[Cite as *State v. Jay*, 2009-Ohio-4364.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91827

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JEFFREY JAY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506937

BEFORE: Celebrezze, J., Blackmon, P.J., and Stewart, J.

RELEASED: August 27, 2009

JOURNALIZED:
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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Jeffrey Jay, appeals his convictions on one count of gross sexual imposition, a violation of R.C. 2907.05(A)(4), and one count of child endangerment, a violation of R.C. 2919.22(A), for which he was sentenced to one year in prison, five years of postrelease control, and classified as a level II sex offender subject to 25 years of registration. On appeal, appellant raises four assignments of error. For the reasons stated below, we affirm appellant's convictions.

{¶ 2} On the afternoon of February 6, 2008, Jeffrey Jay was at home with his two sons Z.W.,[1] age three, and J.W., age nine. Appellant had been drinking a disputed amount of beer. Officer Dan David of the Cleveland Police Department, first to the scene, testified that appellant stated he was changing his three-year old son's diaper on the floor of the bedroom shared by J.W. and Z.W. when he tickled Z.W.'s testicles, which resulted in Z.W. getting an erection. Appellant then stroked Z.W.'s penis a few times while J.W. was in the room. Appellant explained his actions as simply "joking around" and stated that "it was no big deal." Officer David testified that appellant stated he may have used saliva on the boy's penis.

{¶ 3} Later that day, Linda, appellant's companion of 23 years and mother of their three children, returned home. Linda testified that upon

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[1] The minor victims are referred to herein by their initials in accordance with this court's established policy.

arriving home from the grocery store, appellant approached her to talk about something that had happened with Z.W. Appellant and Linda began to argue, which resulted in her wanting appellant out of the house. Linda testified the argument was about appellant's drinking, not about what had happened earlier with Z.W. At some point during the argument, appellant called the police and reported that he had touched his son's penis and testicles. The police arrived shortly thereafter. Officer David testified that appellant was probably intoxicated but was cooperative. After appellant again admitted to tickling his son's testicles and stroking his son's penis, he was arrested and charged with rape of a child under the age of 13.

{¶ 4} According to J.W.'s statement, given February 7, 2008, he witnessed these acts and was disturbed by them. Patricia Altiere, the social worker assigned to the case, testified that J.W. was upset about what he saw.

{¶ 5} Appellant was arraigned on four charges including kidnapping, rape, gross sexual imposition, and child endangerment. He pleaded not guilty to all charges, and his case proceeded before a jury. After the close of the state's case, appellant brought a Crim.R. 29 motion for dismissal of all counts. The judge granted appellant's motion as to the charges of kidnapping and rape. At the conclusion of the three-day jury trial, appellant was found guilty of gross sexual imposition[2] and child endangerment.[3] He

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[2] R.C. 2907.05(A)(4) states:

was sentenced to a prison term of one year for gross sexual imposition and 180 days for child endangerment, to be served concurrently. Postrelease control for five years was imposed pursuant to R.C. 2967.28 as well as sex offender registration requirements for a period of 25 years, pursuant to R.C. 2950.01, et seq.

Review and Analysis

{¶ 6} Appellant appeals to this court to reverse his convictions, citing four assignments of error for review.

{¶ 7} "I. The trial court erred when it failed to grant appellant's motion for judgment of acquittal as to the offenses of gross sexual imposition and endangering children."

{¶ 8} "II. The trial court committed plain error when it failed to instruct the jury on the element of purpose relative to the offense of gross sexual imposition, and thus denied appellant due process and a fair trial."

"(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

"* * *

"(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person."

[3] R.C. 2919.22(A) states:

"No person, who is the parent * * * of a child under eighteen years of age * * *, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support."

{¶ 9} "III. Trial counsel was ineffective when he failed to object to the court's erroneous instruction regarding the offense of gross sexual imposition, and thus denied appellant due process and a fair trial."

{¶ 10} "IV. The jury's verdicts of guilty were against the manifest weight of the evidence."

Crim.R. 29 Sufficiency

{¶ 11} In appellant's first assignment of error, he argues that the court erred in not granting his Crim.R. 29 motion as to the counts of gross sexual imposition and child endangerment. Under Crim.R. 29, a trial court "shall not order an entry of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus. "A motion for judgment of acquittal under Crim.R. 29(A) should only be granted where reasonable minds could not fail to find reasonable doubt." *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394.

{¶ 12} Thus, the test an appellate court must apply in reviewing a challenge based on a denial of a motion for acquittal is the same as a challenge based on the sufficiency of the evidence to support a conviction. See *State v. Bell* (May 26, 1994), Cuyahoga App. No. 65356. In *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492, the Ohio Supreme Court set

forth the test an appellate court should apply when reviewing the sufficiency of the evidence supporting a conviction: "The relevant inquiry on appeal is whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. In other words, an appellate court's function when reviewing the sufficiency of the evidence is to examine the evidence admitted at trial and determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St.2d 169."

Culpable Mental State

{¶ 13} Appellant argues that there was no evidence of sexual contact, a necessary element of gross sexual imposition required by R.C. 2907.05. Sexual contact is defined in R.C. 2907.01(B) to mean "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." Appellant contends a purpose element or mens rea is clear from the statutory language. The touching must be undertaken for the purpose of sexually arousing or gratifying either the person initiating the contact or the person being subjected to the contact. Appellant argues that he lacked the necessary culpable mental state, or mens rea, to fulfill this purpose requirement.

{¶ 14} Not every criminal charge requires a certain mental state for a conviction to stand. The Ohio Supreme Court has held that a culpable mental state "of the offender is a part of every criminal offense in Ohio, except those that plainly impose strict liability." *State v. Colon*, 118 Ohio St.3d 26, 28, 2008-Ohio-1624, 885 N.E.2d 917, 920, ¶11. In this jurisdiction, a culpable mental state is not a required element for gross sexual imposition involving children under the age of 13 because it is a strict liability crime. See *State v. Dunlap*, Cuyahoga App. No. 91165, 2009-Ohio-134; *State v. Aiken* (June 10, 1993), Cuyahoga App. No. 64627, citing *State v. Astley* (1987), 36 Ohio App.3d 247, 250, 523 N.E.2d 322. In *State v. Dunlap*, supra, this court had an opportunity to review whether gross sexual imposition involving a child under the age of 13 requires a culpable mental state. The *Dunlap* court stated: "R.C. 2907.05 * * * is a strict liability offense and requires no precise culpable state of mind. All that is required is a showing of the proscribed sexual contact. *State v. Aiken* [supra]; *State v. Laws* (Dec. 22, 1998), 10th Dist. No. 98AP-306, * * *." *Dunlap*, at ¶5. Appellant's argument of insufficiency of evidence based on a lack of proof of intent is unfounded.

Emotional Harm

{¶ 15} Appellant also argues there is insufficient evidence to sustain a conviction of child endangerment. The state's case is predicated on the

substantial risk created by appellant when J.W. witnessed appellant sexually abuse Z.W., his younger brother.

{¶ 16} The child endangerment statute, R.C. 2919.22(A), "is aimed at preventing acts of omission or neglect when the breach results in a substantial risk to the health or safety of a child. See, e.g., *State v. Sammons* (1979), 58 Ohio St.2d 460, 391 N.E.2d 713, appeal dismissed (1980), 444 U.S. 1008, 100 S.Ct. 655, 62 L.Ed.2d 637; *State v. Kamel* (1984), 12 Ohio St.3d 306, 308, 12 Ohio B. 378, 466 N.E.2d 860; Committee comment to R.C. 2919.22." *State v. Wood*, Licking App. No. 2008-CA-7, 2008-Ohio-4992, ¶57.

{¶ 17} Because there was sufficient evidence to establish that: (1) J.W. witnessed an act of sexual abuse being performed on his three-year old brother perpetrated by appellant; (2) while J.W. was in the care and custody of appellant; (3) that appellant owed J.W. a duty of care and custody; and (4) that this created a substantial risk to the health or safety of J.W., there is sufficient evidence to support appellant's conviction for child endangerment. Sexual abuse creates a substantial risk to the health and safety of a child, whether victim or witness.

Manifest Weight

{¶ 18} In his fourth assignment of error, appellant also attacks his convictions arguing that the verdict is against the manifest weight of the evidence.

{¶ 19} Sufficiency of the evidence is subjected to a different standard than is manifest weight of the evidence. Article IV, Section 3(B)(3), of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the fact-finder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an appellate court "has the authority and duty to weigh the evidence and to determine whether the findings of * * * the trier of fact were so against the weight of the evidence as to require a reversal and a remanding of the case for retrial." *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 345, 82 N.E.2d 709.

{¶ 20} The United States Supreme Court recognized the distinctions in considering a claim based upon the manifest weight of the evidence as opposed to sufficiency of that evidence. The Court held in *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652, that, "unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal, i.e., invocation of the double jeopardy clause as a bar to relitigation." Id. at 43.

{¶ 21} Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated: "The court, reviewing the entire

record, weighs the evidence and all reasonable inferences, considers the credibility of the 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." *Martin,* at 720.

{¶ 22} Viewing the evidence as a whole, there is no indication that the trier of fact "lost its way" in finding appellant guilty of gross sexual imposition and child endangerment. The evidence, including J.W.'s statement, the statements of appellant, and the testimony of the police officers and the social worker involved in the case all provide a substantial base to support the guilty verdicts for gross sexual imposition and child endangerment.

{¶ 23} J.W.'s statement made to a social worker and a police officer shortly after the incident indicated that appellant did what the state purports he did. Appellant's own admissions to officer David and to other police officers provide a substantial basis for conviction. It is clear from this evidence that a reasonable jury could have found appellant guilty of the crimes of gross sexual imposition and child endangerment. Appellant's first and fourth assignments of error are overruled.

"Purpose" Instruction

{¶ 24} Appellant argues that the trial court erred in not instructing the jury as to a necessary element of the crime of gross sexual imposition, namely purpose. We note that defense counsel failed to object to any perceived error in the trial court's jury charge. Failure to object to a jury instruction waives any claim of error relative to that instruction, unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332; *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88. It is well established that, absent plain error, an appellate court will not consider errors to which the defendant failed to object at the trial level. *State v. Williams* (1977), 51 Ohio St.2d 112, 364 N.E.2d 1364.

{¶ 25} Generally, it is the duty of the trial judge in a jury trial to state all matters of law necessary for the information of the jury in giving its verdict. R.C. 2945.11. Correct and pertinent requests to charge the jury must be given by the trial judge, either as specifically proposed or within the substance of a general charge. *State v. Perryman* (1976), 49 Ohio St.2d 14, 358 N.E.2d 1040.

{¶ 26} Appellant argues that the trial judge failed to instruct the jury as to the exact meaning of "purpose," and this constitutes plain error. Appellant argues that by not instructing the jury as to the meaning of

purpose, the state was relieved from its burden of proving the mens rea or culpable mental state for gross sexual imposition.

{¶ 27} The judge in this case instructed the jury as follows:

{¶ 28} "You have [sic] must find beyond a reasonable doubt that on or about the 6th day of February 2008 in Cuyahoga County, Ohio, Jeffrey Jay had sexual contact with [Z.W.], not his spouse, whose age at the time of said sexual contact was under 13 years, whether or not the defendant knew the age of [Z.W.], to wit: date of birth, October 13, 2004.

{¶ 29} "Sexual contact means any touching of an erogenous zone of another, including, but without limitation to, the thigh, genitals, buttocks, pubic region or if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

{¶ 30} "* * *

{¶ 31} "If you find that the State proved beyond a reasonable doubt all of the essential elements of the offense of gross sexual imposition as charged in count three your verdict must be guilty according to your findings."

{¶ 32} The state's argument that gross sexual imposition of a child under 13 is a strict liability crime, which would negate any instruction as to purpose, is supported by the case law in this jurisdiction.

{¶ 33} As stated previously, R.C. 2907.05 is a strict liability crime. See *State v. Dunlap*, supra; *State v. Aiken*, supra; *State v. Laws*, supra. Since a

culpable mental state is not required, an instruction as to purpose is not required. The trial judge did not commit plain error by failing to include a definition of purpose for the culpable mental state for the crime of gross sexual imposition of a child under age 13 as appellant contends. Appellant's second assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 34} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed and deficient; and 2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 35} In reviewing a claim of ineffective assistance of counsel, it *must* be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶ 36} The Supreme Court of Ohio held in *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373, that: "'When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has

been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.' *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 2 O.O.3d 495, 498, 358 N.E.2d 623, 627, vacated in part on other grounds (1978), 438 U.S. 910. This standard is essentially the same as the one enunciated by the United States Supreme Court in *Strickland v. Washington* [supra]."

{¶ 37} Because the jury instruction was not lacking, appellant's counsel did not violate any of counsel's essential duties to appellant in regard to this proposed jury instruction. The court need go no further. *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 358 N.E.2d 623. Appellant did not meet the required showing set forth above, so his claim of ineffective assistance of counsel is overruled.

{¶ 38} All of appellant's assignments of error are without sufficient merit to overturn his conviction for gross sexual imposition and child endangerment.

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 common pleas court to carry this judgment into execution. The defendant's convictions 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.

FRANK D. CELEBREZZE, JR., JUDGE

PATRICIA ANN BLACKMON, P.J., CONCURS;
MELODY J. STEWART, J., CONCURS IN PART
AND DISSENTS IN PART (WITH SEPARATE OPINION)

MELODY J. STEWART, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶ 39} I concur with the majority's decision to affirm appellant's conviction for gross sexual imposition, but respectfully disagree with the decision to affirm the conviction for child endangerment.

{¶ 40} It is abundantly clear that appellant was irresponsible and showed poor judgment when caring for his two young sons on the night in question: poor judgment no doubt exacerbated by his alcohol consumption. And the type of sexual contact appellant engaged in is so abhorrent to most persons that it could be inferred that appellant acted for purposes of sexual

gratification. Although it appears that appellant's actions toward his toddler son were not undertaken to sexually gratify himself, a reasonable trier of fact could find that his aberrant conduct was, at some level, committed to sexually arouse his son – even if done in a playful manner. Certainly, his admission of masturbating the child's penis suggests a kind of depravity that could only be sexual in nature. The jury could rationally find that appellant's actions went beyond puerile fun.

{¶ 41} I do not find, however, that the state proved child endangerment of the older son, who was in the bedroom and witnessed appellant's actions toward the toddler.

{¶ 42} As charged in the indictment, R.C. 2919.22(A) states that no parent of a child under 18 years of age "shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support." There is no allegation that appellant's actions created a safety risk, so the question is whether he created a substantial risk to the boy's health – or more precisely, his mental health.

{¶ 43} The state offered no evidence to show that the older son suffered any ill-effects from witnessing the acts perpetrated on the toddler. In fact, the boy testified only that he saw appellant put his mouth on the toddler's belly and blow, and that the child was laughing from it. The boy said he did not see appellant's hand on the toddler's penis, and it took appellant no

longer than normal to change the toddler's diaper. Additionally, the state did not offer any kind of medical testimony to substantiate its theory that the boy suffered some harm. In the absence of direct evidence on this point, it seems too much to say that appellant's actions caused a "substantial risk" to the boy's emotional well-being. In a criminal case, the evidence should be more compelling than mere speculation that the boy could suffer some emotional trauma in the future. The conviction for child endangerment should be reversed and vacated.