[Cite as *State v. Hill*, 2010-Ohio-4295.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- JOHN H. HILL Defendant-Appellant	JUDGES: Hon. Julie A. Edwards, P. J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J. Case No. CT2009-0044 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the County Court, Case No. CRB 0900154
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 10, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
D. MICHAEL HADDOX PROSECUTING ATTORNEY RONALD WELCH ASSISTANT PROSECUTOR 27 North Fifth Street, P. O. Box 189 Zanesville, Ohio 43702-0189	CHARLES H. RITTGERS NICHOLAS D. GRAMAN RITTGERS & RITTGERS 12 East Warren Street Lebanon, Ohio 45036

Wise, J.

{¶1} Defendant-Appellant John H. Hill appeals his conviction and sentence entered by the Muskingum County Court on one count of endangering children and one count of sexual imposition following a trial by jury.

{¶2} Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶3} On March 2, 2009, Defendant-Appellant John H. Hill was charged with one count of Endangering Children, in violation of R.C. §2919.22(A), a first degree misdemeanor, and one count of Sexual Imposition, a third degree misdemeanor, in violation of R.C. §2907.06(A)(4).

{¶4} The above charges arose from allegations made by Appellant's fifteen year old daughter, K.H., that Appellant had touched her breasts.

{¶5} On September 21, 2009, a jury trial commenced in this matter.

{¶6} At trial, K.H. testified that she was fifteen years old, and that she lived with her father at 185 Shagbark Lane in Muskingum County. (T. at 159). She testified that her father, Appellant, was touching her and that it was wrong and made her uncomfortable. (T. at 160-161). She stated that she told her school counselor, at the urging of her friend, that her father had touched her breasts and demonstrated for the jury that he had "flipped them" in the air. (T. at 161). She testified that this had occurred "quite a few times" over "a couple of months". (T. at 162). She testified that her father touching her breasts made her uncomfortable, and that she was suffering from some emotional problems as a result, such as cutting herself on her arm. (T. at 186-187). K.H. also testified she told her father that the touching made her uncomfortable. (T. at

162). She further testified that she didn't feel safe and that she still cries at night sometimes because of what Appellant did to her. (T. at188). She also testified that she wrote in her journal about the things her dad did to her, but that the journal had been left at her dad's house and she no longer had it. (T. at 186-187).

{¶7} Shona Garver, a school counselor at West Muskingum High School, testified that she knew K.H. and had spoken to her on February 9, 2009. (T. at 212-213). Ms. Garver testified that when she spoke with K.H., she was unhappy and teary-eyed and that she was upset when they spoke. She testified that K.H. showed her fairly superficial wounds on her arms, that evidenced K.H. had been cutting on her arm. (T. at 213-214). Ms. Garver testified that K.H. told her Appellant had touched her breasts three or four times in the past couple months. (T. at 214-215). Ms. Garver stated that as a result of her conversation with K.H., she contacted Children Services and K.H.'s mother. (T. at 215).

{¶8} Both Rhonda Hinkle of Muskingum County Children Services and Detective Todd Kanavel of the Muskingum County Sheriff's Office testified that Appellant admitted he had touched his daughter's breasts. Ms. Hinkle testified Appellant initially stated that he really didn't touch his daughter, but later admitted that he did "poke" his daughter in the breast. (T. at 223-224).

{¶9} Detective Todd Kanavel testified that K.H. was upset during the interviews, and that she was consistent with her allegations that Appellant was touching her breasts. (T. at 234, 237). He further testified that Appellant admitted to touching his daughter's breasts on several occasions over the past year or so. (T. at 235).

{¶10} Appellant's wife, Lisa Hill, testified that she had seen a journal kept by K.H., and that the journal contained entries written by K.H. about things her father had done. (T. at 229). Ms. Hill further testified that she had seen this journal entry prior to the February 9, 2009, disclosure by K.H. (T. at 231). Ms. Hill testified that she was asked to provide the journal to Muskingum County Children Services, but instead of doing so she told them that her dogs had torn out the pages with the allegations, and that she had thrown them away so the dogs would not get in trouble. (T. at 231-232). Ms. Hill admitted that she threw the entries away containing the allegations of inappropriate behavior. (T. at 301-302). She later stated that she would have made a report if she knew that something inappropriate was being done to her stepdaughter. (T. at 300). Ms. Hill added that if she knew K.H.'s allegations were lies, she would not have made a report. (T. at 301).

{¶11} Appellant also testified. During his testimony, Appellant testified that he "poked" his daughter in the "chest". (T. at 334). He further stated that Rhonda Hinkle, Detective Kanavel, and Detective K.C. Jones all had inaccurate notes regarding whether he poked his daughter in the breasts. (T. at 337-338).

{¶12} On September 22, 2009, the jury returned guilty verdicts on both counts.

{¶13} On October 14, 2009, a sentencing hearing was held wherein the trial court sentenced Appellant to 120 days incarceration on the Endangering Children count and sixty (60) days incarceration on the Sexual Imposition count, to be served consecutively. A fine of $500 was also imposed on each count. Additionally, the trial court designated Appellant a Tier I sexual offender.

{¶14} Defendant-Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶15} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING APPELLANT'S CRIMINAL RULE 29 MOTION FOR ACQUITTAL.

{¶16} "II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT QUALIFIED JEAN RANKIN AS AN EXPERT AND PERMITTED HER TO TESTIFY DESPITE HER FAILURE TO SATISFY EVIDENCE RULE 702.

{¶17} "III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DEPRIVED APPELLANT OF HIS RIGHT TO A FULL AND COMPLETE CROSS-EXAMINATION OF ONE OF THE STATE'S WITNESSES.

{¶18} "IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SENTENCED THE APPELLANT TO A GREATER PERIOD OF INCARCERATION FOR EXERCISING HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL.

{¶19} "V. THE JURY ERRED WHEN IT ENTERED A JUDGMENT AGAINST THE APPELLANT WHICH WAS NOT SUPPORTED BY THE SUFFICIENT EVIDENCE TO FIND HIM GUILTY.

{¶20} "VI. THE JURY ERRED WHEN IT ENTERED A JUDGMENT AGAINST THE APPELLANT WHICH WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL.

{¶21} "VII. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO ORDER THE STATE TO PROVIDE A BILL OF PARTICULARS."

I.

{¶22} In his first assignment of error, Appellant asserts that the trial court erred in not granting his Crim.R. 29 motion for acquittal. We disagree.

{¶23} Specifically, Appellant argues that the State failed to prove venue.

{¶24} Crim.R. 29 governs a motion for acquittal. Subsection (A) states the following:

{¶25} "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."

{¶26} The standard to be employed by a trial court in determining a Crim.R. 29 motion is set out in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus:

{¶27} "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment 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."

{¶28} In the case sub judice, Appellant made a motion to acquit for failing to prove venue at the conclusion of the state's case. The trial court overruled the motion.

{¶29} R.C. 2901.12(A) governs venue in criminal cases and states that the trial should be "held in a court having jurisdiction of the subject matter, and in the territory of

which the offense or any element thereof was committed." Therefore, venue can exist in any jurisdiction where *any* element of the crime was committed. *State v. Chakirelis* (March 29, 1996), Lake App. No. 95-L-041, unreported.

{¶30} It is axiomatic that in order for the jurisdiction of the trial court to attach, the state has the burden of establishing that the crime occurred within the trial court's jurisdiction. *State v. Headley* (1983), 6 Ohio St.3d 475, 453 N.E.2d 716. The *Headley* court noted at 477, "Although it is not a material element of the offense charged, venue is a fact which must be proved in criminal prosecutions unless it is waived by the defendant. *State v. Draggo* (1981), 65 Ohio St.2d 88, 90, 418 N.E.2d 1343.

{¶31} The standard of proof is beyond a reasonable doubt, although venue need not be proved in express terms so long as it is established by all the facts and circumstances in the case. *State v. Dickerson* (1907), 77 Ohio St. 34, 82 N.E. 969, paragraph one of the syllabus.

{¶32} During her direct testimony, the victim stated that she was living with Appellant at 185 Shagbark Lane, in Muskingum County, and was attending West Muskingum High School when she went to see the school counselor about Appellant touching her. (T. at 159-161). Additionally, on cross-examination, K.H. testified that an incident occurred on February 8, 2009, at Appellant's house, with just her and Appellant present. (T. at 206). Further, the West Muskingum school counselor, Shona Garver, established that K.H. confided in her about what her father had done to her, and testified that K.H. told her that "there have been some things going on at home with her father within the last couple of months." (T. at 213-214). She then testified K.H. informed her that Appellant was touching her breasts. (T. at 214). Additionally, Rhonda

Hinkle, the supervisor for the intake unit of Muskingum County Children Services, testified that she investigated the sexual abuse allegations against Appellant, and more specifically, that she interviewed K.H. and Appellant. (T. at 220-224). In further support of venue, Detective Todd Kanavel, with the Muskingum County Sheriff's Office, testified that he investigated the sexual abuse allegations. (T. at 234-235).

{¶33} Based on the foregoing, we find there was sufficient direct evidence of the geographical location to establish venue under a Crim.R. 29 standard. Construing the evidence in a light most favorable to the State, there was testimony on the exact location of the incident to establish venue.

{¶34} Upon review, we find the trial court did not err in denying Appellant's Crim.R. 29 motion for acquittal for failing to establish venue.

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

II.

{¶36} In his second assignment of error, Appellant contends it was error for the trial court to allow Jean Rankin to testify as an expert. We disagree.

{¶37} In the present case, Ms. Rankin testified as an expert under Evid.R. 702. Evid.R. 702, provides that if a "witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony" then that expert may testify "to matters beyond the knowledge or experience possessed by lay persons or [to dispel] a misconception common among lay persons" so long as the "testimony is based on reliable scientific, technical, or other specialized information."

{¶38} Determinations regarding the admissibility of expert testimony are generally within the discretion of the trial court and, absent an abuse of that discretion, will not be overturned. *Miller v. Bike Athletic Co*., 80 Ohio St.3d 607, 616, 687 N.E.2d 735, 1998-Ohio-178; *Rigby v. Lake Cty*. (1991), 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 ("a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence").

{¶39} At trial, with respect to her experience in evaluating sexual abuse cases, Ms. Rankin testified that that she was currently employed at Nationwide Children's Hospital and had been there for twenty-two years. (T. at 268). Her current position is as a Mental Health Advocate at the Center for Child and Family Advocacy and her duties involve meeting with the parents or caretakers of children who have allegedly been sexually abused to help them understand the purpose of the forensic interview of the child and make general assessments to make recommendations for counseling. Id. Ms. Rankin testified she had both a bachelor's degree and master's degree in social work from the Ohio State University. (T. at 269). She further testified that she has also received specialized training regarding her field, including trauma-focused cognitive behavioral therapy, which she described as an evidence-based therapy that was researched and proven to be the most effective kind of therapy for kids who have experienced trauma such as sexual abuse or exposure to domestic violence. Id. She stated that she is licensed by the State of Ohio and as such is required to undergo 30 hours of continuing education. Id. She also testified that, as an LISW, she is independently licensed and does not require supervision. Id. Ms. Rankin testified that

she belongs to APSAC, or the American Professional Society on Abused Children, and that she has counseled approximately four to five hundred children who were victims of sexual abuse. (T. at 269-270). Ms. Rankin further advised that she had testified previously as an expert five or six times, although not in Muskingum County. (T. at 247).

{¶40} The Ohio Supreme Court discussed the issue of expert testimony in child sexual abuse cases in *State v. Boston* (1989), 46 Ohio St.3d 108, 545 N.E.2d 1220, overruled, in part, on other grounds by *State v. Muttart*, 116 Ohio St.3d 5, 875 N.E.2d 944, 2007-Ohio-5267. In *Boston*, the Supreme Court held that "the use of expert testimony is perfectly proper [in cases involving alleged child abuse] and such experts are not limited to just persons with scientific or technical knowledge but also include other persons with 'specialized knowledge' gained through experience, training or education." Id. at 126, 875 N.E.2d 944. "[A]n expert's opinion testimony on whether there was sexual abuse would aid jurors in making their decision and is, therefore, admissible pursuant to Evid.R. 702 and 704." Id. at 128, 875 N.E.2d 944. The Court did, however, caution that "[a]n expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." Id. at syllabus.

{¶41} In a more recent case, the Supreme Court re-affirmed its holding in *Boston*, stating that "[i]t is permissible * * * for an expert to convey this belief [, i.e., that the child was actually abused] to the jury." *State v. Stowers*, 81 Ohio St.3d 260, 261, 690 N.E.2d 881, 1998-Ohio-632 (emphasis sic). In *Stowers*, the Court recognized a distinction "between expert testimony that a child witness is telling the truth and evidence which bolsters a child's credibility insofar as it supports the prosecution's

efforts to prove that a child has been abused." Id. at 262, 690 N.E.2d 881. While the former is the type of testimony prohibited by *Boston*, the other type "which is additional support for the truth of the facts testified to by the child, or which assists the fact finder in assessing the child's veracity," does not violate this prohibition. Id. at 262-263, 690 N.E.2d 881.

{¶42} As an example of expert testimony supporting the truth of the facts testified to by the victim, the expert in *Stowers*, supra, testified that the behavior of the victims, specifically their delayed disclosure of the abuse and subsequent recantation of the allegations, was "consistent with behavior observed in sexually abused children." Id. at 261, 690 N.E.2d 881. The expert testified that even though the children changed their stories, her assessment that they had been abused did not change. Id. at 263, 690 N.E.2d 881. The Supreme Court concluded the expert's testimony provided information to the jury which would allow it to make an "educated determination" regarding the ultimate issues in the case. Id. (citation omitted).

{¶43} The decision of whether to allow an expert to offer an opinion on the issue of whether abuse has occurred often turns on the foundation of the expert's opinion. While there must not always be "physical evidence present before an expert can render a valid opinion on whether a child has been sexually abused * * *, there simply has to be something other than the child's unsupported allegations that assisted the expert in arriving at his or her opinion." *State v. Schewirey*, 7th Dist. No. 05 MA 155, 2006-Ohio-7054, at ¶ 48 (citation omitted); accord *State v. Johnson,* 8th Dist. No. 90961, 2008-Ohio-6657, at ¶ 13 (citation omitted); *State v. Winterich*, 8th Dist. No. 89581, 2008-Ohio-1813, at ¶ 24 (citation omitted). "This would obviously include physical evidence,

but could also involve the expert's observations of the child's demeanor or other indicators tending to show the presence of sexual abuse." *Schewirey*, 2006-Ohio-7054, at ¶ 48 (citation omitted).

{¶44} Thus, where the expert's opinion is based solely on the testimony of the alleged victim, courts of appeals have deemed such opinions as tantamount to permitting the expert to testify as to the child's veracity. *State v. Burrell* (1993), 89 Ohio App.3d 737, 746, 627 N.E.2d 605 (an expert's opinion that the victim had suffered sexual abuse is inadmissible "when he conceded that the sole foundation for that belief was his assessment of her veracity").

{¶45} However, where the expert's opinion is "based upon all of the data he had in front of him, [and] not just the victim's statements," it does not "constitute his personal opinion as to the veracity of the victim's complaints" and is, therefore, admissible. *State v. Muhleka*, 2nd Dist. No. 19827, 2004-Ohio-1822, at ¶ 40.

{¶46} We have reviewed Ms. Rankin's testimony in the present case and find that such testimony was based upon all the data before her and was not just a resuscitation of the victim's own statements. Instead, she testified as to whether the behaviors exhibited by the victim were consistent with being sexually abused.

{¶47} Based on the foregoing, we do not find that the trial court abused its discretion in allowing Jean Rankin to testify as an expert in this case.

{¶48} Further, even if we were to find that the trial court erred in admitting Ms. Rankin's testimony, we find that such error would be harmless in that the jury heard testimony about the abuse from the victim, which was corroborated by the testimony of

Shona Garver, Rhonda Hinkle, Det. Kanavel. Even the testimony of Appellant and Lisa Hill supported the victim's testimony.

{¶49} Appellant's second assignment is therefore overruled.

III.

{¶50} In his third assignment of error, Appellant argues that the trial court abused its discretion when it granted the State's motion in limine regarding cross-examination of Ms. Rankin. We disagree.

{¶51} The trial court in this case conducted a voir dire of Ms. Rankin in chambers wherein both the prosecutor and the defense counsel questioned her with regard to both her background and the crux of her testimony.

{¶52} Appellant takes issue with the following answer made by Ms. Rankin during voir dire following defense counsel's question of whether it would influence her opinion to know that the alleged victim suffered other instances of sexual abuse:

{¶53} "That would, you know, play into the overall assessment of the child in terms of, you know, what symptoms she was having and what her behavior was. It would be part of the picture in terms of like – because I'm a clinical social worker, I would need to look at, you know, what's happened, how she is behaving, what's her, you know, mood."

{¶54} Defense counsel then presented the more specific hypothetical situations, such as the child being raped approximately eight (8) years prior and/or having been made to perform oral sex when she was four years old. (T. at 257-259).

{¶55} Upon review, we find that after this exchange, the trial court went on to re-word and present these scenarios to the witness. Ms. Rankin answered in the negative

and stated that neither of these hypothetical situations would alter her opinion. (T. at 259-260).

{¶56} Based on these questions and Ms. Rankin's responses thereto, the State made the following request:

{¶57} "I would make a motion in limine to include any questioning regarding prior rape cases since the expert now indicated it would have no impact upon her evaluation of what these particular detriments were based upon this specific issue.

{¶58} "There is no need to ask that question because it is going to be done for the purpose of not obtaining any helpful information, but merely for the purposes of dragging the victim's name through the mud and it violates the rape shield law." (T. at 264).

{¶59} Appellant argues that by granting such motion in limine, he was denied his Sixth Amendment right to confrontation on this issue. Specifically, he argues that Ms. Rankin testified that she considered prior abuse and factored such abuse into her assessment of K.H., and he therefore should have been granted the opportunity to cross-examine her on this issue.

{¶60} Upon review, we find that the trial court did not err in granting the State's motion in limine as the witness stated that her opinion would not be altered by the additional facts and, therefore, Appellant did not suffer any prejudice by not being able to cross-examine the witness as to such.

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

IV.

{¶62} In his fourth assignment of error, Appellant argues that the trial court abused its discretion in sentencing Appellant. We disagree.

{¶63} Specifically, Appellant argues that the trial court punished him for exercising his right to a jury trial by sentencing him to a greater period of incarceration than was initially offered to him through a plea agreement.

{¶64} A criminal defendant should never be punished for exercising his constitutional right to trial or for refusing to enter into a plea agreement. *State v. O'Dell* (1989), 45 Ohio St.3d 140, paragraph two of the syllabus. "Therefore, although sentencing is generally left to the sound discretion of the trial judge, appellate courts have found that the trial court abuses its discretion when the record affirmatively demonstrates that defendant received an enhanced sentence in retaliation for rejecting a plea offer."

{¶65} This is so because "[a]ny increase in the sentence based upon the defendant's decision to stand on his right to put the government to its proof rather than plead guilty is improper. If courts could punish defendants for exercising their constitutional right to a jury trial, the right would be impaired by the chilling effect." *State v. Morris,* 159 Ohio App.3d 775, 2005-Ohio-962, 825 N.E.2d 637, at ¶ 12 (internal citations omitted) see, also, *State v. Fritz,* 178 Ohio App.3d 65, 2008-Ohio-4389, 896 N.E.2d 778, at ¶ 31.

{¶66} In support of this assignment of error, Appellant directs our attention to an Affidavit signed and filed by his trial counsel which states:

{¶67} "During one of the pre-trials in Judge Visnel's chambers, the stated offered Mr. Hill the opportunity to plead guilty to child endangering in return for dismissal of the sexual imposition charge. The state also indicated that as part of the plea offer, Mr. Hill would be sentenced to 75 days of incarceration with work release after 20 days or an option of 165 days under house arrest. In chambers, Judge Visnel indicated to me that if Mr. Hill did not take the plea offer than he would face a harsher penalty if convicted after exercising his constitutional right to trial."

{¶68} Even considering this Affidavit, which has not been subject to cross-examination, this Court finds that there is no evidence in the record to show the trial court intended to retaliate against Appellant. During the sentencing hearing, the following exchange occurred between the trial court and defense counsel:

{¶69} Mr. Graman: "... Judge, with regard to the sentencing, it's our understanding that previously, I know, when a plea offer was discussed, it was our understanding, at least, that there was a possible sentence kicked around. Well, the indication was the sentence would be if he pled, as to what the State was willing to offer, to 75 days of incarceration with work release after 20 days or an option of 165 days under house arrest.

{¶70} "We would respectfully submit, Judge, that the six month sentence that has been imposed by the Court essentially unfairly punished the defendant by opting to exercise his constitutional right to a trial. We submit it was essentially a trial tax and one that was unconstitutional."

{¶71} The Court: "Well, that would be an issue for the Fifth District Court of Appeals. But I would point out that the plea bargain that was offered by the State

included dismissal of a charge for which a jury convicted him later, and that's the sex offense. So the fact that the plea bargain included a lesser sentence for a lesser charge would be completely different than what you're saying. Am I wrong about that?

{¶72} Mr. Graman: "But I believe, Judge --

{¶73} The Court: "Wait a minute. Let me ask you. Am I wrong about that issue? In other words, the sentence he would have got would have included the dismissal –

{¶74} Mr. Graman: "Yes.

{¶75} The Court: "-- on the charges. Am I right about that, Mr. Graman?

{¶76} Mr. Graman: "That's correct, Your Honor.

{¶77} The Court: "And that was the sex charge which the jury convicted him?

{¶78} Mr. Graman: "Correct, Your Honor. That's correct.

{¶79} The Court: "All right.

{¶80} Mr. Graman**:** "You're correct in saying that, Judge. Despite that though, Judge, we'd still renew our objection on the grounds that we view it as an unconstitutional violation of his right to take this to trial.

{¶81} The Court: "Overruled." (Sent. T. at 13-15).

{¶82} We find that the trial court set forth its reasons for the sentence it imposed and that such reasons were not arbitrary or capricious. We further find that any statements made by the trial court that if Appellant chose to reject the plea agreement to plead to one count and risk going to trial and be convicted of two counts would result in a harsher sentence do not evidence a vindictiveness on the part of the trial court to punish Appellant for exercising his constitutional right to a jury trial.

{¶83} Appellant's fourth assignment of error is overruled.

V., VI.

{¶84} In his fifth and sixth assignments of error, Appellant argues that his conviction is against the manifest weight of the evidence and is not supported by sufficient evidence.

{¶85} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. "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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶86} On review for manifest weight, a reviewing court is to examine 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 jury 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. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. See also, *State v. Thompkins,* 78 Ohio St.3d 380, 678 N.E.2d 541, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175, 485 N.E.2d 717.

{¶87} We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182,

552 N.E.2d 180, certiorari denied (1990), 498 U.S. 881, 111 S.Ct. 228, 112 L.Ed.2d 183. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 674 N.E.2d 1159, 1997-Ohio-260.

{¶88} In the case sub judice, Appellant was convicted of Sexual Imposition, in violation of R.C. 2907.06(A)(4), and Endangering Children, in violation of R.C. 2919.22(A), which state the following:

{¶89} Sexual Imposition

{¶90} "(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:

{¶91} "***

{¶92} "(4) The other person, or one of the other persons, is thirteen years of age or older but less than sixteen years of age, whether or not the offender knows the age of such person, and the offender is at least eighteen years of age and four or more years older than such other person."

{¶93} Sexual contact is defined in R.C. 2907.01(B), which states:

{¶94} "(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."

{¶95} Endangering Children

{¶96} "(A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one 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. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body."

{¶97} Appellant argues that the State failed to prove that Appellant's touching of the victim's breast was done for the "purpose of sexually arousing or gratifying either person".

{¶98} This Court has previously noted that while "sexual arousal" and "sexual gratification" are not defined in the Ohio Revised Code, "R.C. 2907.01(B) contemplate[s] any touching of the described areas which a reasonable person would perceive as sexually stimulating or gratifying." *State v. Gesell,* 12th Dist. No. CA2005-08-367, 2006-Ohio-3621, at ¶ 23, quoting *State v. Astley* (1987), 36 Ohio App.3d 247, 250, 523 N.E.2d 322; also See *In re Anderson* (1996), 116 Ohio App.3d 441, 443, 688 N.E.2d 545.

{¶99} With regard to the sexual imposition charge, we find that the victim testified that she was 15 years old, that Appellant was her father and not her spouse, and that Appellant touched her breasts. (T. at 159-162). In describing how Appellant touched her breasts, the victim stated "[l]ike he flipped them" and then indicated by

placing her hands under her breasts and pushing them in the air. (T. at 161-162). She then went on to testify that this touching had been going on for a couple of months. (T. at 162).

{¶100} "While the purpose of sexual arousal or gratification is an essential element of the offense of gross sexual imposition, there is no requirement that there be direct testimony regarding sexual arousal or gratification. See *In re D.S.,* Warren App. Nos. CA2004-04-036 and CA2004-04-046, 2006-Ohio-18003, ¶ 19, citing *In re Anderson* (1996), 116 Ohio App.3d 441, 443-444, 688 N.E.2d 545; *State v. Mundy* (1994), 99 Ohio App.3d 275, 289, 650 N.E.2d 502. In determining the defendant's purpose, the trier of fact may infer what the defendant's motivation was in making the physical contact with the victim. *Id.; State v. Cobb* (1991), 81 Ohio App.3d 179, 610 N.E.2d 1009." *Gesell,* at ¶ 25.

{¶101} Appellant, in response, testified that he only "poked" his daughter in the chest while chastising or disciplining her for the way she was dressed. (T. at 334). Appellant's wife also testified that she was present when this incident occurred and that Appellant, while telling the victim to go and change her top for church, punctuated each word with a poke and that it was not done in a sexual manner. (T. at 298).

{¶102} Additionally, the trial court heard testimony from Jean Rankin with regard to the harm such abuse can cause to the victim's health and safety in addition to the victim's testimony about her own emotional problems and resulting behaviors, such as cutting herself and crying at night. (T. at 185-188).

{¶103} The jury in this matter chose to believe the victim. A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence

was presented at trial. *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21. Neither is a conviction against the manifest weight of the evidence because the trier of fact believed the state's version of events over the appellant's version. *State v. Gale,* 10th Dist. No. 05AP-708, 2006-Ohio-1523, ¶ 19; *State v. Williams,* 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶ 17. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson* (Mar. 19, 2002), 10th Dist. No. 01AP-973; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams,* 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶ 58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. Consequently, an appellate court must ordinarily give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington,* 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶ 28; *State v. Hairston,* 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶ 74.

{¶104} Therefore, based on the evidence presented, we find sufficient credible evidence to support the jury's guilty verdicts and cannot say that the jury clearly lost its way and created a manifest miscarriage of justice when it convicted Appellant of sexual imposition and child endangering.

{¶105} Appellant’s fifth and sixth assignments of error are overruled.

VII.

{¶106} In his seventh and final assignment of error, Appellant argues that the trial court erred when it failed to order the State to provide a Bill of Particulars. We disagree.

{¶107} Revised Code 2941.07 provides that upon request of the accused, "the prosecuting attorney shall furnish a bill of particulars setting up specifically the nature of the offense charged and the conduct of the defendant which is alleged to constitute the offense."

{¶108} The limited purpose of a bill of particulars is "to elucidate or particularize the conduct of the accused alleged to constitute the charged offense," but not "to provide the defendant with specifications of evidence or to serve as a substitute for discovery." *State v. Sellards* (1985), 17 Ohio St.3d 169, 171, 478 N.E.2d 781.

{¶109} In previous sexual abuse cases involving children, this Court has held:

{¶110} "Ordinarily, precise times and dates are not essential elements of offenses. Thus, the failure to provide dates and times in an indictment will not alone provide a basis for dismissal of the charges. A certain degree of inexactitude of averments, where they relate to matters other than elements of the offense, is not per se impermissible or necessarily fatal to a prosecution." *State v. Barnecut* (1988), 44 Ohio App.3d 149, 151, 542 N.E.2d 353 quoting *State v. Sellards* (1985), 17 Ohio St.3d 169, 171, 478 N.E.2d 781, 784.

{¶111} "The *Sellards* court stated that the absence of specifics must truly prejudice the defendant's ability to fairly defend himself. *Sellards,* supra, at 172, 478 N.E.2d at 784. "Absent material detriment to the preparation of a defense, the omission of specific dates and times is without prejudice, and without constitutional consequence." *Barnecut,* supra, citing *Sellards,* supra, at 172, 478 N.E.2d at 785. If such is not fatal to an indictment, it follows that impreciseness and inexactitude of the evidence at trial is not "per se impermissible or necessarily fatal to a prosecution." *State*

v. Robinette (Feb. 27, 1987), 5th Dist. No. CA-652, unreported, at 6, 1987 WL 7153. The question in such cases is whether the inexactitude of temporal information truly prejudices the accused's ability to fairly defend himself. *Sellards,* supra; *State v. Gingell* (1982), 7 Ohio App.3d 364, 368, 455 N.E.2d 1066, 1071; *State v. Kinney* (1987), 35 Ohio App.3d 84, 519 N.E.2d 1386.

{¶112} While no bill of particulars was filed in the case in response to Appellant's request, it is apparent from the transcript that Appellant was aware of the nature of the charges against him and further knew that one of the incidents was alleged to have occurred on February 8th and the remainder to have occurred from September, 2008, to February 8, 2009. (T. at 130). Nothing in the record suggests that Appellant was prejudiced in any way in preparing his defense by the failure of the complaint to list all the relevant dates.

{¶113} Based on the above, we find Appellant's seventh assignment of error not well-taken and hereby overrule same.

{¶114} For the foregoing reasons, the judgment of the County Court of Muskingum County, Ohio, is affirmed

By: Wise, J.
Edwards, P. J., and
Delaney, J., concur.

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JUDGES

JWW/d 0803

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JOHN H. HILL	:	
Defendant-Appellant	:	Case No. CT2009-0044

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the County Court, Muskingum County, Ohio, is affirmed.

Costs assessed to Appellant.

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JUDGES