[Cite as *State v. Dowding*, 2015-Ohio-1362.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- STEPHEN DOWDING Defendant-Appellant	JUDGES: Hon. John W. Wise, P. J. Hon. Patricia A. Delaney, J. Hon. Craig R. Baldwin, J. Case No. 2014 CA 00131 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Canton Municipal Court, Case No. 2014 CRB 01526
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 6, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOSEPH MARTUCCIO CANTON LAW DIRECTOR TYRONE HAURITZ CANTON CITY PROSECUTOR ANTHONY J. FLEX ASSISTANT CITY PROSECUTOR 218 Cleveland Avenue SW Canton, Ohio 44702	JEFFRY V. SERRA THE FERRUCCIO LAW FIRM 301 Cleveland Avenue NW Canton, Ohio 44702

Wise, P. J.

{¶1}. Appellant Stephen Dowding appeals his conviction, in the Canton Municipal Court, Stark County, on one count of misdemeanor sexual imposition. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2}. On the evening of March 18, 2014, Appellant Dowding and the adult female victim in this matter, M.T., separately attended a contemporary praise and worship service at the Our Lady of Perpetual Help chapel on the campus of Walsh University in North Canton. Walsh, a Catholic university, hosts these casual services every other Tuesday night.

{¶3}. Appellant, age thirty-two at the time in question, was not a college student but played drums at certain worship events on the campus. M.T., a Walsh student, had been acquainted with appellant for approximately three years through her attendance at the various campus worship services, but they were not considered close friends.

{¶4}. On the above date, appellant spoke to M.T. in the chapel lobby after the service. M.T. was at the praise and worship event with R.S., her close friend and roommate, although M.T. was by herself at the time she encountered appellant, and apparently no other persons were in the immediate vicinity of their brief conversation. M.T. happened to be wearing sweatpants and a t-shirt that covered her abdominal area. M.T. later testified: "*** I was talking to [appellant] in the lobby and then he pulled me aside and asked me to lift up my shirt and he pulled his shirt up the same and then felt my stomach and then pulled my sweatpants out and put his hand down my pants." Tr. at 32.

{¶5}. According to M.T.'s trial testimony, appellant then asked her: "Is this weird?" She immediately replied: "Yes. It's weird." Tr. at 42. Appellant's hand went down as far as "right above [her] private area," over her underwear. Tr. at 34. M.T. told him to stop his actions, and he complied. Tr. at 42, 51. At that point, M.T. felt very uncomfortable and "in shock" Tr. at 34. According to M.T., appellant then asked her not to "freak out" and not to tell anyone about the incident because he did not "want to stop playing [drums] here." Tr. at 51. However, he made no apology. Tr. at 57. M.T. shortly thereafter went see the university's director of liturgical music, Pedro Chavez, who has an office in the chapel. He described her demeanor that night as unusually "distraught" and "shaken up." Tr. at 130-131.

{¶6}. The next afternoon, M.T. reported the incident to her counselor, who called the campus police office. Tr. at 38. Appellant was subsequently interviewed by the university's police chief, Thomas R. Thomas, as well as by Officer Jim Amendolar, who handles much of the detective duties on campus. As further analyzed *infra*, appellant did not deny touching M.T.'s lower abdominal area, but he maintained she invited the action by pulling up her shirt and pulling her waistband out or slightly down. He also claimed at one point that M.T. "smiled" at him during the encounter, thus causing him to think it was okay to proceed.

{¶7}. Appellant was subsequently charged with one count of sexual imposition, R.C. 2907.06(A)(1), a third-degree misdemeanor. A jury trial commenced on June 18, 2014. Appellant presented no defense witnesses. After hearing the evidence, the jury found appellant guilty as charged. A sentencing hearing was held on the same day, following which appellant was sentenced *inter alia* to sixty days in jail, with all but

fifteen days suspended, plus two years of probation, with counseling requirements. Appellant was also designated a Tier One sexual offender.

{¶8}. On July 17, 2014, appellant filed a notice of appeal. He herein raises the following four Assignments of Error:

{¶9}. "I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S RULE 29 MOTION FOR ACQUITTAL AS THE FINDING THERE WAS SEXUAL CONTACT WAS SUPPORTED BY INSUFFICIENT EVIDENCE AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶10}. "II. THE TRIAL COURT ERRED IN FINDING LEGALLY SUFFICIENT CORROBORATING EVIDENCE EXISTED AS REQUIRED BY O.R.C. §2907.06(B) TO SUPPORT THE APPELLANT'S CONVICTION FOR SEXUAL IMPOSITION.

{¶11}. "III. THE APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN TRIAL COUNSEL FAILED TO FILE A MOTION TO SUPPRESS THE RECORDED STATEMENTS THE APPELLANT MADE TO THE POLICE.

{¶12}. "IV. THE APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN TRIAL COUNSEL FAILED TO HAVE THE APPELLANT'S COMPETENCE EVALUATED AND FAILED TO CALL ANY WITNESSES AT TRIAL TO EXPLORE THE APPELLANT'S COMPETENCE."

I., II.

{¶13}. In his First and Second Assignments of Error, which we will address together, appellant contends his conviction was not supported by sufficient evidence

and was against the manifest weight of the evidence, and that the trial court erred in denying his motion for acquittal. We disagree.

Sufficiency of the Evidence / Motion for Acquittal - Standard of Review

{¶14}. An appellate court reviews a denial of a Crim.R. 29 motion for acquittal using the same standard used to review a sufficiency of the evidence claim. *See State v. Carter* (1995), 72 Ohio St.3d 545, 553, 651 N.E.2d 965, 1995-Ohio-104. Thus, “[t]he 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.” *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

Sexual Contact - Element of Erogenous Zone

{¶15}. Appellant first challenges the jury's implicit finding of the element of "sexual contact."

{¶16}. Appellant herein was convicted under R.C. 2907.06(A)(1), which states in pertinent part: "No person shall have sexual contact with another, not the spouse of the offender *** when *** [t]he offender knows that the sexual contact is offensive to the other person, or one of the other persons, or is reckless in that regard."

{¶17}. In turn, R.C. 2907.01(B) defines “sexual contact” as "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."

{¶18}. Furthermore, the definition of “recklessness” is defined in R.C. 2901.22(C), which states:

{¶19}. "(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶20}. During questioning by the prosecutor, M.T. testified regarding the moments when appellant's hand proceeded below her stomach area:

{¶21}. "Q. Okay. How far had his hand gone?

{¶22}. "A. Right above my private area.

{¶23}. "Q. You indicated that it was on top of your underwear?

{¶24}. "A. Yes.

{¶25}. "Q. Okay. So his hand was far enough to be on top of your underwear?

{¶26}. "A. (NO AUDIBLE RESPONSE)

{¶27}. "Q. Do you know how far on top of your underwear his hand went?

{¶28}. "A. Um hmm. Well right up - - like his hand was - - when I said stop his hand was at my private area.

{¶29}. "Q. Okay. Did he put his hand anywhere else before he put it on your underwear?

{¶30}. "A. Just on my stomach and then . . .

{¶31}. "Q. Did you want Stephen to - - to put his hand there that night?

{¶32}. "A. No.

{¶33}. "Q. Did you ask him to do that?

{¶34}. "A. No.

{¶35}. "Q. Do you think you were doing anything to indicate that you wanted him to do that?

{¶36}. "A. No."

{¶37}. Tr. at 34.

{¶38}. Appellant also told Officer Amendolar, among other things, that his hand had gone down "to her pubic area," over her underwear but beneath her sweatpants. Tr. at 117.

{¶39}. We note Ohio courts have found that sexual contact can be sufficiently demonstrated by evidence that a defendant "touched an erogenous zone covered by clothing." *See State v. Goins*, 12th Dist. Butler No. CA2000-09-190, 2001-Ohio-8647 (additional citations omitted). Upon review, we find reasonable jurors could have found, beyond a reasonable doubt, that at minimum appellant made erogenous zone contact with the victim in this instance by touching her pubic region on top of her underwear.

Sexual Arousal or Gratification Element

{¶40}. Appellant secondly maintains the State failed to demonstrate the element of his touching with "purpose of sexually arousing or gratifying either person." R.C. 2907.01(B), *supra.*

{¶41}. Whether touching is done for the purpose of sexual gratification is a question of fact to be inferred from the type, nature, and circumstances surrounding the contact. *State v. Cochran*, 5th Dist. Coshocton No. 03–CA–01, 2003-Ohio-6863, ¶ 15, citing *State v. Mundy* (1994), 99 Ohio App.3d 275, 289, 650 N.E.2d 502. In the case sub judice, it is noteworthy that appellant had given M.T. his phone number the

previous autumn, but she had deleted it from her cell phone months before the chapel incident. According to the information gleaned from appellant by the campus police officials, appellant claimed that M.T. initiated the incident by asking him to come over to the side of the chapel lobby and look at her "new skinny stomach." Tr. at 92. Although M.T. specifically denied this discussion about her weight loss at that time[1], it appears undisputed that appellant "immediately" withdrew his hand when M.T. told him to stop. *See* Tr. at 51. While this at least lessened the duration of the offense, it possibly created an inference for the jurors of appellant's recognition that he had already crossed a line into inappropriate sexual behavior. Likewise, according to M.T.'s testimony, he voiced his concern in the midst of the incident that he was perhaps doing something "weird." *See* Tr. at 42. Evidence was also adduced that after he pulled his hand away from M.T.'s sweatpants, he unapologetically asked her to keep quiet about his actions, again suggesting he felt alarmed about the sexual aspects of what he had just done and the resultant jeopardizing of his future with the school's music ministry.

{¶42}. Accordingly, we find reasonable jurors could have found, beyond a reasonable doubt, that appellant's actions were conducted with the purpose of sexual arousal or gratification.

Sufficiency of Corroborating Evidence

{¶43}. Appellant also directs us to R.C. 2907.06(B), which mandates as follows: "No person shall be convicted of a violation of this section solely upon the victim's testimony unsupported by other evidence."

[1] M.T. indicated that she had mentioned the subject of weight loss to appellant about two weeks earlier. Tr. at 48-49.

{¶44}. The aforesaid corroboration requirement is a threshold inquiry of legal sufficiency to be determined by the trial judge, not a question of proof, which is the province of the fact finder. *See State v. Economo,* 76 Ohio St.3d 56, 60 (1996).

{¶45}. In the case sub judice, appellant contends that outside of the victim's own trial testimony and her statements to Officer Amendolar, there was no corroborating evidence of appellant touching her in her pubic region. We conclude otherwise. First, as discussed *supra*, appellant told M.T. not to talk about the incident. This request was not merely in appellant's version of what happened; appellant admitted in a written statement to Chief Thomas that he had "asked her not to tell because I didn't want people to get the wrong idea." *See* Tr. at 97. Ohio law recognizes that attempts to cover up criminal activity can be treated as evidence of consciousness of guilt. *See State v. Lawson*, 12th Dist. Butler No. CA99-12-226, 2001 WL 433121, citing *State v. Biros* (1997), 78 Ohio St.3d 426, 448. In addition, while he essentially claimed that M.T. somehow enticed his actions by pulling her sweatpants out or slightly down with her thumb, appellant conceded to campus police that he at least had put his hand in her pants, over her underwear, down to the pubic area. Tr. at 97, 117. Furthermore, Chief Thomas, Mr. Chavez, and R.S. all testified that M.T., described at various points in the trial as a normally upbeat, even "giggly" person, was visibly quite upset and distraught on the night in question and/or into the next day.

{¶46}. We are therefore unpersuaded that appellant's conviction was allowed by the trial court in violation of the corroboration requirement of R.C. 2907.06(B).

Manifest Weight of the Evidence

{¶47}. Our standard of review on a manifest weight challenge to a criminal conviction is stated as follows: “The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the 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* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In Ohio, a "sufficiency" argument and a "manifest weight" argument in a criminal appeal are not interchangeable and require different analyses. *See*, *e.g*., *State v. Williams,* Scioto App.No. 00CA2731, 2001–Ohio–2579, citing *State v. Ricker* (Sept. 30, 1997), Franklin App.No. 97APC01–96.

{¶48}. Appellant's manifest weight claim largely revisits his contention that there was no evidence of touching of any of M.T.’s erogenous zones for the purpose of arousal or gratification. *See* Appellant's Brief at 11. In the interest of justice, we have reviewed the record and hereby conclude the jury's determination was not against the manifest weight of the evidence, as we are not persuaded that the jurors' assessment of the evidence, including the testimony of the victim and four other prosecution witnesses, resulted in a manifest miscarriage of justice.

{¶49}. Appellant's First and Second Assignments of Error are overruled.

III., IV.

{¶50}. In his Third and Fourth Assignments of Error, which we will also address together, appellant contends he was deprived of the effective assistance of counsel at

trial in violation of the Sixth Amendment to the United States Constitution. We disagree.

{¶51}. Our standard of review for ineffective assistance claims is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his or her essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.*

{¶52}. Appellant first contends his trial counsel was ineffective for failing to seek suppression of his written and verbal responses to campus police questioning by raising the issue of appellant's mental capacity to make a knowing and intelligent waiver of his *Miranda* rights. In a related vein, appellant urges his trial counsel was ineffective for failing to evaluate or explore appellant's competency level as part of his defense. Appellant's brief recites a number of claimed physical and mental issues allegedly impacting his competency. A review of the record reveals unsworn testimony at sentencing, either from appellant or appellant's mother, that he is bi-polar and on several medications, including Depakote and Zyprexa, and that he is "legally blind" and

on the autism spectrum. *See* Tr. at 174-175, 181. The trial court judge appeared to accept that appellant is dealing with Asperger's Syndrome and A.D.D. *See* Tr. at 181-182.

{¶53}. This Court is generally reluctant to attempt to redress an appellate argument seeking to demonstrate that a motion to suppress would have been granted by the trial court, where such an argument essentially speculates as to evidence dehors the record. *See State v. Jackson,* 5th Dist. Stark No. 2005CA00198, 2006–Ohio–4453,¶ 27. Furthermore, we must presume a properly licensed attorney executes his or her duties in an ethical and competent manner. *See State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Under the circumstances presented, we are not inclined to overcome this presumption with the limited information in the appellate record before us.

{¶54}. Appellant's Third and Fourth Assignments of Error are therefore overruled.

{¶55}. For the reasons stated in the foregoing opinion, the judgment of the Canton Municipal Court, Stark County, Ohio, is hereby affirmed.

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

JWW/d 031