[Cite as *In re D.T.W.*, 2015-Ohio-2317.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

IN RE:	:	
		CASE NO. CA2014-09-198
D.T.W.	:	
		O P I N I O N
	:	6/15/2015
	:	
	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. JV2014-0078

D. Joseph Auciello, Jr., 306 South Third Street, Hamilton, Ohio 45011, for appellant

Michael T. Gmoser, Butler County Prosecuting Attorney, Kimberly Kasten, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for appellee

S. POWELL, P.J.

{¶ 1} Appellant, D.T.W., appeals from the decision of the Butler County Court of Common Pleas, Juvenile Division, adjudicating him a delinquent child for having committed acts that if charged as an adult would constitute two counts of attempted gross sexual imposition. For the reasons outlined below, we affirm.

{¶ 2} On January 17, 2014, a complaint was filed by Detective Mark Nichols of the Hamilton Police Department alleging D.T.W., who was 16 years old at the time, committed

acts that if charged as an adult would constitute rape in violation of R.C. 2907.02(A)(1)(b), a first-degree felony, and gross sexual imposition in violation of R.C. 2907.05(A)(4), a third-degree felony. As stated in the complaint, the charges stemmed from allegations D.T.W. engaged in anal and oral sex with the then 12-year-old son of D.T.W.'s mother's live-in boyfriend. The complaint also alleged D.T.W. "rubbed his penis" on the alleged victim.

{¶ 3} On February 6, 2014, D.T.W.'s defense counsel filed a motion for competency and requested the juvenile court order a competency evaluation. After holding a hearing on the matter, the juvenile court granted D.T.W.'s motion. Approximately one week later, on February 13, 2014, a competency evaluation was conducted by Dr. Robert Kurzhals, a clinical psychologist. It is undisputed that at the time the competency evaluation was conducted, D.T.W. was committed to the juvenile detention center on an unrelated domestic violence charge against his mother's then boyfriend.

{¶ 4} On March 6, 2014, the juvenile court held a competency hearing to determine if D.T.W. was competent to stand trial. During this hearing, and by stipulation of the parties, the juvenile court admitted Dr. Kurzhals' written competency assessment report into evidence. As part of that report, Dr. Kurzhals recommended that D.T.W. be found incompetent to stand trial due to his severe mental defect, substantially below average intellectual abilities, and diagnosis of mild mental retardation. However, despite these issues, Dr. Kurzhals nevertheless found D.T.W. "could likely be restored to competence within the time allowable by law, given the time available to restore him to competency, if a competency attainment program were made available to him." Based on Dr. Kurzhals' report, the juvenile court found D.T.W. incompetent to stand trial, but continued the matter to allow the state to gather information regarding whether a proper competency attainment program could be provided for D.T.W.

{¶ 5} On March 24, 2014, the trial court held a hearing to determine whether the state

had located a proper competency attainment program in an effort to restore D.T.W.'s competency to stand trial. At that hearing, the state informed the juvenile court that it had obtained the services of James M. O'Connell, a licensed professional counselor, to offer his opinion as to whether D.T.W. could attain competency to stand trial within the timeframe required by law. Thereafter, once D.T.W. was remanded to the juvenile detention center for evaluation by O'Connell, the following exchange occurred:

> [DEFENSE COUNSEL]: Generally in response to the reason why we're here as far as the restoration issue it would be my position echoing what was said in the earlier competency report that was submitted as an exhibit. I think that language as far as restorability is in my reports but I don't believe that it's * * * appropriate or the proper course today in light of the psychological findings spelled out in the report as, from the * * * psychological evaluation and the fact that I think [Dr. Kurzhals] essentially says that * * * his present incompetency status is due to his intellectual limitations and I don't feel that * * * those are, or will be able to be overcome in a reasonable time by way of evaluation or further treatment so I would ask that the matter be dismissed.
>
> BY THE COURT: No, I need an opinion from the, from the expert to tell me that.
>
> [DEFENSE COUNSEL]: Okay.
>
> BY THE COURT: If in fact he tells me that then you may have an argument okay. But I think we're premature right now and basically we can't move this case forward until we find that out. So that's what we're going to do.

{¶ 6} On April 7, 2014, the trial court held another hearing, wherein it reviewed O'Connell's submitted competency attainment plan. The competency attainment plan was subsequently admitted into evidence by stipulation of the parties. As part of the competency attainment plan, O'Connell found D.T.W. "a marginal to fair candidate to attain competency" within eight weeks or within eight to ten counseling sessions. After reviewing the submitted competency attainment plan, the juvenile court adopted the plan and set the matter for another competency hearing.

{¶ 7} On June 9, 2014, the parties reconvened to conduct a hearing on D.T.W.'s competency to stand trial in light of the now completed competency attainment services. At this hearing, and again by stipulation of the parties, O'Connell's competency attainment report was also admitted into evidence. As relevant here, O'Connell's competency attainment report stated the following:

> [D.T.W.] has been seen for attainment programming on six occasions. Throughout the attainment process [D.T.W.] has been very cooperative and impressed as highly motivated for a favorable outcome. [D.T.W.] has been able to maintain good focus. Rapport was easily established. He has a speech impediment, but this did not significantly impede his ability to communicate. However, it does tend to give the impression that [D.T.W.] is functioning cognitively at a lower level than he actually does function.
>
> During the course of the attainment programming [D.T.W.] was able to learn factual information related to the trial process. He appreciates the seriousness of the offenses for which he is charged. [D.T.W.] demonstrated that he clearly understands the plea's available to him. He demonstrates a reasonable understanding with regard to the workings of the trial, as well as trial outcomes and potential consequences. [D.T.W.] demonstrated good awareness of the role of various individuals in the courtroom. He understands the adversarial process. Further, he demonstrates a reasonable understanding of the plea bargain process.

Concluding his report, O'Connell stated that D.T.W. "benefited from the competency attainment process and at this time I would recommend the court move forward in making a determination as to his competency to proceed."

{¶ 8} Upon review of O'Connell's report, the juvenile court then asked D.T.W.'s defense counsel if he had seen any improvement with his ability to talk with D.T.W. about the proceedings and charges pending against him. In response, D.T.W.'s defense counsel stated D.T.W. had "always been able to, been very responsive and appropriate in his * * * question and answer sessions with me throughout this case." The juvenile court then addressed D.T.W. personally, asking him his age, where he went to school, as well as his

understanding of the proceedings, and his general right to have a trial and present witnesses in his defense. The juvenile court also questioned D.T.W. about the role of his defense counsel, the prosecutor, and the judge, all of which D.T.W. stated that he understood. Specifically, as it relates to the separate roles of the prosecutor and the judge, the following exchange occurred:

> BY THE COURT: This guy over here, he's the prosecutor, is he on your side?
>
> [D.T.W.]: No sir.
>
> BY THE COURT: Okay, he represents the State of Ohio, the police department that charged you, you understand that?
>
> [D.T.W.]: Yes sir.
>
> BY THE COURT: He's going to be presenting things if we have a trial against you, right?
>
> [D.T.W.]: Yes sir.
>
> BY THE COURT: But ultimately it's up to me to decide who wins, right?
>
> [D.T.W.]: Yes sir.
>
> BY THE COURT: Okay, and you understand that you can also enter a plea to a lesser included charge that [your defense counsel] might have talked to you about back there cause I don't know because I wasn't back there but you understand that don't you?
>
> [D.T.W.]: Yes sir.
>
> BY THE COURT: Okay. You know the court is not going to demand from you that you know all the things that I'm going to talk about because a lot of those things are legal terms but you understand what's going on here, we're going to make a decision whether you did it or not, right?
>
> [D.T.W.]: Yes sir.

{¶ 9} Following this exchange, the juvenile court determined D.T.W. was competent to stand trial. In so holding, the juvenile court stated, in pertinent part:

> BY THE COURT: * * * I'm going to make a finding that [D.T.W.] is competent to stand trial. I think it's clear to me and it's clear to Mr. O'Connell that he understands the trial process. He understands it's serious. He understands, he understands plea bargaining, you just started with him. He understands the * * * the trial process, what you do, what the prosecutor does, what I do, what witnesses are and all that. * * * [S]o I think he's benefited from the attainment counseling and I'm going to make a finding that he's competent to stand trial.

{¶ 10} After finding D.T.W. competent to stand trial, the matter then proceeded to a two-day adjudication hearing, during which time the juvenile court heard testimony from both D.T.W. and the alleged victim, among others. After both parties rested, the juvenile court found the state did not meet its burden of proof in regards to the charge of rape in violation of R.C. 2907.02(A)(1)(b), but did satisfy its burden as it relates to two counts of attempted gross sexual imposition in violation of R.C. 2923.02(A) and R.C. 2907.05(A)(4), both fourth-degree felonies if committed by an adult. The juvenile court then adjudicated D.T.W. a delinquent child and ordered him to be committed to the juvenile detention center for a minimum period of six months, all of which was suspended, dependent upon D.T.W. successfully completing a sex offender rehabilitation program at the juvenile rehabilitation center.

{¶ 11} D.T.W. now appeals from his adjudication as a delinquent child by finding he committed acts that if charged as an adult would constitute two counts of attempted gross sexual imposition, raising three assignments of error for review. For ease of discussion, D.T.W.'s second and third assignments of error will be addressed out of order.

{¶ 12} Assignment of Error No. 2:

{¶ 13} THE TRIAL COURT ERRED BY FINDING [D.T.W.] COMPETENT TO STAND TRIAL.

{¶ 14} In his second assignment of error, D.T.W. argues the juvenile court erred by

finding him competent to stand trial after originally being found incompetent.[1] In support of this claim, D.T.W. argues the juvenile court erred by finding him competent based on its "limited questioning, coupled with prior reports, and an alleged six week attainment period." According to D.T.W., this is "nowhere near significant enough to make any substantiation of [his] competency." We disagree.

{¶ 15} Prior to the enactment of 2011 H.B. 86 effective September 30, 2011, the Ohio Revised Code did not contain any provisions for determining a juvenile's competence to stand trial. *In re Stone*, 12th Dist. Clinton No. CA2002-09-035, 2003-Ohio-3071, ¶ 7. However, with the passage of 2011 H.B. 86, the Ohio Revised Code now contains statutory provisions that govern juvenile competency determinations. *In re D.T.L.M.*, 12th Dist. Butler Nos. CA2014-06-142 and CA2014-07-160, 2015-Ohio-1762, ¶ 8. These provisions are found in R.C. 2152.51 through R.C. 2152.59. *In re S.D.*, 8th Dist. Cuyahoga No. 99763, 2014-Ohio-2528, ¶ 13.

{¶ 16} Pursuant to R.C. 2152.51(A)(1), a child is incompetent to stand trial if, due to mental illness, intellectual disability, or developmental disability, or otherwise due to a lack of mental capacity, "the child is presently incapable of understanding the nature and objective of proceedings against the child or of assisting in the child's defense." However, it is rebuttably presumed that a child does not have a lack of mental capacity if the child is: (1) fourteen years of age or older, and (2) not otherwise found to be mentally ill, intellectually disabled, or developmentally disabled. R.C. 2152.52(A)(2). As provided by R.C. 2152.52(A)(1), except in juvenile proceedings alleging that a child is an unruly child or a juvenile traffic offender, "any

1. It should be noted, although arguing the juvenile court erred by finding him competent to stand trial, D.T.W. has cited to a number of cases and evidentiary rules that address issues regarding whether a witness is competent to testify. "[T]he test for incompetency to stand trial and the test to determine the competency of a witness to testify are not the same." *State v. Conner*, 8th Dist. Cuyahoga No. 99557, 2014-Ohio-601, ¶ 35, citing *State v. Strickland*, 2d Dist. Montgomery No. 10968, 1988 WL 137458, *3 (Dec. 20, 1988). Therefore, although informative, we find the legal authority cited by D.T.W. is distinguishable from the case at bar and otherwise not applicable to our review of the juvenile court's determination finding D.T.W. competent to stand trial.

party or the court may move for a determination regarding the child's competency to participate in the proceeding."

{¶ 17} If a party moves the juvenile court for a competency determination, such as the case here, the juvenile court may elect to hold a hearing to determine whether there is a reasonable basis to conduct a competency evaluation. R.C. 2152.53(A)(3). Thereafter, if the juvenile court finds there is a reasonable basis to conduct such an evaluation, or if the prosecuting attorney and the subject child's attorney agree to the evaluation, the juvenile court "shall order a competency evaluation and appoint an evaluator." R.C. 2152.53(B). In conducting this evaluation, the evaluator is not required "to act as if he is an attorney and explain the minutia of criminal procedure." *In re S.D.*, 2014-Ohio-2528 at ¶ 21. Rather, the evaluator is simply required to "assess whether the individual, in conjunction with advice from legal counsel, is capable of assisting counsel, understanding those things necessary for a proper defense, and for the individual to make informed decisions." *Id.*

{¶ 18} Upon completing the competency evaluation, the evaluator must then submit to the juvenile court a written competency assessment report. R.C. 2152.56(A). As part of the written competency assessment report, the evaluator must address the subject child's capacity to do all of the following:

> (1) Comprehend and appreciate the charges or allegations against the child;
>
> (2) Understand the adversarial nature of the proceedings, including the role of the judge, defense counsel, prosecuting attorney, guardian ad litem or court-appointed special assistant, and witnesses;
>
> (3) Assist in the child's defense and communicate with counsel;
>
> (4) Comprehend and appreciate the consequences that may be imposed or result from the proceedings.

R.C. 2152.56(B)(1)-(B)(4).

{¶ 19} The report shall also include the evaluator's opinion as to whether the child, due to mental illness, intellectual disability, or developmental disability, or otherwise due to a lack of mental capacity, is currently incapable of understanding the nature and objective of the proceedings against the child or of assisting in the child's defense. R.C. 2152.56(A). Pursuant to R.C. 2152.56(C), the report shall further include the evaluator's opinion regarding the extent to which the subject child's competency may be impaired by the child's failure to meet one or more of the criteria listed in R.C. 2152.56(B)(1) through (B)(4). However, the report must not include any opinion as to: (1) the child's sanity at the time of the alleged offense; (2) details of the alleged offense as reported by the child; or (3) an opinion as to whether the child actually committed the offense or could have been culpable for committing the offense. R.C. 2152.56(A).

{¶ 20} After the competency evaluation is complete, the juvenile court "shall hold a hearing to determine the child's competency to participate in the proceeding." R.C. 2152.58(A). During this time, "a competency assessment report may be admitted into evidence by stipulation." R.C. 2152.58(B). In determining the competency of the subject child, "the court shall consider the content of all competency assessment reports admitted as evidence." R.C. 2152.58(C). The juvenile court may also "consider additional evidence, including the court's own observations of the child's conduct and demeanor in the courtroom." *Id.*

{¶ 21} Following the juvenile court's competency hearing, if the juvenile court determines that the subject child is competent, "the court shall proceed with the delinquent child's proceeding as provided by law." R.C. 2152.59(A). However, if the juvenile court determines the "child is not competent but could likely attain competency by participating in services specifically designed to help the child develop competency, the court may order the child to participate in services specifically designed to help the child develop competency at

county expense." R.C. 2152.59(C). If the subject child is required to participate in competency attainment services, such services shall last no longer than what is required for the child to attain competency, nor shall the child be required to participate in competency attainment services beyond the maximum time periods allowed by R.C. 2152.59(D)(2) and (D)(3). Thereafter, following a hearing on the matter, and pursuant to R.C. 2152.59(H)(5), if the juvenile court determines that the subject child has obtained competency after completing the necessary competency attainment services, "the court shall proceed with the delinquent child's proceeding" in accordance with R.C. 2152.59(A).

{¶ 22} An appellate court will not disturb a competency determination if there is "'some reliable, credible evidence supporting the trial court's conclusion that [the defendant] understood the nature and objective of the proceedings against him.'" *State v. Ramirez*, 12th Dist. Butler No. CA2010-11-305, 2011-Ohio-6531, ¶ 30, quoting *State v. Williams*, 23 Ohio St.3d 16, 19 (1986); *In re A.T.*, 6th Dist. Ottawa Nos. OT-12-023 and OT-12-030, 2014-Ohio-1761, ¶ 39; *see also In re S.D.*, 2014-Ohio-2528 at ¶ 25 (affirming juvenile court's decision where there was "sufficient credible evidence for the trial court to find that [the subject child] was competent to stand trial"). "Deference on these issues should be given to those 'who see and hear what goes on in the courtroom.'" *State v. Locke*, 11th Dist. Lake No. 2014-L-053, 2015-Ohio-1067, ¶ 93, quoting *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, ¶ 33.

{¶ 23} After a thorough review of the record, we find reliable, credible evidence supports the juvenile court's decision finding D.T.W. competent to stand trial. As the record reveals, the juvenile court complied with all of the requirements found in the juvenile competency statutes before issuing its decision finding D.T.W. competent to stand trial. This includes adopting a competency attainment plan that outlined the competency attainment services recommended for D.T.W. to attain competency to stand trial. The juvenile court also

addressed D.T.W. personally, questioning him on his age, where he went to school, as well as his understanding of the proceedings, his general right to have a trial and present witnesses in his defense, and the role of his defense counsel, the prosecutor, and the judge, all of which D.T.W. stated he understood. We find nothing about this questioning improper or overtly suggestive as D.T.W. now suggests.

{¶ 24} Moreover, although D.T.W. takes issue with the juvenile court's finding he had attained competency after just six weeks, as noted above, R.C. 2152.59(D)(2) specifically states that "[n]o child shall be required to participate in competency attainment services for longer than is required for the child to attain competency." In turn, the fact that D.T.W. was able to attain competency earlier than expected is of little to no consequence. To hold otherwise would undermine the language found in R.C. 2152.59(D)(2) and implicitly place a mandatory minimum period of time that a subject child would be required participate in competency attainment services. The General Assembly did not include such language within the juvenile competency statutes, and neither shall we for it is well-established that this court may not add or delete words when construing a statute. *State v. Braden*, 12th Dist. Preble No. CA2013-12-012, 2014-Ohio-3385, ¶ 21, citing *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, ¶ 25.

{¶ 25} Furthermore, as the competency attainment report indicates, D.T.W. was able to learn factual information related to the trial process. The competency attainment report also indicates D.T.W. was able to appreciate the seriousness of the charges against him, as well as understand the general workings of a trial, the adversarial process, and potential trial outcomes and consequences. In addition, when asked about his own interactions with his client, D.T.W.'s defense counsel specifically stated that D.T.W. had "always been able to, been very responsive and appropriate in his * * * question and answer sessions with me throughout this case." Therefore, because reliable, credible evidence supports the juvenile

court's decision finding D.T.W. was competent to stand trial, D.T.W.'s second assignment of error is without merit and overruled.

{¶ 26} Assignment of Error No. 3:

{¶ 27} [D.T.W.] WAS DENIED AN EFFECTIVE RIGHT TO COUNSEL WHEN TRIAL COUNSEL FAILED TO CROSS-EXAM THE DOCTORS SUBMITTING REPORTS REGARDING [D.T.W.'S] INCOMPETENCE.

{¶ 28} In his third assignment of error, D.T.W. argues he received ineffective assistance of counsel as his defense counsel: (1) failed to move the juvenile court for yet another competency evaluation, and (2) failed to cross-examine Dr. Kurzhals and O'Connell as it relates to their written reports submitted to the juvenile court by stipulation of the parties. However, it is well-established that "decisions regarding what stipulations should be made, what evidence is to be introduced, what objections should be made, and what pretrial motions should be filed, primarily involve trial strategy and tactics." *State v. Cline*, 10th Dist. Franklin No. 05AP-869, 2006-Ohio-4782, ¶ 22, citing *State v. Edwards*, 119 Ohio App.3d 106 (10th Dist.1997). As this court has stated previously, "[e]ven debatable trial strategies and tactics do not constitute ineffective assistance of counsel." *In re Z.C.*, 12th Dist. Warren Nos. CA2005-06-065, CA2005-06-066, CA2005-06-081, and CA2005-06-082, 2006-Ohio-1787, ¶ 24. Therefore, because both of the alleged deficiencies raised by D.T.W. fall squarely within the confines of trial strategy and tactics, D.T.W.'s third assignment of error is without merit and overruled.

{¶ 29} Assignment of Error No. 1:

{¶ 30} THE TRIAL COURT PREJUDICED [D.T.W.] BY ENTERING GUILTY VERDICTS FOR TWO COUNTS OF ATTEMPTED GROSS SEXUAL IMPOSITION CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 31} In his first assignment of error, although not specific, D.T.W. argues the juvenile

court's adjudication of him as a delinquent child must be reversed because the two counts of attempted gross sexual imposition were not supported by sufficient evidence and were otherwise against the manifest weight of the evidence. We disagree.

{¶ 32} As this court has stated previously, because a finding that an adjudication of delinquency is not against the manifest weight of the evidence necessarily includes a finding on sufficiency, "the determination that a juvenile court's delinquency finding is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency." *In re M.J.C.*, 12th Dist. Butler No. CA2014-05-124, 2015-Ohio-820, ¶ 29, citing *In re N.J.M.*, 12th Dist. Warren No. CA2010-03-026, 2010-Ohio-5526, ¶ 35. As a result, this court will review the juvenile court's decision adjudicating D.T.W. a delinquent child under a manifest weight of the evidence challenge. *In re A.M.I.*, 12th Dist. Warren No. CA2014-07-095, 2015-Ohio-367, ¶ 6. "The standard of review applied in determining whether a juvenile court's adjudication of delinquency is against the manifest weight of the evidence is the same standard this court applies in adult criminal convictions." *In re M.J.C.* at ¶ 28.

{¶ 33} A manifest weight of the evidence challenge examines the "inclination of the greater amount of credible evidence, offered at a trial, to support one side of the issue rather than the other." *State v. Barnett*, 12th Dist. Butler No. CA2011-09-177, 2012-Ohio-2372, ¶ 14. To determine whether a conviction is against the manifest weight of the evidence, the reviewing court must look at the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving the conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Morgan*, 12th Dist. Butler Nos. CA2013-08-146 and CA2013-08-147, 2014-Ohio-2472, ¶ 34. However, while appellate review includes the responsibility to consider the credibility of witnesses and the weight given to the evidence, these issues are primarily matters for the

trier of fact to decide. *State v. Barnes*, 12th Dist. Brown No. CA2010-06-009, 2011-Ohio-5226, ¶ 81. An appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances when the evidence presented at trial weighs heavily in favor of acquittal. *State v. Blair*, 12th Dist. Butler No. CA2014-01-023, 2015-Ohio-818, ¶ 43.

{¶ 34} As noted above, D.T.W. was adjudicated a delinquent child for committing acts that if charged as an adult would constitute two counts of attempted gross sexual imposition in violation of R.C. 2923.02(A) and R.C. 2907.05(A)(4). Pursuant to R.C. 2923.02(A), the criminal attempt statute, "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." As to the offense of gross sexual imposition, R.C. 2907.05(A)(4) provides that "[n]o person shall have sexual contact with another, not the spouse of the offender, * * * when * * * [t]he other person * * * is less than thirteen years of age, whether or not the offender knows the age of that person." The term "sexual contact" as defined by R.C. 2907.01(B) means "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region * * * for the purpose of sexually arousing or gratifying either person."

{¶ 35} In this case, D.T.W. initially argues his adjudication must be reversed due to the "substantial inconsistencies" in the eyewitness testimony offered by the state and that of the alleged victim. However, as this court has repeatedly stated, determinations regarding witness credibility, conflicting testimony, and the weight to be given such evidence are primarily for the trier of fact. *In re N.J.M.*, 2010-Ohio-5526 at ¶ 39. Moreover, although D.T.W. denied the allegations against him, it is well-established that when conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the trier of fact believed the prosecution testimony. *In re M.J.C.*, 2015-Ohio-

820 at ¶ 35, citing *State v. Lunsford*, 12th Dist. Brown No. CA2010-10-021, 2011-Ohio-6529, ¶ 17. Further, "'[t]he decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness.'" *In re D.L.B.*, 12th Dist. Fayette No. CA2011-09-019, 2012-Ohio-3045, ¶ 43, quoting *State v. Rhines*, 2d Dist. Montgomery No. 23486, 2010-Ohio-3117, ¶ 39.

{¶ 36} Here, although the victim's testimony was somewhat inconsistent and conflicting with that of the state's other eyewitness, K.S., as well as the testimony of D.T.W. himself, the juvenile court was able to see and hear the victim testify regarding D.T.W.'s alleged acts. For instance, the victim testified that D.T.W. had twice put his penis "inside my butthole." The victim also testified that D.T.W. had twice tried to put his penis in his mouth. Specifically, as the victim testified:

> [THE STATE]: * * * [H]ow many times did that happen when he tried to get your mouth on his penis?
>
> [THE VICTIM]: How many times have that happened was umm… that happened was once he, once he got, once he got done umm… once he got done trying to put inside, inside my butthole then once he was umm… then once he got done doing that, then he started to put it inside, inside my mouth every other time, once he was done putting his penis inside my butthole.
>
> [THE STATE]: Okay, he tried to get you to put it, your mouth on it?
>
> [THE VICTIM]: Yes sir.
>
> [THE STATE]: Okay, now how, I guess when he would try to do that would his penis be out or would it be under clothes, would it be over clothes or out, out exposed or would it be under clothes?
>
> [THE VICTIM]: It would be out.
>
> [THE STATE]: It would be out, okay, and would it be hard or would it be soft?
>
> [THE VICTIM]: Hard.
>
> [THE STATE]: It would be hard?

> [THE VICTIM]: Yes sir.
>
> [THE STATE]: And you said he was trying to push your head, how was he trying to push your head, did he have that back of your head, the front of your head, where was he trying to push on to get your head onto his penis?
>
> [THE VICTIM]: He was on the back of the head. He had his hands on the back of my head.

{¶ 37} Given the fact that the juvenile court did not adjudicate D.T.W. a delinquent child based on the single count of rape, but rather, only on two counts of attempted gross sexual imposition, it is clear the juvenile court discounted certain portions of the victim's testimony regarding the alleged rape.[2] The juvenile court, however, apparently did find credible the victim's testimony regarding D.T.W.'s attempts to put his penis in his mouth, as well as giving some credence to the state's other witness, K.S., who testified he also witnessed D.T.W. attempt to put his penis in the victim's mouth on two occasions. As the trier of fact, the juvenile court was free to believe all, part or none of these witnesses' testimony. *In re A.E.*, 10th Dist. Franklin Nos. 07AP-685 and 07AP-748, 2008-Ohio-1375, ¶ 26. Therefore, because the responsibility to consider the credibility of witnesses and the weight given to the evidence are primarily matters for the trier of fact to decide, D.T.W.'s first argument is without merit.

{¶ 38} Next, D.T.W. argues his adjudication as a delinquent child must be reversed due to a lack of physical evidence to substantiate the two counts of attempted gross sexual

2. In reaching its decision finding the state failed to meet its burden as to the single count of rape, the juvenile court stated "that there needs to be some corroboration, some certainty in the court's mind anyway, as to what actually transpired[.]" The juvenile court also stated that "although [the rape] may have happened * * * we don't have any corroboration of that except from the testimony of [the victim.]" However, while it appears this may have been merely a slip of the tongue, we note that "corroborating evidence of a victim's testimony is not required in a rape case." *State v. Rose*, 12th Dist. Butler No. CA2011-11-214, 2012-Ohio-5607, ¶ 63, citing *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶ 53 (stating "[c]orroboration of victim testimony in rape cases is not required"); *see also State v. Ramallo*, 6th Dist. Lucas No. L-14-1026, 2015-Ohio-1792, ¶ 29 (noting "[t]here is no requirement, statutory or otherwise, that a rape victim's testimony must be corroborated as a condition precedent to conviction").

imposition against him. However, as this court recently stated, "[p]hysical evidence of sexual contact is not a required element of gross sexual imposition." *In re M.J.C.*, 2015-Ohio-820 at ¶ 34, citing *In re C.S.*, 10th Dist. Franklin No. 11AP-667, 2012-Ohio-2988, ¶ 30. Instead, where the testimony of a child victim is sufficient to support a conviction for gross sexual imposition, such as the case here, "the conviction will not be reversed as being against the manifest weight of the evidence merely because there was no forensic evidence to support it." *In re A.L.*, 12th Dist. Butler No. CA2005-12-520, 2006-Ohio-4329, ¶ 27. This principle is even more applicable here considering D.T.W. was not adjudicated a delinquent child for two counts gross sexual imposition, but rather, merely two counts of *attempted* gross sexual imposition. The lack of physical evidence establishing these two charges is therefore neither surprising nor fatal. Accordingly, D.T.W.'s second argument is likewise without merit.

{¶ 39} In light of the foregoing, and having found no merit to either of D.T.W.'s arguments contained herein, D.T.W.'s first assignment of error is overruled since his adjudication as a delinquent child for having committed acts that if charged as an adult would constitute two counts of attempted gross sexual imposition was not against the manifest weight of the evidence and was otherwise supported by sufficient evidence.

{¶ 40} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.