[Cite as *State v. Yerkey*, 2021-Ohio-3331.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

GERALD YERKEY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0087

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 19-CR-907

BEFORE:
David A. D'Apolito, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Gregg Rossi, and *Atty. James Melfi,* Rossi & Rossi Co., 26 Market Street, 8th Floor, Huntington Bank Building, P.O. Box 6045, Youngstown, Ohio 44501, for Defendant-Appellant.

Dated: September 15, 2021

D'Apolito, J.

{¶1} Appellant Gerald Yerkey appeals his conviction for two counts of gross sexual imposition in violation of R.C. 2907.05(C)(1), felonies of the fourth degree, following a bench trial in the Mahoning County Court of Common Pleas. He was sentenced to one year of community control and adjudged a Tier I sex offender.

{¶2} Appellant's victim is his niece, who was in her mid-twenties and living in his trailer when the crimes occurred. The victim suffers from Attention Deficit Hyperactivity Disorder ("ADHD") with moderate developmental delays.

{¶3} R.C. 2907.05(A)(5) provides, in pertinent part:

> No person shall have sexual contact with another, * * * [or] cause another, to have sexual contact with the offender * * * when * * * [t]he ability of the other person to resist or consent * * * is substantially impaired because of a mental * * * condition * * * and the offender knows or has reasonable cause to believe that the ability to resist or consent of the other person * * * is substantially impaired because of a mental * * * condition.

{¶4} Appellant advances three assignments of error. First, Appellant challenges the evidentiary standard to establish that the victim's ability to resist or consent is substantially impaired because of a mental condition, that is, "a present reduction, diminution, or decrease in the victim's ability, either to appraise the nature of her conduct or to control her conduct." The standard was first announced in dicta by the Ohio Supreme Court in *State v. Zeh,* 31 Ohio St.3d 99, 509 N.E.2d 414 (1987) and is uniformly applied in every appellate district in Ohio. Nevertheless, Appellant contends that the standard is at odds with the statutory language requiring substantial impairment. In his second and third assignments or error, Appellant asserts that, assuming arguendo *Zeh* correctly states the evidentiary standard, the state failed to offer sufficient evidence that the victim's ability to resist or consent was substantially impaired, and, further, that the manifest weight of the evidence as it relates to that element of the crime does not support the verdict. For the following reasons, Appellant's conviction is affirmed.

FACTS AND PROCEDURAL HISTORY

{¶5} At the time of trial, the victim testified that she was living in a group home and the Mahoning County Board of Developmental Disabilities ("MCBDD") assisted her with grocery shopping, preparing food, washing her clothes, taking her medications, and her personal hygiene. The victim had previously lived with her sister, who assisted her with her daily life activities, until her sister moved to Nevada to pursue a relationship with a man that she met through social media.

{¶6} As a consequence, the victim moved into Appellant's trailer in order to be close to and care for her father, Appellant's brother, who was suffering from dementia. The victim's father lived in the same trailer park as Appellant. The victim's father died two months prior to the bench trial.

{¶7} Tyisha Williams, the victim's case manager at MCBDD, testified that the victim contacted her daily, sometimes several times a day, during the roughly six months (February of 2019 through August of 2019) that she resided with Appellant and expressed concerns regarding the rental payments being made to Appellant by the victim's sister, who controlled the victim's money. The victim alleged that the rent was not being paid to the landlord. Williams suspected that there was another problem at the trailer, but the victim did not divulge any additional information about Appellant's conduct.

{¶8} According to the victim's testimony, she told her sister to discontinue the rent payments because their uncle was molesting her. However, her sister took no action on the victim's behalf, recommending instead that the victim tell someone else. The victim told Williams about the molestation after the victim moved from Appellant's trailer to the home of former neighbors, the Hamiltons, where she stayed for six months prior to her placement in the group home. It was the Hamiltons who removed the victim from Appellant's trailer and called the Goshen Township Police Department after she told them that Appellant was molesting her.

{¶9} The victim testified that Appellant touched her breasts and vagina, which she referred to as her "private area," "down below," or her "uterus," under her clothes. (*Id*. at 46-47.) She conceded that she told the police in both her written and videotaped statements that Appellant only touched her vagina over her clothes. During her videotaped interview, she stated that she "blocked" Appellant from touching her under her

pants. She further testified that the first time that Appellant molested her, she asked Appellant to stop "at the last minute," but he did not. (*Id*. at 47,49.)

{¶10} On two occasions, Appellant licked the victim's breasts. On another occasion, he fondled the victim after she asked him to wash her back while she was in the shower. She explained that her sister had previously helped her bathe and shower. The victim estimated that Appellant touched her inappropriately at least twenty times.

{¶11} When asked what she was thinking when her uncle was molesting her, she responded, "That I should be – I need to move out." (*Id*. at 50.) When asked on cross-examination whether she was conscious of Appellant's actions during the assaults, she responded that she was "[c]onfused." (*Id*. at 104.)

{¶12} The victim testified on cross-examination that she was able to verbalize her thoughts, and, specifically, that she had, in the past, told people to stop engaging in certain conduct. She further testified that there were times when she told Appellant to stop touching her. She conceded that, on occasion, when she told Appellant to stop touching her, he complied.

{¶13} The victim further testified on cross-examination that she told Appellant not to touch her below the waist because her "private area is between [her] and [her] doctor." (*Id*. at 88.) She conceded that she knew that area was "off limits." (*Id*.) When she was asked on cross-examination about inviting Appellant into the bathroom to wash her back during her shower, she stated that she asked him "[o]nly to wash [her] back, nothing else." (*Id*. at 80.)

{¶14} Alex Vrable, D.O., the victim's family doctor for the past ten to fifteen years, described the victim as "very slow." Although the victim was Dr. Vrable's patient, the victim's mother would describe the victim's medical issues to Dr. Vrable. Dr. Vrable observed that the victim's intellect was "depressed to some degree as it relates to comprehension, processing information, simple things like reading, writing, listening, hearing, understanding, [and] reasoning." (*Id*. at 18.) The victim's diagnoses were ADHD with moderate developmental delays.

{¶15} The victim testified that she graduated from Boardman High School, but attended special education courses. The victim has only had one paying job. She worked

at Burlington on the maintenance staff for two weeks but left her employment to care for her father.

{¶16} At the trial, the victim testified that she likes to watch "Tom and Jerry." She also likes "SpongeBob Squarepants." She reads books written for children between grades two and six. In an assessment prepared in 2020, the victim reported a fear of ghosts and "the dark."

{¶17} The victim requires verbal prompts to brush her teeth and bathe, and she has suffered skin disorders due to poor hygiene. Mr. Hamilton testified that the victim had to be re-taught to brush her teeth. Testimony offered by the state established that the victim could not drive, cook meals (she was afraid after having burned herself on a stove), manage money, or live independently. According to the 2020 assessment, the victim had never been sexually active.

{¶18} Sergeant Matthew Beck of the Goshen Township Police Department interviewed Appellant as a part of the criminal investigation. When Beck inquired as to the victim's cognitive ability, Appellant responded that "she's very smart for her condition; she knows how to do things like cleaning, cooking, et cetera; to take care of herself; but [Appellant] was aware that she is retarded [Appellant's term]." (*Id*. at 179.) Appellant denied any sexual contact with the victim, but claimed that she would like to have a boyfriend. Appellant characterized the victim as an honest person.

{¶19} Sergeant Beck also interviewed the victim. He testified that she "appeared to have more of the mind of a child," and that she was nervous because she was afraid "she was in trouble for something." (*Id*. at 178.)

{¶20} The sole witness for the defense was a forensic psychiatrist, Adrienne Saxton, M.D. Dr. Saxton reviewed the victim's videotaped police interviews, Dr. Vrable's medical notes, and the MCBDD records from 2017 to 2020.

{¶21} Dr. Saxton opined that the victim suffered from a mild impairment in her day-to-day functioning, but that it does not substantially impair her ability to consent or resist. Dr. Saxton predicated her opinion on the victim's statement to Appellant that she did not want to be touched "down below." According to Dr. Saxton, the foregoing testimony established that the victim was capable of "set[ting] limit[s]." (*Id*. at 248.) Dr. Saxton opined:

> That shows that [the victim] has an understanding that she is able to have a say in this, that she doesn't have to do something that she doesn't want to do, and that's an important point related to capacity to make these types of decisions. One needs to understand that you can say yes or no, that you have some rights in the matter.

(*Id*. at 249.)

{¶22} Dr. Saxton further relied on the victim's use of correct anatomical terms (i.e., breasts) to conclude that she had a basic understanding of sexual conduct, as well as her ability to recognize inappropriate conduct. However, on cross examination, she conceded that the phrase "down there" was a "rudimentary term." (*Id*. at 265.)

{¶23} During her direct testimony, Dr. Saxton opined that the victim suffers a mild impairment of her ability to consent or resist based on the medical definition of "substantially impaired." Dr. Saxton later conceded on cross examination that she did not know the legal definition of the phrase "substantially impaired." When she was given the legal definition from *Zeh*, she further conceded that she presumed that the legal standard was much higher. Finally, Dr. Saxton recognized that the finding in the 2020 assessment that the victim lacks the understanding and judgment to understand financial and emotional abuse is relevant to her ability to consent to sexual activity.

{¶24} However, on redirect, Dr. Saxton, applying the legal definition of "substantially impaired," concluded that the victim was aware that her breasts were being touched, and that "there's no indication that [her ability to control her conduct] was impaired, as she said in her video that certain conduct was not allowed, that he wasn't – she wasn't going to allow him to touch her in the vaginal area, she was blocking that, so there's no indication of significant impairment in that area." (*Id*. at 282.)

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN APPLYING THE WRONG DEFINITION OF "SUBSTANTIALLY IMPAIRED" AS IT RELATES TO R.C. 2907.05(A)(5).

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT'S DECISION IN CONVICTING [APPELANT] OF TWO COUNTS OF GROSS SEXUAL IMPOSITION IN VIOLATION OF R.C. 2907.05(A)(5) WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 3

THE STATE'S EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN A CONVCTION OF R.C. 2907.05(A)(5).

{¶25} Because Appellant's assignments of error are predicated upon the same element of the crime – that the victim's ability to resist or consent was substantially impaired because of a mental condition – they are addressed together. We address them out of order, for the purpose of clarity of analysis.

{¶26} "Sufficiency of the evidence is a legal question dealing with adequacy." *State v. Pepin-McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, 929 N.E.2d 476, ¶ 49 (7th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "Sufficiency is a term of art meaning that legal standard which is applied to determine whether a case may go to the jury or whether evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Draper*, 7th Dist. Jefferson No. 07 JE 45, 2009-Ohio-1023, ¶ 14, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955).

{¶27} To discharge the state's burden when prosecuting a criminal offense, "'probative evidence must be offered' on 'every material element which is necessary to constitute the crime.'" *State v. Billman*, 7th Dist. Monroe Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶ 8, citing *State v. Martin*, 164 Ohio St. 54, 57, 128 N.E.2d 7 (1955). In a sufficiency review, a reviewing court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Rucci*, 7th Dist. Mahoning No. 13 MA 34, 2015-Ohio-1882, ¶ 14, citing *State v. Merritt*, 7th Dist. Jefferson No. 09 JE 26, 2011-Ohio-1468, ¶ 34. If there is insufficient evidence to support a conviction, retrial is barred. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 16-20.

{¶28} This is distinct from a review of the manifest weight of the evidence, which focuses on the state's burden of persuasion. *Id.* A reviewing court "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 484 N.E.2d 717 (1st Dist.1983). A reversal should be granted only "in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Andric*, 7th. Dist. Columbiana No. 06 CO 28, 2007-Ohio-6701, ¶ 19, citing *Martin* at 175.

{¶29} The *Zeh* standard has been applied without exception throughout Ohio to establish substantial impairment in gross sexual imposition and rape cases where the victim was voluntary intoxicated (the majority of the case law), as well as where the victim is developmentally disabled. We most recently applied the *Zeh* standard in *State v. Pyles*, 7th Dist. Mahoning No. 13 MA 22, 2015-Ohio-5594. In that case, the 19-year-old victim's therapist testified that the victim had an I.Q. of 58, functioned at a second- or third-grade level, and was required to have a legal guardian. The victim's legal guardian testified that the victim was unable to take care of herself or protect herself. *Id.* at ¶ 71. We opined:

> Because the term "substantially impaired" is not defined in the Ohio Revised Code, the term "must be given the meaning generally understood in common usage." *State v. Zeh*, 31 Ohio St.3d 99, 103, 509 N.E.2d 414 (1987). In order to establish substantial impairment, the State must demonstrate "a present reduction, diminution or decrease in the victim's ability, either to appraise the nature of his conduct or to control his conduct. This is distinguishable from a general deficit in ability to cope, which condition might be inferred from or evidenced by a general intelligence or I.Q. report." *Id.* at 103-104. This court explained that " '[s]ubstantial impairment' need not be proven by expert medical testimony; it may be proven by the testimony of persons who have had some interaction with the victim and by permitting the trier of fact to obtain its own assessment of the victim's ability to either appraise or control her conduct." *State v. Hillock*, 7th Dist. No. 02-CA-538, 2002-Ohio-6897, at ¶ 21.

> For example, in *Hillock*, this court found that the State presented sufficient evidence that the victim was "substantially impaired" by her mental condition where the victim had an I.Q. of 64, which qualified as "mentally retarded," and the victim was 14 years old but functioned at a third-grade level. *Id.* at ¶ 22-25.

Id. at ¶ 68-69.

{¶30} Other Ohio appellate districts have concluded that similar evidence was sufficient to fulfill the element of substantial impairment. For instance, the 21-year-old male victim in *State v. Slaughter*, 2d Dist. Montgomery No. 25270, 2013-Ohio-1824, had an I.Q. of 62, which is classified as "mild mental retardation." The victim's academic skills ranged from the kindergarten to second-grade level, depending on the subject. The victim's mother testified that he had the mind of a child, and that he enjoyed roller skating and outings to Chuck E. Cheese. The victim's mother further testified that the victim could never live on his own. *Id.* at ¶ 8-9. According to the testimony of the victim, he was confused by Slaughter's advances, he objected to Slaughter's conduct, and attempted to escape the situation by telling Slaughter that he (the victim) "had to leave." *Id.* at ¶ 11.

{¶31} Likewise, in *State v. Horn*, 6th Dist. Wood No. 2016WD0053, 2020-Ohio-3546, ¶ 14, appeal not allowed, 160 Ohio St.3d 1420, 2020-Ohio-4811, 154 N.E.3d 105, ¶ 14, reconsideration denied, 160 Ohio St.3d 1499, 2020-Ohio-5634, 159 N.E.3d 291, ¶ 14, the 16-year-old victim suffered from ADHD and took medication for that condition. There was evidence that Horn was aware of that fact, as well as the fact that the victim did not understand the implications of the sexually explicit chats she was having online. The jury heard testimony that the victim was a little slow and low functioning, and she frequently had poor hygiene and had to be reminded to wash properly. During the victim's testimony she held a teddy bear, was unable to explain what an erection was, and confused physics class with physical education class. *Id.* at 14.

{¶32} In *State v. Rivera*, 9th Dist. Lorain No. 18CA011263, 2019-Ohio-62, testimony established that the victim had a learning disability, attended special education classes to receive her high school degree at the age of twenty, was subject to a guardianship, and received supplemental social security income. Although she had some

experience working at a restaurant, the victim's employment was temporary and linked to a special education class that allowed students to try different jobs in the community. She was unemployed at the time of trial and relied on the monthly sum she received from social security. The jury also heard several different individuals indicate the victim had difficulties with comprehension. *Id.* at ¶ 13-14.

{¶33} Finally, in *State v. Patterson*, 5th Dist. Stark No. 2017CA00022, 2017-Ohio-8970, the arresting officer testified that the victim appeared to have a developmental delay, and he had to review information repeatedly with her. The officer that interviewed her testified she was able to answer questions, but he had difficulty at times communicating information in a way that she could understand. The nurse who examined the victim testified that she obviously had mental health issues and possibly some delays. *Id.* at ¶ 46-47.

{¶34} The evidence adduced at trial in the case sub judice was the very same type of evidence accepted throughout Ohio to demonstrate a reduced ability either to appraise the nature of the victim's conduct or to control her conduct. However, Appellant contends that the only evidence offered at trial that directly addressed the victim's ability to resist or consent was Dr. Saxton's opinion that the victim suffered only a minor impairment.

{¶35} The determination of the victim's level of impairment, if any, in her ability to resist or consent was an element of the crime, and, therefore, a determination for the trier of fact. The trial court appears to have given little weight to Dr. Saxton's testimony, because she conceded that she did not know the legal definition of "substantially impaired" until she was testifying on cross-examination. Further, Dr. Saxton conceded the limitations of her opinion, insofar as she never examined the victim.

{¶36} Accordingly, we find that there is sufficient evidence in the record that the victim's ability to resist or consent was substantially impaired due to a mental condition, as that phrase is interpreted in *Zeh, supra*. We further find that the evidence, if believed, supports the verdicts in this case.

{¶37} Turning to Appellant's first assignment of error, Appellant contends that "[c]ourts, in *Zeh, supra,* and others adhering to it, have failed to give the phrase 'substantial impairment' its general meaning understood in common usage." (App. Brf.,

p. 12.) Appellant argues that "substantial" is generally defined as "considerable in quantity: significantly great," and that terms like "reduction," "diminution," and "decrease," are consistent with a mild or moderate impairment rather than a substantial one.

{¶38} The *Zeh* standard presumes that an individual with a diminished ability either to appraise the nature of her conduct or to control her conduct will have a substantial impairment in her ability to resist or consent to sexual advances. Appellant appears to argue that a victim must have a substantial inability to appraise the nature of her conduct or to control her conduct in order to have a substantial impairment in her ability to resist or consent to sexual advances.

{¶39} However, we find that Appellant's diminished ability to appraise the nature of her conduct or to control her conduct translates to a substantial impairment of her ability to resist or consent in this case. The victim was characterized as having moderate developmental delays. Nonetheless, she is largely incapable of the most fundamental tasks – grocery shopping, preparing food, washing her clothes, taking her medications, and her personal hygiene. Despite the characterization of her developmental delays as moderate, her inability to perform basic daily activities, coupled with her childlike demeanor and diminished cognitive abilities, are sufficient to establish a substantial impairment in her ability to resist or consent.

{¶40} For instance, the victim testified that she asked Appellant to wash her back because her sister had previously assisted her while bathing and showering. Appellant's inability to understand the impropriety of such a request, particularly in light of the ongoing abuse, demonstrates a substantial impairment to her ability to appraise her conduct. The victim's inability to appraise her conduct constitutes a substantial impairment of her ability to resist or consent, insofar as she invited her uncle, who was molesting her, into the bathroom while she was in a state of undress. Accordingly, we find that the *Zeh* standard does not diminish the statutory requirement of substantial impairment of the victim's ability to resist or consent.

CONCLUSION

{¶41} In summary, we find that the trial court did not err in applying the evidentiary standard announced in *Zeh, supra,* in this case. According to the doctrine of

stare decisis, "courts [should] follow controlling precedent, thus creating stability and predictability in our legal system." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256. Further, we do not agree that the evidentiary standard announced in *Zeh* falls short of establishing a substantial impairment to the victim's ability to resist or consent. Finally, we find that the evidence adduced at trial was sufficient to establish that the victim's ability to resist or consent was substantially impaired due to a mental condition, and, further, that the evidence, if believed, supports the verdicts in this case. Accordingly, Appellant's convictions are affirmed.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.