of the syllabus. The court must inquire "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." *State v. Taylor*, 2023-Ohio-4160 (5th Dist.), citing *Jenks,* 61 Ohio St.3d 259*.*

{¶37} In *State v. Pollard,* 2009-Ohio-2313 (5th Dist.), this Court addressed sufficiency in a case involving a 14-year-old who had been subjected to repeated sexual contact from her father. On one occasion, Defendant was sitting with his daughter on her bed. He leaned over and pinched her breast. In analyzing the claim for gross sexual imposition, the Court declined to use the definition of force applied in *Schaim* because the victim was a minor and still considered a child. Because she was not of so tender an age, however, as the children in *Eskridge* and *Dye,* the Court looked to whether her will was overcome by fear or duress.

{¶38} We held that "in determining whether a course of conduct results in duress, the question is not what effect such conduct would have upon an ordinary man but rather the effect upon the particular person toward whom such conduct is directed, and in determining such effect the age, sex, health, and mental condition of the person affected, the relationship of the parties and all the surrounding circumstances may be considered." *Id.* at ¶ 41*,* citing *State v. Woods* 48 Ohio St.2d 127, 135–136 (1976), overruled in part, on other grounds, by *State v. Downs*, 51 Ohio St.2d 47 (1977), paragraph one of the syllabus. As the victim's father, the defendant held a position of authority over her. *Id.* at ¶ 42. Therefore, the force or threat of force could be met "without evidence of express threat of harm or evidence of significant physical restraint." *Id.* The victim testified that she had been repeatedly sexually abused by her father, that he was bigger than her, and

that she felt that she had to obey him. *Id.* We concluded that there was sufficient evidence of force. *Id.*

{¶39} In this case, we have reviewed the record and find the evidence was sufficient to meet the elements of gross sexual imposition as alleged in Counts 2 through 5. We begin our analysis by looking at the parties to determine their relationship, and then we look at their physical status such as their ages and stature. There was no question that Defendant was K.S.'s father and that he was an authority figure in her life. She testified that he was often home with her, he established chores, set household rules such as prohibiting her taking a cell phone into her room, and enforced boundaries by not allowing her to have a boyfriend. In addition, he oversaw her behavior in the home and meted out punishment. Also, the evidence demonstrated that the age, size, and strength of the parties were disparate. Defendant was much older and he was a much larger than his teenage daughter.

{¶40} There are four specific contacts that give rise to the charges against Defendant. Viewing the evidence in the light most favorable to the prosecution for sufficiency, we conclude that the Defendant touched his daughter's breasts, buttocks, and thigh. In each event force was present.

{¶41} The first contact is when K.S. raised her arms in the air to get Defendant's attention. Defendant came over and put his hands on her arms and began rubbing them. K.S. testified that he then put his hands down through the sleeves of her shirt and placed his hands directly on her breasts while her arms were in an upright position. Defendant removed his hands only when she lowered her arms. She demonstrated to the medical forensic interviewer that she had to fold them in front of her in a protective manner.

Defendant admitted to the detective that he rubbed K.S.'s arms. He described it as tickling. After rubbing her arms, he said he then put a hand down her shirt. He claimed he wanted to feel directly beneath her breast to see if she was hurting from a previous injury. He stated that she was not wearing a bra.

{¶42} K.S. was on the loveseat throughout this and her father stood over her. The jury was able to assess his size in relation to that of K.S. He manipulated her shirt to reach in through the sleeves and then put his hands through them. Although K.S. had put her arms up only to get Defendant's attention, Defendant stood over her and kept her arms in the air as he rubbed them. Defendant's actions compelled her to keep her arms up while he forced his arms into her shirt and touched her breasts.

{¶43} In the second example of contact, Defendant would not allow K.S. to leave the house to meet with a friend unless she submitted to him touching her behind. After she stood in front of him and he squeezed her buttocks, she was given permission to go. A child is subject to the will of the parent is all aspects of everyday living. By denying her permission to leave the house without submitting to sexual contact, Defendant was inflicting constraint. She did not, as defense counsel has argued "bargain for the touching in exchange for the benefit of going to her friend's house." She merely asked to meet her friend and was met with the requirement of sexual contact before she could do so.

{¶44} In the next event, Defendant and K.S. were sitting on the loveseat watching television together and Defendant began rubbing her inner thigh. K.S. described it as the inner part of her leg, closer to her vagina. The touch was not fleeting or momentary but consisted of Defendant running his hand up and down her thigh, getting closer to her vagina as he did so. K.S. testified that she felt very uncomfortable, but she did not tell him

to stop because she was scared. The touching stopped when she moved away, but she was compelled by fear not to stop it. That fear caused the unwanted touching to continue until she moved away, thereby overcoming her will.

{¶45} In the final example, while she was standing and leaning against the back of the loveseat to watch the television on the opposite wall, Defendant came up behind her, placed his hands on her stomach and pressed his lower body against her. She could feel his penis against her body. He then backed up and put his hands on her buttocks, squeezed them, and told her she "had a nice butt."

{¶46} The photos provided to the jury show an area approximately the width of a hallway, with an opening to an office directly behind it. In that space, Defendant placed his hands on her waist and confined her within his grip while she was up against the loveseat. His contact continued when he backed up in the space and put his hands on her buttocks. This restraint, coupled with the relationship between the two, was sufficient to demonstrate force.

{¶47} In addition to the testimony that the sexual contact occurred, there was testimony that the Defendant was known for his temper, the home environment was tense, he yelled at K.S., and he slapped his children. When K.S. confided in her mother, she was told to tell Defendant to stop but the touching continued. She testified that on one occasion of telling Defendant to stop that he responded by yelling that the police could not enter their home. In her session with the Child Assessment Center, she stated that she finally stopped saying no because she was so tired of it happening. She was consistent throughout that she felt unsafe at home and that she felt scared when

Defendant was touching her body. She testified that there had been consequences in the past for not obeying him in other matters, such as not doing chores.

{¶48} This Court has examined the evidence admitted at trial and determined that such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. Accordingly, the evidence was sufficient, and the first assignment of error is overruled.

II

Manifest Weight of the Evidence Standard of Review

{¶49} In addition to his argument that there was insufficient evidence of force, Defendant also argues that the jury's verdict was against the manifest weight of the evidence. The criminal manifest weight of the evidence standard was explained in *Thompkins*, 78 Ohio St.3d 380. The Court distinguished between "sufficiency of the evidence" and "manifest weight of the evidence," finding that these concepts differ both qualitatively and quantitatively. *Id.* at 386. Unlike sufficiency of the evidence which asks whether the evidence is legally sufficient to support a verdict as a matter of law, weight of the evidence addresses the evidence's effect of inducing belief. *Id.* at 386–387. A reviewing court asks whether the state or the defendant's evidence is more persuasive. *State v. Wilson*, 2007-Ohio-2202, ¶ 25. Although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. *Thompkins,* 78 Ohio St.3d at 387. "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Id*., citing *Tibbs v. Florida*, 457 U.S. 31, 42 (1982).

{¶50} To evaluate a manifest weight claim, a court must review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. *State v. McKelton*, 2016-Ohio-5735 at ¶ 328. The court must decide whether "'the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed.'" *Id*., quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983).

{¶51} In *State v. Clay*, 2005-Ohio-6 (9th Dist.) a 16-year-old victim was molested by her stepfather. She testified that she was scared and would try to move away from the touching to get him to stop. The victim was scared to say anything because the defendant was "supposed to be her father" and she did not want to upset her mother or cause the family to split up. The court held that the defendant's sexual contact coupled with his stepdaughter's fear established a finding a force and his conviction was not against the manifest weight of the evidence.

{¶52} In this case, K.S. detailed five instances of unwanted touching, four of which the jury found to be compelling. We have reviewed the record to determine if the jury lost its way concluding that Defendant committed acts amounting to gross sexual imposition for those four instances. We find that it did not.

{¶53} K.S. detailed the unwanted touching to her school counselor, to a medical forensic interviewer with the Child Assessment Center, and at trial. While she was not always clear about the timeline and sequence of events, she was consistent in the description of the types of touching that took place and the location where the events occurred. She testified that the touching occurred two to three times per week. There

were times she told him to stop and times she didn't because she was scared. She did not feel safe in her home.

{¶54} There was testimony from K.S. and her brother that Defendant slapped the children. There was testimony from a sister-in-law that the home setting was tense, and that Defendant yelled and had a temper.

{¶55} In his interview with the detective, Defendant described his version of two of the incidents in detail. His answer for one act is that he put his hand in her shirt to examine a previous injury. For a second act, he agreed he was in his boxer shorts, but that he merely stood next to K.S. with his hand on her back. The jury was free to assess each witness and determine which witness was more credible.

{¶56} In a jury trial, matters of credibility of witnesses are primarily for the trier of fact and we must give deference to the jurors' judgment. See *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. We will not overturn the verdict on a manifest weight challenge simply because the jury chose to believe the evidence offered by the prosecution. In this case there was competent, credible evidence presented to support the allegations. The jury did not clearly lose its way and create such a manifest miscarriage of justice that the conviction must be reversed. Defendant's second assignment of error is overruled.

III

Jury Instruction on a Lesser Offense

{¶57} In his third assignment of error, the Defendant argued that the trial court committed plain error by failing to instruct the jury on sexual imposition R.C. 2907.06 as a lesser included offense of gross sexual imposition. R.C. 2907.05(A)(1) prohibits sexual

contact with another when “the offender knows that the sexual contact is offensive to the other person” or the other person is “thirteen years of age or older but less than sixteen years of age * * * and the offender is at least eighteen years of age.” It does not require the element of force.

{¶58} Because the instruction was not requested at the trial court, and no objection was made for it not being given, Defendant concedes that this Court may review only for plain error. Crim.R. 52(B) states “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”

{¶59} The Ohio Supreme Court explained the clear error rule in *State v. Barnes*, 94 Ohio St.3d 21 (2002). It noted that, by its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. *Id* at 27.

{¶60} First, there must be an actual error, meaning a deviation from a legal rule. *Id.,* citing *State v. Hill* (2001), 92 Ohio St.3d 191, 200, *United States v. Olano*, 507 U.S. 725, 732 (1993). Second, the error must be plain. An error is plain when it is an obvious defect in the trial proceedings. *Id.* citing *State v. Sanders*, 92 Ohio St.3d 245, 257 (2001), *State v. Keith*, 79 Ohio St.3d 514, 518 (1997). Third, the error must have affected substantial rights. *Id.* Affecting substantial rights means that the trial court's error must have affected the outcome of the trial. *Id.,* citations omitted. Even with these limitations, the Court admonished that plain error “is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Barnes*, 98 Ohio St.3d at 27, quoting *State v. Long* (1978), 53 Ohio St.32d 91; See also, *State v. Landrum* (1990), 53 Ohio St.3d 107.

{¶61} The decision regarding whether to request a jury instruction is generally a trial strategy decision. *State v. Moses,* 2003-Ohio-5830 (5th Dist.). A charge on a lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. *St. v. Thomas*, 40 Ohio St.3d 213 (1988).

{¶62} In addressing the first two assignments of error, we determined that there was sufficient evidence to prove the element of force. We also concluded that the evidence was not against the weight of the evidence for the jury to find that Defendant was guilty of gross sexual imposition. Accordingly, the evidence did not reasonably support an acquittal and there was no plain error when jury instructions did not include the lesser offense. The third assignment of error is overruled.

CONCLUSION

{¶63} The three assignments of error are overruled. The judgment of the Delaware County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Hoffman, J. and

Baldwin, J., concur.