[Cite as *State v. Ward*, 2010-Ohio-6462.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2010-CA-0026
JASON WARD	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Court of Common Pleas, Case No. 2009-CR-766
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 28, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KIRSTEN L. PSCHOLKA-GARTNER ASSIST. PROSECUTOR 38 South Park Street Mansfield, OH 44902	BYRON D. CORLEY 3 North Main Street Mansfield, OH 44902

Gwin, J.

{¶1} Defendant-appellant, Jason Ward, appeals from his conviction and sentence in the Richland County Court of Common Pleas Jury for one count of rape in violation of R.C. 2907.02(A)(1)(c)[impaired victim], one count of rape in violation of R.C. 2907.02(A)(2)[force], and one count of sexual battery in violation of R.C. 2907.03(A)(2). The plaintiff appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} In May of 2007, C.W., a mildly mentally retarded fifteen-year-old girl, lived in Shelby, Ohio with her adoptive mother, Jewell Ward, her sister, Heather Ward, her foster-sister, Brady Ward, and her adoptive brother appellant.

{¶3} On May 6, 2007 at around 11:00 p.m., C.W. was playing the Dukes of Hazzard video game on the Play Station in the living room. She was having trouble getting past a particular level of the game, so she asked appellant to help her. Appellant sat down next to her on the floor and began playing the game. After a short time, he began inserting his fingers into C.W.'s vagina and used his tongue to lick her breast. Appellant then laid C.W. back on the floor, removed her pajama pants and underwear, and engaged in vaginal and anal intercourse with her.

{¶4} C.W. told appellant to stop and moaned in pain; however, appellant continued. She did not physically resist because she was afraid appellant would hurt her worse. C.W. also did not yell out to her adoptive mother, Jewell, who was sleeping in the bedroom next to the living room. At trial, she explained that she did not think Jewell would believe her or do anything about it. This claim was backed up by her

sister Heather, who testified that over the years, appellant had physically assaulted the girls in the household, and Jewell had not done anything about it.

{¶5} After the incident, C.W. went to the bathroom and then went to sleep in the bedroom with Jewell. The next morning, she begged Jewell to let her ride her bike to school by herself instead of having Jewell drop her off as she usually did. Along the way, her favorite teacher, Mr. Solis, saw her, stopped, and picked her up. During the ride to school, C.W. told Mr. Solis that appellant had raped her; however, it is unknown if he reported that disclosure to school officials.

{¶6} Later that morning, teacher's aide Barbara Gonzales saw C.W. using the computer in the resource room of the high school. When she went over to make sure that C.W. was accessing educational materials, Ms. Gonzales saw that C.W. had typed a note, which stated:

{¶7} "Mr. Solis, my stepbrother raped me. I'm very scared. He made me do it. He called you a deckhand [meaning dickhead]. He said I had a nice pussy and wanted to fuck me. He made me do it. I want to live with you. I'm very scared. What if I were your daughter?" [State's Exhibit 11].

{¶8} After seeing this note, Ms. Gonzales became concerned. She printed the note off the computer and took C.W. down to guidance counselor Cynthia Roby's office. From there, the Shelby police were contacted. Officer Paul Zehner responded to the school and took a statement from C.W. about the sexual assault.

{¶9} After the interview with Officer Zehner, C.W. went to Med Central Hospital for a sexual assault examination. That examination revealed an abrasion extending from the area between her vagina and anus to the inside of her labia majora and

minora. This injury was consistent with penetration. Forensic testing of swabs taken during the exam and of the clothing C.W. was wearing at the time of the assault revealed the presence of amylase, a component in saliva, on C.W.'s left breast and in a cutting from her underwear. The DNA profile developed from that biological fluid was consistent with the standard submitted by appellant.

{¶10} As a result of the investigation into C.W.'s sexual assault allegations, appellant was indicted by the Richland County Grand Jury for one count of rape in violation of R.C. 2907.02(A)(1)(c), one count of rape in violation of R.C. 2907.02(A)(2), and one count of sexual battery in violation of R.C. 2907.03(A)(2).

{¶11} Prior to trial appellant filed a motion pursuant Evid.R. 601 requesting that the trial court conduct a voir dire examination of C.W. to determine her competency to testify. The court conducted the examination before C.W. took the stand at appellant's jury trial. At the conclusion of that evaluation, the trial court found that she was competent to testify and she did testify before the jury during appellant's trial. C.W. at the time of trial was eighteen years old with an IQ of 58 and functioning in the age range between five years eleven months to eleven years of age.

{¶12} The state called twelve other witnesses during appellant's two-day trial. Appellant chose not to take the stand in his own defense; however, the defense did call his mother, Jewell Ward, to testify on his behalf.

{¶13} When the trial concluded on January 29, 2010, the jury found appellant guilty of all three counts in the indictment. At his sentencing hearing on February 1, 2010, the trial court sentenced appellant to nine years on Count I, nine years on Count II, and four years on Count III. Those sentences were mandatory sentences, which the

court ordered to run concurrent. The trial court also imposed five years of mandatory post-release control, and classified appellant as a Tier III sex offender.

{¶14} Appellant has timely appealed, raising the following two assignments of error:

{¶15} "I. THE TRIAL COURT COMMITTED PLAIN ERROR BY DETERMINING THAT AN EIGHTEEN YEAR OLD WITNESS VICTIM WHO HAD AN IQ OF 58 AND FUNCTIONING RANGE BETWEEN FIVE YEARS ELEVEN MONTHS TO ELEVEN YEARS WAS COMPETENT TO TESTIFY.

{¶16} "II. WARD'S RIGHT TO DUE PROCESS OF LAW AS MANDATED BY BOTH THE UNITED STATES AND OHIO CONSTITUTIONS WAS DENIED WHEN HE WAS CONVICTED OF TWO COUNTS OF RAPE AND ONE COUNT OF SEXUAL BATTERY ON EVIDENCE WHICH WAS INSUFFICIENT AS A MATTER OF LAW."

I.

{¶17} In his first assignment of error, appellant contends that the trial court committed plain error in finding C.W. competent to testify at trial because the court failed to address C.W.'s ability to observe, recall, and communicate accurate impressions or observations of pertinent facts. Specifically, appellant claims that the trial court failed to inquire about C.W.'s ability to recall events from the relevant time period of the offense. We disagree.

{¶18} Appellant concedes we must review this assignment of error under the plain error standard. As the United States Supreme Court recently observed in *Puckett v. United States* (2009), 129 S.Ct. 1423, 1428, 173 L.Ed.2d 266, "If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the

judgment, for example, or ordering a new trial) is strictly circumscribed. There is good reason for this; 'anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal.'" (Citation omitted).

{¶19} "[A]n appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Marcus* (May 24, 2010), 560 U.S. __, 130 S.Ct. 2159, 2010 WL 2025203 at 4. (Internal quotation marks and citations omitted).

{¶20} "We have previously held that if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional[l] errors that may have occurred are subject to harmless-error analysis. *State v. Hill* (2001), 92 Ohio St.3d 191, 197, 749 N.E.2d 274, quoting *Rose v. Clark* (1986), 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460. Moreover, as we stated in *State v. Perry,* 101 Ohio St.3d 118, 2004- Ohio-297, 802 N.E.2d 643, [c]onsistent with the presumption that errors are not structural, the United States Supreme Court ha[s] found an error to be structural, and thus subject to automatic reversal, only in a very limited class of cases. *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)

(complete denial of counsel)); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31(1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction). *Wamsley*, supra 117 Ohio St.3d at 391-392, 884 N.E.2d at 48-49, 2008-Ohio-1195 at ¶ 16. [Citations and internal quotation marks omitted].

{¶21} "We emphasize that both this court and the United States Supreme Court have cautioned against applying a structural-error analysis where, as here, the case would be otherwise governed by Crim.R. 52(B) because the defendant did not raise the error in the trial court. See *Hill*, 92 Ohio St.3d at 199, 749 N.E.2d 274; *Johnson*, 520 U.S. at 466, 117 S.Ct. 1544, 137 L.Ed.2d 718. This caution is born of sound policy. For to hold that an error is structural even when the defendant does not bring the error to the attention of the trial court would be to encourage defendants to remain silent at trial only later to raise the error on appeal where the conviction would be automatically reversed. We believe that our holdings should foster rather than thwart judicial economy by providing incentives (and not disincentives) for the defendant to raise all errors in the trial court-where, in many cases, such errors can be easily corrected." 101 Ohio St.3d at 124, 802 N.E.2d at 649, 2004-Ohio-297 at ¶23.

{¶22} Thus, the defendant bears the burden of demonstrating that a plain error affected his substantial rights and, in addition that the error seriously affect[s] the

fairness, integrity or public reputation of judicial proceedings. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120 802 N.E.2d 643, 646. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240; *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus; *Perry*, supra, at 118, 802 N.E.2d at 646.

{¶23} Evidence Rule 601 states:

{¶24} "Every person is competent to be a witness except:

{¶25} "(A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."

{¶26} See, also R.C. 2317.01.

{¶27} The trial court is in the best position to determine the competency of witnesses and is afforded considerable discretion in such matters. *State v. Uhler* (1992), 80 Ohio App.3d 113, 118, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph one of the syllabus. See, also, *State v. Wilson* (1952), 156 Ohio St. 525; *Banez v. Banez*, Stark App. No. 2006CA00216, 2007-Ohio-4584 at ¶20. Absent an abuse of discretion, the competency determinations of the trial court will not be disturbed on appeal. *State v. Frazier* (1991), 61 Ohio St.3d 247, 251.

{¶28} The term "unsound mind" includes all forms of mental retardation. R.C. 1.02(C). Being of unsound mind, however, does not automatically render a witness incompetent to testify. *State v. Grahek*, Cuyahoga App. No. 81443, 2003-Ohio-2650, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. The Supreme Court

of Ohio reiterated in *Bradley* that " 'a person, who is able to correctly state matters which have come within his perception with respect to the issues involved and appreciates and understands the nature and obligation of an oath, is a competent witness notwithstanding some unsoundness of mind.' " 42 Ohio St.3d at 141, 538 N.E.2d 373, quoting *State v. Wildman* (1945), 145 Ohio St. 379, 61 N.E.2d 790, paragraph three of the syllabus. See, *State v. Sanders*, Cuyahoga App. No. 86405, 2006-Ohio-809 at ¶12; *In re J.M.,* Montgomery App No. 22836, 2009-Ohio-3950, ¶ 24; *Boyd v. Edwards* (June 3, 1982), Cuyahoga App. No. 43954, citing Annotation, 148 A.L.R. 1140.

{¶29} The test for competency of a witness presumed incompetent is set forth in the syllabus of *State v. Frazier* (1991), 61 Ohio St.3d 247, 574 N.E.2d 483, certiorari denied (1992), 503 U.S. 941, 112 S.Ct. 1488, 117 L.Ed.2d 629. In determining competency to testify, "the trial court must take into consideration (1) the [presumed incompetent person's] ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the [presumed in-competent person's] ability to recollect those impressions or observations, (3) the [presumed incompetent person's] ability to communicate what was observed, (4) the [presumed incompetent person's] understanding of truth and falsity and (5) the [presumed incompetent person's] appreciation of his or her responsibility to be truthful." Id. *In re Clark*, Licking App. Nos. 2004CA00043, 2004CA00044, 2004-Ohio-7260 at ¶24.

{¶30} A court conducting a voir dire to determine competency is not chained to a ritualistic formula to ask specific questions. However, it must satisfy itself of the elements enumerated in *Frazier. State v. Swartsell*, Butler App. No. CA2002-06-151,

2003-Ohio-4450 at ¶ 13. As long as a witness understands the oath, or has the mental capacity sufficient to receive just impressions of the facts and transactions relating to what he or she is being questioned upon, then he or she is competent to testify at trial. *State v. Bradley* (1989), 42 Ohio St.3d 136, 140-141, 538 N.E.2d 373. See, also, *State v. Wildman* (1945), 145 Ohio St. 379, 61 N.E.2d 790, paragraph three of the syllabus.

{¶31} A trial court's decision that a presumed incompetent witness is competent to testify must be approached by a reviewing court with great deference because the trial judge has the opportunity to observe the person's appearance, his or her manner of responding to the questions, general demeanor and any indicia of ability to relate the facts accurately and truthfully. See *Frazier,* 61 Ohio St.3d 247, 251, 574 N.E.2d 483; *State v. Lewis* (1982), 4 Ohio App.3d 275, 277, 448 N.E.2d 489, 490.

{¶32} In the competency hearing conducted in the case at bar, C.W. stated the following: her name, age, street address, what she did before court, and her doctor's name. (T. at 168-169). The court inquired of C.W. on "what it means to tell the truth," C.W. replied, "it means don't lie and stuff." (T. at 170). Thereafter C.W. stated her school, favorite teacher, pet names, and some of the gifts she has gotten for Christmas. (T. at 172-175). Subsequent to this dialogue, C.W. was deemed competent to testify. (T. at 175).

{¶33} Appellant argues that the trial court's failure to inquire about C.W.'s ability to recall events from the same timeframe as the offense in question is fatal to the court's determination of C.W.'s competency to testify. Appellant further asserts that C.W. lacked the intellectual capacity either to accurately recount the events at issue, or to be able to receive just impressions.

{¶34} Prior to the competency hearing Sherry Mitchell testified for the State. Ms. Mitchell has a Bachelor's in special education and a Master's in administration and special education. Ms. Mitchell oversees C.W. and has known her nine years. Ms. Mitchell answered in the affirmative that C.W's auditory skills are pretty much diminished. Appellant further contends that this skill is of primary importance in order for a witness to be found competent to testify.

{¶35} The State concedes that the voir dire of C.W. was limited to facts and events that had occurred in close proximity to the date of appellant's jury trial, and did not address C.W.'s ability to recall events from May of 2007 when the offense at issue occurred. [State's Brief at 7].However, the state contends that the deficiency was cured by C.W.'s subsequent trial testimony.

{¶36} At least six appellate districts have recognized that a deficiency in questioning during a competence hearing may be cured if a child's subsequent trial testimony establishes competence. *State v. Molen*, Montgomery App. No. 21941, 2008-Ohio-6237 at ¶13. (Citing *State v. Middlesworth,* Wayne App. No. 05CA0016, 2006-Ohio-12, ¶ 8, citing *State v. Wells,* Summit App. No. 21149, 2003-Ohio-3162, and *State v. Lewis* (1982), 4 Ohio App.3d 275, 448 N.E.2d 487; see also *In re Clark,* Licking App. Nos.2004CA00043, 2004CA00044, 2004-Ohio-7260, ¶ 32; *State v. Wilson* (Feb. 18, 2000), Adams App. No. 99CA672; *State v. McShan* (Aug. 28, 1997), Cuyahoga App. No. 71139; *State v. Allard* (April 12, 1995), Knox App. No. 93-7, aff'd, 75 Ohio St.3d 482, 663 N.E.2d 1277, 1996-Ohio-208; *Wooten v. Paxson* (March 28, 1995), Paulding App. No. 11-94-8, n. 2; *State v. White* (Nov. 10, 1987), Hardin App. No. 6-86-8; *State v. Morgan* (1986), 31 Ohio App.3d 152, 156-157, 509 N.E.2d 428). Indeed, as we have

previously held, "This court can examine the child's testimony at trial, as well as his *voir dire* examination, to determine whether the court abused its discretion in finding the child competent to testify." *State v. Allard,* supra. (Citing *State v. Lewis* (1982), 4 Ohio App. 3d 275, 277).

{¶37} During the trial court's inquiry, C.W. was able to state her name and age, who she currently lives with, and the address where she lives. (T. at 168). When the court asked C.W. what she had done earlier that day, she stated that she had been to Mansfield Pediatrics to have blood taken. (T. at 168-169). She explained that they put a needle in her arm. (T. at 169). C.W. was also able to communicate that she attends counseling with Dr. Fox and Dr. Panke at the Center. (T. at 169-170). When the court asked her about what she does at counseling, she stated, "I talk about my feelings and stuff with both of them." (T. at 170). Finally, when the trial court asked C.W. if she knew what the Bible was, C.W. replied, "Jesus made it." (T. at 171).

{¶38} At trial, C.W. testified that she had lived with her adoptive mother, Jewell Ward, from the time she was "seven or nine" years old. (T. at 176-177). She indicated that her real sisters, Heather and Kristina, her foster sister, Brandy, and her stepbrother, appellant, all lived with her at Jewell's house. (T. at 178). C.W. testified that they lived on Broadway in Shelby, and that she attended Shelby schools. (T. at 179). However, she indicated that she does not live there anymore because "something bad" happened with appellant when she was fifteen years old. (T. at 179-180). When the prosecutor asked C.W. what she meant by "something bad," C.W. explained that she meant rape, sexual abuse. (T. at 180, 183).

{¶39} C.W. initially did not recall what she had done earlier in the day before the rape occurred; however, she later testified that she had gone with appellant to his friend Jeremy's house where she played with a girl named Felicia. (T. at 180-181; 216-217). Despite her uncertainty about earlier events, C.W. was certain about what she was doing when the rape occurred. She stated several times that she and appellant were sitting on the living room floor playing the Dukes of Hazzard game on the Playstation. (T. at 181-184; 217). C.W. indicated that it was 11:00 p.m., and her adoptive mother, Jewell, was lying down in her bedroom next to the living room with the door open. (T. at 182-183; 217).

{¶40} When the prosecutor asked C.W. what happened, she stated that appellant raped her. She clarified that by rape, she meant, "Have sex with me." (T. at 183). The prosecutor then asked C.W. what she meant by sex, and what body part appellant used. C.W. explained that appellant used his penis, and put it in her vagina. (T. at 183-184; 205).

{¶41} C.W. testified that at the time of the rape, she was wearing a black t-shirt and red pajama pants and appellant was wearing a black t-shirt and red shorts. (T. at 184; 204). C.W. initially had difficulty explaining what happened to their clothes when the rape occurred. (T. at 185-186). However, when the prosecutor asked her if appellant left his shorts on, pulled them down, or took them off when he put his penis into her vagina, C.W. responded, "Pulled them down." (T. at 186). She also indicated that she did not have her pajama pants or underwear on when appellant had sex with her because appellant pulled them down. (T. at 186, 204-205, 207).

{¶42} Using male and female anatomical drawings (State's Exhibits 33a and 34), the prosecutor asked C.W. more detailed questions about the rape. C.W. was able to circle the appropriate body parts on each drawing when the prosecutor asked her what she meant by a penis and a vagina. (T. at 192). When the prosecutor asked C.W. to draw an "X" on any other areas of her body where the Appellant touched her inappropriately, she marked the left breast of the female drawing. (T. at 192-193). She referred to that area as "my boob." (T. at 193). C.W. indicated that appellant did not use his hands to touch her there; he licked her with his mouth. (T. at 193). Thereafter, C.W. also drew an "X" on the buttocks of the female drawing. She indicated that appellant stuck his penis up her butt. (T. at 193-194, 205). When the prosecutor asked her what that felt like, C.W. replied "weird." (T. at 192). She indicated that it felt "tight" when appellant put his penis in her vagina. (T. at 194). C.W. testified that appellant told her she had a nice vagina, only "he used the P word." (T. at 194). C.W. also testified that appellant put his finger inside her vagina. (T. at 205).

{¶43} When the prosecutor asked C.W. if appellant's penis looked like the one she circled on the male anatomical drawing, C.W. responded that it was longer and had hair. (T. at 206). She did not know if anything came out of his penis when he was raping her because he wore a condom. (T. at 206). When the prosecutor asked what a condom is, C.W. stated "[s]omething that goes over your penis." (T. at 206). She indicated that it was made out of latex, which is "like rubber." (T. at 207). She indicated that the brand name of the condom that appellant used was "Trojan." (T. at 206).

{¶44} After appellant finished raping her, he threw the condom in the garbage and went upstairs. (T. at 207; 209). C.W. went to the bathroom and then went to bed in

Jewell's room. (T. at 197; 207-208). She testified that Jewell was asleep when she went to bed. She did not know whether Jewell was sleeping during the rape, but she did remember Jewell yelling at her from the bedroom to go to bed after the rape was over. (T. at 208-209; 219). C.W. indicated that she did not tell Jewell what happened after the rape because she did not think Jewell would believe her. (T. at 197). When the prosecutor asked her if appellant said anything to her about telling anyone what happened, C.W. stated "he told me not to tell anybody because he don't want to be in jail." (T. at 197).

{¶45} When the prosecutor asked C.W. if she was worried about anything after the rape, she indicated that she was afraid that appellant would kill her. (T. at 197-198). C.W. again stated that she did not tell Jewell, what happened, but she did tell her teachers at school the next day. She first told one of her teachers, Mr. Solis, when he stopped and picked her up as she was riding her bike to school. (T. at 219-220; 228-230). Later that morning, she also told Ms. Gonzales and Ms. Roby what the Appellant had done to her. (T. at 195; 198; 219-220). After she told Ms. Gonzales and Ms. Roby, a policeman named Zehner came to the school and she told him what happened. (T. at 198; 209). When the prosecutor asked if she told Officer Zehner the truth, C.W. indicated that she did. (T. at 198).

{¶46} When the prosecutor showed C.W. State's Exhibit 11, the note Ms. Gonzales saw C.W. typing in the computer lab on May 7, 2007, she identified it as something she had written. (T. at 195). Although she did not want to read the contents of the note, she indicated that what she wrote was the truth. (T. at 195-196). C.W. also identified State's Exhibit 12, a handwritten note, as something she had written. (T. at

196). She also did not want to read that note aloud because "it's embarrassing." (T. at 196). However, she indicated that what she wrote in that note was the truth. (T. at 196).

{¶47} Although C.W. refused to read State's Exhibit 12 aloud, the prosecutor did elicit responses from her when he asked her about specific statements in the note. For example, the prosecutor asked, "It says I told him to stop, did you do that?" (T. at 196). C.W. responded that she did tell appellant to stop, but he would not do what she asked. (T. at 196; 219). C.W. testified that she did not do anything when appellant refused to stop because she "thought he would hurt [her] more." (T. at 197). She did not yell out to alert Jewell to what was happening because "[Jewell] don't want her son in jail." (T. at 197). C.W. stated that she did groan during the rape because she was in pain. (T. at 221; 224).

{¶48} In addition to the notes she had written, C.W. identified State's Exhibits 17 and 18, which were drawings she had made depicting what appellant had done to her. (T. at 200-202). In State's Exhibit 17, she pointed out appellant getting ready to hurt her by sticking his penis in her. (T. at 201). She indicated that she had written "Let me lick the hurt away" because that is what appellant did to her when he put his tongue on her boob. (T. at 201). In State's Exhibit 18, she drew herself with appellant's penis going into her. (T. at 202).

{¶49} C.W.'s testimony regarding the events is consistent with her prior statements to school officials, the police, and the sexual assault nurse.

{¶50} From her testimony, it is clear that C.W. had sufficient mental capabilities to receive accurate impressions of the facts surrounding the offense, to recall those impressions, and to communicate them to the trier of fact.

{¶51} Therefore, C.W.'s trial testimony cured any deficiency in the trial court's questioning during the competence hearing. We find no plain error because C.W.'s subsequent trial testimony demonstrated her competence as a witness. From her testimony, it is clear that C.W. had sufficient mental capabilities to receive accurate impressions of the facts surrounding the offense, to recall those impressions, and to communicate them to the trier of fact. Because appellant was not prejudiced by the trial court's failure to ask questions about the relevant time frame during the competence hearing, we find no plain error. Appellant's first assignment of error is overruled.

II.

{¶52} In his second assignment of error appellant argues that his convictions for rape and sexually battery are based upon insufficient evidence. Specifically, appellant maintains that the state failed to produce adequate proof of sexual conduct to support a conviction for a violation of R.C. 2907.02(A) [rape] and R.C. 2907.03(A) (2) [sexual battery]. We disagree.

{¶53} Our standard of reviewing a claim a verdict was not supported by sufficient evidence is to examine the evidence presented at trial to determine whether the evidence, if believed, would convince the average mind of the accused's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in the 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, 574 N.E.2d 492, superseded by State constitutional amendment on other grounds as stated in *State v. Smith* (1997), 80 Ohio St.3d 89, 684 N.E.2d 668..

{¶54} The Supreme Court has explained the distinction between claims of sufficiency of the evidence and manifest weight. Sufficiency of the evidence is a question for the trial court to determine whether the State has met its burden to produce evidence on each element of the crime charged, sufficient for the matter to be submitted to the jury.

{¶55} Manifest weight of the evidence claims concern the amount of evidence offered in support of one side of the case, and is a jury question. We must determine whether the jury, in interpreting the facts, so lost its way that its verdict results in a manifest miscarriage of justice, *State v. Thompkins* (1997), 78 Ohio St. 3d 387, 678 N.E.2d 541, 1997-Ohio-52, superseded by constitutional amendment on other grounds as stated by *State v. Smith,* 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668. 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 the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the

credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶56} In *Thompkins*, the Ohio Supreme Court held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." Id. at paragraph three of the syllabus. However, to "reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required." Id. at paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶38, 775 N.E.2d 498

{¶57} Employing the above standard, we believe that the state presented sufficient evidence from which a jury could conclude, beyond a reasonable doubt, that appellant committed the offenses of rape and sexually battery.

{¶58} In the case at bar, appellant argues that the evidence in this case was deficient in proving that he had sexual conduct with C.W.

{¶59} "Sexual conduct" is defined as "vaginal intercourse between a male and a female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, 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 cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." R.C. 2907.01(A).

{¶60} When the prosecutor asked C.W. what happened, she stated that appellant raped her. She clarified that by rape, she meant, "Have sex with me." (T. at

183). The prosecutor then asked C.W. what she meant by sex, and what body part appellant used. C.W. explained that appellant used his penis, and put it in her vagina. (T. at 183-184; 205).

{¶61} C.W. was able to circle the appropriate body parts on each drawing when the prosecutor asked her what she meant by a penis and a vagina. (T. at 192). When the prosecutor asked C.W. to draw an "X" on any other areas of her body where appellant touched her inappropriately, she marked the left breast of the female drawing. (T. at 192-193). She referred to that area as "my boob." (T. at 193). C.W. indicated that appellant did not use his hands to touch her there; he licked her with his mouth. (T. at 193). Thereafter, C.W. also drew an "X" on the buttocks of the female drawing. She indicated that appellant stuck his penis up her butt. (T. at 193-194; 205).

{¶62} Corroboration of victim testimony in rape cases is not required. See *State v. Sklenar* (1991), 71 Ohio App.3d 444, 447, 594 N.E.2d 88; *State v. Banks* (1991), 71 Ohio App.3d 214, 220, 593 N.E.2d 346; *State v. Lewis* (1990), 70 Ohio App.3d 624, 638, 591 N.E.2d 854; *State v. Gingell* (1982), 7 Ohio App.3d 364, 365, 7 OBR 464, 455 N.E.2d 1066." *State v. Johnson*, 112 Ohio St.3d 210, 217, 2006-Ohio-6404 at ¶53, 858 N.E.2d 1144, 1158. See also, *State v. Basham*, Muskingum App. No. CT2007-0010, 2007-Ohio-6995.

{¶63} Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant had sexual conduct with C.W. and further that he committed the crime of rape and the crime of sexual battery. We hold, therefore, that the state met its burden of

production regarding each element of the crime of rape and sexual battery and, accordingly, there was sufficient evidence to support appellant's convictions.

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

{¶65} For the foregoing reasons, the judgment of the Court of Common Pleas, of Richland County, Ohio, is affirmed.

By Gwin, J.,

Edwards, P.J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

_____
HON. PATRICIA A. DELANEY

WSG:clw 1119

[Cite as *State v. Ward*, 2010-Ohio-6462.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JASON WARD	:	
Defendant-Appellant	:	CASE NO. 2010-CA-0026

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

_____
HON. W. SCOTT GWIN

_____
HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY