[Cite as *State v. Havugiyaremye*, 2010-Ohio-4204.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-08-1201

Appellee — Trial Court No. CR-2008-01950

v.

Valentin Havugiyaremye — **DECISION AND JUDGMENT**

Appellant — Decided: August 13, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael E. Narges, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Lucas County Court of Common Pleas which, following a jury trial, found appellant, Valentin Havugiyaremye, guilty of two counts of gross sexual imposition, in violation of R.C. 2907.05(A)(5) and (B), each a felony of the fourth degree, and rape, in violation of R.C.

2907.02(A)(1)(c) and (B), a felony of the first degree. On June 27, 2008,[1] appellant was ordered to serve 17 months in prison for each count of gross sexual imposition and six years as to the rape conviction, six years of which was mandatory pursuant to R.C. 2929.13(F). The sentences were ordered to be served consecutively, for a total prison term of eight years and ten months. Appellant was also found to be a Tier I and Tier III Sex Offender, pursuant to R.C. 2950.01. Appellant timely appealed and raises the following assignments of error:

{¶ 2} "1. The trial court committed plain [error] by granting the state's motion to join the two criminal indictments against appellant together for trial as appellant was prejudiced by the joinder.

{¶ 3} "2. Appellant received ineffective assistance of counsel as trial counsel failed to preserve the issue of prejudicial joinder for appeal.

{¶ 4} "3. The trial court erred by not granting appellant's motion for acquittal under Criminal Rule 29 as the state failed to provide legally sufficient evidence to prove the charges of gross sexual imposition and rape against [the female victim].

{¶ 5} "4. Appellant's conviction for gross sexual imposition and rape against [the female victim] fell against the manifest weight of the evidence presented at trial.

[1]The trial court later entered a nunc pro tunc judgment entry on January 5, 2010, in order to comply with Crim.R. 32(C), *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, and *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609.

{¶ 6} "5. Appellant's conviction for gross sexual imposition against [the male victim] fell against the manifest weight of the evidence presented at trial."

{¶ 7} We will consider appellant's first and second assignments of error together as they both relate to the joinder of two criminal cases for trial. Appellant argues that it was plain error for the trial court to try the cases together and that his counsel was ineffective for failing to preserve the issue for appeal by not renewing an objection at the close of the state's case-in-chief. The following facts are relevant to these assignments of error.

{¶ 8} On November 1, 2007, in case No. CR 07-3272, appellant was indicted with one count of rape and one count of gross sexual imposition arising out of an incident with a female victim, which occurred on or about October 11, 2007, at the University of Toledo Carlson Library ("the UT incident"). On February 20, 2008, in case No. CR 08-1413, appellant was indicted with one count of gross sexual imposition arising out of an incident with a male victim, which occurred on or about October 9, 2007, at a facility run by the Anne Grady Corporation ("Anne Grady"), which houses mentally and physically handicapped individuals ("the Anne Grady incident").

{¶ 9} On February 28, 2008, the state moved the trial court to join the offenses for trial pursuant to Crim.R. 8. Specifically, the state asserted that the crimes were of a similar character, either case would be capable of inclusion in the trial of the other by virtue of Evid.R. 404(B), the incidents occurred within two days of each other, both alleged victims were mentally challenged, and appellant's employment as a caregiver in a

facility for the mentally challenged conferred upon him a greater awareness of whether a potential victim may be mentally challenged, thereby potentially giving rise to a similar plan, scheme, or design. The state also asserted that the nature of the acts and evidence in both cases would be simple and direct, and a reasonable and impartial jury could easily sort out the evidence from each incident to arrive at independent verdicts.

{¶ 10} On April 7, 2008, appellant objected to the state's motion to join the offenses. Appellant argued that the differences between the cases and the potential for inflaming the jury substantially outweighed the state's argument in favor of judicial economy. Specifically, appellant asserted that case No. CR 07-3272 concerned allegations of rape and gross sexual imposition of a 20 year-old female who may or may not be mentally retarded; whereas, case No. CR 08-1413 concerned alleged touching of a 15-year-old profoundly mentally and physically handicapped male. Appellant asserted that the facts, witnesses, locations, dates, allegations, and potential defenses for each case were different and that even a reasonable juror would have great difficulty remaining impartial upon hearing the facts of each case during a single trial.

{¶ 11} A hearing was held on the issue on April 17, 2008. The trial court determined, based upon all the facts, allegations, and applicable law, that the jurors would "certainly" be able to separate and consider each charge individually when they deliberated and, therefore, joinder pursuant to Crim.R. 8(A) was appropriate. Thereafter,

the state reindicted appellant for one count of rape and two counts of gross sexual imposition in case No. CR 08-1950. The matter then proceeded to jury trial on June 10, 2008.

{¶ 12} Regarding joinder of offenses, Crim.R. 8(A) states that "[t]wo or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." The law favors joining multiple criminal offenses in a single trial pursuant to Crim.R. 8(A). *State v. Franklin* (1991), 62 Ohio St.3d 118, 122, citing *State v. Lott* (1990), 51 Ohio St.3d 160, 163.

{¶ 13} Two or more offenses can be joined if they are of the same or similar character. Id., citing *State v. Torres* (1981), 66 Ohio St.2d 340, 343. However, the accused may move to sever joined offenses pursuant to Crim.R. 14, as set forth in *Torres* at syllabus: "A defendant claiming error in the trial court's refusal to allow separate trials of multiple charges under Crim.R. 14 has the burden of affirmatively showing that his rights were prejudiced; he must furnish the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial, and he must demonstrate that the court abused its discretion in refusing to separate the charges for trial."

{¶ 14} As set forth in *Franklin*, 62 Ohio St.3d at 22, there are two manners by which the prosecutor may counter the accused's claim of prejudice:

{¶ 15} "* * * The first is the 'other acts' test, where the state can argue that it could have introduced evidence of one offense in the trial of the other, severed offense under the 'other acts' portion of Evid.R. 404(B). The second is the 'joinder' test, where the state is merely required to show that evidence of each of the crimes joined at trial is simple and direct. If the state can meet the joinder test, it need not meet the stricter 'other acts' test. Thus, an accused is not prejudiced by joinder when simple and direct evidence exists, regardless of the admissibility of evidence of other crimes under Evid.R. 404(B). [Citations omitted.]"

{¶ 16} A Crim.R. 14 motion for severance of counts due to prejudicial misjoinder is waived unless it is renewed at the close of the state's case or at the conclusion of all the evidence. *State v. Strobel* (1988), 51 Ohio App.3d 31, 33. In this case, counsel failed to renew appellant's pretrial motion to sever the counts of the indictment at the close of the state's case or at the close of all the evidence. Appellant's arguments regarding severance, therefore, would be waived on appeal absent plain error. However, the state asserts that appellant's arguments were before the court and sufficiently preserved for appeal and urges this court to consider the merits of appellant's arguments pursuant to an abuse of discretion standard.

{¶ 17} Appellant argues that this case is similar to *State v. Garber* (Dec. 24, 1986), 6th Dist. No. F-85-12, wherein this court held that joinder was inappropriate because "the

heinous nature of the charges against appellant," i.e., sexual offenses against seven complainants, each of whom were in Garber's care as foster children, "would naturally tend to enflame the minds of jurors" and cause them to lose their objectivity, thereby resulting in prejudice to Garber. In *Garber*, this court also found that the evidence presented for each offense was "not extremely simple" because it was based upon "a narrative of events long since past with little or no physical evidence." We, however, find that the facts in *Garber* distinguish it from the case at hand.

{¶ 18} In this case, the two crimes were of the same or similar character, insofar as appellant had alleged sexual contact and/or conduct with victims whose ability to resist or consent was substantially impaired because of a mental or physical condition. Unlike *Garber*, the evidence of the crimes joined at trial was simple and direct, therefore, making it unlikely that the jury would confuse the evidence proving the separate offenses. Further, appellant was not prevented from defending each offense. Finally, we note that the trial court instructed the jury that it must consider each count and the evidence applicable to each count separately, and that the verdict as to each count must not be influenced by the verdict in any other count.

{¶ 19} Accordingly, we find that the trial court did not abuse its discretion in joining appellant's cases pursuant to Crim.R. 8(A) and that appellant was not prejudiced by the joinder. We find that no manifest miscarriage of justice occurred and, therefore, the trial court did not commit plain error in joining the offenses. Having found that the joinder was appropriate, we further find that appellant was not prejudiced and, therefore,

appellant was not denied the effective assistance of counsel for failing to raise the issue of joinder again at the time of trial. Appellant's first and second assignments of error, therefore, are found not well-taken.

{¶ 20} Appellant argues in his third, fourth and fifth assignments of error that the evidence was insufficient to prove the charges of gross sexual imposition and rape and that the verdicts were against the manifest weight of the evidence. We disagree.

{¶ 21} Crim.R. 29(A) states that a court shall order an entry of judgment of acquittal if the evidence is insufficient to sustain a conviction of the offenses. As such, the issue to be determined with respect to a motion for acquittal is whether there was sufficient evidence to support the conviction. Sufficiency of the evidence and manifest weight of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

{¶ 22} "Sufficiency" applies to a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of a crime. Id. In making this determination, an appellate court must determine 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.

{¶ 23} When considering whether a judgment is against the manifest weight of the evidence, an appellate court will not reverse a conviction where the trier of fact could reasonably conclude from substantial evidence that the state has proved the offense

beyond a reasonable doubt. *State v. Eskridge* (1988), 38 Ohio St.3d 56, 59. The court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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." *Thompkins* at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. The discretionary power to grant a new trial should be exercised only in exceptional cases where the evidence weighs heavily against the conviction. Id.

{¶ 24} Appellant was convicted of two counts of gross sexual imposition, in violation of R.C. 2907.05(A)(5), which states in pertinent part that "[n]o person shall have sexual contact with another, not the spouse of the offender * * * when * * * [t]he ability of the other person to resist or consent * * * is substantially impaired because of a mental or physical 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 or physical condition * * *." Pursuant to R.C. 2907.01(B), "'Sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

{¶ 25} With respect to rape, appellant was found guilty of violating R.C. 2907.02(A)(1)(c), which states in pertinent part that "[n]o person shall engage in sexual conduct with another who is not the spouse of the offender * * *, when * * * [t]he other

person's ability to resist or consent is substantially impaired because of a mental or physical condition * * *, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition * * *." Pursuant to R.C. 2907.01(A), "'Sexual conduct' means * * * without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another."

{¶ 26} The phrase "substantially impaired" is not defined in the Ohio Criminal Code, and, therefore, must be given the meaning generally understood in common usage. *State v. Zeh* (1987), 31 Ohio St.3d 99, 103. As set forth by the Ohio Supreme Court in *Zeh*, "substantial impairment must be established by demonstrating a present reduction, diminution or decrease in the victim's ability, either to appraise the nature of his conduct or to control his conduct." Id. at 103-104. "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 104.

{¶ 27} Appellant argues that there was insufficient evidence presented with respect to the UT incident to convict appellant of rape and gross sexual imposition. Specifically, appellant argues that the evidence failed to show that he knew or had reasonable cause to believe that the victim was substantially impaired. Appellant asserts that, based upon the testimony, it typically takes people approximately 15 minutes to determine that something is amiss with the victim and, because he only spoke to the victim briefly prior to the alleged incident, he could not have determined in that short

time whether the victim's ability to resist or consent was substantially impaired because of a mental or physical condition. Appellant also points out that the victim approached him of her own free will, suggested that they should go someplace else because they could get into trouble, and willingly left the library with him to go to his car.

{¶ 28} The victim of the UT incident has a mental impairment, cognitive disability, and, according to her mother, is unable to live on her own. Based in part on I.Q. results, the victim receives disability benefits for her condition. According to the victim's mother, the victim does not speak appropriately, comprehend well, and is very slow. The mother gave an example of how, to the victim's extreme embarrassment, the victim was talked into standing up on a table in the middle of the cafeteria and singing a song, which she did, but not well. At 19 years of age, the victim was not able to complete a job program and was deemed not to be "TARTA trainable," through the Lucas County Board of Mental Retardation and Developmental Disabilities ("MRDD"), when the victim disclosed personal information and got into a car with a stranger when she missed her bus.[2] The victim has a driver's license, but her mother does not allow her to drive alone.

{¶ 29} The mother would allow the victim to go to the Active Christians Today ("ACT") house, adjacent to the University of Toledo ("UT"), where some of the girls took the victim "under their wings." The mother felt that the victim was safe to walk on campus and use the computer in the library because there were other people around.

[2]Apparently, this was a concocted situation to test the victim.

However, the mother would not allow the victim to go to the movies or the mall alone because the victim is "not responsible," has "made so many bad decisions," does not "have a thought process," and it "takes her quite a while to process information." In particular, the mother testified that the victim's poor decision-making includes walking up to strangers and talking to them.

{¶ 30} Sarah Rahn, an acquaintance of the victim from ACT, testified that she had known the victim for approximately two to three years through her activities with ACT. Rahn testified that on the night of the incident, the victim was supposed to meet with Rahn and other ACT leaders before Bible study began so that they could "talk to her about our Bible study, just make sure she understood like the rules and what we were expecting of her and just like the standard norms because we didn't want the other girls to be scared or whatever because a lot of girls aren't used to handling her * * *." When asked during cross-examination to describe the victim, Rahn stated: "In general she's a very outgoing person. She's always asking people how they're doing. She's very genuine. But she's just not all mentally there, like she doesn't have the mind frame as the normal college-age person. So everybody just draws away from that." Rahn knew the moment she met the victim that she was not "all mentally there." However, Rahn estimated that it takes most people in ACT, who range in age from 17 to 28 years-old, about 10 to 20 minutes before noticing the victim's mental disabilities.

{¶ 31} Regarding the UT incident itself, the victim testified that, on October 11, 2007, she left the ACT house and walked to the library to use a computer there in order to

look up ideas for a *Wizard of Oz* costume. She sat next to appellant on the second floor of the library. They were each using a library computer. There was no other person in the area. The victim testified that she saw that appellant had pornographic pictures on his computer screen. She then pulled up a website with pornographic pictures on her computer. Appellant asked her to join him at his computer. She refused twice, but then agreed. Once next to appellant, he grabbed her hand and placed it on his exposed penis. Appellant proceeded to put his hands down her pants, where he digitally penetrated her vagina. The victim later discovered that he had caused her to bleed.

{¶ 32} The victim testified that, when she told appellant she was uncomfortable and was concerned that they would get into trouble, he tried to kiss her and touched her breasts on the outside of her clothing. She testified that she was afraid of appellant and suggested that they go someplace else. The victim did not explain her rationale in this regard. Appellant asked the victim to walk to his car with him. She twice refused and then agreed. According to the victim, as they were leaving the second floor, and about to descend the stairs to the first floor, appellant said to her that she had better not tell anyone, otherwise he would come after her. Although she testified that she was afraid of appellant, she left the library with him and they walked a long distance across campus in close proximity to one another.[3] The victim testified that appellant was close enough to her that she feared he would grab her if she tried to run. While walking, the victim told

[3]During one police interview, the victim had said that they held hands while crossing campus, but during her trial testimony, she denied that this had occurred.

appellant her name, lied about having a job, and lied about her age.[4] The victim eventually became convinced that her life was in danger and devised a plan to have appellant leave her alone, go get his car, and come back and pick her up. When appellant was out of sight, the victim did not seek assistance from anyone, but instead ran back to the ACT house, where her mother had dropped her off and where her book bag was located. The victim hid behind objects along the way so she would not be seen by passing cars.

{¶ 33} According to Rahn, the victim was hysterical, afraid and could hardly be understood. To help her feel safer, a group of girls from the ACT house took the victim over to UT's police department, where the victim made a statement. Eventually, the police were able to identify the suspect, based upon the victim's description, his first name, which he gave to the victim, and a photo array in which the victim identified him.

{¶ 34} Lieutenant Rodney Theis, with UT's police department, was the first to interview the victim. He testified that the victim seemed mentally impaired in some way, but that he did not write it down in his report because he did not think it was relevant to the facts of the offense. Theis thought he had told Detective John Lautzenheiser, also with UT's police department, about her mental impairment, but Lautzenheiser did not recall being told this. Nevertheless, Lautzenheiser testified that, during his interview with the victim, "[i]t became apparent fairly quickly after speaking with her that there

[4]The victim said she told him that she was 18, rather than 19, because she believed that it would be a crime for him, who she believed was 36 years old, to do those things to her if she was 18.

may be some type of mental handicap * * *." Approximately 15 minutes into the interview with Lautzenheiser, the victim's mother pulled Lautzenheiser aside and told him that the victim suffered from learning and cognitive disabilities, but Lautzenheiser testified that he had already determined that the victim had some type of mental deficiency.

{¶ 35} Appellant was interviewed by the police regarding his encounter with the victim. He denied having done anything but touch her breast on the outside of her clothing after she had approached him, kissed him on the cheek, and put her hands on his chest. Appellant told police that it was the victim's idea to leave the library. Appellant denied that he knew the victim suffered from any mental impairment.

{¶ 36} Based on the foregoing testimony, we find that there was sufficient evidence upon which the jury could have relied in finding that the victim was substantially impaired due to a mental condition which interfered with her ability to resist or consent to appellant's conduct. As testified to by her mother, the victim had a history of putting herself in dangerous positions, such as getting into a car with a stranger during TARTA training. It is clear that the victim was aware of her surroundings and could recall facts in great detail, yet she was incapable of extricating herself from a situation in which she was uncomfortable and afraid until much later after the incident. In fact, the victim's inability to appraise the nature of her conduct or control it was evidenced by the fact that she agreed to leave the library with a stranger, who she was afraid of and who had just raped her, and did not attempt to raise anyone's attention either in the library or

during the long walk across campus towards appellant's vehicle. Even when she figured out how she could get away from him, she did not seek immediate help from campus police or bystanders, but instead ran back to the ACT house in an apparent fit of hysteria.

{¶ 37} We further find that there was sufficient evidence upon which the jury could have relied in finding that appellant knew or had reasonable cause to believe that the victim's ability to resist or consent was substantially impaired because of a mental condition. The police and Rahn each testified that it was immediately apparent to them that the victim suffered some mental impairment and that, at the most, it would take someone 10 to 20 minutes to make that determination. Appellant had experience working with mentally impaired individuals immediately prior to his encounter with the victim. The jury could have determined that appellant was more likely than the average person to recognize a mental incapacity. Appellant argues that he had little exchange with the victim prior to having physical contact with her and, therefore, could not have known of her disability. This reasoning, however, is incongruous with the fact that appellant threatened the victim that he would come after her if she told anyone. If appellant believed he was engaging in sexual conduct with a person who was capable of consenting, and had consented, then it defies logic that he would threaten her after-the-fact in order to keep her from telling. Moreover, the jury was able to view the victim herself and determine how apparent her mental limitations would appear to a stranger.

{¶ 38} Accordingly, after viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements

of the crimes of rape and gross sexual imposition with respect to the UT incident. Appellant, however, additionally argues that the convictions were against the manifest weight of the evidence. Upon review of the entire record, we find that the jury reasonably could have concluded from the evidence presented that the state proved the offenses of rape and gross sexual imposition beyond a reasonable doubt. We further find that the trier of fact did not clearly lose its way or create a manifest miscarriage of justice and that the convictions were not against the manifest weight of the evidence.

{¶ 39} Appellant additionally argues that his conviction of gross sexual imposition with respect to the victim of the Anne Grady incident was against the manifest weight of the evidence. Specifically, appellant argues that the only witness to the alleged incident testified that appellant groped the victim's testicles on the outside of his pull-up diaper and blue jean overalls, but, the victim never reacted or made any sound after having his genitals groped, even though the witness testified that the victim is sometimes aware of his surroundings.

{¶ 40} Kristine Dauer, an employee of Anne Grady Corporation, testified that she was working on October 9, 2007, in the D1 home, which is an all male home. As direct support personnel, during each shift Dauer would have a case load of about four individuals, for whom she provided complete care, supervision, and active treatment. Dauer testified that appellant was also direct support and, on the evening of the incident, was caring for the victim.

{¶ 41} Dauer testified that the victim was a 17-year-old male, who could not write or speak, would occasionally wear pull-up diapers instead of underwear, was sometimes aware of his surroundings, and could sometimes recognize faces. The victim had an affinity for radios and would play with them whenever possible. Sometimes the victim was able to find ways to have some type of relationship or interaction with certain people.

{¶ 42} Dauer testified that, on October 9, 2007, at approximately 6:00 p.m., appellant was standing next to the victim in front of a window with their backs to the room. The victim was wearing a pull-up and overalls that day, but there was no sign that he had been incontinent, e.g., "puddles" on the floor. Dauer had been helping another resident in the bathroom just prior to walking out into the main rooms. She testified that she had "a clear view of pretty much the entire dining room, living room layout." At that point, Dauer saw appellant put his arm around the victim, which was normal because direct support personnel have relationships with the residents. But then, she saw appellant "slowly reach his hand down [the victim's] back to his bottom and reach under to his groin area and grope his groin area for a good four to five seconds." Dauer also testified that she "saw his hand go in between both of [the victim's] legs into his groin area. And with a firm grab, grab his testicle area."

{¶ 43} According to Dauer, the job required them to touch residents for a variety of things, e.g., to feed, bathe, brush teeth, change them if they are incontinent, check on them, get them dressed and undressed, put them to bed. However, she noted that the

appropriate procedure for checking for incontinence was to take the person into the bathroom and shut the door, to respect their privacy, and put on gloves before checking.

{¶ 44} Dauer testified that she did not scream out when she observed appellant groping the victim because she wanted Erin Celek, the other employee in the area, to see appellant's conduct as well. After getting Celek's attention, Dauer left the house and informed a supervisor regarding what she had witnessed. Dauer testified that after returning from speaking with her supervisors, there was "a dramatic difference" in the victim. The victim was typically very loud and liked to stay in the living room and out of his bedroom, but when she returned to the house, the victim was sitting in his bed, his eyes were red, and he was not making a noise, which was very unusual for him.

{¶ 45} Celek was sitting at a table doing paperwork when she saw Dauer motioning her to come over. Dauer told Celek what she had seen appellant do to the victim. After talking to Dauer, Celek reentered the room and saw that appellant had his hand on the victim's lower back. Celek, however, had not seen appellant groping the victim. Celek also noted that after the incident, the victim was acting unusually because he typically was very active and liked to engage in certain activities, but on the evening of the incident, she noticed that he was "very quiet, drawn back * * * would barely walk around," and just did not seem like he was "too happy of a person at that time."

{¶ 46} Supervisor Marlene Moll questioned appellant regarding the alleged incident. Appellant denied having done anything wrong, said that he would feel residents from behind to check for incontinence, but acknowledged that he had never been trained

to do that. He denied that he would put his arm around people. Regarding Dauer's allegations, appellant told Moll that he had taken the victim to the bathroom that night, but the victim did not indicate that he needed to go. Appellant also denied having checked the victim from behind for incontinence. Moll additionally testified that around 4:00 p.m. on the day of the incident, she had informed appellant, who was still in the two-month probationary period after starting his job, that he was not going to pass his performance evaluation and that he would be terminated at the conclusion of his probationary period.

{¶ 47} Jeff Scheff investigated the incident on behalf of the MRDD. Scheff attempted to have charges brought against appellant, but the prosecution would not proceed against appellant at that time. Scheff brought the matter to the state's attention again after appellant had been indicted with the rape and gross sexual imposition charges arising out of the UT incident. Thereafter, charges were brought against appellant with respect to the Anne Grady incident.

{¶ 48} The evidence established that appellant touched an erogenous zone on the victim when he grabbed the victim's genitals and buttock. Appellant stated to Moll that he would check for incontinence from behind; however, he denied that he checked the victim in that manner on the evening of the incident. Additionally, given the slow, intentional descent down the victim's back and buttocks, culminating in a firm grasp of the victim's genitals for four to five seconds, we find that the jury could have found beyond a reasonable doubt that appellant's intent when touching the victim was to

sexually arouse or gratify either party. Accordingly, we find that the trier of fact did not clearly lose its way or create a manifest miscarriage of justice and the conviction of gross sexual imposition with respect to the Anne Grady incident was not against the manifest weight of the evidence.

{¶ 49} Based upon the foregoing, we find appellant's third, fourth and fifth assignments of error not well-taken. As such, on consideration whereof, this court finds that substantial justice has been done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE