

[Cite as *State v. Israel*, 2010-Ohio-5044.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MIAMI COUNTY**

STATE OF OHIO

Plaintiff-Appellee

v.

JOHN D. ISRAEL

Defendant-Appellant

Appellate Case No. 09-CA-47

Trial Court Case No. 09-CR-125

(Criminal Appeal from  
Common Pleas Court)

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**OPINION**

Rendered on the 15<sup>th</sup> day of October, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant John D. Israel appeals from his conviction and sentence for Gross Sexual Imposition of a person under the age of thirteen, in violation

of R.C. 2907.05(A)(4). Israel contends that the evidence is not sufficient to support a conviction, that his conviction is against the manifest weight of the evidence, and that the trial court erred in imposing the maximum sentence.

{¶ 2} We conclude that the evidence in the record is sufficient to support a conviction; that the conviction is not against the manifest weight of the evidence; and that the trial court was within its judicial discretion to impose the maximum sentence on the appellant. Accordingly the judgment of the trial court is Affirmed.

I

{¶ 3} In early January 2009, Israel was visiting his nephew's son, Luke H., along with various other friends and family members, to watch Luke's high school basketball game. During the course of the day the weather turned bad, and the game was cancelled, so the family decided to make the most of it by playing games, cooking out, and drinking alcohol. Israel indicated that he started drinking alcoholic beverages at about 10:00 a.m., finishing around one and a half cases of beer.

{¶ 4} At some time that day, Renee H., Luke's mother, called the minor complainant's mother, Renee's niece, to ask if the minor, M.G., who was eight years old at the time, and her twin sister, McK.G., would like to spend the night as well.

{¶ 5} M.G. and McK.G. arrived at the H. home around 8:30 p.m. The children played hide and go seek and video games with the other children in the house before it was time to turn in for the night.

{¶ 6} Renee testified that she made up beds in the living room around 1:15 a.m. to accommodate the house full of family and friends that night. The people to be

sleeping in the living room on the floor were: Luke, Brittany (Renee's daughter), Chelsea (Brittany's friend), McK.G., and M.G., with Israel on the couch.

{¶ 7} The descriptions on how everyone on the floor was sleeping in relation to Israel vary somewhat from witness to witness. Some of the testimony indicates that the children were sleeping perpendicular to the couch, so that M.G. could touch the couch with her feet, while other testimony puts all of the makeshift beds parallel to the couch on which Israel was sleeping. What is agreed is that M.G. did not start off parallel next to the couch.

{¶ 8} The room was not in complete darkness. There was light coming from both the connected kitchen and the adjoining room housing the computer.

{¶ 9} From the excitement of the day the two little girls were still slightly wound up, but had both lain down for the night, when Brittany and Chelsea went to the adjoining room to view the Myspace website. Luke was on an inflatable mattress in the room and was trying to go to sleep. Israel testified that the girls were being noisy and he told them to quiet down so that everyone could go to sleep.

{¶ 10} M.G., who was deemed competent to testify, testified that while the older girls were in the other room, Israel called her over to the couch several times. M.G. finally went over to the couch; Israel told her to lie down next to the couch. M.G. testified that Israel told her to keep a lookout for the older girls, and proceeded to touch her. M.G. testified that Israel touched her, rubbing her under her shirt, rolling her nipples between his thumb and index finger, and touched her down her panties. During this time, Israel told M.G. that she was beautiful and that she looked like her mother. This went on for an estimated five to ten minutes.

{¶ 11} Israel testified that he was just trying to calm M.G. down, since she was upset that her sister had left the room. He admitted that he touched her, but in his drunken state he did not know where he was patting her to calm her down so that he could get some sleep. Israel further insists that there was no sexual motivation to the physical contact.

{¶ 12} Luke testified that while he was trying to sleep, he heard Israel call M.G. over to the couch several times. Luke also testified that he heard Israel tell M.G. that she was as beautiful as her mother and he heard Israel tell her to be quiet. After several minutes of listening to what was happening, Luke opened his eyes out of curiosity. Luke testified that he saw Israel with his hand on M.G. at the same time that the older girls came back into the room.

{¶ 13} While M.G. was lying next to the couch, the older girls came back to the room to check on the little girls. Brittany testified that she witnessed Israel with his hand on M.G.'s breast area, under a blanket. Her statements do vary slightly from her written account of what happened that night, but do indicate that Israel was touching M.G. on the chest. Chelsea's testimony states that she witnessed Israel with his hand on M.G., but over the blanket.

{¶ 14} Brittany's first inclination was that she needed to tell someone, so she ran to her mother's room to wake up Renee. Renee was enraged to hear what had happened and was yelling at Israel, and had the older girls take the younger girls into the master bedroom. At this point several people asked M.G. what had happened. Brittany then suggested that she and Chelsea take the girls to M.G.'s house, which they did.

{¶ 15} Israel testified that prior to the night of the alleged offense, there were no hard feelings harbored against him by any of the members of his family who testified. He further stated that they would have no reason to lie to the jury about what they saw that night based on a personal vendetta against him.

{¶ 16} M.G.'s mother was called, by Renee, who was out at the time with her friend, Tammy. Once Tammy arrived at the house, everyone agrees that she was the motivating force behind calling the authorities.

{¶ 17} Sheriff's Deputy Tim Larger was the first law enforcement officer to respond to the H. residence. He stated that he got to the home at around 3:15 in the morning. He testified that when he arrived, he spoke with Renee and then headed over to M.G.'s house with another deputy to speak with M.G. Deputy Larger testified that the witnesses were all interviewed in close quarters and that he spoke with the older girls first. He had them write out their statements without speaking to each other.

{¶ 18} Deputy Davidson testified that he did not record his interview with M.G., but put it all into his incident report that he filed. Deputy Davidson testified that after taking all of the statements of the witnesses over at M.G.'s house, he and Deputy Larger went back to the H. house to help arrest Israel. Deputy Davidson stated that they did this because they did not know if the arrest would be difficult in the heated emotional environment. Deputy Davidson further testified that Israel was hard to wake up, but was able to move without any assistance, although he did appear to be under some influence of alcohol.

{¶ 19} Israel was charged by indictment with Gross Sexual Imposition of a person under the age of thirteen. Following a jury trial, he was convicted, and

sentenced to imprisonment for the maximum term of five years. From his conviction and sentence, Israel appeals.

II

{¶ 20} Israel's First Assignment of Error is as follows:

{¶ 21} "THERE WAS INSUFFICIENT EVIDENCE FOR THE JURY TO FIND APPELLANT GUILTY OF GROSS SEXUAL IMPOSITION AND THE CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 22} Israel contends that the State failed to prove the crux of the case – that his contact with M.G. was for purposes of sexual gratification. Israel argues that there are inconsistencies in the testimony of the witnesses, and in one instance, discrepancies between the paragraph that the witness wrote for police on the night in question and her testimony in court. Israel also points to the fact that the initial police interview of M.G. was not recorded, leaving one to wonder if her testimony improved over time.

{¶ 23} The Supreme Court of Ohio has held that a sufficiency-of-the-evidence argument raises the issue of whether each element of an offense has been adequately proven to allow the case to go to the jury or to sustain the verdict as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 1997-Ohio-52. The Supreme Court of Ohio set forth the test in *State v. Jenks* (1991), 61 Ohio St.3d 259, stating that, "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the

evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.”

{¶ 24} When the trial transcript in this case is reviewed in a light most favorable to the State, the evidence and testimony admitted at trial warrants a reasonable jury in finding that the essential elements of the offense were proven beyond a reasonable doubt.

{¶ 25} In order to prove the offense of Gross Sexual Imposition proscribed by R.C. 2907.05(A)(4), the State must prove that the defendant had sexual contact with a person, not the defendant’s spouse, and that the contact was with a person under the age of thirteen, whether the defendant knew the age of the person or not. “Sexual contact” is defined 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.” R.C. 2907.01(B).

{¶ 26} The State met its burden with the introduction of the testimony of the victim and three eyewitnesses. The victim, being at the time of the hearing under the age of ten, was determined by the trial court to have been competent to testify, and the issue of her competency is not contested on appeal. The victim’s testimony establishes that the touching went far beyond a simple pat to calm down a child. The eight-year-old victim testified that Israel manipulated her nipples while he told her that she was beautiful. She testified that the touching continued for five to ten minutes. When this testimony is viewed in a light most favorable to the State, the inference is overwhelming that Israel had sexual contact with the victim. M.G. testified that she was

under the age of thirteen and had never been married. Her statements to police were not recorded at the time, but were testified to by the responding officer, who stated that he put the statements in his report.

{¶ 27} Three witnesses testified that the victim was lying next to the couch Israel was on and that Israel was touching the victim's chest area. Except where testimony has been fabricated by different witnesses in concert with one another, minor inconsistencies in their testimony are commonplace – in this case, for example, the placement of the blanket on the victim. This is part of human nature, and the jury was instructed to remember this during deliberations, and to weigh the credibility of the testimony of the witnesses for themselves. A reasonable juror could conclude from the evidence presented at trial that Israel had sexual contact with the victim, who was a person under the age of thirteen to whom he was not married.

{¶ 28} Once the sufficiency of the evidence has been determined we next consider the manifest weight of the evidence. The Supreme Court of Ohio has held that, “[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a ‘ “thirteenth juror” ’ and disagrees with the factfinder's resolution of the conflicting testimony. *Tibbs*, 457 U.S. at 42, 102 S.Ct. at 2218, 72 L.Ed.2d at 661. See, also, *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 20 OBR 215, 219, 485 N.E.2d 717, 720-721 (‘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. The discretionary

power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.’).” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶ 29} Notwithstanding the existence of some discrepancies between the testimony of various witnesses in this case, a reasonable jury could find that on the night in question Israel did touch M.G. – Israel admitted as much – and that the touching was in the area of the victim’s breast. The witnesses differ on a placement of a blanket on the victim, but not the shocking sight of seeing a grown man with his hand on an eight-year-old girl’s breast. On this record, a reasonable jury could credit M.G.’s testimony that she was touched by Israel for several minutes, under her shirt, manipulating her nipples, touching her under her panties, and telling her she was beautiful, and therefore find that Israel had sexual contact with the victim, either to gratify himself, to arouse her, or for both purposes.

{¶ 30} We have reviewed the entire record, weighed the evidence and all the reasonable inferences that can be drawn therefrom, considered the credibility of the witnesses, and have determined that this is not the rare case where the finder of fact lost its way, leading to a miscarriage of justice so great that the collective wisdom reposing in the jury must be set aside and the case remanded for a new trial.

{¶ 31} Israel’s First Assignment of Error is overruled.

### III

{¶ 32} Israel’s Second Assignment of Error is as follows:

{¶ 33} “THE TRIAL COURT ERRED IN IMPOSING THE MAXIMUM SENTENCE ON APPELLANT.”

{¶ 34} Israel contends that a maximum sentence was not appropriate in this case, because his offense consisted of a single event, with physical contact limited to a duration of five to ten minutes, while he was intoxicated, albeit voluntarily.

{¶ 35} The Supreme Court of Ohio has held, in *State v. Foster*, 109 Ohio St.3d 1, 2006- Ohio-856, paragraph seven of the syllabus, that “[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or their reasons for imposing maximum, consecutive, or more than the minimum sentences.” The Supreme Court of Ohio has further held, in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26, that a reviewing court, “must examine the sentencing court’s compliance with all the applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court’s decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard.” If the court of appeals finds under the test set out in *Kalish* that the sentence is not clearly and convincingly contrary to law, then it must proceed to the second prong of the test, whether there was an abuse of discretion by the court made during sentencing. An abuse of discretion “ ‘implies that the court’s attitude is unreasonable, arbitrary or unconscionable.’ ” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (citation omitted). The Ohio Supreme Court noted in *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, that most abuses of discretion result in decisions that are unreasonable, rather than arbitrary or unconscionable. A decision is unreasonable if it lacks a sound reasoning process. *Id.*

{¶ 36} Voluntary intoxication is not a defense. The trial court was within its

sentencing authority to impose the maximum sentence available under the statute.

{¶ 37} We conclude that the trial court did not abuse its discretion in imposing the maximum sentence. To begin with, Israel has a significant criminal history that includes a Sexual Battery conviction in 1984, two OVI convictions, two Assault convictions, three Disorderly Conduct convictions, and a felony Failure to Support conviction. The victim was well under thirteen years of age, having been eight years old at the time of the offense. Finally, Israel had a familial relationship with the victim, which he abused. Israel is the great uncle of Luke, who is the son of Renee, who described herself as being the great aunt of the victim. We cannot say that the trial court was unreasonable in deciding to impose the maximum sentence of five years in this case.

{¶ 38} Israel's Second Assignment of Error is overruled.

IV

{¶ 39} Both of Israel's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and FROELICH, J., concur.

Copies mailed to:

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Hon. Jeffrey M. Welbaum