

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J
	:	
-vs-	:	
	:	Case No. 18 CAA 10 0080
KIM J. SABO	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Delaware County Court of Common Pleas, Case No.18CR I 04 0248

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: July 25, 2019

APPEARANCES:

For Plaintiff-Appellee

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Gwin, P.J.

{¶1} Appellant Kim J. Sabo [“Sabo”] appeals his convictions and sentences after a jury trial in the Delaware County Court of Common Pleas.

Facts and Procedural History

{¶2} On April 26, 2018, Sabo was indicted on three counts of Gross Sexual Imposition, all felonies of the fourth degree in violation of R.C. 2907.05(A)(1). On August 23, 2018, Sabo’s trial counsel filed a Motion in Limine. Subsequently, on August 27, 2018 counsel filed a Revised Motion in Limine seeking to prohibit “the State of Ohio from introducing into evidence any testimony or any other evidence concerning Defendant’s prior convictions.” The defense was seeking to exclude Sabo’s 2013 conviction for Child Enticement. (MT. at 4-5)¹. A hearing on Sabo’s motion took place on August 27, 2018. Following the hearing, the trial court denied the motion in limine, but ruled that it would “provide the appropriate Jury Instructions to the Jury that they are not to consider the evidence for character purposes.” *Judgment Entry Denying Defendant’s Revised Motion in Limine*, filed Aug. 26, 2018 at 2. [Docket Number 32]. As for the purposes of admitting the evidence, the trial court found that it would “allow it to be admitted for the purpose of sexual gratification, but also — the identification is not necessary, but certainly the plan or the scheme.” (MT. at 9). Sabo’s jury trial commenced the next day.

{¶3} Officer Jason Carroll from the Delaware Police Department testified that on July 10, 2017 he responded to an address in Delaware County. He further testified that he took a statement from Jane Doe regarding the offense. Jane Doe informed Officer Carroll that she knew Sabo from doing work around his home. On this day, she went to

¹ For clarity sake, the hearing on Sabo’s Motions in Limine will be referred to as “MT.”; the transcript of Sabo’s Jury Trial will be referred to by volume and page number as “JT.”

his home to see if there was more work to be done. She went with juvenile, A.C.; however, she went inside the home alone because Sabo did not want a lot of kids in his house. While in the home, Jane Doe told Officer Carroll that Sabo stopped her from leaving and tried to give her a hug. In doing so, he groped her buttocks, put his fingers up her shorts, and pulled his groin into her as well as put her hand onto his groin. She fled shortly after and disclosed to A.C. and then the police. Officer Carroll collected evidence and took a report, sending it onto a detective.

{¶4} Jane Doe testified that she first met Sabo when she sold him baked good for a school fundraiser. After this first encounter, she began going to his residence to earn money by doing various chores for him. On July 10, 2017, Jane Doe decided to go over to Sabo's house to see if she could earn some money. Her boyfriend A.C. was with her, but he did not go inside with her. She testified that her boyfriend did not go inside with her because Sabo informed her that he "didn't want a lot of kids in his house." Jane Doe described Sabo's home as a very small apartment, without a stove, shower, or bathtub.

{¶5} Jane Doe testified that when she went inside she asked Sabo if there was anything she could do to earn money. He informed her that he did not have anything for her to do, but proceeded to give her a pop, after which she asked to use the restroom. Jane Doe testified that when she exited the bathroom, Sabo was standing outside the bathroom door. After noticing this, she began to leave when Sabo leaned in to give her a hug. She responded to by patting his back and saying that she would see him later. After this, Sabo pulled her back in, wrapped his arms around her, and placed his hands on her buttocks; partially sliding them under her shorts. According to Jane Doe's

testimony, after doing so, he pushed her towards him and his private area in a way that their groins touched. Then, she testified, "he let go with one of his hands and grabbed my wrist, and pulled my hand in to touching his private area." Sabo grabbed her hand and placed it on his penis. After this Jane Doe testified that she proceeded to yank herself away from him and run out of his apartment.

{¶6} A.C. testified that on July 10, 2017, he went with Jane Doe to Mr. Sabo's home, as he had several times before, and that Jane Doe had worked for Sabo in the past many times. He further testified that on July 10, 2017 Jane Doe went inside Sabo's home. A.C. testified that Jane Doe left in a hurry from Sabo's home and then disclosed the sexual touching.

{¶7} Officer Thomas Donoghue testified that he took over the case after the initial report. He identified the suspect as Kim Sabo. He interviewed Sabo and found his version of the events inconsistent. Sabo told Officer Donoghue initially that Jane Doe had never been to his apartment, and then changed his story to state she had been there with her mother, and then allowed the possibility that she had been there on the date in question to use the restroom. Sabo denied entirely Jane Doe had ever done any work or chores for him or came to his home regularly to do so. In a second conversation, Sabo followed the exact same pattern with Officer Donoghue, again denying Jane Doe had ever been there, then there with her mother and once alone.

{¶8} Ms. Michele Leighty, who previously worked as an investigator on child abuse/neglect cases for Delaware County Job and Family Services was called to testify at trial. Prior to her testimony, the court gave the following limiting instruction:

It is anticipated that evidence will be received from the State's next witness that the Defendant was convicted of Child Enticement. That evidence was received — or will be received only for a limited purpose. It will not be received, and you may not consider it, to prove the character of the Defendant in order to show that he acted in conformity, or accordance with that character. If you find that the Defendant was convicted of Child Enticement, you may consider that evidence only for the purpose of whether the Defendant had a plan, a purpose, or both, and that evidence cannot be considered for any other purpose."

1JT. at 165-166.

{¶9} In 2013, Ms. Leighty investigated a case involving an eight-year-old girl, S.H, who it was alleged received an inappropriate hug/touching from Sabo. During her investigation, Ms. Leighty interviewed S.H. and prepared a report for Job and Family Services as well as for law enforcement.

{¶10} Ms. Leighty testified that S.H. informed her that at the time of the incident Sabo was living out of his truck while he was digging out a basement. S.H. began communicating with him after riding by on her bicycle. At some point Sabo asked her to help her with his project and that over a period, she would help him with digging out the basement, by throwing rocks into a ditch. In exchange, he would give her things such as candy and necklaces. According to Ms. Leighty's testimony, at one point Sabo asked S.H. to sit on his lap, and that when she did, he gave her a hug during which he "squeezed over top of her clothing on her breast." Ms. Leighty testified that Sabo pled guilty to one count of Child Enticement, a felony of the fifth degree. The state introduced exhibits of

Sabo's indictment, withdrawal of his plea of not guilty, the dismissal for the second count of the indictment, and his judgment entry of sentence. All were admitted without objection.

{¶11} Sabo testified on his own behalf. He acknowledged knowing Jane Doe and that she had been in his residence. Sabo denied the allegations against him and testified that he never had Jane Doe clean for him. Sabo denied that he had done anything inappropriate with S.H. He explained that he accepted a plea deal because he was homeless at the time.

{¶12} At the conclusion of the trial Sabo was found guilty on all counts. A sentencing hearing took place on September 24, 2018 at which Sabo was sentenced to serve seventeen months in prison on each count, consecutively, for a total of fifty-one months in prison.

Assignment of Error

{¶13} Sabo raises two assignments of error,

{¶14} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE STATE TO INTRODUCE EVIDENCE REGARDING THE FACTS OF APPELLANT'S PRIOR CONVICTION OF CHILD ENTICEMENT.

{¶15} "II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ENTERED A JUDGMENT AGAINST THE APPELLANT WHEN THE JUDGMENT WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

{¶16} In his First Assignment of Error, Sabo contends the trial court abused its discretion by allowing testimony concerning his 2013 conviction for Child Enticement

because the testimony was not admissible under Evid.R. 404(B) and was unfairly prejudicial.

STANDARD OF APPELLATE REVIEW.

{¶17} “[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.” *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991). “Ordinarily, we review a trial court’s hearsay rulings for an abuse of discretion. *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967). However, we review de novo evidentiary rulings that implicate the Confrontation Clause. *United States v. Henderson*, 626 F.3d 326, 333 (6th Cir. 2010).” *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶97.

A. Whether the trial court abused its discretion by admitting evidence of Sabo’s prior conviction.

{¶18} Evid.R. 404(A) provides that evidence of a person’s character is not admissible to prove the person acted in conformity with that character. Evid.R. 404(B) sets forth an exception to the general rule against admitting evidence of a person’s other bad acts. The Rule states as follows: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

{¶19} The admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that

the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment. See *State v. Curry*, 43 Ohio St.2d 66, 68, 330 N.E.2d 720, 723(1975). This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature, as is certainly true in this case. *State v. Schaim*, 65 Ohio St.3d 51, 60, 1992-Ohio-31, 600 N.E.2d 661,669.

{¶20} The legislature has recognized the problems raised by the admission of other acts evidence in prosecutions for sexual offenses, and has carefully limited the circumstances in which evidence of the defendant's other sexual activity is admissible. The rape statute and the gross sexual imposition statute both contain subsections that address the admissibility of evidence of other sexual activity by either the victim or the defendant. *Schaim*, supra. (Footnotes omitted). Because of the severe social stigma attached to crimes of sexual assault and child molestation, evidence of these past acts poses a higher risk, overall, of influencing the jury to punish the defendant for the similar act rather than the charged act. Accordingly, the State may not “parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo.” *Huddleston v. United States*, 485 U.S. 681, 689, 108 S.Ct. 1496, 99 L.Ed.2d 771(1988).

{¶21} In *State v. Williams*, 134 Ohio St.3d 521, 983 N.E.2d 1278, 2012–Ohio–5695, the Ohio Supreme Court stated that trial courts should conduct a three-step analysis when considering the issue of “other acts” evidence:

The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of

the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. See Evid.R. 403.

Id. at ¶ 20.

{¶22} In the case at bar, the trial court ruled that the prior conviction testimony was admissible “for the purpose of sexual gratification” and “the plan or scheme.” MT at 9; *Judgement Entry denying Defendant’s Motion in Limine*, filed Aug. 27, 2018 at 1. [Docket Number 32].

1. Sexual Gratification.

{¶23} Sabo was convicted of three counts of Gross Sexual Imposition. R.C. 2907.05 provides in relevant part,

(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:

(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

{¶24} 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.” R.C. 2907.01(B). “Sexual arousal” and “sexual gratification” are not defined in the Ohio Revised Code. See *In re Anderson*, 116 Ohio App.3d 441, 443, 688 N.E.2d 545(12th Dist. 1996). However, “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. Butler No. CA2005-08-367, 2006-Ohio-3621, ¶ 23, quoting *State v. Astley*, 36 Ohio App.3d 247, 250, 523 N.E.2d 322(10th Dist.1987).

{¶25} “The definition of sexual contact includes an express culpability requirement of ‘purpose.’” *State v. Curtis*, 12th Dist. Butler No. CA2008-01-008, 2009-Ohio-192, ¶ 90, citing *State v. Mundy*, 99 Ohio App.3d 275, 295, 650 N.E.2d 502 (2nd Dist. 1994). When determining if sexual contact occurred, the trier of fact should infer from the evidence presented at trial whether the defendant's purpose was sexual arousal or gratification by his contact with those areas of the body proscribed in R.C. 2907.01(B). *State v. Gesell*, supra, ¶ 24. The trier of fact should consider the type, nature, and circumstances of the contact when making its decision. Along with viewing the personality and demeanor of the defendant, the trier of fact may “infer what the defendant's motivation was in making the physical contact with the victim. If the trier of fact determines that the defendant was motivated by desires of sexual arousal or gratification, and that the contact occurred, then the trier of fact may conclude that the object of the defendant's motivation was achieved.” *Gessell*, ¶24, citing *State v. Cobb*, 81 Ohio App.3d 179, 195, 610 N.E.2d 1009 9th Dist. 1991).

{¶26} “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. *In re Anderson*, 116 Ohio App.3d 441, 443-444, 688 N.E.2d 545 (12th Dist. 1996); *State v. Mundy*, 99 Ohio App.3d 275, 289, 650 N.E.2d 502 (2nd Dist. 1994). 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. *State v. Cobb* (1991), 81 Ohio App.3d 179, 610 N.E.2d 1009.” *State v. Gesell*, 12th Dist. Butler No. CA2005-08-367, 2006-Ohio-3621, ¶ 25.

{¶27} A defendant's requisite motive and intent under R.C. 2907.05 is sexual gratification. That element was apparent from the charges against the defendant and was not a material issue. *State v. Clemons*, 94 Ohio App.3d 701, 709, 641 N.E.2d 778(12th Dist. 1994) (*citing State v. Smith*, 84 Ohio App.3d 647, 617 N.E.2d 1160(2nd Dist. 1992)).

{¶28} Jane Doe testified that Sabo placed his hands on her buttocks; partially sliding them under her shorts and Sabo grabbed her hand and placed it on his penis on top of his clothes. Therefore, sexual gratification was not a material issue. Sabo denied that he touched Jane Doe. Sabo did not argue that he mistakenly or accidentally touched her in an inappropriate manner. Therefore, whether Sabo committed a crime is the crux of the dispute. If a crime did in fact occur, no dispute exists that the touching was for the sexual arousal or gratification of the perpetrator.

{¶29} The evidence of Sabo's prior conviction for Child Enticement was not admissible to show “Sexual gratification.”

2. Scheme or Plan.

{¶30} The Ohio Supreme Court’s decision in *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278 is instructive. In that case, Williams was charged with multiple counts of rape, kidnapping, and unlawful sexual conduct with a minor after he allegedly molested a 14-year old boy. Williams had become the child’s mentor in his local church and groomed him for a period of time before the sexual assaults began. Prior to impaneling the jury, the state moved to admit evidence that Williams had had a similar relationship with a 16-year-old member of the high school swim team Williams had coached. In support of its motion, the state argued that Williams’s relationship with the swimmer paralleled the relationship he had with his mentee. According to the state, both relationships “indicated a course of conduct constituting a common plan, demonstrated a distinct pattern of sexual conduct constituting modus operandi, and by reasonable inference, tended to prove Williams’s intent to achieve sexual gratification with teenage males.” *Id.* at ¶ 5.

{¶31} The trial court in *Williams* allowed the evidence to be admitted, but gave a cautionary instruction before the evidence was presented. *Id.* at ¶ 8. The trial court reiterated this instruction prior to deliberations, and the jury found Williams guilty.

{¶32} Williams appealed his convictions, arguing the trial court erred in admitting evidence of his prior criminal acts with another teenage boy. After conducting a three-step analysis, the Ohio Supreme Court determined that the evidence was admissible. First, the court found that the swimmer’s testimony was relevant because it tended “to show the motive Williams had and the preparation and plan he exhibited of targeting, mentoring, grooming, and abusing teenage boys.” The court noted that the swimmer’s testimony also rebutted the suggestion offered by the defense during opening statements

that the victim had falsely accused Williams of abuse with the hope of getting out of trouble at school. The court also found the swimmer's testimony that "Williams received 'some type of sexual gratification' " was relevant to show Williams's intent to receive sexual gratification. *Id.* at ¶ 22. Therefore, with respect to the first step of the analysis, the court determined that the swimmer's testimony was relevant.

{¶33} The *Williams* court also determined, in the second step of the analysis that the state did not offer the testimony to prove that Williams's conduct was in conformity with his bad character. In making this conclusion, the *Williams* court found that the swimmer's testimony demonstrated Williams's plan and preparation to target teenage males, who had no father figure, in order to gain their trust and confidence for the purpose of grooming them for sexual activity. *Id.* at ¶ 21.

{¶34} Finally, the court determined, in the third step of the analysis, that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The court reasoned that the limiting instructions "lessened the prejudicial effect" of the swimmer's testimony and corroborated the victim's testimony, which had been disputed by Williams. Moreover, the court concluded that the swimmer's testimony was probative because "it helped prove motive, preparation, and plan on the part of Williams."

{¶35} The other acts evidence in *Williams* was of grooming techniques which were not criminal acts, but which ultimately resulted in criminal sexual acts. The defendant in *Williams* targeted, befriended, and mentored vulnerable teenage boys in an effort to gain their trust to facilitate his plan to engage in sexual activity with them. In the case at bar, the testimony was that Sabo befriended the child in the previous case, asked the child to

help him with “chores” or work that he was doing, and that he paid her in candy or necklaces. He then invited the child to sit on his lap and under the guise of hugging the child touched the child in a sexual manner.

{¶36} The second step is to consider whether the evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith, or whether the other acts evidence is presented for a legitimate purpose. In the case at bar, the testimony was relevant as a behavioral fingerprint. Sabo would befriend young girls, gain the trust of the children by offering to pay them to help him around his home and then under the guise of an innocent “hug” touch the children in an inappropriate and sexual manner.

{¶37} As previously stated, the third step of the *Williams* analysis requires the court to consider whether the probative value of the prior criminal acts is substantially outweighed by the danger of unfair prejudice. In the case at bar, the trial court gave a limiting instruction prior to the testimony of Ms. Leighty and again at the conclusion of the case. 1JT at 165-66; 2JT at 27.

{¶38} In *Williams*, the Ohio Supreme Court concluded,

This evidence is not unduly prejudicial, because the trial court instructed the jury that this evidence could not be considered to show that Williams had acted in conformity with a character trait. This instruction lessened the prejudicial effect of A.B.’s testimony, and A.B. corroborated J.H.’s testimony about the sexual abuse, which had been denied by Williams. Thus, Evid.R. 404(B) permitted admission of evidence of Williams’s prior crime because it helped to prove motive, preparation, and

plan on the part of Williams. The prejudicial effect did not substantially outweigh the probative value of that evidence.

134 Ohio St.3d 521, ¶24.

{¶39} In the case at bar, the trial court instructed the jury that the evidence could not be considered to show that Sabo had acted in conformity with a character trait. The testimony corroborated Jane Doe’s testimony about the sexual abuse, which had been denied by Sabo. Thus, Evid.R. 404(B) permitted admission of evidence of Sabo’s prior crime because it helped to prove motive, preparation, and plan on the part of Sabo. The prejudicial effect did not substantially outweigh the probative value of that evidence.

{¶40} Sabo’s First Assignment of Error is overruled.

II.

{¶41} In his Second Assignment of Error, Sabo contends that the jury’s findings are against the manifest weight of the evidence.

STANDARD OF APPELLATE REVIEW.

Manifest weight of the evidence.

{¶42} As to the weight of the evidence, the issue is whether the jury created a manifest miscarriage of justice in resolving conflicting evidence, even though the evidence of guilt was legally sufficient. *State v. Thompkins*, 78 Ohio St.3d 380, 386–387, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated by State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668, 1997–Ohio–355; *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001).

“[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every

reasonable presumption must be made in favor of the judgment and the finding of facts.

* * *

“If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.”

Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶43} The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Murphy*, 4th Dist. Ross No. 07CA2953, 2008–Ohio–1744, ¶ 31. Because the trier of fact sees and hears the witnesses and is particularly competent to decide whether, and to what extent, to credit the testimony of particular witnesses, the appellate court must afford substantial deference to its determinations of credibility. *Barberton v. Jenney*, 126 Ohio St.3d 5, 2010–Ohio–2420, 929 N.E.2d 1047, ¶ 20. In other words, “[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe.” *State v. Dyke*, 7th Dist. Mahoning No. 99 CA 149, 2002–Ohio–1152, at ¶ 13, citing *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125(7th Dist. 1999). Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact finder, as long as a rational basis exists in the record for its decision. *State v. Picklesimer*, 4th Dist. Pickaway No. 11CA9, 2012–Ohio–1282, ¶ 24.

{¶44} Once the reviewing court finishes its examination, an appellate court may not merely substitute its view for that of the jury, but must find that “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. Thompkins, supra*, 78 Ohio St.3d at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721(1st Dist. 1983). Accordingly, reversal on manifest weight grounds is reserved for “the exceptional case in which the evidence weighs heavily against the conviction.” *Id.*

ISSUE FOR APPEAL.

Whether the jury clearly lost their way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered.

{¶45} The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness’s credibility. “While the trier of fact may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant’s conviction against the manifest weight or sufficiency of the evidence.” *State v. Craig*, 10th Dist. Franklin No. 99AP–739, 1999 WL 29752 (Mar 23, 2000) citing *State v. Nivens*, 10th Dist. Franklin No. 95APA09–1236, 1996 WL 284714 (May 28, 1996). Indeed, the trier of fact need not believe all of a witness’ testimony, but may accept only portions of it as true. *State v. Raver*, 10th Dist. Franklin No. 02AP–604, 2003–Ohio–958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke*, 10th Dist. Franklin No. 02AP–1238, 2003–Ohio–2889, citing *State v. Caldwell*, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks*, 61 Ohio St.3d 259, 272, 574

N.E.2d 492 (1991), paragraph one of the syllabus, *superseded by State constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89, 102 at n.4, 684 N.E.2d 668 (1997).

{¶46} In the case at bar, the jury heard the witnesses viewed the evidence and heard both Jane Doe and Sabo testify and be subject to cross-examination. Thus, a rational basis exists in the record for the jury’s decision.

{¶47} We find that this is not an “exceptional case in which the evidence weighs heavily against the conviction.” *State v. Thompkins*, 78 Ohio St.3d 380, 386–387, 678 N.E.2d 541 (1997), *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. Based upon the foregoing and the entire record in this matter we find Sabo’s conviction is not against the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before them. The jury heard the witnesses, evaluated the evidence, and was convinced of Sabo’s guilt.

{¶48} The jury neither lost their way nor created a miscarriage of justice in convicting Sabo of three counts of Gross Sexual Imposition.

{¶49} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed proves all the elements of the crimes for which Sabo was convicted.

{¶50} Sabo’s Second Assignment of Error is overruled.

{¶51} The judgment of the Delaware County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Delaney, J., concur