[Cite as *State v. Glass*, 2003-Ohio-879.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81607

STATE OF OHIO	:	JOURNAL ENTRY
Plaintiff-Appellee	:	AND
v.	:	OPINION
LEROY GLASS	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION: FEBRUARY 27, 2003

CHARACTER OF PROCEEDING: Criminal appeal from Common Pleas Court, Case No. CR 396319.

JUDGMENT: AFFIRMED.

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:
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Ronni Ducoff
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TIMOTHY E. McMONAGLE, J.:

{¶1} Defendant-appellant, Leroy Glass, appeals from the judgment of the Cuyahoga County Court of Common Pleas, rendered after a bench trial, finding him guilty of gross sexual imposition and kidnapping. For the reasons that follow, we affirm.

{¶2} The record reflects that in September 2000, the Cuyahoga County Grand Jury indicted appellant on one count of gross sexual imposition, in violation of R.C. 2907.05; one count of rape, in violation of R.C. 2907.02; and one count of kidnapping, in violation of R.C. 2905.01. Appellant pled not guilty to the charges. Appellant waived his right to trial by jury and a bench trial commenced on May 13, 2002.

{¶3} Gigi Jackson testified that in September 2000, she lived in a house on Ohio Street with her daughter, Laresa Jackson, and two grandchildren, seven-year-old T. and four-year-old N. Jackson testified further that appellant, who was her boyfriend at the time, would sometimes stay with her. According to Jackson, appellant came over at approximately 8:00 p.m. on September 1, 2000 and went to her bedroom. When Jackson went to the bedroom a short time later, she found appellant wrestling with T. and N., as he often did. After watching them for a few minutes, Jackson told the children to get their pajamas on and get ready for bed. The children left the room with her and she went to clean the porch and then lock up the house.

{¶4} Jackson testified that as she came back into the house, she was surprised to see N. sitting in the front room. When Jackson questioned N., he told her that he could not get back into her bedroom. Jackson testified that she then went to her bedroom and found the door closed. According to Jackson, she had to force the door open because it was "jarred real tight where I couldn't get in." Upon entering the bedroom, Jackson saw appellant on the bed on top of T., his knee and leg over her face, and she heard T. screaming, "Get off of me." Jackson testified that she went over to the bed and told appellant to let T. get up. When appellant did not do so, Jackson lifted his leg off T. and hit him. According to Jackson, T. ran over to a corner of the room and cowered in a fetal position on the floor, crying. Jackson testified that when she asked appellant why T. was crying, he stated, "Ain't nothing wrong with that girl," and left. After instructing Jackson to make sure that appellant was gone, T. told Jackson, "Grandpa put his weenie in me."

{¶5} Upon hearing appellant's voice when he returned to the house a short time later, T. hid in her bedroom closet. While appellant was in Jackson's bedroom, Jackson convinced T. to come out of the closet and tell her mother what had happened. Jackson testified that she "wanted to kill" appellant and grabbed a knife and scissors, but T. convinced her to call the police instead.

{¶6} T. testified that on the evening of September 1, 2000, she, N. and appellant were lying on the bed in her grandmother's bedroom watching television. After Jackson told T. and N. to get

ready for bed, they put their pajamas on and went back to Jackson's bedroom. T. then told N. to go to the bathroom. According to T., as she was walking out of the room behind N., appellant grabbed her arm and then closed the door with his foot. T. tried to get away but she and appellant fell in the struggle. T. testified that appellant then pulled her onto the bed and told her to get on her knees. According to T., as appellant stood on his knees behind her, with his hand on her mouth, he pulled down her pajama shorts and underpants. She then felt him "putting his private" in her anus. T. testified that appellant told her "he was going to hurt me real bad" if she told anyone what happened.

{¶7} According to T., appellant heard her grandmother coming and "was acting like he was playing with me" when Jackson pushed the door to the bedroom open. T. denied that she was wrestling with appellant when Jackson came into the room and testified that she ran to the corner of the room, crying, after her grandmother told appellant to let her go.

{¶8} Cleveland police officer George Kwan responded to the house at approximately 11:00 p.m. Kwan testified that T. told him that appellant had grabbed her, pulled her down on the bed and touched her in her "private parts" with his "private part." Kwan and his partner then arrested appellant.

{¶9} Michael Friel, a social worker, testified that he interviewed T. in the Emergency Room at University Hospitals late on the evening of September 1, 2000. Friel testified that T. told him that she and her brother had been playing in her grandmother's

bedroom and when her little brother had to go to the bathroom, her grandmother's boyfriend had grabbed her arm and pulled her on top of him on the bed. T. then refused to discuss the incident any further with Friel.

{¶10} Dr. Meg Tomcho testified that her genital examination of T. that evening indicated a white discharge and redness in the area, nonspecific findings which Tomcho testified could be suggestive of trauma. Tomcho testified that blood on a vaginal swab was also nonspecific but could be indicative of trauma.

{¶11} Joseph Serowik, an examiner in the Cleveland Police Department Scientific Investigtion Unit, testified that T.'s pajamas and underpants tested negative for semen and blood.

{¶12} Cleveland police detective Karl Lessman testified that he separately interviewed T., N., Gigi Jackson and her daughter. According to Lessman, all of the interviews corroborated what T. told him about the incident.

{¶13} Paul DiVincenzo, a child psychologist, testified that he met with T. for approximately eight sessions beginning in October 2000. DiVincenzo testified that T. told him that appellant put her on top of him in her grandmother's bedroom and then started "humping me doing an adult thing." T. told him that appellant pulled out his "thing" and tried to put it in her anus but put his penis back in his pants when he heard her grandmother coming.

{¶14} Appellant testified that prior to the alleged incident, he had known Gigi Jackson for approximately eleven years.

Although their relationship was romantic at times, appellant never married Jackson and, in fact, married two other women during the years he knew Jackson. Appellant testified that Jackson was upset with him because he was involved with other women and not committed to her. According to appellant, Jackson asked him to marry her and became upset when he told her no. Appellant testified that Jackson orchestrated his arrest by concocting a story and influencing T. to go along with her.

{¶15} Appellant testified that he went to Jackson's house at approximately 1:00 p.m. on September 1, 2000. Jackson was sitting on the porch, drinking beer, and was angry that appellant had not come to the house earlier. Appellant left the house and returned at about 9:00 p.m.

{¶16} According to appellant, Jackson began "talking crazy" to him so he ignored her and went to her bedroom. T. and N. then came in to play with him, as they often did. The children left the room after Jackson told them it was time for bed and then Jackson came back in the bedroom, wanting to talk to appellant. Appellant testified that he told her to leave him alone so she left the room. According to appellant, he fell asleep and the "next thing I know the police wake me up with a flashlight."

{¶17} The trial court denied appellant's Crim.R 29 motion for acquittal and subsequently found appellant guilty of gross sexual imposition and kidnapping and not guilty of rape. The trial court sentenced appellant to eight years incarceration on the

kidnapping conviction and three years incarceration for gross sexual imposition, the sentences to be served concurrently.

{¶18} Appellant timely appealed, raising three assignments of error for our review.

{¶19} In his first assignment of error, appellant asserts that the trial court erred in denying his Crim.R. 29 motion for acquittal.

{¶20} Crim.R. 29(A) provides, in pertinent part:

{¶21} "The court on motion of a defendant *** shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment *** if the evidence is insufficient to sustain a conviction of such offense or offenses."

{¶22} A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the State has met its burden of production at trial. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390. On review for sufficiency, courts are to assess not whether the State's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. Id. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. The weight and credibility of the evidence are left to the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶23} Construing the evidence produced at trial in a light most favorable to the prosecution, as we are required to do, we conclude that there was sufficient evidence to support appellant's convictions.

{¶24} Appellant was convicted of gross sexual imposition and kidnapping. R.C. 2907.05 defines gross sexual imposition as having sexual contact with another when the other person is less than thirteen years of age, whether or not the offender knows the age of that person. Sexual contact means any touching of an erogenous zone of another, including the thigh, genitals, buttock, pubic region, or breast, for the purpose of sexually arousing or gratifying either person. R.C. 2907.01(B).

{¶25} There was sufficient evidence to demonstrate that, at a minimum, appellant touched T.'s buttocks for the purpose of sexual arousal. T. testified that appellant pulled her onto the bed and forced her to get on her knees. She testified further that as he was behind her on the bed, he pulled down her pajama pants and underpants and then she felt him put his "private" in her anus. Kwan, Friel, Lessman, and DiVincenzo all testified that T. told them, on separate occasions, that appellant had pulled her on to the bed and then touched her "private parts" with his "private part." Although the act of touching, in and of itself, is not sufficient for a conviction, it may constitute strong evidence of intent considering the type, nature and circumstances of the contact. *In the matter of: April Anderson* (1996), 126 Ohio App.3d 441, 444. Thus, viewing this testimony in a light most favorable

to the prosecution, we conclude that a rational factfinder could have found the essential elements of gross sexual imposition proven beyond a reasonable doubt.

{¶26} Likewise, a reasonable factfinder could have found the essential elements to support a conviction for kidnapping. R.C. 2905.01 provides, in pertinent part, that kidnapping is restraining the liberty of another to engage in sexual activity. T. testified that as she tried to leave the bedroom, appellant grabbed her arm, put his foot on the door and closed it. She testified further that she tried to get away, but fell. Finally, she testified that appellant put his hand over her mouth so that she could not scream and told her that he would hurt her if she told anyone what happened. Jackson testified that she had to force the bedroom door open. She testified further that when she entered the bedroom, she saw appellant's leg and knee over T.'s face as they were on the bed and she heard T. screaming, "Get off of me." Viewing this evidence in a light most favorable to the prosecution, we conclude there was sufficient evidence from which a reasonable factfinder could conclude that appellant restrained T.'s liberty in order to engage in sexual activity.

{¶27} Appellant's first assignment of error is overruled.

{¶28} In his second assignment of error, appellant contends that his convictions were against the manifest weight of the evidence.

{¶29} 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. *Thompkins,* supra. When a defendant asserts that his conviction is against the manifest weight of the evidence, an appellate court must review 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* (1986), 33 Ohio App.3d 339, 340.

{¶30} Appellant contends that his convictions were against the manifest weight of the evidence because T.'s testimony was unreliable and Jackson did not witness the alleged incident. Appellant also contends that the objective medical findings weigh against conviction. Appellant's arguments are without merit.

First, it is within the purview of the factfinder to believe part or all of any testimony it hears. We, as a reviewing court, must only consider whether the evidence and any reasonable inference therefrom can support the verdict. In so doing, we consider the witnesses' credibility and whether the factfinder lost its way in resolving conflicts in the evidence. *State v. Jordan* (Feb. 14, 2002), Cuyahoga App. Nos. 79469 and 79470.

{¶31} Here, the trial court obviously believed T.'s testimony that appellant touched her buttocks but did not believe her testimony regarding the alleged rape. We find nothing in the

record to indicate that the trial court lost its way in reaching this verdict.

{¶32} Moreover, appellant's contention that Jackson's testimony is insufficient because she did not witness the alleged incident ignores Jackson's testimony that she had to force the bedroom door open, and when she did, she saw appellant on the bed with his leg and knee over T. Appellant also ignores Jackson's testimony that when she separated appellant from T., she saw T. run to the corner, crying.

{¶33} Finally, appellant's argument that the medical findings weigh against conviction ignores Tomcho's testimony that there was redness in the vaginal area and blood on a vaginal swab. Tomcho also testified that in light of the clinical examination, she could not rule out sexual abuse.

{¶34} After reviewing the entire record, weighing the evidence and considering the credibility of the witnesses, we are not persuaded that the trial court clearly lost its way and created such a miscarriage of justice that appellant's convictions must be reversed. Rather, as set forth in our discussion regarding appellant's first assignment of error, the record reveals substantial evidence from which the trial court could have concluded, beyond a reasonable doubt, that appellant was guilty of both gross sexual imposition and kidnapping.

{¶35} Appellant's second assignment of error is therefore overruled.

{¶36} In his third assignment of error, appellant contends that the trial court erred in finding T. competent to testify. Appellant waived this argument, however, by failing to object in the trial court to the court's determination that T. was competent to testify. *State v. Williams* (1977), 51 Ohio St.2d 112. Even considering appellant's argument under a plain error standard, however, we find no error.

{¶37} Evid.R. 601(A) provides that "every person is competent to be a witness 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."

{¶38} As the Ohio Supreme Court stated in *State v. Said* (1994), 71 Ohio St.3d 473,

{¶39} "Competency under Evid.R. 601(A) contemplates several characteristics. See *State v. Frazier* (1991), 61 Ohio St.3d 247, 251, certiorari denied (1992), 503 U.S. 941. Those characteristics can be broken down into three elements. First, the individual must have the ability to receive accurate impressions of fact. Second, the individual must be able to accurately recollect those impressions. Third, the individual must be able to relate those impressions truthfully. ***"

{¶40} A trial court's decision that a child witness is competent to testify must be approached by a reviewing court with great deference because the trial judge has the opportunity to observe the child's appearance, his or her manner of responding to

the questions, general demeanor and any indicia of ability to relate the facts accurately and truthfully. Id. at 487. Therefore, we will not disturb the trial court's ruling absent an abuse of discretion. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶41} Appellant admits that the trial court established that T. knew the difference between truth and falsity, but asserts that the trial court could not accurately assess her recollection of the incident because there was no independent corroboration that her recollection of the incident was either true or accurate. There is no requirement, however, that the court have corroborating evidence in order to be convinced of the accuracy of the child's recollection of past events. "While *Frazier* requires that the trial judge determine whether a child can perceive, recollect, and truthfully relate events, a general inquiry is sufficient for the court to make that determination." *State v. McNeill* (1998), 83 Ohio St.3d 438, 443.

{¶42} Appellant also contends that an inconsistency between T.'s trial testimony and her interview with DiVincenza shortly after the incident regarding her knowledge of appellant's name indicates that she was not competent to testify because she did not have an accurate recollection of events. We disagree. Any inconsistency during trial would affect the weight and credibility of her testimony, not its admissibility.

{¶43} Our review of the record indicates that the trial judge asked T. sufficient questions to allow the court to ascertain

her intellectual ability to accurately recount events and to determine whether she knew the difference between truth and falsehood and understood the need to be truthful. Accordingly, we are unable to conclude that the trial court abused its discretion in finding T. competent to testify.

{¶44} Appellant's third assignment of error is therefore overruled.

Judgment 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 Cuyahoga 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.

TIMOTHY E. McMONAGLE
JUDGE

JAMES J. SWEENEY, P.J. AND

DIANE KARPINSKI, J. CONCUR.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).